

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JENNIFER BANDIERO,
Appellant,
vs.
RICHARD BANDIERO,
Respondent.

No. 80756-COA

FILED

DEC 16 2020

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

ORDER OF AFFIRMANCE

Jennifer Bandiero appeals from a district court order denying a motion to modify child custody. Eighth Judicial District Court, Family Court Division, Clark County; Cheryl B. Moss, Judge.

Jennifer and Richard Bandiero have one minor child. The parties were not married when the child was born in 2015, and their romantic relationship ended shortly thereafter. Richard brought a paternity action in 2016, and the parties eventually stipulated to joint legal and physical custody.

A few months later, the child returned from Richard's care ill and behaving oddly. In addition, on a couple of occasions, Richard delivered the child to Jennifer with vomit or diarrhea on her person or clothing. Jennifer took the child to a drug-testing lab for a hair follicle drug test. The test was positive for methamphetamine. Jennifer also submitted hair follicle samples from herself and her other son; both tested negative. Jennifer then took the child to a hospital where the child's urine tested negative. Hospital staff reported the child's positive hair follicle drug test to the Department of Family Services (DFS) to investigate.

Jennifer moved to modify custody, claiming that Richard was responsible for the child's positive drug test, Richard and his mother smoked marijuana around the child, and operated a methamphetamine lab out of

their Pahrump home. Jennifer requested sole legal and primary physical custody of the child. Jennifer filed a motion to shorten time, which was granted. The district court held an ex parte hearing and temporarily suspended Richard's custody rights and granted Jennifer the right to inspect and forensically test an RV trailer on the Pahrump property.

DFS investigated the circumstances surrounding the child's positive drug test. At the time, Richard lived part-time at the Pahrump home with his mother, her boyfriend, and a preteen boy. DFS drug tested Richard, his mother, and the boy, all of whom consented. Richard and his mother tested negative, but the boy tested positive for methamphetamine. The mother's boyfriend refused a drug test. The RV on the Pahrump property had trace amounts of methamphetamine in it, but there were no signs of a methamphetamine lab or drug usage on the premises. DFS closed its investigation, concluding that Jennifer's allegations were unsubstantiated. Richard subsequently obtained a home in Las Vegas.

Richard moved to set aside the temporary order. After a hearing on Richard's motion to set aside, the district court temporarily reinstated joint legal and physical custody based on Richard's negative drug test and the DFS investigation. The parties stipulated that they each would submit to a psychological evaluation at their own expense. The district court also ordered that Jennifer could randomly require Richard to submit to a drug test and that the child could visit the Pahrump home for short periods to see the grandmother but had to stay at Richard's new Las Vegas home overnight.

Dr. Paglini, a licensed psychologist, evaluated both parents pursuant to the court's order. However, this process took over a year because Jennifer was having trouble paying for the evaluation and regularly canceled and rescheduled her appointments with Dr. Paglini. The

evaluation included multiple interviews with each party, interviews with known associates of the parties, home inspections, and random drug tests. Dr. Paglini noted in his report that Richard had some narcissistic and borderline personality disorder traits but did not make a formal diagnosis. Dr. Paglini further noted that Richard downplayed his previous drug usage. For example, Richard initially stated that he hardly ever used marijuana, but correspondence provided by Jennifer showed otherwise. However, Dr. Paglini's inspection of Richard's Las Vegas home and his interviews with family members showed that Richard was a fit parent and not an abuser of drugs anymore. All of Richard's drug tests came back negative, including the random tests.

With respect to Jennifer, Dr. Paglini noted that she possessed some obsessive-compulsive traits and tended to be overbearing towards Richard but was otherwise a very good parent. Dr. Paglini's 61-page report concluded that both parents were good with the child and able to care for her adequately, but they needed therapy and co-parenting classes to avoid the toxic aspects of their relationship.

The hearing date for the court to consider the report from Dr. Paglini and set an evidentiary hearing was continued eight times because of the delays in Dr. Paglini completing his evaluation. The district court never made specific findings justifying why it was not making the custody determination within six months of Richard's response to Jennifer's motion for sole legal and primary physical custody. At the return hearing for Dr. Paglini's report, the court kept the custody status quo and set a discovery deadline and a two-day evidentiary hearing. The district court also ordered the parties to attend parenting and high conflict prevention classes. Richard completed both classes but Jennifer did not complete either. One month prior to the hearing, Jennifer moved to extend discovery and the hearing

date, among other things. The court extended the discovery schedule and granted a new hearing date six months later based on Jennifer's request.

