IN THE COURT OF APPEALS OF THE STATE OF NEVADA

NICHOLAS CHARLES MILLER,
Appellant,
vs.
JESSICA MARIE MILLER,
Respondent.

No. 75875-COA

FILED

AUG 22 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Nicholas Charles Miller appeals from a district court decree of divorce.[1] Eighth Judicial District Court, Family Court Division, Clark County; Charles J. Hoskin, Judge.

At the outset of the litigation below, respondent Jessica Miller was awarded temporary primary physical custody of the parties' minor child, subject to Nicholas' supervised parenting time. The case was subsequently administratively reassigned, where litigation continued and proceeded to trial. As relevant here, the district court found that Jessica demonstrated by substantial evidence that Nicholas is unable to adequately care for the parties' child for at least 146 days of the year and that Nicholas failed to provide any evidence to the contrary. The district court also found that "[c]redible evidence was presented that Nicholas committed domestic violence against Jessica's father, as [Nicholas] was convicted of that crime." Accordingly, the district court concluded that it was in the child's best interest to grant Jessica primary physical custody subject to Nicholas' supervised parenting time. Further, the decree of divorce requires Nicholas to attend individual psychotherapy for a minimum of six months and to

[1]This matter was transferred to the Nevada Court of Appeals on August 1, 2019.

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successfully complete both an anger management course and the Cooperative Parenting course at UNLV before the supervision requirement will be lifted. This appeal followed.

On appeal, Nicholas asserts that the district court abused its discretion in awarding Jessica primary physical custody and in requiring his parenting time to be supervised. This court reviews a child custody decision for an abuse of discretion, but "the district court must have reached its conclusions for the appropriate reasons." *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241-42 (2007). Additionally, the district court must apply the correct legal standard in reaching its conclusion, and no deference is owed to legal error. *See Davis v. Ewalefo*, 131 Nev. 445, 450-51, 352 P.3d 1139, 1142-43 (2015); *Williams v. Waldman*, 108 Nev. 466, 471, 836 P.2d 614, 617-18. When making a custody determination, the sole consideration is the best interest of the child. NRS 125C.0035(1); *Davis*, 131 Nev. at 451, 352 P.3d at 1143.

First, Nicholas asserts that the district court abused its discretion by considering his nolo contendere plea in a criminal matter, contrary to NRS 48.125(2). NRS 48.125(2) provides that "[e]vidence of a plea of nolo contendere or of an offer to plead nolo contendere to the crime charged or any other crime is not admissible in a civil or criminal proceeding involving the person who made the plea or offer." Here, while it appears that the district court improperly considered Nicholas' nolo contendere plea contrary to NRS 48.125(2), Nicholas failed to object to the admission of evidence of his plea at trial. Thus, any argument contesting the admission of the evidence is waived. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal.").

However, regardless of the admissibility of Nicholas' nolo contendere plea, when the district court finds by clear and convincing

evidence that a party engaged in an act of domestic violence against the child, a parent of the child, or any other person residing with the child, a presumption exists that sole or joint physical custody by the perpetrator of domestic violence is not in the best interest of the child. NRS 125C.0035(5). Upon finding that such an act of domestic violence occurred, the court is required to set forth findings that support the determination that domestic violence occurred and findings that the custody order adequately protects the child and the victim of domestic violence. *See* NRS 125C.0035(5)(a)-(b). Here, while the district court found that Nicholas engaged in an act of domestic violence, it is not clear whether the district court applied the rebuttable presumption that joint physical custody was not in the child's best interest and, if so, the decree fails to make any findings that the custody order adequately protects the child and the victim. *Id.* Because the district court failed to make these required findings, we must necessarily reverse and remand this matter to the district court for it to make the required findings pursuant to NRS 125C.0035(5)(b).[2]

Nicholas next argues that the district court abused its discretion in concluding the best interest factors weighed in favor of granting Jessica primary physical custody, overcoming the presumption in favor of joint physical custody. In making a custody determination, the sole

