

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SHAWN D. MONAHAN,
Appellant,
vs.
SUSAN M. MONAHAN,
Respondent.

No. 80390-COA

FILED

MAR 25 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *Elizabeth A. Brown*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Shawn D. Monahan appeals from a post-divorce decree order regarding child custody. Eighth Judicial District Court, Family Court Division, Clark County; Lisa M. Brown, Judge.

Susan and Shawn Monahan filed for divorce and then stipulated to the terms of their divorce. The district court judge to whom the case was originally assigned accepted and memorialized the Monahan's agreement by issuing a divorce decree.¹ Per the divorce decree, Susan and Shawn agreed to share joint legal and physical custody over their three children. They also agreed that neither would abuse alcohol while they were with the children.

However, after a series of alcohol-related events, including two DUIs and an incident where Shawn was excessively intoxicated at his child's birthday party, Susan decided to seek sole legal and primary physical custody over their children. She began by exercising her right to a peremptory challenge against the initial district court judge pursuant to Nevada Supreme Court Rule (SCR) 48.1. The peremptory challenge was granted and the case was automatically reassigned to a new department.

The next day, Susan moved for sole legal and primary physical custody over the children, for supervised visits for Shawn, child support, and attorney fees and costs. Shawn opposed the motion, arguing, among other

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

things, that Susan's peremptory challenge was improper because the original district court judge ruled on a contested matter by issuing the divorce decree. The newly assigned judge conducted a hearing on Susan's motion and issued an order following the hearing. In its order, the district court did not mention the peremptory challenge or rule on Shawn's objection to it. The court maintained the parties' agreement for joint legal custody but awarded Susan primary physical custody and granted Shawn supervised parenting time.

Subsequently, the district court conducted a case management conference, where Shawn asked the court for a child custody evaluation to determine what effect his alcohol use had on the children. The district court granted the request, and the parties stipulated to a custody evaluation by Dr. Stephanie Holland, a licensed psychologist.

Dr. Holland evaluated Susan and Shawn over the course of several months. In her expert report, Dr. Holland diagnosed Shawn as suffering from severe alcoholism, which resulted in him having trouble getting up in the morning and sometimes calling in sick to work. The report noted that, immediately before the divorce, Shawn was arrested twice for DUI, and was convicted of one of the incidents, and that Shawn had once been admitted into a hospital emergency room for alcohol intoxication and dehydration, where he disclosed to hospital staff that his work suspended him for 30 days due to alcohol consumption. Further, Dr. Holland noted that Shawn's responses indicated "high levels of defensiveness, denial of distress, and self-perceived adjustment." Accordingly, Dr. Holland suggested that Shawn was likely underreporting his symptoms, and the court should interpret his profile "with extreme caution." Dr. Holland recommended that the court aim towards granting joint legal and physical custody of the children, with a graduated plan for increased parenting time given Shawn's continued sobriety, and as extended periods of sobriety for Shawn were

documented, Shawn's parenting time should be increased until ultimately Shawn and Susan would share parenting time. Dr. Holland recommended that Shawn would need one year of documented sobriety before considering shared custody.

The district court held an evidentiary hearing solely on the issue of child custody, where it heard testimony from Shawn, Susan, and Dr. Holland. Notably, at the hearing, Shawn called Dr. Holland as a witness and asked her for a recommended graduated parenting time schedule past the first year of documented sobriety.² Susan objected to the testimony because Dr. Holland in her report did not discuss a graduated parenting time schedule following one year of Shawn's sobriety, if shared physical custody was not feasible. The district court agreed with Susan and without further explanation sustained the objection.

Following the hearing, the district court issued findings of fact and conclusions of law. The district court found that Shawn has a severe alcohol abuse problem. Accordingly, the district court gave Susan and Shawn joint legal custody, but it found that Shawn was not capable of sharing joint physical custody because of his alcoholism. For example, the district court found that Shawn consumed alcohol in front of the children on many occasions, and they were scared many of those times. The district court also noted a specific incident that occurred during his child's birthday party where he appeared drunk while only in his underwear, falling over and injuring himself. Although Shawn maintained that he was mostly sober after the divorce, the district court found that Shawn's testimony about his

²Specifically, Shawn asked, "And at this point, assuming that we've been 12 months now, it's after a year, what would be the appropriate recommendations we give the Court for as far as examples of graduated schedule."

sobriety was not credible, as he continued to minimize his alcoholism during the hearing. The district court also added that Shawn failed to submit any medically related records documenting his sobriety, and he failed to attend Alcoholics Anonymous (AA) meetings. Shawn also drove with the children, despite a court order prohibiting him from doing so.

Further, the district court disagreed with Dr. Holland's suggested graduated parenting time schedule because it lacked foundation regarding the frequency of Shawn's alcohol use and did not take into account the seriousness of Shawn's alcoholism. The court determined that Dr. Holland "was guarded in her testimony. Dr. Holland's testimony also pointed out that her report is remiss regarding [Shawn's] rehabilitation records, and that she did not speak with his treating therapists, which the Court finds to be a serious problem with the report." The district court then allowed the parties to each submit a graduated parenting time schedule, and it is unclear from the record whether the parties did so. The district court eventually filed a graduated parenting time order, which partially adopted Dr. Holland's recommendations, from which Shawn appeals.