The district court finally held a two-day hearing over 30 months after Jennifer filed her initial motion to modify custody. At the outset of the hearing, Jennifer informed the court that Dr. Paglini was unavailable to testify because it was his wedding anniversary. The court declined to continue the hearing because Jennifer failed to provide an affidavit or other information establishing good cause to support a continuance and also noted that Dr. Paglini's report was already part of the court record.

At the conclusion of the hearing, the district court denied Jennifer's motion and found that it was in the best interest of the child to keep the joint custody arrangement. The district court made findings regarding the best interest of the child factors in NRS 125C.0035(4), including that the parties were able to cooperate and that the issues in this case were mainly due to the parties' conflicting personality traits. The district court could not determine how the child ingested or was exposed to methamphetamine but noted that it could have been caused by someone in the Pahrump home. Upon the request of Richard's counsel, the district court also made a finding that there had been no substantial changes in the circumstances to warrant modification of custody in favor of Jennifer.

On appeal, Jennifer challenges the order denying her motion to modify custody, asserting that (1) the district court erred in considering the events that occurred after she filed her motion to modify custody and in failing to resolve the custody issues within six months in violation of SCR 251; (2) the district court applied the wrong legal standard; (3) the district court erred in "refusing to allow" Dr. Paglini to testify; and (4) the district court's findings were not supported by substantial evidence. We disagree.

The district court did not abuse its discretion in considering the events occurring after Jennifer filed her motion to modify custody

Jennifer contends that the district court violated SCR 251 and should not have considered evidence from the 30-month period between the filing of her motion and the hearing. Jennifer points to statements by the district court indicating that there may have been changed circumstances warranting modification of custody at the time she brought her motion but not as of the date of the hearing.

At the outset, we note that Jennifer did not raise her arguments regarding SCR 251 below or object to the admission of evidence garnered after she filed her custody motion, including the drug testing results and Dr. Paglini's report. Thus, Jennifer waived these arguments. *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, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."). Even if not deemed waived, we conclude that Jennifer's arguments are unavailing, as set forth below.

While we review the district court's custody determinations for a clear abuse of discretion, it must reach its conclusions for appropriate reasons. *See Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241-42 (2007). Under SCR 251, issues affecting the custody of a minor child typically must be resolved within six months of the filing of a responsive pleading. Only "[e]xtraordinary cases" presenting "unforeseeable circumstances may be subject to extensions of time beyond the six-month period," and the district court must provide "specific findings [to] justify the extension of time." *Id.*

When a party complains on appeal of an error that the party caused, the invited error doctrine bars appellate relief. *Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994). This doctrine applies to both

“affirmative conduct” and a “failure to act” to prevent the error. *Id.* (internal quotations omitted).

Here, the district court initially scheduled the deadline for Dr. Paglini’s report and return hearing within six months of Richard’s response to Jennifer’s motion to modify custody, apparently attempting to comply with the rule. However, Jennifer caused numerous delays in this case, which lasted over 30 months from her initial motion. She prolonged the completion of her psychological evaluation for over a year due to a lack of funding and because she failed to attend some of her scheduled appointments. And, rather than informing the district court that time was of the essence, Jennifer filed a motion for an extension of discovery and to continue the hearing date, thereby prolonging the custody determination another six months. Furthermore, Jennifer presented evidence from the alleged improper time period. Thus, the invited error doctrine bars Jennifer’s complaints regarding these delays and the introduction of evidence garnered after she filed her motion.

Although the district court ideally should have made specific findings as to why it did not resolve Jennifer’s motion within six months pursuant to SCR 251, Jennifer has not shown any harm to her substantial rights. *Cf.* NRCPC 61 (providing that any error or defect in the proceeding must be disregarded if it does not affect a party’s substantial rights). Indeed, the reason for the delays was self-evident: the psychological evaluations had not been completed or Jennifer asked to continue the evidentiary hearing.

