IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RIGOBERTO FRANCO,
Appellant,
vs.
GABRIELA FRANCO,
Respondent.

No. 69098

FILED

SEP 26 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Rigoberto Franco appeals from a divorce decree. Eighth Judicial District Court, Family Court Division, Clark County; Rena G. Hughes, Judge.

Rigoberto and Gabriela Franco married in October 2001 and filed for divorce in November 2014. They have two minor children. As relevant to this appeal, after a trial the district court awarded the parties joint legal custody but gave Gabriela primary physical custody and ordered Rigoberto to pay $1,000 per month in child support. The court further awarded Gabriela $5,000 in attorney fees. The parties had minimal community property and associated debt, which the district court divided between them.[1]

On appeal, Rigoberto argues the district court abused its discretion by awarding an upward deviation of child support, by failing to divide the marital property equally, and by awarding attorney fees without proper evidentiary support. Although we affirm the district court's

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

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decisions regarding child support and the division of property, we agree with Rigoberto that the district court abused its discretion by awarding attorney fees without making the requisite findings on the *Brunzell*[2] factors.

We review the district court's decision regarding child support for abuse of discretion, and we presume the trial court properly exercised its discretion in child support matters. *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). NRS 125B.070(1) sets the monthly amount of child support for two children at 25 percent of the noncustodial parent's income. Although a district court may make equitable adjustments to this amount, the court must first expressly determine the amount owed under the formula, and then set forth findings of fact as to the basis for the deviation. *Wallace*, 112 Nev. at 1020, 922 P.2d at 544. This basis must be tied to at least one of the factors enumerated in NRS 125B.080(9). *Khaldy v. Khaldy*, 111 Nev. 374, 376, 892 P.2d 584, 585 (1995) (explaining that NRS 125B.080(6)[3] requires courts to make specific factual findings when deviating from the formula, and that NRS 125B.080(9) limits the factors upon which a court may base a deviation).

The district court calculated Rigoberto's child support obligation at $824.25 per month, but ordered an upward deviation to $1,000 per month based on the relative timeshare, the parties' incomes, and Gabriela's childcare burden. These amounts correspond to NRS 125B.080(9)(f), (j), and (l). Because the district court determined the

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[2]*Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 455 P.2d 31 (1969).

[3]We note that this statute has since been amended, but those amendments do not apply to this case, which was decided before the amendments' effective date.

amount owed under the formula and thereafter articulated factual findings supported by the record on three of the NRS 125B.080(9) factors, we conclude the district court did not abuse its discretion by awarding $1,000 per month in child support under these facts.

We next turn to the community property distribution. We review the district court's determination for an abuse of discretion, *Wolff v. Wolff*, 112 Nev. 1355, 1359, 929 P.2d 916, 918-19 (1996), and we will not set aside the district court's factual findings unless they are clearly erroneous or not supported by substantial evidence. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009). It is not within this court's purview to weigh conflicting evidence or assess witness credibility. *Ellis v. Carucci*, 123 Nev. 145, 152, 161 P.3d 239, 244 (2007). Property acquired during marriage is presumed to be community property, although this presumption may be rebutted by clear and convincing evidence. *Forrest v. Forrest*, 99 Nev. 602, 604-05, 668 P.2d 275, 277 (1983).

Rigoberto fails to show how the district court unequally divided the community property in light of the total assets and debt ultimately awarded to each party. Although Rigoberto argues remand is necessary because the district court had inadequate evidence to determine the community property's value in dividing the community property, this argument fails because except for few values testified to at trial, Rigoberto did not present any exhibits or other evidence proving value or showing an unequal distribution. *See Drespel v. Drespel*, 56 Nev. 368, 373, 45 P.2d 792, 793 (1935) (providing that litigants must be active and diligent in procuring the evidence upon which they rely to maintain their cause and that available evidence must be presented at the initial trial on the matter). Further, the record shows that Rigoberto agreed with the district court on

several key points, including awarding the home and almost all property therein to Gabriela.[4] Finally, although Rigoberto claims two guns adjudicated by the district court as community property were in fact his separate property, he failed to present sufficient evidence below supporting this claim. Accordingly, Rigoberto has not shown the district court abused its discretion.

