IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CAROL ANN STROM,
Appellant,
vs.
EDWARD R. KELLER,
Respondent.

No. 82851-COA

ORDER OF AFFIRMANCE

Carol Ann Strom appeals a district court order modifying child custody and holding her in contempt. Eighth Judicial District Court, Family Court Division, Clark County; Charles J. Hoskin, Judge.

Edward R. Keller and Carol never married and have one minor child together.[1] After Edward filed a motion to establish paternity in district court, the court entered a stipulation and order establishing Edward's paternity and granting Carol primary physical custody until the child turned six, at which time the parties would share joint physical custody. In the same year the child was to turn six, but before the child turned six, Edward filed a motion to modify custody seeking primary physical custody. At the subsequent evidentiary hearing, the parties jointly submitted the report from a psychological evaluation Carol had previously received which concluded that Carol had paranoid personality traits, among other things, and recommended that she participate in therapy to resolve these issues. Assuming that Carol would follow its orders, the district court granted the parties joint physical custody and ordered Carol to receive at least six months of therapy from a seasoned psychologist familiar with high conflict civil domestic matters. The court also required Carol to distribute half of

[1]We recount the facts only as necessary for our disposition and we refer to the parties by their first names as the district court did.

the child's federal Supplemental Security Income (SSI) benefits to Edward because the parties would be jointly sharing physical custody.

Six months later, Edward filed pro se a motion to enforce and/or for contempt based on Carol's failure to participate in therapy or distribute the child's SSI benefits. In his prayer for relief, Edward asked the district court to award him primary physical custody. But because Carol had appealed the prior order, and the appeal was still pending, the district court merely stated it was inclined to grant an order to show cause for contempt on both of Edward's claims and to set an evidentiary hearing to determine custody modification. After Carol's appeal was resolved a year later, resulting in an affirmance of the order for joint physical custody,[2] Edward re-filed his pro se motion, again asking in his prayer for relief to modify custody and award him primary physical custody. This time, the court issued an order to show cause for contempt and set an evidentiary hearing for it and modification of physical custody.

At the evidentiary hearing, where each party was represented by counsel, the district court found that Carol knew she had received SSI benefits on behalf of her child, knew she was required to distribute one-half of those SSI benefits to Edward, and knew that she had not distributed those benefits. The district court also found that although Carol claimed to have completed the required six months of therapy, she had not submitted credible proof showing that she did so, nor that any of her therapy had been with a qualified psychologist as required. The court then (1) ordered Carol to pay Edward his share of the SSI benefits in the amount of $7,896, (2) sanctioned Carol $1,150 for her contempt in failing to distribute the SSI

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[2]*Strom v. Keller*, Docket No. 78824-COA, 2020 WL 729663 (Nev. Ct. App. Feb. 11, 2020) (Order of Affirmance).

benefits and ordered that it be paid to Edward, and (3) ordered Carol to pay a portion of Edward's attorney fees in an amount to be determined upon Edward's submission of an affidavit of fees and costs accompanied by an analysis pursuant to *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969).

Also at the evidentiary hearing, the district court analyzed each of the statutorily required best interest custody factors and found modification was in the child's best interest. In so finding, the court included in its findings that Carol (1) failed to participate in her court-ordered therapy, thereby lessening her ability to be a safe and effective parent; and (2) took independent steps regarding the child's schooling, which also violated a previous court order, thereby displaying a lack of cooperation. The court then granted Edward primary physical custody. Carol now appeals both the custody and contempt orders.[3]

The district court did not change custody to punish Carol for her failure to comply with court orders

Carol argues the district court modified custody to punish her for not completing her court-ordered therapy, which, as she claims, is prohibited under *Sims v. Sims*, 109 Nev. 1146, 865 P.2d 328 (1993), and *Lewis v. Lewis*, 132 Nev. 453, 373 P.3d 878 (2016).

"This court reviews the district court's decisions regarding custody . . . for an abuse of discretion." *Rivero v. Rivero*, 125 Nev. 410, 428, 216 P.3d 213, 226 (2009). Although district courts have broad discretion in

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[3]Although Carol filed a fast track statement, Edward never filed a mandated response under NRAP 3E(d)(2). Prior to filing this disposition, Edward filed a motion seeking leave to file a late response. Based on our disposition, we conclude that such a response is unnecessary and consequently deny it as moot.

determining child custody, "the district court must have reached its conclusions for the appropriate reasons" and we "will not set aside district court's factual findings if they are supported by substantial evidence." *Id.*; *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007).