Additionally, Jennifer enjoyed joint custody throughout the proceedings and was not deprived of any time with the child. *See Sims v. Sims*, 109 Nev. 1146, 1150, 865 P.2d 328, 331 (1993) (providing that time “is of the essence” for child custody determinations where one parent does not share equal physical custody because there is danger of “irreparable harm”

to the child's relationship with the parent). But-for Jennifer's delays, this custody determination likely would have been completed in compliance with SCR 251 or shortly thereafter. Furthermore, Jennifer never objected to the scope of the discovery order or any evidence gathered after she filed her motion to modify custody, including Dr. Paglini's report. Therefore, Jennifer's arguments regarding SCR 251 and the events occurring after she filed her motion to modify custody are unpersuasive.

The district court applied the correct legal standard in resolving Jennifer's motion to modify custody

Jennifer claims that the district court applied the wrong legal standard and did not make findings that it was in the best interest of the child to maintain joint custody. The district court must apply the correct legal standard in reaching custody determinations, and we owe no deference to legal error. *See Ellis*, 123 Nev. at 149, 161 P.3d at 241-42. "To succeed on a motion to modify custody, a party in a joint physical custody arrangement must show that modification is in the child's best interest." *Nance v. Ferraro*, 134 Nev. 153, 156, 418 P.3d 679, 681 (Ct. App. 2018) (citing *Rivero v. Rivero*, 125 Nev. 410, 430, 216 P.3d 213, 227 (2009)). "[B]ut if the opposing party has primary physical custody of the child, the movant must show there has been a substantial change in circumstances affecting the welfare of the child and that modification is in the child's best interest." *Id.* In determining the best interest of the child for purposes of physical custody, the district court must apply and set forth specific findings for each of the applicable statutory factors. *See Lewis v. Lewis*, 132 Nev. 453, 460, 373 P.3d 878, 882 (2016).

Here, the district court applied the best interests of the child factors set forth in NRS 125C.0035(4). It made a specific finding under each factor, as required by *Lewis*. The district court also applied the substantial

change in circumstances standard, which was unnecessary, because the parties shared joint custody and only the best interest of the child had to be considered.¹ Although the district court unnecessarily applied the first part of the *Ellis* standard on substantial change of circumstances, this circumstance does not constitute error because it was immaterial and the district court applied the correct standard pursuant to NRS 125C.0035(1) and (4). The district court determined, above all else, what was in the best interest of the child. That is the controlling standard. It does not appear that the district court's unnecessary finding of no changed circumstances was erroneous nor did it affect its ultimate determination on the child's best interests. Thus, we conclude that the district court applied the correct standard in denying Jennifer's motion to modify custody.

The district court did not abuse its discretion in denying Jennifer's request to continue the hearing so that Dr. Paglini could testify

Jennifer claims that the district court "refused" to permit Dr. Paglini to testify. She claims that Dr. Paglini's testimony was necessary to analyze his report and that the court should have continued the hearing date until Dr. Paglini could testify.

We review the district court's denial of a request for a continuance for an abuse of discretion. *Bongiovi v. Sullivan*, 122 Nev. 556,

¹See *Rivero v. Rivero*, 125 Nev. 410, 430, 216 P.3d 213, 227 (2009) ("When considering whether to modify a physical custody agreement, the district court must first determine what type of physical custody arrangement exists because different tests apply depending on the district court's determination. A modification to a joint physical custody arrangement is appropriate if it is in the child's best interest. . . . In contrast, a modification to a primary physical custody arrangement is appropriate when there is a substantial change in the circumstances affecting the child and the modification serves the child's best interest." (citing *Ellis*, 123 Nev. at 150, 161 P.3d at 242)).

570, 138 P.3d 433, 444 (2006). A motion for a continuance based on an unavailable witness must be supported by an affidavit, except when the moving party did not have time to prepare an affidavit. *See* DCR 14(1); *see also* EDCR 7.30(a).

Here, Jennifer did not provide an affidavit detailing why Dr. Paglini was unavailable, when she learned about his unavailability, or what diligence she had undertaken to procure his attendance, including whether he had been subpoenaed to testify. She also never claimed to the district court that she did not have time to prepare an affidavit, nor does she make this argument on appeal. When the district court commented, “you knew [Dr. Paglini] couldn’t make it before we even started the proceedings. We could have moved this trial,” Jennifer did not claim otherwise, nor did she offer oral testimony explaining the situation. Additionally, Dr. Paglini’s entire 61-page report was already part of the district court’s record, which the court considered as evidence. Jennifer did not explain what portion of the report was unclear or incomplete. Finally, Jennifer has not articulated how Dr. Paglini’s testimony would have changed the result of the proceeding. Accordingly, we conclude that the district court did not abuse its discretion in denying Jennifer’s request for another continuance.

