IN THE COURT OF APPEALS OF THE STATE OF NEVADA

IN THE MATTER OF THE GUARDIANSHIP OF THE PERSON AND ESTATES OF C.T.F. AND P.G.S., MINOR PROTECTED PERSONS.

PAMELA L.; AND MICHAEL L.,
Appellants,
vs.
JOHN M.; MARIA M.; VICKY F.; DONALD F.; KRISTIN S., PARENT; C.T.F. AND P.G.S., MINOR PROTECTED PERSONS,
Respondents.

No. 83443-COA

FILED

MAR 23 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Pamela L. and Michael L. appeal from a district court order appointing Vicky F. and Donald F. as guardians for C.F. and Maria M. and John M. as guardians for P.S. Fourth Judicial District Court, Elko County; Kriston N. Hill, Judge.

Kristin S. is the natural mother of both children.[1] Maternal great grandparents (Luceros) and paternal grandparents (McGrews and Fergusons, referred to collectively as paternal grandparents) each competingly sought guardianship of their respective great grandchildren or grandchild because allegedly Kristin was unsuitable to care for them.

When C.F. and P.S. were approximately three months and two

[1]We recount the facts only as necessary for our disposition. Kevin F. is C.F.'s natural father and TJ M. is P.S.'s natural father. We do not consider TJ's parental suitability because he is deceased. We also do not consider Kevin's suitability because he is not a party nor are his rights asserted here on appeal.

years old, respectively, Kristin gave her written consent to the Fergusons' guardianship over C.F. and the McGrews' guardianship over P.S. while she sought rehabilitation in California for methamphetamine use. Paternal grandparents each filed a petition for general guardianship over their respective grandchild asserting that Kristin could not care for the children and had left them in their care while she sought treatment. After about a week, Pamela L. traveled to California to bring Kristin home. Kristin apparently did not attend any rehabilitation program while in California. Upon her return to Nevada, Kristin rescinded her consent to paternal grandparents' guardianships and instead consented to the Luceros' guardianship over both children. The Luceros then petitioned the district court for the appointment of general guardians over C.F. and P.S., arguing they should be the guardians because they could keep the children together and with their mother who was residing in the Lucero home.

The district court temporarily granted co-guardianship to all petitioning parties. Pursuant to the court order, C.F. and P.S. would spend one week together with the Luceros, then C.F. would spend the next week with the Fergusons and P.S. would spend that same week with the McGrews. The court set the hearing on final guardianship for about one month later. However, for reasons unknown, the parties continued exercising the week-on/week-off arrangement for nearly two years under the temporary co-guardianship orders. During that period, the Luceros and the McGrews attended sessions with a court-appointed co-parenting counselor. The Luceros put P.S. in therapy for stress resulting from the back and forth between households. And the McGrews took P.S. to a dietician because Maria M. was concerned about her health. Unlike P.S., C.F. did not seem to experience distress resulting from the exchanges.

However, C.F. did experience some developmental issues during this time.

The week-on/week-off schedule halted when the McGrews returned P.S. to the Luceros with a bruise on her body. Maria admitted that she spanked P.S. but maintained that the bruise was from her falling on a hearth in the McGrew home. Before returning P.S. to the McGrews the following week, P.S.'s therapist filed a claim with the Nevada Division of Child and Family Services (DCFS), and the Luceros filed an ex parte motion with the district court to suspend the guardianship exchanges pending completion of the DCFS investigation. The district court granted the motion. The Luceros took sole guardianship of P.S. from that point forward, but continued C.F.'s weekly exchanges with the Fergusons.

Approximately two months later, the court began the final guardianship hearing. On day one of the hearing, the court was set to hear from DCFS regarding a 2014 substantiated report of child neglect against the Luceros for lack of supervision in their home; however, paternal grandparents moved the court to review the report in camera and the Luceros objected for lack of foundation. Paternal grandparents had subpoenaed all substantiated reports of abuse or neglect against the Luceros but apparently had not seen them or known their contents before the hearing.

Thereafter, the district court learned about two potential attorney conflicts of interest regarding the substantiated neglect report against the Luceros. Paternal grandparents' attorney revealed that he formerly represented the Luceros' then 15-year-old grandson in a juvenile

delinquency[2] matter that later gave rise to the report. Additionally, the children's attorney represented the grandson's victim in a child protection cause brought under NRS Chapter 432B (432B hereinafter), which stemmed from DCFS's determination that the Luceros failed to protect a child in their home from their grandson. However, after hearing from the attorneys and considering the test adopted in *Waid*,[3] the district court determined there were no conflicts and allowed the representations to continue.

