IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RUSTEN MCMILLAN,
Appellant,
vs.
SHARLA WEISENBERGER,
Respondent.

No. 77713-COA

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Rusten McMillan appeals from a district court order denying a motion to modify child custody and child support and modifying parenting time. Third Judicial District Court, Lyon County; John Schlegelmilch, Judge.

McMillan and Sharla Weisenberger have one child together, a six-year-old girl.[1] In 2014, McMillan and Weisenberger agreed that they would have joint legal custody and Weisenberger would have primary physical custody. At the time, Weisenberger lived in Nevada and McMillan lived in southern California when he was not working in Alaska. Later, McMillan moved to California full-time and the couple agreed to a de facto joint custody parenting time schedule wherein Weisenberger had custody four weeks at a time, followed by McMillan having three weeks of parenting time. This schedule accommodated McMillan's full-time residence in California. However, when the child reached school age, McMillan's time was apparently reduced to one weekend per month, to be exercised in Nevada.

In 2018, McMillian obtained a job in Fallon, Nevada, and moved to be closer to the minor child, who also lived in Fallon. Following the move,

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

McMillan filed a motion to modify custody, child support, and parenting time seeking joint physical custody. McMillan argued that his move constituted a substantial change in circumstances such that joint physical custody would be in the best interest of the child.

After conducting a hearing, the district court found that while his move was "admirable," McMillan "cannot show" that his move to Nevada was a substantial change in circumstances as his relocation was "not a change in circumstances that effect[s] the well-being of the child." The court explicitly refused to analyze the best interest factors, concluding it was unnecessary in light of its ruling. Nevertheless, the district court significantly expanded McMillan's parenting time from the restrictive one weekend a month schedule that had been imposed. The district court also denied McMillan's request to modify child support, but determined that McMillan could provide proof of his reduction in income, apparently due to taking a lesser paying job in order to move to Fallon, and have the matter brought before the child support hearing master.

On appeal, McMillan argues that the district court erred by denying his motion to modify custody because the court failed to consider that his relocation to Fallon was a substantial change in circumstances and the court refused to make findings concerning the best interests of the child in determining a change in custody. McMillan also argues that under the preference created by NRS 125C.0025 for joint physical custody, the court should have considered his request for joint physical custody as being in the best interest of the child. Weisenberger counters that the relocation of a non-custodial parent, to be closer to the child, does not automatically create a preference for joint physical custody sufficient to overcome the initial

custodial determination, especially when the parents have never had a joint physical custody arrangement.[2]

Findings of fact are reviewed for an abuse of discretion and will not be set aside unless they are clearly erroneous or not supported by substantial evidence. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009). But "deference is not owed to legal error or to findings so conclusory that they may mask legal error." *Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015) (citations omitted). A modification of primary physical custody is warranted only when the party seeking a modification proves there has been (1) a substantial change in circumstances affecting the welfare of the child, and (2) the child's best interest is served by the modification. *Ellis v. Carucci*, 123 Nev. 145, 150, 161 P.3d 239, 242 (2007). Nevada statutes and published opinions from the Nevada Supreme Court do not require the district court to conduct an evidentiary hearing nor to make findings of fact in connection with the first prong; indeed, the purpose of the first prong is to determine whether an evidentiary hearing is warranted to address the second prong. Once the district court proceeds to the second prong of the analysis, it must make relevant findings of fact regarding all of the "best interest" factors.

The district court concluded that McMillan's relocation did not constitute a substantial change in circumstances affecting the welfare of the child. Weisenberger essentially argues that the relocation does not

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[2]We note that despite McMillan's previous residence in California, joint physical custody was a viable custody arrangement as demonstrated by McMillan having the child for three weeks on, and then four weeks off. This arrangement continued until the child reached school age, and then the schedule significantly changed by reducing McMillan's parenting time. Thereafter, McMillan relocated to Fallon to be closer to his child.