However, we agree the district court failed to make the requisite *Brunzell* findings before awarding attorney fees. We review the district court's decision for an abuse of discretion. *Miller v. Wilfong,* 121 Nev. 619, 622, 119 P.3d 727, 729 (2005). In divorce proceedings, the district court may award preliminary attorney fees pursuant to NRS 125.040(1)(c) and final attorney fees pursuant to either NRS 125.150(4) or *Sargeant v. Sargeant*, 88 Nev. 223, 495 P.2d 618 (1972), if a party presents a financial hardship. *See Miller*, 121 Nev. at 624, 119 P.3d at 730. Parties seeking fees in a family law dispute "must support their fee request with affidavits or other evidence," and the district court is required to "consider the disparity of income of the parties[.]" *Id.* at 623-24, 119 P.3d at 730. The district court must also consider the four factors set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969).[5] *Miller*, 121 Nev. at 623, 119 P.3d at 730. Although the district court need not set forth

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[4]Although Rigoberto fails to show the district court unequally distributed the property, we note our concern with the district court's failure to order Rigoberto's name be removed from the home mortgage and title, and Gabriella's counsel conceded as much during the oral argument.

[5]Those include "(1) the qualities of the advocate . . . (2) the character of the work to be done . . . (3) the work actually performed . . . [and] (4) the result[.]" *Brunzell*, 85 Nev. at 349, 455 P.2d at 33.

express findings on each factor, the district court must demonstrate it considered the required factors. *Logan v. Abe,* 131 Nev. ___, ___, 350 P.3d 1139, 1143 (2015).

Here, although we find that there was a legal basis for the award,[6] the record does not reflect that the district court considered affidavits or other evidence in determining the *Brunzell* factors. Although the district court referenced *Brunzell* in awarding attorney fees, nothing in the record shows the district court actually assessed the *Brunzell* factors in reaching its decision. We therefore reverse the attorney fees award and remand for the district court to make the necessary 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.
Silver

_________________________, J.
Gibbons

TAO, J., concurring:

On appeal, we (along with the father's pro bono appellate counsel) are stuck with the record made below before the district court, and

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[6]Substantial evidence supports the district court's conclusion that a fees award was appropriate under *Sargeant*, and the awards were also proper under NRS 22.100(3) and under NRS 125.150(4) as a "reasonable attorney's fee" in light of Rigoberto's conduct, Gabriela's testimony regarding her costs, and the outcome at trial.

consequently I concur in the judgment of limited remand based upon the arguments we can legitimately reach. But had things been argued differently below, this case would scream out for a more far-reaching reversal of the district court.

The district court found the father's monthly gross monthly income to be $3,297. It then ordered him to pay what amounts to 54% of his income to the mother in the form of alimony ($800 per month) and child support ($1000 per month)—plus giving her the house the family used to live in—leaving him with $1,497 per month in income and no place to live. This equates to an annual income of around $17,964 per year, barely above the 2017 national poverty level of $16,240 for a two-person household. *See* Annual Update of the HHS Poverty Guidelines, 82 Fed. Reg. 19, 8831 (Jan. 31, 2017). The court piled debt on top of that, ordering him to pay the children's health care insurance coverage, $5,000 in attorney fees, $2,758 in credit card debt, $600 in arrearages, and around $11,500 in car loans, while keeping him responsible for the remaining balance of about $175,000 for the mortgage on the house that he no longer lives in.

Is there any way that this is all going to be paid off by someone on poverty-level wages? Maybe. But I can't see how. And if it isn't, then here's the parade of horribles that will likely ensue: the car gets repossessed, the credit cards are cancelled, and the mortgage goes into default and the home is foreclosed upon, leaving both parents with tarnished credit scores and the children with no access to a car and no stable place to live.