In modifying a joint physical child custody arrangement, a district court must consider whether there has been a substantial change in circumstances and if modifying custody is in the child's best interest. *See Romano v. Romana*, 138 Nev., Adv. Op. 1, ___ P.3d ___, ___ (2022). Courts have broad discretion in determining what evidence they may consider when evaluating a child's best interest. *Truax v. Truax*, 110 Nev. 437, 438-39, 874 P.2d 10, 11 (1994) (noting NRS 125C.0035(4) is nonexhaustive); *see also Rivero*, 125 Nev. at 428, 216 P.3d at 226 (noting courts' broad discretion in child custody matters). But courts cannot consider "failure to follow court orders . . . as a factor in determining the child's best interest during a modification of custody" or it amounts to an abuse of discretion. *Lewis v. Lewis*, 132 Nev. 453, 459, 373 P.3d 878, 882 (2016). Thus, courts cannot modify custody to punish parents for their contempt. *Sims v. Sims*, 109 Nev. 1146, 1149, 865 P.2d 328, 330 (1993).

In *Sims*, the father moved for primary physical custody because the mother left the ten-year-old daughter at home alone. *Id.* at 1147, 865 P.2d at 329. In resolving the motion, the district court denied the request but ordered that the child not be left alone for even five minutes and be within sight of a responsible adult at all times. *Id.* The order also stated that if the child was left alone in the future, physical custody would change. *Id.* After the father learned that the mother left the daughter alone for several hours over a three-day period, he again sought primary physical custody, which the district court granted. *Id.* at 1147-48, 865 P.2d at 329-30.

On appeal, the Nevada Supreme Court held that "although the order signed by the district court judge recites that the change is in the best interests of the child, the entire thrust of the findings by the factfinder . . . relates to the mother's disobedience of the court's prior order." *Id.* at 1149, 865 P.2d at 330. The supreme court further concluded that the order the mother violated was questionable at best and that "the mother's disobedience of the order was virtually the only factor given weight in the . . . determination that custody should be changed." *Id.* The court then held that such a determination "does not comport with our best interests of the child standard." *Id.* The court further reasoned that if the district court truly considered leaving the child alone to be problematic, it would have changed custody immediately after the hearing rather than waiting six months to issue its decision. *Id.* at 1149, 865 P.2d at 331. In addition, the supreme court considered the district court's order as arbitrary because the father was not even raising the child—it was the father's elderly mother who was raising her. *Id.* The supreme court then reversed the district court's custody determination. *Id.* at 1150, 865 P.2d at 331.

In *Lewis*, the district court ordered the father to pay child support, tutoring costs, and medical insurance. 132 Nev. at 455-56, 373 P.3d at 879-80. The mother then filed both a motion to modify custody and to enforce the child support order. *Id.* at 456, 373 P.3d at 880. The court stated that modifying custody was "in the child's best interest based on [the father's] conduct over the past ten (10) months" without specifying what conduct. *Id.* at 458, 373 P.3d at 881 (internal quotation marks omitted). The court did, however, find that the father had not paid his child support, tutoring costs, or medical insurance. *Id.* And orally, the district court specifically noted that changing custody was in the child's best interest

based largely on the father disobeying court orders. *Id.* at 459, 373 P.3d at 881-82.

On appeal, the supreme court noted that the district court "appeared to base its order modifying child custody, at least in part" on the father's failure to comply with the court's order. *Id.* at 459, 373 P.3d at 882. This included a written finding and an oral pronouncement that modifying custody was in the child's best interest because of that failure to obey. *Id.* The supreme court then held that "[b]ecause [the father's] failure to follow court orders may not be considered as a factor in determining the child's best interest during a modification of custody, we hold that the district court abused its discretion." *Id.* But the supreme court also held that the district court failed to make specific factual findings regarding each of the statutorily listed factors. *Id.* at 460, 373 P.3d at 882. Consequently, "[b]ecause the district court abused its discretion by improperly considering [the father's] failure to comply with court orders and failing to enter specific factual findings as to each of the statutory best-interest-of-the-child factors," the court reversed the district court order. *Id.*

Here, Carol has failed to demonstrate that the district court impermissibly considered her noncompliance as a factor in modifying custody and thus abused its discretion. Although the district court repeatedly referred to Carol's failure to participate in court-ordered therapy in its best-interest-of-the-child analysis, it was not the only factor considered—as was the case in *Sims*. Indeed, the district court found that seven of the factors favored Edward and none favored Carol. The court also pointed to three best interest custody factors that favored Edward that did not rely on Carol's noncompliance: the level of conflict between the parents,

ability of the parents to cooperate,[4] and ability to maintain relationships with siblings.