The district court also heard testimony indicating that DCFS unsubstantiated the bruise-related claim of abuse against the McGrews, attributing P.S.'s injury to her fall on the hearth. The court heard testimony that going back and forth between the McGrews' and the Luceros' homes had caused P.S. "distress" but that she loved both sets of grandparents and both homes. There was also testimony that P.S. had gained significant weight while living solely with the Luceros—P.S. weighed as much as a cousin almost twice her age and in one month gained what an average child her age gains in one year. At the conclusion of the second day of testimony, the court noted that its "overriding concern" was P.S.'s weight. As such, it ordered that the McGrews and Luceros return to the week-on/week-off schedule pending a final decision on guardianship. Maria was given specific court orders not to spank P.S. or any other children in P.S.'s presence.

At the end of the final day of the hearing six months later, C.F.

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[2]This was referred to as a "juvenile criminal" matter below. However, only adults or minors who are certified as adults are charged with crimes. *See* NRS 62B.330; NRS 62B.390.

[3]*Waid v. Eighth Judicial Dist. Court*, 121 Nev 605, 610, 119 P.3d 1219, 1223 (2005).

and P.S.'s court-appointed attorney asked the district court to review DCFS reports for all parties in camera. The Luceros stated that they "might object to that" because they did not "know the scope of what is potential that you might have to look at in camera" and the reports may give the court "a skewed view of" the Luceros. The children's attorney argued that the reports were pertinent. The Luceros stated that their "objection would stand" because they did not know what was in the reports, no one could refute them, and they were hearsay. The court noted the Luceros' objection but ultimately reviewed the DCFS reports.

After reviewing all the evidence, the district court issued its findings of fact and order granting guardianship. First, the court found by clear and convincing evidence that Kristin currently was unsuitable to care for her children. The court found that Kristin had a history of drug use, had failed to attend drug rehabilitation or counseling, had been unemployed, and had not had unsupervised or unassisted visitation since the temporary co-guardianship had commenced. The court found, based on her hearing testimony, that Kristin was "mentally and emotionally unstable" such "that it would not be in the best interests of the children to be placed in her legal custody." Next, the court found that continuing the week-on/week-off schedule was not in the best interests of the children.

Looking at which temporary co-guardianship should continue, the district court found Pamela was unwilling to co-parent with Maria and the Luceros would not allow a relationship between P.S. and the McGrews. The court was concerned the Luceros would do this to the Fergusons in the future, given the Luceros' "pattern" of behavior. The court found the Luceros had "an unstructured, chaotic home which" was not in P.S.'s best interest and that they had not acted on concerns regarding P.S.'s weight

until the final phase of the hearing. The court found the Luceros had a bankruptcy on their record and prior issues with law enforcement. Finally, based on its in camera review of DCFS reports for all parties, the court found the Luceros had "voluminous DCFS involvement" and at least one substantiated report of child neglect from 2014. Therefore, the district court found that granting the Luceros guardianship over the children would not be in the children's best interests.

In contrast, the district court found the McGrews offered a structured home life and had been diligent about addressing P.S.'s excessive weight. The Fergusons had not been the subject of any DCFS reports and the McGrews had one unsubstantiated abuse or neglect claim resulting from P.S.'s bruise incident. The court found paternal grandparents were "ready, willing and able to provide stability in housing and care for" C.F. and P.S. As such, the court appointed the Fergusons as guardians of C.F. and the McGrews as guardians of P.S. The court ordered that Kristin was entitled to supervised visitation as prescribed by the guardians. The district court also ordered that the Luceros were entitled to visitation so long as it was in the best interests of the children. The Luceros filed a motion to reconsider, which the district court denied because they had not demonstrated sufficient new facts or convinced the court that a different arrangement was in the children's best interests. The Luceros now raise multiple issues on appeal and we address each in turn.[4]

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[4]Kristin then petitioned to terminate the guardianship, but it appears the district court stayed, deferred, or dismissed her petition for lack of jurisdiction because the Luceros already filed a notice of appeal. This petition was filed after the district court order was appealed in this case. Therefore, any facts or arguments therein are not before this court. *See Douglas Disposal, Inc. v. Wee Haul, LLC*, 123 Nev. 552, 557 n.6, 170 P.3d

The district court did not abuse its discretion by reviewing the DCFS reports in camera

The Luceros argue that the district court erred by reviewing the DCFS reports in camera. First, they argue the DCFS reports were hearsay without an exception. Paternal grandparents counter that the district court did not rely on any out-of-court statements in finding that only the Luceros had a substantiated DCFS case.