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[2]Although the district court found Nicholas engaged in an act of domestic violence, apparently against Jessica's father based on its finding that Nicholas "was convicted of that crime" and Jessica's father was the named victim in Nicholas' criminal matter, contrary to the district court's finding, Nicholas was not convicted of domestic violence relating to that incident. Moreover, because the district court's order makes no findings, it is unclear whether Jessica's father resided with the child, such that the NRS 125C.0035 considerations would be met. *See* NRS 125C.0035(4)(k); NRS 125C.0035(5). Accordingly, on remand, the district court should also make findings of fact that support the determination that domestic violence occurred, as required by the statute.

consideration is the best interest of the child. NRS 125C.0035(1); *Davis*, 131 Nev. at 451, 352 P.3d at 1143. Moreover, the district court's "order must tie the child's best interest, as informed by specific, relevant findings respecting the [best interest factors] and any other relevant factors, to the custody determination made." *Davis*, 131 Nev. at 451, 352 P.3d at 1143. Without specific findings and an adequate explanation for the custody determination, this court cannot discern whether the custody determination was appropriate. *Id.* at 452, 352 P.3d at 1143.

To the extent Nicholas challenges the district court's determinations as to witness credibility or the weight of the evidence, this court will not reweigh the same on appeal. *See Ellis*, 123 Nev. at 152, 161 P.3d at 244 (refusing to reweigh credibility determinations on appeal); *Quintero v. McDonald*, 116 Nev. 1181, 1183, 14 P.3d 522, 523 (2000) (refusing to reweigh evidence on appeal). However, to the extent the district court found that Jessica demonstrated, by substantial evidence, that Nicholas is unable to adequately care for the minor child for at least 146 days per year, it implicitly applied a presumption that joint physical custody is not in the child's best interest pursuant to NRS 125C.003(1)(a). But there are no findings of fact explaining how the district court reached this conclusion or whether it was, in fact, applying the presumption. Although Jessica asserted that Nicholas was unable to care for the parties' child for at least 146 days per year because his work schedule requires him to travel, Nicholas testified that his current position does not require him to travel, unlike his last position. Because there are no findings as to the evidence either in support of or contrary to the application of the presumption, this court cannot say with assurance that the custody determination was made for appropriate reasons. *See Davis*, 131 Nev. at 452, 352 P.3d at 1143. Accordingly, we necessarily reverse and remand this matter to the district court for further findings on this issue. *See id.* at 451, 352 P.3d at 1143.

Nicholas also asserts that the district court abused its discretion by ordering supervised parenting time in the temporary order issued at the beginning of litigation, which Nicholas contends led the trial judge to assume such supervision was appropriate following trial. Based on our review of the record, the district court considered the evidence presented at trial. And despite Nicholas' assertion, nothing in the record suggests the district court based its custody determination on the temporary custody order entered at the beginning of litigation, rather than the evidence admitted at trial. Accordingly, we discern no abuse of discretion on this basis. *See Ellis*, 123 Nev. at 149, 161 P.3d at 241-42.[3]

Lastly, Nicholas contends the district court failed to provide him due process by shortening the time for trial from six hours to three hours. Due process requires notice and an opportunity to be heard. *Micone v. Micone*, 132 Nev. 156, 159, 368 P.3d 1195, 1197 (2016). And importantly, "a party threatened with loss of parental rights must be given [the] opportunity to disprove evidence presented." *Gordon v. Geiger*, 133 Nev. 542, 545-46, 402 P.3d 671, 674 (2017) (quoting *Wallace v. Wallace*, 112 Nev. 1015, 1020, 922 P.2d 541, 544 (1996) (internal quotations omitted)).