automatically create a preference for joint physical custody. We agree that a move to the same city, standing alone, does not automatically constitute the necessary change to meet the test announced in *Ellis*. *See id.*; *Bryant v. Bryant*, Docket No. 76480 (Ct. App., Order of Reversal and Remand, October 16, 2019) ("[G]iven the seriousness of the findings in the district court's initial order awarding [the father] primary physical custody and . . . their continuing conflicts, the evidence showing that [the mother] moved and obtained new employment, standing alone, does not establish the substantial change in circumstances required by *Ellis*."). In some situations, unlike the one in *Bryant*, a major relocation to be near the child, coupled with other circumstances that positively affect the welfare of the child, may be enough to meet the first prong of *Ellis*. Thus, the district court possessed discretion in how it resolved the "substantial change in circumstances" test and whether it needed to proceed to conduct a hearing and analyze the "best interest" factors. Ordinarily, we would give deference to its conclusion.

Here, however, the district court employed a confusing procedure. It appears to have jumped immediately to the second prong and conducted an evidentiary hearing without first analyzing whether a "substantial change in circumstances" had occurred warranting such a hearing. During the hearing, the district court allowed the parties to introduce evidence and present argument relating to the child's best interests. However, following the hearing, the district court then issued a written order in which it determined that the "substantial change in circumstances" prong had not been satisfied and, therefore, it was not required to make findings regarding the best interest factors. But if that were true, then no hearing was necessary in the first place. *See Rooney v. Rooney*, 109 Nev. 540, 543, 853 P.2d. 123, 125 (1993). Here, despite its written conclusion, the district court not only allowed such a hearing but also

permitted the parties to introduce evidence concerning the best interests of the child. And, ultimately, the court proceeded to adjust the custody schedule in order to grant more parenting time to McMillan, suggesting that it was indeed granting his motion for additional parenting time, at least in part.

Sorting all of this out, the contents of the district court's written order conflicts with the procedures it employed and the relief that it ultimately granted. When such a conflict exists, we focus on what the district court did rather than what it said, because appellate courts sit to review judgments, not the district court's internal reasoning. *Cf. United States v. Rivera*, 613 F.3d 1046, 1051 (11th Cir. 2010) ("A bedrock principle upon which our appellate review has relied is that the appeal is not from the [reasoning] of the district court but from its judgment." (internal quotation marks and citations omitted)). Indeed, we "will affirm a district court's order if the district court reached the correct result, even if for the wrong reason." *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010).

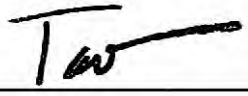
Here, the district court effectively granted at least a portion of McMillan's motion when it modified custody to give him more parenting time. This is the most logical way to interpret what happened below, despite what the district court wrote in its order regarding the lack of any substantial change in circumstances affecting the child. By changing the custody arrangement, the district court necessarily must have concluded that increased parenting time served the child's best interests. *See* NRS 125C.0045(1). But its final order omitted the factual findings regarding the "best interest" factors necessary to support this conclusion. Accordingly, the district court abused its discretion by changing the custody schedule without making the necessary factual findings to support it. *See Davis*, 131 Nev. at 452, 352 P.3d at 1143.

Finally, we consider McMillan's argument that the district court should have modified his child support obligation based on his new employment situation, having taken a pay cut to move to Fallon, as well as his updated financial disclosure and tax returns. McMillan also argues that his child support obligation is now above the presumptive maximum. Weisenberger argues that McMillan failed to raise the issue below. We agree with Weisenberger. This court cannot consider matters that do not properly appear in the record on appeal. *Carson Ready Mix, Inc. v. First Nat'l Bank of Nev.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981). Notably, the record on appeal does not include any financial disclosures reflecting any changes in income or financial status warranting a review of child support. Further, the district court advised McMillan that he could raise this issue with the hearing master. Therefore, we conclude that the district court did not abuse its discretion by not modifying McMillan's child support obligation. Nevertheless, if the district court does grant the motion to further modify custody upon remand, the child support obligation will need to be adjusted. *See Wright v. Osburn*, 114 Nev. 1367, 1368-69, 970 P.2d 1071, 1072 (1998).

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.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Bulla

cc: Hon. John Schlegelmilch, District Judge
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