IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARTHA MCKEE-BLACKHAM,
Appellant,
vs.
BRIAN LEE MALEY,
Respondent.

No. 70555

APR 25 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY DEPUTY CLERK

ORDER OF AFFIRMANCE

Martha (Matte) McKee-Blackham appeals from a district court order granting primary physical custody of a minor child. Eighth Judicial District Court, Family Court Division, Clark County; Cheryl B. Moss, Judge.

Respondent Brian Lee Maley filed for divorce from Matte in 2014.[1] During those proceedings, Brian moved for primary physical custody of their son, R.B. At the custody trial, the court heard testimony relating to a concurrent dispute between Matte and her ex-husband, Mr. Blackham, concerning custody of their children, including testimony from Blackham and from a psychologist who prepared a custody evaluation for the court in that case. The district court granted Brian primary physical custody of R.B. Matte filed a post-trial motion for a new trial, which the court denied. This appeal follows.[2]

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

[2]We note that, during the pendency of this appeal, Matte notified this court that she obtained an order from a court in Alabama, where she currently resides, granting her temporary legal and physical custody of R.B. on an emergency basis, and also that she filed a concurrent emergency motion for temporary custody with the district court below. However, those matters do not affect this appeal. Matte did not initially

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Matte asserts that the district court erred in failing to grant her primary physical custody of R.B.[3] A district court's decision regarding child custody is reviewed for an abuse of discretion. *See Wallace v.*

. . . *continued*

move to remand this case to the district court in line with the specific procedures set forth in *Mack-Manley v. Manley*, 122 Nev. 849, 855-56, 138 P.3d 525, 530 (2006) (requiring the party seeking a change in custody while the case is on appeal to move for a remand to the district court), but she has now. The motion is denied as a remand is unnecessary because a district court has the authority to decide emergency motions while an appeal is pending. *See id.* at 856, 138 P.3d at 530 ("[T]he district court's jurisdiction to make short-term, temporary adjustments to the parties' custody arrangement, on an emergency basis to protect and safeguard a child's welfare and security, is not impinged when an appeal is pending."). Accordingly, this court reaches the merits of this appeal.

[3]Matte also argues the district court abused its discretion by denying her motion for a new trial. However, Matte did not identify or refer to the district court's order denying her motion for a new trial in her notice of appeal. A notice of appeal must "designate the judgment, order or part thereof appealed," NRAP 3(c)(1)(B), and this court generally will not consider an order that is not identified in the notice of appeal. *See Collins v. Union Fed. Sav. & Loan Ass'n*, 97 Nev. 88, 89-90, 624 P.2d 496, 497 (1981). While this court may consider an order that an appellant fails to identify in her notice of appeal "where the intention to appeal from a specific judgment may be reasonably inferred from the text of the notice and where the defect has not materially misled the respondent," *id.* at 90, 624 P.2d at 497, this court and the Nevada Supreme Court have not used this flexibility to consider an order filed *after* the order the appellant identifies in the notice of appeal. *See, e.g., Krause Inc. v. Little*, 117 Nev. 929, 933, 34 P.3d 566, 569 (2001) (looking at referenced judgment notwithstanding the verdict to construe notice of appeal as referring to underlying verdict). We decline to expand the rule's application in this way here. Accordingly, we will not consider Matte's argument concerning the district court's order denying her motion for a new trial.

Wallace, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). "In reviewing child custody determinations, [this court] will not set aside the district court's factual findings if they are supported by substantial evidence, which is evidence that a reasonable person may accept as adequate to sustain a judgment." *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007) (footnote omitted). When conflicting evidence is presented, this court "leave[s] witness credibility determinations to the district court and will not reweigh credibility on appeal." *Id.* at 152, 161 P.3d at 244.

"In making a child custody determination, 'the sole consideration of the court is the best interest of the child.'" *Davis v. Ewalefo*, 131 Nev. ___, ___, 352 P.3d 1139, 1143 (2015) (quoting NRS 125.480(1) (2009)).[4] "In determining the best interest of the child, the court *shall* consider and set forth its specific findings" with respect to, among other things, each of the twelve factors set forth in NRS 125C.0035(4). *Lewis v. Lewis*, 132 Nev. ___, ___, 373 P.3d 878, 882 (2016) (internal quotation marks omitted) (discussing the identical factors from NRS 125.480(4) (2009)). Moreover, the court must tie its findings with respect to each factor to the best interest of the child. *See Davis*, 131 Nev. at ___, 352 P.3d at 1143.