I don't know what good any of this does for the children. Child support, alimony, and custody timeshares aren't supposed to be used by district courts to screw one party in favor of the other, no matter how much

the court may think one parent wronged the other, as the district court obviously thought happened here. They're not supposed to be punitive or retributory, not even against a party who behaves improperly in court and invites a contempt finding, as the father did here. The father may not have acted like a saint during this litigation. But that should matter extremely little to how much child support he must pay or how the community assets ought to be equitably divided.

The only intended purpose of a child support award is to effectuate the best interests of the children. And those best interests aren't generally served when one parent is bankrupted or forced into poverty in order to support another who works far less or not at all. Awarding more child support is not always better, especially if in the long run doing so hurts the stability of the parents and prevents them from providing for the child. *Fernandez v. Fernandez*, 126 Nev. 28, 37-39, 222 P.3d 1031, 1037-38 (2010). Rather,

> neither our statutes nor public policy supports the argument that more court-ordered child support is always better for the child than less. The formula and guideline statutes are not designed to produce the highest award possible but rather a child support order that is adequate to the child's needs, fair to both parents, and set at levels that can be met without impoverishing the obligor parent or requiring that enforcement machinery be deployed.

Id. "[W]hat really matters" under the 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." *Barbagallo v. Barbagallo*, 105 Nev. 546, 551, 779 P.2d 532, 536 (1989), *partially overruled on other grounds by Wright v. Osburn*, 114 Nev. 1367, 1368-69, 970 P.2d 1071, 1072 (1998), *as*

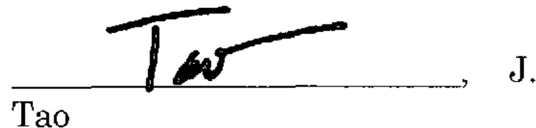
recognized in Rivero v. Rivero, 125 Nev. 410, 437, 216 P.3d 213, 232 (2009). This is evident in NRS 125B.080(6), which requires findings to support deviations from the formula—whether the deviation "is greater or less" than the guideline amount; and in NRS 125B.145(4), which defines "changed circumstances" for modification-review purposes as "a change of 20 percent or more in the gross monthly income" of the support obligor, "whether the 20-percent change was up or down." *See Fernandez*, 126 Nev at 39, 222 P.3d at 1038.

Thus, "it would not be in a child's best interest to force the parent into a level of debt he or she has no ability to pay." *In re Marriage of Alter,* 89 Cal.Rptr.3d 849, 858 (Cal. Ct. App. 2009); *accord Grimes v. Grimes,* 621 A.2d 211, 214 (Vt. 1992) (recognizing that "[t]here is a practical side to this issue [since a] clearly excessive child support order may lead . . . to collection difficulties and periodic returns to court" and "[a] support amount that, on paper, appears generous to the children becomes illusory if, for reasons related to the excessive size of the payments, collection must be coerced on a regular basis."); *Krieman v. Goldberg,* 571 N.W.2d 425, 432 (Wis. Ct. App. 1997) (holding that to "subject a payor parent to an unreviewable stipulation for child support could jeopardize the payor parent's financial future, may have detrimental effects on the parent/child relationship and in this way would ultimately not serve the best interests of the child.").

Yet this seems to be precisely what the district court's order is likely to produce here: when there's too much debt for the father to pay off on too little income, then nobody should be surprised if sooner or later everyone ends up back in court, either in connection with bankruptcy proceedings, foreclosure and eviction actions, or family court motions

alleging missed alimony or child support payments—or some combination of all three. In the end, all of these only hurt the children.

Although we normally give discretion to a district court, the district court abuses its discretion when it commits legal error or imposes an award that no reasonable judge would. *See Davis v. Ewalefo*, 131 Nev. ___, ___, 352 P.3d 1139, 1142 (2015) ("deference is not owed to legal error") *Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 126 Nev. 423, 428, 245 P.3d 535, 538-39 (2010) ("An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." (internal quotation marks omitted)). I would characterize the district court's award as failing on both counts. Had the father known what to do below and made the proper arguments and objections for us to review on appeal, I'd favor reversing the whole thing and ordering the district court to start over from scratch.



_______________________________, J.
Tao

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