Shawn makes two arguments on appeal.³ First, Shawn avers that the district court erred when it excluded testimony from Dr. Holland

³Shawn also argues that the district court erred in denying his opposition to Susan's peremptory challenge after the initial district court made a ruling in a contested matter. However, we need not consider this claim because Shawn failed to present relevant authority to support his concern. See *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006). Additionally, Shawn failed to provide an adequate record on appeal. Because Shawn has not attached a hearing transcript, and there is no evidence that the district court considered his opposition because it did not mention the peremptory challenge in its order, we presume that Shawn did not raise the issue at the hearing, and we need not consider the issue. See *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123

about a graduated parenting time schedule because the testimony would have given the district court more information to consider. Second, Shawn claims that the district court violated his due process rights by using his alcoholism to punish him by restricting his custody over his children.

Expert witness testimony

Shawn claims the district court erred in denying Dr. Holland's expert testimony about a future graduated parenting time schedule given Shawn's self-documented periods of extended sobriety. He also claims that the district court erred in concluding that Dr. Holland did not discuss a graduated parenting plan in her report, and therefore, denying her testimony on this basis. Shawn points out that Dr. Holland included several sentences about a graduated parenting time schedule in her expert report. He argues that her expert testimony in this area would have provided the district court with more factors to consider and a more thorough parenting time recommendation that would serve the children's best interests.

If we treat Shawn's first issue on appeal as an improper exclusion of expert testimony, this court reviews the district court's decision "to admit [or exclude] expert testimony without an expert witness report or other disclosures for an abuse of discretion." *Khoury v. Seastrand*, 132 Nev. 520, 533, 377 P.3d 81, 90 (2016); *see also Johnson v. Egtegar*, 112 Nev. 428, 436, 915 P.2d 271, 276 (1996). NRCP 16.2(d)(5)(A) (2017) generally requires

Nev. 598, 603, 172 P.3d 131, 135 (2007) (holding that an appellate court presumes missing portions of the record support the district court's ruling); *see also 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."). Like in *Old Aztec*, it was incumbent on Shawn to move the district court for an amended order to make an explicit ruling on his opposition, considering the missing portions of the record. *See Old Aztec Mine, Inc.*, 97 Nev. at 52-53, 623 P.2d at 983-84; NRCP 52(a)(3) & (b).

a party calling an expert witness to disclose a written report that includes “a complete statement of all opinions to be expressed and the basis and reasons therefor.” “The purpose of discovery rules ‘is to take the surprise out of trials of cases so that all relevant facts and information pertaining to the action may be ascertained in advance of trial.’” *DeChambeau v. Balkenbush*, 134 Nev. 625, 627, 431 P.3d 359, 361 (Ct. App. 2018) (quoting *Washoe Cty. Bd. of Sch. Trs. v. Pirhala*, 84 Nev. 1, 5, 435 P.2d 756, 758 (1968)). Permitting an expert witness to testify outside the scope of the written report can, in some circumstances, constitute an abuse of discretion. *DeChambeau*, 134 Nev. at 628, 431 P.3d at 361.

Additionally, even if a district court abuses its discretion in admitting or excluding evidence, we review the error under the harmless error doctrine, which requires Shawn to prove that the error affected his substantial rights. *Cf.* NRC 61; *see also Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010). “An error is harmless when it does not affect a party’s substantial rights.” *Wyeth*, 126 Nev. at 465, 244 P.3d at 778. “[I]f the moving party shows that the error is prejudicial, reversal may be appropriate.” *Id.* (citing *Cook v. Sunrise Hosp. & Med. Ctr.*, 124 Nev. 997, 1006-07, 194 P.3d 1214, 1219-20 (2008)). To demonstrate an error is prejudicial, “the movant must show that the error affects the party’s substantial rights” such that, but for the district court’s error, “a different result might reasonably have been reached.” *Id.* The inquiry is fact-dependent; thus, this court reviews the entire record to evaluate the error. *Id.*

The district court did not abuse its discretion in excluding Dr. Holland’s testimony about a graduated parenting time schedule after one year of sobriety because a reasonable judge could have concluded that the testimony was outside the scope of Dr. Holland’s expert report, with the

exception that Dr. Holland's report indicated that after one year of sobriety shared custody could be *considered* by the court. Dr. Holland's written report did not include any opinion about the need for a graduated parenting time schedule after one year of sobriety if shared custody was not feasible, or indeed what such a plan would look like. Therefore, the district court agreed that this made her testimony unknown and impossible for Susan to prepare for—a decision that was within the district court's discretion pursuant to NRCP 16.2(d)(5)(A) (2017). Indeed, the purpose of the rule is to remove surprises at trial, especially new expert opinions which are not contained in the expert's report. Thus, the district court was within its discretion to exclude Dr. Holland's potential testimony regarding a graduated parenting time schedule to be implemented one year after Shawn achieved sobriety where shared custody was not yet feasible.