At trial, the court heard testimony from five witnesses: Matte, Brian, Blackham, a psychologist who conducted a custody evaluation for the court in Matte's other custody case, and a psychologist who conducted a custody evaluation for the district court in this case. In its written order granting primary physical custody to Brian, the court made findings with

[4]NRS 125.480 was repealed in 2015, 2015 Nev. Stat., ch. 445, § 19, at 2591, and reenacted in relevant part as NRS 125C.0035.

respect to all twelve factors enumerated in NRS 125C.0035(4), focusing extensively on Matte's co-parenting issues with respect to her children with Blackham.[5]

Matte essentially claims that the district court abused its discretion by improperly considering evidence from the concurrent custody dispute and by failing to give adequate weight to specific pieces of testimony. These arguments are unpersuasive.

First, Matte fails to present any legal authority in support of the contention that the district court in this case should not have considered testimony pertaining to Matte's other children. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (noting that the court need not consider claims that are not cogently argued or supported by relevant authority). Moreover, to the extent that Matte argues that such testimony was not relevant to determining R.B.'s best interest in this case, she failed to object on those grounds at trial and we need not consider this argument on appeal. *See Thomas v. Hardwick*, 126 Nev. 142, 156, 231 P.3d 1111, 1120 (2010) (holding that failure to object at trial on the grounds urged on appeal precludes consideration of those grounds).

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[5]For example, the district court heard testimony from Blackham that he and Matte had minimal interaction with each other and that Matte had kept information about their son from him. The court heard further testimony that Matte would make disparaging remarks about Brian to Blackham, and on one occasion sent a vitriolic email objecting to Blackham and Brian's attempts to organize a playdate for all of the children. Ultimately, the court-appointed custody evaluator for this case testified that Brian should probably have custody of R.B. if the court still thought that Matte's co-parenting problems were an issue.

Matte's arguments fail on the merits as well because evidence regarding Matte's past conduct with respect to her other children and ex-husband was relevant in determining R.B.'s best interest. *See Gaskill v. Gaskill*, 936 S.W.2d 626, 630 (Tenn. Ct. App. 1996) (noting that a parent's character as evidenced by their past conduct is a consideration for courts to weigh in custody cases); *see also Abid v. Abid*, 133 Nev. ___, ___, 406 P.3d 476, 481 (2017) (noting that "[c]ategorically excluding" relevant evidence "would force the district court to close its eyes . . . and possibly place or leave a child in a dangerous living situation"). A district court may consider evidence relevant to a parent's conduct, including misconduct, because a parent's conduct is relevant to what custody arrangement is in the child's best interest.[6]

Finally, this court cannot reweigh the evidence adduced at trial on appeal, and there is substantial evidence in the record even without the evidence related to the other custody matter to support the district court's findings on the best interest factors, particularly with respect to which parent is more likely to allow a continuing relationship between the child and the noncustodial parent, as well as the level of conflict between the parties. *See* NRS 125C.0035(4)(c)-(d). Consequently,

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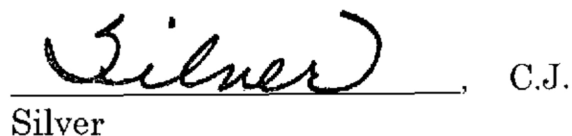
[6]We caution that a parent's past misconduct is not necessarily a dispositive factor in custody disputes and it does not create any presumption as evidence of domestic violence does. *See* NRS 125C.0035(5). As another court put it, "in light of our guiding principle—the best interest of the child—there can be no absolutes in child custody cases." *S.L. v. J.R.*, 56 N.E.3d 193, 196 (N.Y. 2016) (internal quotation marks omitted).

we conclude that the district court did not abuse its discretion in awarding primary physical custody of R.B. to Brian. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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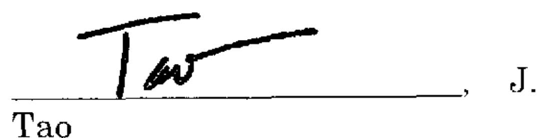
Silver



_______________, J.
Tao

_______________, J.
Gibbons

cc: Hon. Cheryl B. Moss, District Judge, Family Court Division
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