

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHAZ M.P. HUNTER,
Appellant,
vs.
ALYSSA J. HUNTER,
Respondent.

No. 79381-COA

FILED

APR 27 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Chaz M.P. Hunter appeals from a district court order modifying child custody. Third Judicial District Court, Lyon County; Leon Aberasturi, Judge.

Chaz M.P. Hunter and respondent Alyssa J. Hunter shared joint legal custody of their child pursuant to a Rhode Island divorce decree. The decree also granted Chaz primary physical custody of the parties' minor child, and allowed Chaz to relocate with the child to Nevada. After an incident at school involving inappropriate sexual behavior by the child, a subsequent investigation revealed two additional incidents that occurred while under Chaz's care. The district court granted Alyssa temporary primary physical custody in Massachusetts for one year to obtain treatment for the child.

There, the child received treatment from various specialists. One year later, after learning more information about the extent of the child's experiences in Nevada and after seeing the child's improvement under her mother's care in Massachusetts, the district court granted Alyssa primary physical custody.¹ This appeal followed.

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

This court reviews a district court's child custody determination for an abuse of discretion. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007). "District courts have broad discretion in child custody matters, but substantial evidence must support the court's findings. Substantial evidence is evidence that a reasonable person may accept as adequate to sustain a judgment." *Rivero v. Rivero*, 125 Nev. 410, 428, 216 P.3d 213, 226 (2009) (citation and internal quotations omitted). When a trial court's determination is based on conflicting evidence, this court will not disturb that determination on appeal if it is supported by substantial evidence. *Fletcher v. Fletcher*, 89 Nev. 540, 542, 516 P.2d 103, 104 (1973). This court will not reweigh witness credibility or the weight of evidence on appeal. *Ellis*, 123 Nev. at 152, 161 P.3d at 244.

Chaz first argues that the district court improperly modified the custody agreement by finding a substantial change in circumstances based on previously litigated information, thus violating the principles of res judicata. Alyssa argues that res judicata does not bar the evidence here under *Castle v. Simmons*, 120 Nev. 98, 86 P.3d 1042 (2004).

"A modification of primary physical custody is warranted only when (1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the modification would serve the child's best interest." *Ellis*, 123 Nev. at 153, 161 P.3d at 244. The first prong is commonly known as the "changed circumstances" doctrine, and it arises from the principle of res judicata to prevent dissatisfied parties "[from filing] immediate, repetitive, serial motions until the right circumstances or the right judge allows them to achieve a different result, based on essentially the same facts." *Castle*, 120 Nev. at 103-04, 86 P.3d at 1046 (alteration in original) (internal quotations omitted).

Previously, the changed circumstances doctrine required the moving party to show that (1) the child's circumstances had changed since the immediately preceding custodial order and, (2) evidence existing at the time of a previous custody determination could not be used to show a substantial change in circumstances in a later order. *Hopper v. Hopper*, 113 Nev. 1138, 1143, 946 P.2d 171, 174-75 (1997); *McMonigle v. McMonigle*, 110 Nev. 1407, 1408, 887 P.2d 742, 743 (1994). However, *Castle* overruled *McMonigle* and *Hopper* regarding the second point, concluding that "a party seeking to change custody [may] introduce evidence of domestic violence if the moving party or the court *was unaware of the existence or extent of the conduct* when the court rendered its prior custody decision." 120 Nev. at 105, 86 P.3d at 1047 (emphasis added).

Here, the parties dispute whether the holding regarding the domestic violence evidence in *Castle* applies to the child's sexually inappropriate behavior evidence in this case. We need not make this determination and instead rely on *Abell v. Second Judicial District Court*, 58 Nev. 89, 96-97, 71 P.2d 111, 113 (1937), which was also relied on in *Castle*. In *Abell*, the supreme court "concluded that a change of custody may be based on material facts that existed when the decree was entered but were unknown to either the moving party or the court." *Castle*, 120 Nev. at 105, 86 P.3d 1042 at 1047. Consequently, under *Abell*, we conclude that the parties' filings and the district court's order below demonstrate that neither the parties nor the court were aware of the extent of the child's inappropriate behavior at the time of the court's previous custodial order.

The immediately preceding final custodial order in this case was filed on March 22, 2018. There, the district court found no substantial change in circumstances warranting a change of custody and found that it

was in the best interest of the child for primary custody to remain with Chaz. At that time, the parties and the court were aware of the incident at school. In the final order granting Alyssa primary physical custody, the district court relied on facts that the parties and the court were not aware of when the court entered the March 22 order.² For example, the district court had since become aware that there had been at least two additional incidents: an incident that occurred before the school incident with Chaz's boss' son and an incident at the Boys and Girls Club.³ The record on appeal demonstrates that the parties and the district court were not aware of all of the child's behavioral issues at the time of the March 22 order. Therefore, we conclude that the district court properly relied on new evidence to show a substantial change in circumstances and we affirm on this point.

Chaz next argues that a number of the district court's findings in both the temporary custody and final custody hearings and orders were based on bias and prejudice rather than on substantial evidence. Chaz also argues that a number of the district court's findings were incorrect.⁴ The district court's remarks referencing its previous experience as a prosecutor do not demonstrate bias or prejudice warranting reversal. "[R]emarks of a

²Technically, the next custodial order was the district court's order granting temporary primary physical custody to Alyssa. However, because that order was not a final order, it does not have any preclusive effect for the purposes of the changed circumstances doctrine, and the facts therein could still be used in the district court's final order. *See Rennels v. Rennels*, 127 Nev. 564, 569-70, 257 P.3d 396, 399-400 (2011) (concluding that a final order has preclusive effect under the changed circumstances doctrine).

³We do not recount all of the new information gathered between the March 22 order and the final order for the privacy of the parties.

⁴We decline to conclude that Alyssa confessed error by not responding to these arguments. *See* NRAP 31(d)(2).

judge made in the context of a court proceeding are not considered indicative of improper bias or prejudice unless they show that the judge has closed his or her mind to the presentation of all the evidence.” *Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998) (considering a judge’s remarks concerning his history as a prosecutor and how he would have handled the case differently).

Although the district court in this case referenced its previous experience as a prosecutor, the court also considered all the witness testimony and documentary evidence presented at the hearing. For example, the district court heard evidence that the child had experienced some kind of trauma while under Chaz’s care, and was acting out with inappropriate sexual behavior. The court also considered evidence that the child was receiving mental health services in Massachusetts, and was showing improvement. We conclude that the record demonstrates that the district court based its findings on substantial evidence. Therefore, we will not disturb these findings on appeal. *Fletcher*, 89 Nev. at 542, 516 P.2d at 104; *see also Ellis*, 123 Nev. at 152, 161 P.3d at 244 (“This court will not reweigh witness credibility or the weight of evidence on appeal.”).

Chaz finally argues that the district court failed to make relevant findings under the child’s best interest factors. The district court’s order contains findings that indicate that all of the best interest factors were considered by the court in accordance with *Davis v. Ewalefo*, which requires the district court to tie the best interest factors, and any other relevant factors, to the ultimate custody determination. 131 Nev. 445, 451, 352 P.3d 1139, 1143 (2015). Although the district court’s findings could have contained additional details, we were able to ascertain which factors the

court relied on in determining custody in favor of Alyssa and the district court's findings are supported by substantial evidence.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Leon Aberasturi, District Judge
Carolyn Worrell, Settlement Judge
Leavitt Law Firm
Kozak & Associates, LLC
Third District Court Clerk