The district court’s findings were supported by substantial evidence

Jennifer argues that the district court’s findings regarding the child’s best interest are not supported. She challenges the district court’s findings as to NRS 125C.0035(4)(e) (“The ability of the parents to cooperate to meet the needs of the child”) and NRS 125C.0035(4)(f) (“The mental and physical health of the parents”). Under factor (4)(e), Jennifer claims that the district court erred when it orally stated “I don’t think that co-parenting is in your near future” but then concluded in its order that the parents had the ability to cooperate. Under factor (4)(f), Jennifer claims that the district

court's findings that both parents were mentally fit to parent the child were contradicted by the record because Richard had mental health disorders, as found in Dr. Paglini's report.²

We review findings of fact for abuse of discretion and will not set aside those findings unless they are clearly erroneous or unsupported by substantial evidence. *See Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009). "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." *Asphalt Prods. Corp. v. All Star Ready Mix, Inc.*, 111 Nev. 799, 802, 898 P.2d 699, 701 (1995) (internal quotation omitted). "In any action for determining physical custody of a minor child, the sole consideration of the court is the best interest of the child." NRS 125C.0035(1). The statutory best interest factors in NRS 125C.0035(4) are a non-exhaustive list of factors to be considered. *See Nance*, 135 Nev. at 158, 418 P.3d at 685 (explaining that the statutory best interest factors provides a non-exhaustive list for the district court's consideration).

With respect to the parties' ability to cooperate, the district court set out specific requirements regarding all future communications between the parties to minimize any cooperation issues. Although it noted that co-parenting was not currently possible, it found that the parties could effectively cooperate to meet the needs of the child so long as they confine all

²Jennifer does not address any of the other eight factors or the district court's findings applying them. Therefore, she has waived a challenge to them. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (explaining that if a matter is not raised on appeal, it is considered waived). Therefore, affirmance would also be warranted based on the remaining factors. *See* NRS 125C.0035(4) (providing that the court shall consider the enumerated best interest factors "among other things").


correspondence to Our Family Wizard and keep their communications short and focused to specific topics. The district court prohibited any communication involving unnecessary lecturing or hostility between the parties. To ensure that the parties have minimal contact, the district court modified the custody schedule so that exchanges would take place at school. Jennifer does not cite to any portion of the record or any authority to show how this arrangement is not in the child's best interest or that cooperation will not be facilitated. Thus, the district court's findings regarding the parties' ability to cooperate under the requirements imposed by the court are supported by ample evidence and the custodial order contained sufficient safeguards to facilitate cooperation and co-parenting between the parties.


With respect to the mental health of the parties, Dr. Paglini never formally diagnosed Richard with narcissistic or borderline personality disorder. He noted that Richard tended to exhibit some of these characteristics, but a person exhibiting certain symptoms of a mental health disorder is not a diagnosis. Likewise, Dr. Paglini's description of Jennifer's obsessive-compulsive behavior would also imply that she has a mental disorder but it is not a diagnosis either. Therefore, this evidence effectively makes this factor neutral, as the district court found. Based on the voluminous amount of text and email correspondence in the record on appeal, the district court properly noted that people with these personality traits do not work well with each other. That observation, however, does not mean that Jennifer is automatically entitled to primary physical custody. Additionally, Jennifer does not articulate how Richard's personality traits are so detrimental towards the child's best interests as to establish an abuse of discretion by the district court.


The district court additionally found, with substantial support from Dr. Paglini's report, that, on balance, the relevant factors weighed in

favor of maintaining joint custody, including the child's good relationship with both parties, *see* NRS 125C.0035(4)(h), and the ability of both parties to care for the needs of the child, *see* NRS 125C.0035(4)(g). Jennifer does not identify any evidence or make any argument to overcome these findings. Richard completed two parenting classes (which Jennifer failed to attend), obtained a new residence in Las Vegas away from the suspected drug abusers in the Pahrump home, continually tested negative for any drug or controlled substance, and was deemed a fit parent by Dr. Paglini. Although concerning, the district court could not determine how the child tested positive for methamphetamine, but Richard was not proven to be at fault. Therefore, Jennifer's substantial-evidence claim lacks merit, and we defer to the district court's findings regarding the child's best interest as its findings are supported by substantial evidence. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Tao


_____, C.J.
Gibbons


_____, J.
Bulla

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