IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARK EDWARD SUMMIT,
Appellant,
vs.
MARGARET MARIE SUMMIT,
Respondent.

No. 71912

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Mark Edward Summit appeals from a district court post-divorce decree order concerning child custody and the distribution of proceeds from the sale of the parties' marital residence. Eighth Judicial District Court, Family Court Division, Clark County; William S. Potter, Judge.

The underlying divorce decree ordered the sale of the parties' marital residence, provided each party a share of the proceeds from that sale, and awarded respondent Margaret Marie Summit primary physical custody of the parties' children. Margaret later moved for an order to show cause seeking, among other things, a portion of Mark's proceeds from the sale of the marital residence based on allegations that he violated provisions in the divorce decree. Mark opposed that motion and further argued that he was entitled to a portion of Margaret's proceeds because she violated a provision of the divorce decree and committed other improprieties. Mark also moved to modify custody based on the parties' de facto timeshare arrangement and allegations that Margaret committed domestic violence

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and behaved erratically, arguing for primary physical custody in his favor or joint physical custody. The district court granted each party's request for a portion of the other parties' proceeds in part, but denied Mark's motion to modify custody. This appeal followed.

With regard to the proceeds from the sale of the marital residence, Mark first argues that the district court should not have awarded Margaret a credit for certain medical expenses and he disputes the amount of the credit that he received for Margaret's failure to pay a credit card debt. Margaret counters that Mark agreed to the relief granted during the hearing on these issues. As Mark failed to provide a copy of the transcript from that hearing for our review,[1] it is unclear whether he agreed to the district court's disposition of these matters as Margaret contends. But because Mark bore the burden of providing this court with an adequate appellate record, we necessarily presume that the missing transcript supported the district court's decision. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (explaining that appellant is responsible for preparing an adequate appellate record and that "[w]hen an appellant fails to include necessary documentation in the record, we necessarily presume that the missing [documents] support[] the district

[1]While Mark filed a transcript request form, he never provided us with the transcripts he sought, requested that the court reporter be compelled to prepare them, or otherwise acted to ensure this court received a copy of the transcript. *See* NRAP 9(b)(1)(B) (requiring pro se litigants who request transcripts and have not been granted in forma pauperis status to file a copy of their completed transcript with the clerk of the supreme court).

court's decision"). Thus, relief is not warranted on this basis and we affirm the district court's decision as to these credit issues.

Mark similarly asserts that the district court should have awarded him credits because he made a mortgage payment on Margaret's behalf and she caused the marital residence to depreciate.[2] Our review of the record in this regard reveals that, although Mark raised these issues below, such that they should have been resolved by the district court in the course of the underlying proceeding, the court's written order did not actually rule on these issues, make relevant factual findings, or otherwise acknowledge that the issues were pending before the court. And because these determinations require the resolution of factual issues that should be presented to the district court in the first instance, we remand these matters to the district court for it to enter a written order ruling on these issues. *See Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012) (explaining that "appellate court[s are] not particularly well-suited to make factual determinations in the first instance").

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[2]Insofar as Mark challenges the district court's refusal to award him a credit for expenses that he incurred repairing damages that Margaret allegedly caused, he does not provide any argument or explanation to challenge the bases for the district court's decision in this regard—that he failed to provide any receipts and that the home sold. As a result, he waived any such challenge and we therefore affirm the district court's resolution of this issue. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that arguments not raised on appeal are deemed waived).

Turning to Mark's motion to modify custody, he argues that the district court did not consider evidence showing that he had de facto primary physical custody and that, following entry of the divorce decree, Margaret committed domestic violence and otherwise engaged in erratic behavior. In response, Margaret asserts that the district court determined that Mark's supporting materials did not demonstrate he was entitled to relief.[3]

As a preliminary matter, while Mark failed to provide a copy of the transcript from the hearing on his motion to modify, we do not presume here that the missing transcript supported the district court's decision, *cf. Cuzze*, 123 Nev. at 603, 172 P.3d at 135, because the district court's written order is facially deficient. In particular, while the district court, in evaluating Mark's motion, was required to determine what type of custody arrangement the parties exercised in practice and to apply the appropriate modification test based on that determination, the court's order does not include any of the required findings on these issues or even identify what test it applied in denying Mark's request for relief. *See Rivero v. Rivero*, 125 Nev. 410, 430, 216 P.3d 213, 227 (2009) (explaining the procedure for evaluating modification requests and concluding that the district court

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[3]To the extent Margaret argues that Mark could not move to modify custody because he did not appeal the final custody order, her argument fails because custody orders can be modified at any time if certain conditions are met. *See* NRS 125C.0045(1)(b) (authorizing district courts to modify custody orders at any time); *see also Rivero v. Rivero*, 125 Nev. 410, 430, 216 P.3d 213, 227 (2009) (setting forth the test for evaluating modification requests).

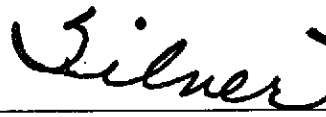
abused its discretion by failing to make findings of fact supported by substantial evidence with regard to the parties' existing custody arrangement); *see also Lewis v. Lewis*, 132 Nev. ___, ___, 373 P.3d 878, 882 (2016) (reversing the district court's custody modification as an abuse of discretion based on its failure to make specific findings with regard to the best interest factors).

Indeed, the only rationale for denying Mark's motion set forth in the district court's order was that his sole reason for seeking modification was that he had currently been exercising de facto primary physical custody. But modification is permitted to align the custody order with the existing custody arrangement actually being exercised by the parties. *See Bluestein v. Bluestein*, 131 Nev. ___, ___, 345 P.3d 1044, 1048 (2015) (recognizing that the district court has authority to modify its custody orders based on de facto custody arrangements). Moreover, Mark identified purported domestic violence and erratic behavior in his argument for modification. And to the extent the district court otherwise addressed custody in its written order, it seemed to recognize, without resolving, issues relevant to determining whether modification of the custody arrangement was warranted. *See* NRS 125C.0035(4) (identifying mandatory factors for the district court's consideration in child custody matters). For example, the district court warned Margaret that, if half of Mark's allegations were true, then "she [wa]s on the fast track to losing custody."

Given the foregoing, we conclude that the district court abused its discretion in denying Mark's motion to modify custody without applying the proper analytical framework and making the required findings. *See Rivero*, 125 Nev. at 428, 216 P.3d at 226 (explaining that a district court's

custody decisions will not be disturbed absent an abuse of discretion). Accordingly, we reverse the district court's denial of Mark's motion to modify custody and remand this matter for further proceedings consistent with this order.

It is so ORDERED.[4]



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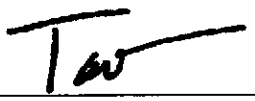

_____, J.
Tao

_____, J.
Gibbons

cc: Hon. William S. Potter, District Judge, Family Court Division
Mark Edward Summit
Roberts Stoffel Family Law Group
Eighth District Court Clerk

[4]We have considered Mark's remaining arguments and conclude they do not provide a basis for reversal.