We review a district court's ruling on admissibility of hearsay for an abuse of discretion. *See In re Termination of Parental Rights as to N.J.*, 116 Nev. 790, 804, 8 P.3d 126, 135 (2000). Hearsay is an out-of-court statement offered for the truth of the matter asserted. NRS 51.035. Here, whoever completed the reports did so outside this proceeding. DCFS reports are intended to communicate information about the underlying incidents to certain inquirers, such as the court or persons who have filed or intend to file for guardianship of a child. *See* NRS 432B.290. And paternal grandparents appear to have offered the reports for the truth of the matter asserted—that there were substantiated DCFS claims against the Luceros but none against the McGrews or Fergusons. Therefore, the DCFS reports likely were hearsay.

However, we cannot determine whether a hearsay exemption or exception applies[5] because the district court made no ruling on this issue

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508, 512 n.6 (2007) ("The district court did not address this issue. Therefore, we need not reach the issue.").

[5]*See, e.g.*, NRS 51.035(3)(a) (statement of a party opponent is not hearsay); NRS 51.075(1) (general exception for hearsay that offers assurances of accuracy not likely to be enhanced by calling the declarant, even though declarant is available); NRS 51.135 (exception for regularly conducted activity, commonly called the business records exception); NRS

and the Luceros failed to provide this court with the DCFS reports. The Luceros, as appellants, bear the burden of providing us with "any . . . portions of the record essential to determination of issues raised in appellant[s'] appeal." NRAP 30(b)(3). Generally, we "cannot consider matters not contained in the record on appeal." *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007). As such, because the Luceros "fail[ed] to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision."[6] *Id.*

Further, "this court has held that where inadmissible evidence has been received by the court, sitting without a jury, and there is other substantial evidence upon which the court based its findings, the court will be presumed to have disregarded the improper evidence." *McMonigle v. McMonigle*, 110 Nev. 1407, 1409, 887 P.2d 742, 744 (1994) (internal quotation marks omitted), *overruled on other grounds by Castle v. Simmons*, 120 Nev. 98, 86 P.3d 1042 (2004).

Here, substantial evidence supports the district court's guardianship determination, which tracks the minor guardianship statutes, even without the DCFS reports. First, the Fergusons testified that they got along with everyone and, if awarded guardianship, they would support visits with the Luceros. Second, the co-parenting counselor testified that

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51.155 (public records exception); NRS 51.315(1) (same as NRS 51.075(1) general exception, but declarant is unavailable).

[6]We note that there could be additional hearsay within the DCFS reports, which would in turn require their own exceptions to be admissible. NRS 51.067. However, we cannot make that determination because the reports are not in the record. *See Cuzze*, 123 Nev. at 603, 172 P.3d at 135.

the McGrews took responsibility for their actions, were reasonable, and "were willing to try to hold out the olive branch," whereas "the Luceros were just not willing to try to resolve [their issues]." Third, the DCFS specialist testified that the Lucero home "was chaotic" with "kids running around" and people going "in and out of the home," whereas the McGrew home was "very calm," "very clean, [and] very well organized." Fourth, Maria testified that she made efforts to control P.S.'s weight such as bringing P.S. to a dietician, limiting unhealthy foods, controlling her portions, and weighing her regularly when in the McGrews' care. Fifth, at the final day of the hearing (about six months from the first day), Pamela testified in regard to P.S.'s weight that the parties "just need to let her grow and run and play, not make a big deal out of it." Sixth, appearing to deny P.S.'s excessive weight gain while in his and Pamela's care, Michael L. testified that P.S. was not overeating at the Luceros' home. Seventh, unlike paternal grandparents' petitions, the Luceros' petition for guardianship disclosed a bankruptcy and a felony conviction. Pamela's testimony also indicated several involvements with law enforcement, including one for allegedly purchasing a vape for children and taking her granddaughter's friend to get a piercing without her parents' consent. Finally, Pamela testified that she told the police a criminal suspect was not in her home when officers were at her door, but she admitted that the police later found him in her home.[7]

In sum, we conclude that substantial evidence supported the district court's decision to award guardianship of C.F. to the Fergusons and

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[7]Pamela testified that this was not a lie, rather she did not know the suspect was in her home when speaking to police. However, the district court found that Pamela lied to the police and in turn lied in her testimony about this incident. We do not reweigh that credibility determination on appeal. *See Ellis v. Carucci*, 123 Nev. 145, 152, 161 P.3d 239, 244 (2007).

guardianship of P.S. to the McGrews even without the DCFS reports.[8] Thus, even if the DCFS reports were inadmissible in the first instance, the Luceros have not demonstrated any error would have made a difference in the outcome of the case. As such, we cannot conclude reversal is warranted on inadmissibility grounds.