More importantly, Carol's noncompliance here is directly relevant to the district court's best-interest-of-the-child analysis, unlike in *Lewis* where the district court did not make specific factual findings and the father's noncompliance dealt primarily with failure to pay child support. Indeed, the court specifically found that Carol's failure to address her mental health made it difficult to effectively deal with the child's own mental health issues. The court thus did not seek to punish Carol's noncompliance with a custody change; it instead analyzed how Carol's underlying behavior might impact the child's best interest.

The district court was not prohibited from considering Carol's noncompliance *as that conduct related to the child's best interest*. *See* NRS 125C.0035; NRS 125C.0045(2). Otherwise, a district court could not effectively analyze a child's best interest. Indeed, district courts are empowered with substantial authority to make orders relating to the child's best interest. *See* NRS 125C.0045(1)(a) ("During the pendency of the action, at the final hearing or at any time thereafter during the minority of the child, [the court may] make such an order for the custody, care, education, maintenance and support of the minor child as appears in his or her best interest . . . .").

Once a court makes such an order, according to Carol, the district court could *never* consider violations of those orders, even when they

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[4]The district court found that Carol took independent steps regarding the child's schooling, which the court noted violated its order. However, it later clarified that Carol technically did not violate that order because Carol's actions were unsuccessful, and therefore, she was not found in contempt.

affect the child's best interest. In other words, a district court's orders regarding a child's best interest may end up prohibiting it from evaluating the behavior giving rise to those orders in the first place when performing a modification analysis. Because the district court was required to consider the child's best interest, we reject Carol's broad reading of *Sims* and *Lewis*. *See* NRS 125C.0035; NRS 125C.0045(2). Accordingly, the district court did not abuse its discretion in considering Carol's noncompliance because the court found that the noncompliance directly affected the child's best interest.

Substantial evidence supports the district court's custody modification order

Carol argues that substantial evidence did not support the district court's custody determination. Carol primarily argues that the factors that allegedly favored Edward resulted from the district court's impermissible consideration of her noncompliance with its prior orders. However, she also claims that there was no testimony or documentary evidence presented regarding the high conflict in this case.

On appeal, we review physical custody determinations for an abuse of discretion and will not reverse an order that substantial evidence supports. *Rivero*, 125 Nev. at 428, 216 P.3d at 226. This requires an appellant to show that a reasonable person would not accept the evidence as adequate to support the judgment. *Ellis*, 123 Nev. at 149, 161 P.3d at 242. In other words, an appellant must show the district court's decision is clearly wrong. *Valverde v. Valverde*, 55 Nev. 82, 84, 26 P.2d 233, 234 (1933). And in making that determination, we will not reweigh the evidence or make credibility determinations. *Ellis*, 123 Nev. at 152, 161 P.3d at 244; *Quintero v. McDonald*, 116 Nev. 1181, 1183, 14 P.3d 522, 523 (2000).

In modifying joint custody, the district court must find that modification is in the best interests of the child. *Truax*, 110 Nev. at 438-39, 874 P.2d at 11. This requires a district court to evaluate, and make specific

findings regarding, *at a minimum*, the statutorily listed best interest custody factors. *Davis v. Ewalefo*, 131 Nev. 445, 451, 352 P.3d 1139, 1143 (2015).

Here, substantial evidence supported the district court's determination. The district court specifically found that "this is a high conflict case" because, when asked during trial about her mental health, Carol "could not see past her interactions with Edward." In support, the court found that Edward had not initiated conflict or engaged with Carol and that he had been patient throughout the whole process. The court also found that the ability-of-the-parents-to-cooperate factor favored Edward because Carol consistently took independent steps regarding the child's schooling. The court further found that the factor considering the mental health of the parents and the physical, developmental, and emotional needs of the child favored Edward because Carol either refused to address her own mental health issues or could not recognize that she had any. According to the court, this made "it difficult for her to effectively assist with the needs of the child" who also had physical and mental health issues: allergies, asthma, ADHD, and potentially autism.

Additionally, the court found that the ability-to-maintain-a-relationship-with-a-sibling factor favored Edward because Edward had two sons, one of whom resided at home. Although not in the order, Edward testified at trial that the son who resided at home watched over the child while the child did at-home learning. Finally, the court found that the history of parental abuse or neglect favored Edward because the district court was concerned about "Carol's lack of ability to focus and her paranoia affecting her ability to care for the child and potentially resulting in neglect." Finally, the court determined Carol was unable to adequately care for a child for at least 146 days of the year, thereby implicitly invoking the presumption

against joint custody in NRS 125C.003(1)(a). The court found all other factors neutral.