However, even if the district court abused its discretion by excluding Dr. Holland's potential testimony, the error would be harmless because Shawn has not demonstrated that but for the error, the district court might reasonably have reached a different conclusion. The district court provided the parties with additional time to provide evidence of a graduated parenting time schedule that exceeded one year after the evidentiary hearing, allowing Shawn the opportunity to provide the additional evidence, including supplemental suggestions from Dr. Holland, that he believed might have led the district court to reach a different result. Thus, even if the district court erred by not allowing Dr. Holland to testify regarding a future graduated parenting time schedule at the evidentiary hearing, the error is harmless because he had ample time following the hearing to submit additional evidence, which he did, and the court entered an order for a graduated reunification plan covering the ensuing years.

Due process

Shawn argues the district court violated his substantive due process rights pursuant to Article 1, Section 8 of the Nevada Constitution because he claims the district court used his alcoholism as a punishment against him. Further, he claims that the district court denied his request to test for sobriety, but still repeatedly found that Shawn failed to prove his sobriety. He also argues that the requirements for visitation are punitive and onerous, as they require him to go through four breathalyzer tests a day, provide all his medical records, and attend AA meetings instead of different rehabilitation programs that he prefers. He claims that the requirements for visitation and the limited visitation schedule do not relate back to the children's best interests.

Although parents have a fundamental liberty interest in the care, custody, and management of a child, the interest is not absolute. *In re Guardianship of L.S. & H.S.*, 120 Nev. 157, 166, 87 P.3d 521, 527 (2004). The State has a paramount interest in protecting a child's welfare, and thus may limit parental authority or even permanently deprive parents of their children. *Id.* Accordingly, the district court has broad discretion in determining child custody. *Rivero v. Rivero*, 125 Nev. 410, 428, 216 P.3d 213, 226 (2009). The key factor is whether the district court's findings are supported by substantial evidence. *Id.* Substantial evidence is "evidence that a reasonable person may accept as adequate to sustain a judgment." *Id.* (quoting *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007)). However, the Nevada Supreme Court has determined that "a court may not use changes of custody as a sword to punish parental misconduct." *Wiese v. Granata*, 110 Nev. 1410, 1412, 887 P.2d 744, 746 (1994) (quoting *Dagher v. Dagher*, 103 Nev. 26, 28 n.3, 731 P.2d 1329, 1330 n.3 (1987)).

Shawn relies on *Wiese*, 110 Nev. 1410, 887 P.2d 744, to support his claim that a district court cannot restrict child custody as a punishment for his alcoholism. In *Wiese*, the Nevada Supreme Court held that the district court's failure to provide a party with notice that child custody would be at stake violated a party's right to due process. *Wiese*, 110 Nev. at 1412, 887 P.2d at 745-46. The district court failed to notify a party that it would determine child custody at a hearing, then punished one of the parties for missing the hearing by stripping the party of custody over their children. *Id.* The Nevada Supreme Court reasoned that this violated a party's due process rights because the district court must provide notice when a party's substantial rights are affected, and the district court used custody rights as a punishment for failing to attend the hearing. *Id.*

As a preliminary matter, Shawn's argument that this case involves a constitutional violation akin to *Wiese* is misplaced. Here, Shawn had notice that the evidentiary hearing involved custody rights, and Shawn testified and mounted evidence at the hearing to support his position. Further, the district court's actions in *Wiese* differ from the district court's actions in this case. In *Wiese*, the district court punished a party for failing to attend a hearing that the district court failed to provide notice for by removing the party's custody over a child. Shawn has not provided any substantive analysis explaining why the district court's actions in the instant case resemble the district court's actions in *Wiese*.

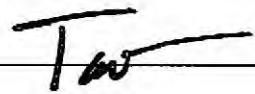
To the contrary, the record provides substantial evidence supporting the district court's findings that its visitation order was in the children's best interests. Despite how onerous Shawn thinks the district court's requirements may be, the district court found that Shawn has a severe alcohol addiction that jeopardizes his decision-making, especially around his children. This addiction culminated in multiple events that

scared and embarrassed the children, such as showing up intoxicated at his child's birthday party in only his underwear and falling over. It also jeopardized their safety, as Shawn was convicted of a DUI, but still drove with his kids in his car despite a court order prohibiting him from doing so. Further, the record suggests that Shawn underplayed the seriousness of his addiction and failed to prove his sobriety with objective evidence. Accordingly, the district court's continuing requirement that Shawn submit evidence of his sobriety was not a tool to punish him or make his life excessively difficult, but rather, it was necessary to document Shawn's sobriety and protect the best interests of the children. Therefore, the district court did not abuse its discretion because a reasonable person may accept that evidence as adequate to support the district court's findings and conclusions.

Therefore, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Linda Marie Bell, Chief Judge, Eighth Judicial District Court
Department T, Eighth Judicial District Court, Family Court Division
Nevada Family Law Group
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Eighth District Court Clerk