IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KENNETH BRADY,
Appellant,
vs.
KELLY FORTIN,
Respondent.

No. 78836-COA

FILED

JAN 21 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Kenneth Brady appeals from a district court child custody decree. Eighth Judicial District Court, Clark County; David S. Gibson, Jr., Judge.

In the proceedings below, following a trial, the district court entered a decree of custody awarding the parties joint legal custody and respondent Kelly Fortin primary physical custody of the parties' two minor children, subject to Kenneth's parenting time. Kenneth appealed and this court reversed and remanded the decree, concluding that the district court failed to make sufficient findings tied to the children's best interest and addressing whether the domestic violence presumption applied in determining child custody. *Brady v. Fortin*, Docket No. 75130-COA (Order of Reversal and Remand, November 19, 2018). Following remand from this court, the district court reconsidered the evidence presented at trial and issued an amended decree of custody, which made additional factual

findings and maintained the award of primary physical custody to Kelly.[1] This appeal followed.

On appeal, Kenneth challenges the district court's amended decree awarding Kelly primary physical custody. This court reviews a child custody decision for an abuse of discretion. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007). In reviewing child custody determinations, this court will affirm the district court's determinations if they are supported by substantial evidence. *Id.* at 149, 161 P.3d at 242. Substantial evidence is that which a reasonable person may accept as adequate to sustain a judgment. *Id.* When making a custody determination, the sole consideration is the best interest of the child. NRS 125C.0035(1); *Davis v. Ewalefo*, 131 Nev. 445, 451, 352 P.3d 1139, 1143 (2015). Further, we presume the district court properly exercised its discretion in determining the child's best interest. *Flynn v. Flynn*, 120 Nev. 436, 440, 92 P.3d 1224, 1226-27 (2004).

First, Kenneth asserts that the district court abused its discretion in considering his nolo contendere plea in violation of NRS 48.125(4), in not considering that he completed ten domestic violence classes as suggested by the initial trial judge, in not considering Kelly's testimony that the domestic violence was an isolated incident, and in not considering that there have been no further incidents of domestic violence in the three years since that incident. In this court's prior order of reversal and remand in Docket No. 75130-COA, we concluded that the district court

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[1]The original custody trial took place before Senior Judge Gerald Hardcastle, with the resulting order entered by former Judge Jennifer Elliott. Following our reversal and remand of this prior order, the case proceeded before Judge David Gibson, who entered the custody order at issue in this appeal.

had improperly considered Kenneth's nolo contendere plea in violation of NRS 48.125(4), but that the error was harmless in light of the other substantial evidence supporting the finding of domestic violence. Thus, we need not revisit this issue. *See Dictor v. Creative Mgmt. Servs., LLC*, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010) (discussing the law-of-the-case doctrine).

Additionally, on remand, the district court reiterated its finding that domestic violence occurred based on the testimony of the parties, not on Kenneth's nolo contendere plea, specifically finding that Kelly's testimony regarding the incident was more credible. Similarly, the district court made specific findings regarding the fact that Kenneth completed domestic violence classes, Kelly's testimony that this was an isolated incident, and that there have not been any additional incidents, indicating the district court did consider this evidence. Because the record indicates that the district court properly considered the evidence before it and substantial evidence in the record supports the district court's findings, we discern no basis for relief as to this issue. *See Ellis*, 123 Nev. at 149, 161 P.3d at 241. To the extent Kenneth challenges the weight of the evidence or the credibility of the witnesses, we do not reweigh the same on appeal. *See id.* 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).

Next, Kenneth asserts that the district court abused its discretion in failing to conclude that the best interest factors were equal, or were not beneficial to either party. Although Kenneth believes the evidence supported a different conclusion, as noted above, this court does not reweigh the evidence or witness credibility. *See Ellis*, 123 Nev. at 152, 161 P.3d at

244; *Quintero*, 116 Nev. at 1183, 14 P.3d at 523. Accordingly, because substantial evidence in the record supports the district court's findings as to the best interest of the children pursuant to NRS 125C.0035(4), we discern no abuse of discretion. *See Ellis*, 123 Nev. at 149, 161 P.3d at 241.

Kenneth also contends that the district court abused its discretion in determining the parties' time-share did not amount to a joint physical custody arrangement based solely on the hours each party has the children, rather than considering the best interest of the children, and in failing to consider *Bluestein v. Bluestein*, 131 Nev. 106, 345 P.3d 1044 (2015), as suggested by this court's order of reversal and remand. Contrary to Kenneth's assertion, in this court's prior order in Docket No. 75130-COA, we concluded that the district court did not abuse its discretion in determining that the parties' time-share arrangement amounted to a primary physical custody designation. Moreover, we only noted that the district court should consider this issue if necessary on remand, citing *Bluestein* for the proposition that the district court has broad discretion in determining whether a time-share arrangement should be designated as primary or joint physical custody based on the children's best interest. Accordingly, based on the district court's findings as to the children's best interest, we again discern no abuse of discretion in the court's conclusion that the parties' time-share should be designated as primary physical custody. *See id.* at 113, 345 P.3d at 1049; *Ellis*, 123 Nev. at 149, 161 P.3d at 241.

Lastly, as to Kenneth's assertion that the district court abused its discretion by solely reviewing the evidentiary hearing and not the record in its entirety, it is unclear what information Kenneth believes the district court should have considered, but did not. However, the district court's

amended decree specifically states that it properly considered the entire evidentiary hearing, the pleadings, and the evidence received. *See Krause Inc. v. Little*, 117 Nev. 929, 935-36, 34 P.3d 566, 570 (2001) (explaining that a finder of fact may not consider evidence out of court and must make its determination "based upon the evidence submitted"). To the extent Kenneth asserts that the district court should have held a new evidentiary hearing, this court did not order a new trial on remand and Kenneth has failed to provide cogent argument to support his position that one was nevertheless required. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider claims that are not cogently argued).

Accordingly, we

ORDER the judgment of the district court AFFIRMED.[2]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

[2]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.

cc: Hon. David S. Gibson, Jr., District Judge
Kenneth Brady
Smith Legal Group
Eighth District Court Clerk