

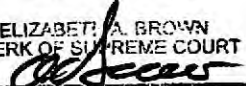
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RICHARD BYNAN,
Appellant,
vs.
VALERIE BYNAN,
Respondent.

No. 81775-COA

FILED

MAY 27 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Richard Bynan appeals from an amended order awarding attorney fees in a family matter. Eighth Judicial District Court, Clark County; Vincent Ochoa, Judge.

In the proceedings below, the parties were divorced by way of a decree of divorce entered in 2011. The parties stipulated to modify their custodial timeshare several times over the years, but always maintained a joint legal and joint physical custody arrangement. As relevant here, in October 2019, Richard filed a motion for an order to enforce and/or for an order to show cause why respondent Valerie Bynan should not be held in contempt for violating the custody order. In particular, Richard alleged that Valerie allowed the parties' minor child, who was just 10 years old at the time, to drive a vehicle on more than one occasion, placing the child in danger. He also asserted that Valerie violated the legal custody arrangement on several occasions by failing to communicate relevant information regarding the child to Richard. In his motion, Richard sought to modify physical custody until Valerie completed parenting courses to ensure the safety of the child in the future and assurances that Valerie

would not allow the child to drive any vehicle again until he was of legal age to do so. Valerie opposed and counter-moved to modify the custodial timeshare, for a behavior order, and for other related relief.

At the hearing on the motion, the parties advised that they resolved almost all of the issues between them, including stipulating to changing their custodial timeshare to a week on/week off schedule, and the only outstanding issues were whether a behavior order was warranted and a holiday schedule for their timeshare agreement. The district court accepted the parties' stipulation as to the primary issues, denied Valerie's request for a behavior order, ordered that neither party would allow the child to drive a vehicle until he was of legal age to do so and had taken a driving course, and referred the parties to mediation to attempt to resolve the holiday schedule.

Following entry of the written order from the hearing, Valerie moved for her attorney fees and costs in the amount of \$6,560.50, citing NRCP 54, NRS 18.010(2), and EDCR 7.60(b). Richard filed an opposition, and Valerie filed her reply. Without a hearing, the district court entered an order granting Valerie's request, awarding her \$4,500 in fees and costs. The order granting Valerie attorney fees and costs incorrectly indicated that Richard did not file an opposition to the motion. Accordingly, Richard moved to reconsider the award of attorney fees and costs, noting that he had filed an opposition, and arguing that fees and costs were not warranted as Valerie was not the prevailing party and his motion was not frivolous or without merit. The district court denied Richard's motion for reconsideration, but entered an amended order awarding attorney fees, indicating that Richard had filed an untimely opposition and concluding

again that \$4,500 in fees and costs were warranted pursuant to NRCP 54, NRS 18.010(2), and EDCR 7.60(b). This appeal followed.

On appeal, Richard challenges the district court's amended order awarding attorney fees. This court reviews a district court's award of attorney fees for an abuse of discretion. *Miller v. Wilfong*, 121 Nev. 619, 622, 119 P.3d 727, 729 (2005). An abuse of discretion occurs when the district court's decision is not supported by substantial evidence. *Otak Nev., LLC v. Eighth Judicial Dist. Court*, 129 Nev. 799, 805, 312 P.3d 491, 496 (2013). When awarding attorney fees in a family law case, the district court must consider the factors set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), and must also consider the disparity in the parties' income pursuant to *Wright v. Osburn*, 114 Nev. 1367, 1370, 970 P.2d 1071, 1073 (1998). *Miller*, 121 Nev. at 623, 119 P.3d at 730.

Here, the district court's order cites to NRCP 54, NRS 18.010(2), and EDCR 7.60(b) as support for its attorney fees determination. Despite citing to these rules, the district court did not make any findings relating to an award of fees pursuant to NRS 18.010(2)(b)¹ or EDCR 7.60(b). Indeed, the district court did not make a finding that Valerie was the prevailing party and it is unclear from the record whether she prevailed as, based on our review of the record, it appears that both parties prevailed on at least some of their requests for relief. Moreover, there are no findings regarding whether the district court believed that Richard's motion or his opposition

¹We note that the district court did not indicate whether it relied upon NRS 18.010(2)(a) or NRS 18.010(2)(b) in awarding attorney fees, but in light of its citation to EDCR 7.60(b) and because NRS 18.010(2)(a) is inapplicable in this case, we interpret the court's order as relying on NRS 18.010(2)(b).

to Valerie's counter-motion were "brought or maintained without reasonable ground or to harass" Valerie. NRS 18.010(2)(b); *see also* EDCR 7.60(b) (providing that the court may order a party to pay attorney fees if it finds that the party presents a frivolous or unnecessary motion, or unreasonably and vexatiously multiplies the proceedings, amongst other things).

Further, based on our review of the record, it is not clear that the district court properly considered *Wright v. Osburn* in determining a reasonable award of attorney fees. Although the district court stated it considered the *Brunzell* factors, it did not cite to *Wright* and it failed to make any findings or otherwise demonstrate that it considered any disparity in the parties' incomes. *See Miller*, 121 Nev. at 623, 119 P.3d at 730; *cf. MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, 134 Nev. 235, 245, 416 P.3d 249, 258-59 (2018) (explaining that while the failure to make explicit findings as to the *Brunzell* factors is not a per se abuse of discretion, the district court must demonstrate that it considered the required factors and the award must be supported by substantial evidence). Thus, we are unable to discern from the record whether the district court properly determined that a fee award was appropriate under NRS 18.010(2)(b) or EDCR 7.60(b), or whether it properly considered the required factors under *Wright*, and we necessarily reverse and remand the award of attorney fees and costs to the district court for additional findings.² *See Miller*, 121 Nev. at 622-23, 119

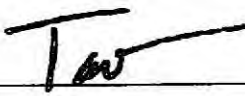
²We also note that the district court's order awards Valerie \$4,500 in attorney fees and costs, but does not delineate what portion of the award is for attorney fees as opposed to costs. Therefore, it is impossible for this court to determine whether the amount of fees is reasonable as it is not clear what amount the district court awarded in attorney fees. As such, on remand, if the district court still finds the awards of fees and costs are warranted, the court should clarify its order to indicate the amount awarded for attorney fees and the amount awarded for costs.

P.3d at 729-30; *see also Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142-43 (2015) (explaining that “deference is not owed to legal error, or to findings so conclusory they may mask legal error” (internal citations omitted)).

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Vincent Ochoa, District Judge
McFarling Law Group
Valerie Bynan
Eighth District Court Clerk