Based on the above, Carol has failed to demonstrate that the district court clearly reached the wrong conclusion when it modified custody. The court made specific factual findings regarding each of the best interest custody factors and found that several of them favored Edward. A reasonable person could thus accept the district court's modification conclusion based on the evidence presented.

The district court did not abuse its discretion in holding Carol in contempt for failing to distribute the child's SSI benefits

Carol next argues that the district court erred when it held her in contempt for not distributing to Edward his court-ordered one-half share of the child's SSI benefits. According to Carol, federal law prohibits district courts from transferring or assigning SSI benefits.

On direct appeal, we "normally review an order of contempt for abuse of discretion." *Lewis*, 132 Nev. at 456, 373 P.3d at 880. However, Carol waived review of her claim because she never objected on these grounds at the evidentiary hearing. *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 . . . is deemed to have been waived and will not be considered on appeal."). Indeed, rather than objecting to the contempt, she *conceded* it.

Thus, we can only review Carol's claim, if at all, through the deferential lens of plain error. *See Bradley v. Romeo*, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986). Under plain-error review, "the error [must be] so unmistakable that it reveals itself by a casual inspection of the record." *Williams v. Zellhoefer*, 89 Nev. 579, 580, 517 P.2d 789, 789 (1973) (internal quotation marks omitted).

Here, the district court's holding Carol in contempt for failing to transfer the SSI benefits constituted error is not apparent from a casual inspection of the record. Indeed, Carol's entire argument rests on the proposition that the Nevada Supreme Court established in *Metz v. Metz*, 120 Nev. 786, 795-96, 101 P.3d 779, 785-86 (2004), and *Boulter v. Boulter*, 113 Nev. 74, 78, 930 P.2d 112, 114 (1997), that SSI benefits are not "transferable or assignable." Those cases are distinguishable.

In *Boulter v. Boulter*, the supreme court held that one spouse could not transfer his right to receive social security benefits he had not received yet to his spouse in a marital settlement agreement. 113 Nev. at 78, 930 P.2d at 114. In *Metz v. Metz*, the court held that federal law preempted Nevada law and thus prohibited district courts from including a spouse's SSI as income in calculating child support. 120 Nev. at 795-96, 101 P.3d at 785-86. The thrust of both of those decisions rested on the fact that the "purpose of SSI is to provide a recipient with a minimum income for his or her own needs." *Id.* at 795, 101 P.3d at 785; *see also Boulter*, 113 Nev. at 77, 930 P.2d at 113-14 (explaining Congress's purpose in establishing the federal law in question).

That purpose controls here. Indeed, the district court did not require either Carol or Edward to transfer or distribute *their* social security benefits. Rather, the district court only required that Carol distribute to Edward half of the benefits intended for their *child* because they were sharing joint physical custody. Thus, the district court's order *supported* the main purpose for the federal law—providing the recipient with income to support his or her needs—when it required the SSI recipient's joint custodians to each have a portion of that money to provide for the recipient's needs. Accordingly, not only did Carol fail to demonstrate that there was a plain error, but she also failed to demonstrate any error. The district court

thus did not abuse its discretion in holding Carol in contempt for failing to distribute the SSI benefits because the evidence shows Carol had notice of a valid court order and willfully violated it by withholding the aggregate amount of $7,896 that was ordered to be provided to Edward to help support the child.[5]

Accordingly, we

AFFIRM the judgment of the district court.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Charles J. Hoskin, District Judge, Family Court Division
The Hill Law Group
Bellon Law Group Ltd.
Eighth District Court Clerk

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[5]Carol also claims that the district court improperly awarded Edward attorney fees without giving her the opportunity to contest the exact fees under *Love v. Love*, 114 Nev. 572, 959 P.2d 523 (1998). However, we lack jurisdiction to hear this claim because the order that Carol appeals under is not a final attorney fee award as the district court left for "future consideration" the amount of the award. *Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 445, 874 P.2d 729, 733 (1994) ("[A] final, appealable judgment is one that disposes of the issues presented in the case . . . and leaves nothing for the future consideration of the court." (internal quotation marks omitted)); NRAP 3(A)(b)(1) (listing what may be appealed). We note that the ultimate award of attorney fees in this case is independently appealable as a special order after final judgment. To our knowledge, Carol has not filed an appeal from that order, and, in any regard, that is not the order she has presently brought before us.