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[3]To the extent Nicholas challenges the temporary order, any such challenge is moot as that order was superseded by the divorce decree. *See Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) (explaining that appellate courts generally will not consider moot issues). And while Nicholas' argument asserts that the transcript from the February 15, 2017, hearing demonstrates his position, he failed to provide this court with a transcript from that hearing, and we therefore presume the missing transcript supports the district court's decision. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (noting that it is appellant's burden to ensure that a proper appellate record is prepared and that, if the appellant fails to do so, "we necessarily presume that the missing [documents] support[ ] the district court's decision").

Here, the district court's initial order setting the time for trial, filed on November 28, 2017, provided that trial would last six hours, with each party having three hours to present their cases. The matter was subsequently reassigned and the trial rescheduled. In the subsequent scheduling order, filed on December 21, 2017, contrary to Jessica's assertion, the district court did not order that the trial would last three hours. Rather, the scheduling order indicates that a half-day trial setting would last three hours, while a full day trial setting would last six hours, with the time equally divided by the parties. Nowhere in the scheduling order does it state whether this matter was set for a full day or a half day.[4] However, at the start of trial, the district court informed the parties that each side would have one and one-half hours to present evidence, including any cross-examination, for a total of three hours. Thus, based on our review of the record, it appears that Nicholas was not informed that he only had one and one-half hours to present his case until the moment trial started.[5]

Once trial commenced, Nicholas called a percipient witness and conducted his direct examination. Nicholas then took the stand and testified. Notably, the district court reminded the parties how much time

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[4]We note that the trial was again vacated and rescheduled at Jessica's request for a continuance, but no updated scheduling order to reflect this continuance appears in the record.

[5]The transcript from the trial indicates that the parties discussed the time limit at the start of trial. Both parties indicated they were informed by the district court's chambers that trial could go past three hours, suggesting the parties knew before trial that the matter was set for three hours. However, nothing in the record besides this colloquy supports this inference or clarifies when the parties were advised of the same. Indeed, even if the parties were informed that the trial was set for three hours prior to trial, this discussion only emphasizes that the parties thought they had additional time, and the district court informed them at the start of trial that the matter could not, in fact, go past three hours.

was remaining throughout the proceedings. However, during Nicholas' redirect examination, his one and one-half hour time limit expired. Jessica then proceeded to call her own witnesses. When Nicholas' counsel attempted to cross-examine Jessica, the district court informed him that because his time expired, he would not be entitled to cross-examine any of Jessica's witnesses, and he objected to the time restriction. Despite his objection, the district court prohibited Nicholas' counsel from cross-examining Jessica or the expert witness who conducted a psychological evaluation of Nicholas and provided an expert report.

We recognize that the district court has wide discretion in conducting a trial, including creating limitations on the presentation of evidence. *Young v. Nev. Title Co.*, 103 Nev. 436, 441, 744 P.2d 902, 904 (1987); *see also* NRCP 16(c)(2)(M) (providing that at any pretrial conference, the district court may establish a reasonable time limit on the time allowed to present evidence). However, "this discretion is not without limits," and judges should accord every party a "full right to be heard according to law." *Young*, 103 Nev. at 441, 744 P.2d at 904-05. Here, although Nicholas was provided the opportunity to be heard to the extent a trial was held, the time limit imposed by the district court ultimately resulted in Nicholas being unable to cross-examine the opposing party and the expert witness. This is particularly concerning in light of the serious allegations of domestic violence at issue in this case and the district court's reliance on the expert's report in its ultimate decision to allow Nicholas only supervised parenting time with the parties' child. While Nicholas likely should have objected to the time restriction sooner, based on the particular facts of this case, and considering our resolution of the remaining issues on appeal, we conclude

this matter should be reversed and remanded for the parties' to have an opportunity to present evidence and cross-examine the witnesses.[6]

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.[7]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Charles J. Hoskin, District Judge, Family Court Division
Nicholas Charles Miller
Ford & Friedman, LLC
Eighth District Court Clerk

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[6]We note that the district court's strict adherence to the time limits affected both parties. After cross-examining Nicholas and his percipient witness, and testifying herself, Jessica was left with just one minute and twenty-two seconds to call the expert witness.

[7]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.