

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANTONIO XAVIOR ROJAS,
Appellant,
vs.
ANNA MARIA BOLANOS-ALVARADO,
Respondent.

No. 78392-COA

FILED

OCT 21 2020

ELIZABETH L. BROWN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Antonio Xavier Rojas appeals from a district court order modifying custody. Eighth Judicial District Court, Family Court Division, Clark County; Bill Henderson, Judge.¹

Antonio Rojas and Anna Maria Bolanos-Alvarado were married for nearly eight years and had two children.² The couple divorced in May of 2017. In their decree of divorce, the district court awarded them joint legal and joint physical custody of their two minor children.

Thereafter, a series of events led to the district court entering two temporary custody orders that changed the terms and conditions of custody. Four months after the initial decree, Anna was arrested for attempting to smuggle 80 kilos of cocaine and heroin into the United States, and Antonio filed a motion seeking to modify custody. Anna filed an opposition to the motion, moving that temporary primary custody be granted to Cynthia Martin while Anna served her prison sentence because Antonio had a habitual drug problem. Following a hearing on the matter, the district court awarded temporary guardianship to Martin pending Antonio's completion of an in-patient drug treatment program.

¹The Honorable Bill Henderson, District Judge, signed the order on behalf of the Honorable Charles Hoskin, who presided over the hearing.

²We do not recount the facts except as necessary to our disposition.

In May of 2018, the district court found that Antonio had complied with its previous order for treatment and awarded him temporary primary custody of the children. Following completion of her sentence, Anna filed a motion for sole physical custody in July of 2018. Anna argued that Antonio had severed all communication with her, and that the welfare of her children was unknown. Antonio filed an opposition, seeking sole legal and sole physical custody of the children. Antonio argued that the children were finally settled into a routine in California and that Anna could not provide a safe environment for them.

Following evidentiary hearings, the district court awarded the parties joint legal custody but primary physical custody to Anna. In its order, the district court stated that since the divorce decree there had “been substantial changes in circumstances for both parties; Mom went to prison, Dad had serious drug issues and a guardian had to be put in place.” When considering the best interests of the children, the district court found that several factors favored Anna and that Antonio “did not testify about his ability to cooperate” or the nature of his relationship with the children.

On appeal, Antonio argues that (1) the district court abused its discretion by looking to the divorce decree as the controlling order instead of the subsequent order granting him temporary physical custody; (2) the district court improperly considered evidence of Antonio’s past use of illegal drugs that pre-dated the entry of the most recent temporary order; and (3) the district court abused its discretion by ignoring his testimony about several of the best interest factors, including allowing his children to communicate with their mother and his daily routine with the children.

We review a district court’s factual findings for an abuse of discretion and will not set aside those findings unless they are clearly erroneous or not supported by substantial evidence. *Ogawa v. Ogawa*, 125

Nev. 660, 668, 221 P.3d 699, 704 (2009). Substantial evidence 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).

We first consider Antonio's argument that the district court abused its discretion by looking to the divorce decree instead of the more recent award of temporary physical custody. Antonio argues that using the divorce decree as the controlling order allowed the district court to consider what would otherwise be inadmissible evidence, namely his prior drug abuse, to determine that there had been a substantial change in circumstances and in the best interest determination. Anna counters that Antonio failed to object to the admission of the drug use evidence below and that a temporary custody order cannot be considered when modifying custody because it is not a final order.

A modification of primary physical custody is warranted only when the party seeking a modification proves there has been (1) a substantial change in circumstances *affecting the welfare of the child*, and (2) the child's best interest is served by the modification; however, a modification of joint physical custody only requires the court to consider the second factor, best interest. *Ellis*, 123 Nev. at 150, 161 P.3d at 242; see *Madrid v. Hernandez*, Docket No. 75461-COA (Order of Affirmance, December 20, 2018) (unpublished). While review for abuse of discretion is ordinarily deferential, deference is not owed to legal error. *Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015).

Here, we conclude that, under the circumstances of this case, the district court properly based its decision on the divorce decree granting the parties joint physical custody rather than the subsequent temporary order. The temporary order was entered following abbreviated hearings during which neither side presented evidence. Furthermore, the district court did

not make any findings regarding the “best interest of the child” as would be statutorily required in order to have implemented a decree or final change of custody order, nor did it consider the necessary relocation factors. *See* NRS 125C.0035(4) and 125C.070. Additionally, the temporary physical custody order awarding custody to Antonio was in place for only two months before Anna was released from prison and filed her motion for sole physical custody before the court made its final custody decision.

Under these circumstances, the district court properly decided Anna’s motion by comparing the situation that then existed to the original permanent decree rather than the last temporary order unsupported by any “best interest” findings. We do not determine, and offer no opinion on, whether a motion to modify custody can ever be evaluated based upon a temporary custody order, but only that, based on the circumstances of this case, the district court properly evaluated Anna’s motion based upon the decree.


Thus, we also conclude that the district court was not precluded from considering evidence of events that pre-dated the entry of the temporary order, namely Antonio’s use of illegal drugs. Antonio did not object to the admission or consideration of the evidence related to his drug use that occurred before the order giving him temporary custody, and therefore, he waived this issue. *See In re J.D.N.*, 128 Nev. 462, 468, 283 P.3d 842, 846 (2012) (“[W]hen a party fails to make a specific objection before the district court, the party fails to preserve the issue for appeal.”); *see also Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). Because the district court properly considered Anna’s motion based on the divorce decree, it was not error for the court to consider Antonio’s drug use that occurred after the decree was entered, as it was relevant in determining the best interest of the child.


Although the district court unnecessarily considered the parties' "substantial change in circumstances" as set forth in *Ellis* when determining whether to modify the parties' joint physical custody arrangement, it was of no consequence to the outcome. Further, if there was any error, it was harmless because only the best interest of the children had to be considered when the court awarded primary physical custody to Anna, and the court considered all the best interest factors. The record as a whole reflects that the court adequately considered Anna's drug conviction, as well as the cooperation and developmental needs of the children. Finally, the court considered that Antonio was not able to take care of the children when Anna was in prison, resulting in a necessary guardianship.


Both parties agree, however, that the district court's order included one erroneous finding pursuant to NRS 125C.0035(4)(h) regarding the nature of the relationship Antonio had with his children. It is unclear how the court resolved this finding—in favor of Anna or Antonio—since no resolution is set forth in the order, although it appears the court used this factor in Anna's favor. Anna argues this error was harmless. We agree as the remainder of the district court's "best interest" findings were based upon substantial evidence. *Cf.* NRCP 61 (error that does not affect substantial rights shall be disregarded).

Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Tao


_____, C.J.
Gibbons


_____, J.
Bulla

cc: Hon. Bill Henderson, District Judge, Family Court Division
Hon. Charles Hoskin, District Judge, Family Court Division
Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC
Law Office of Michael Rhodes, PLLC
Eighth District Court Clerk