The Luceros then argue that the DCFS reports were improper, "'secret' hearsay" because the court reviewed the evidence in camera and the district court should have given the Luceros an opportunity to respond. According to the Luceros, the court's review therefore constituted a due process violation under the Nevada and United States Constitutions. Paternal grandparents counter that the Luceros did not request to be present for the in camera review or request further hearings on the matter. The Luceros reply that, had they been able to respond to the in camera evidence, the court would have learned that the DCFS case against them resulted in children being returned to their care and that DCFS placed children with the Luceros on numerous other occasions.[9]

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[8]We note there was other evidence provided to the district court in this case that may have supported a different result. However, our inquiry is whether substantial evidence supports the district court's decision, not whether substantial evidence supports a different decision. *See Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013).

[9]The Luceros also note that they "understand" the McGrews were under DCFS investigation following a child's death by gunshot in their basement. They argue that this investigation may not have been in the reports and that the Luceros should have been able to ask about the incident but could not because of the in camera review. However, the district court already confirmed that the unsubstantiated bruise report was the only DCFS report it reviewed against the McGrews. Therefore, this argument is not properly before this court, *see Douglas*, 123 Nev. at 557 n.6, 170 P.3d at 512 n.6, and we do not consider it.

Foremost, the Luceros waived their due process claim by failing to specifically assert it below during the hearing or in their motion to reconsider. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). And while "issues of a constitutional nature may be addressed when raised for the first time on appeal," *Levingston v. Washoe County*, 112 Nev. 479, 482, 916 P.2d 163, 166 (1996), we decline to do so here as the Luceros have provided no authority indicating they had a due process right to review confidential reports in open court or otherwise, *see Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

Even if the Luceros were owed an opportunity to respond, we are not convinced they had no opportunity to do so. The district court confirmed that, upon requesting DCFS reports for all parties, it only received reports against the Luceros and one unsubstantiated report against the McGrews relating to P.S.'s bruise. The Luceros would have been notified of any investigative reports filed against them. *See* NRS 432B.260(5) ("If an agency which provides child welfare services investigates a report of alleged abuse or neglect[,] . . . the agency shall inform the person . . . who is named in the report . . . ."). They do not argue on appeal that they were not. Furthermore, the Luceros were a part of the investigation underlying the only other DCFS report reviewed. As a result, the Luceros would have known about all the DCFS reports reviewed in camera or they could have made further inquiries during the hearing. And pursuant to NRS 432B.290(2)(i) and (r), they would have had access to them before the hearing.

The Luceros therefore would have had an opportunity to prepare testimony regarding the contents of those reports. Because a DCFS representative testified on day one of the hearing that there was a

substantiated report against the Luceros and an unsubstantiated report against the McGrews, the Luceros would have even had time during the hearing (approximately six months between the first and last days) to obtain the reports and prepare a response. Failure to seize that opportunity does not provide them a basis for relief here. As a result, the district court's review of the DCFS reports in camera is not reversible error.

The district court did not abuse its discretion by awarding guardianship to paternal grandparents

The Luceros argue that the district court should not have awarded guardianship of C.F. to the Fergusons and P.S. to the McGrews. They assert the district court should have considered that the children were no longer in need of guardianship because Kristin was sober, responsible, and showed ability to care for her two other children. Paternal grandparents counter that the district court properly ordered guardianships for C.F. and P.S. because Kristin was not suitable.[10]

We "will not disturb the district court's exercise of discretion unless the discretion is abused." *In re Guardianship of D.R.G.*, 119 Nev. 32, 37, 62 P.3d 1127, 1130 (2003). And the district court did not abuse its discretion if "the district court's [guardianship] decision was based upon appropriate reasons." *Id.* (internal quotation marks omitted).

Here, the district court based its decision regarding Kristin's suitability on appropriate reasons. Donald F. testified that since C.F. was born, Kristin, to his knowledge, had no full-time job nor the means of providing for C.F.'s needs. Maria testified that, to the best of her

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[10]The Luceros reply that Kristin is now fit to care for the children. However, we cannot consider on appeal any facts the Luceros allege about Kristin that occurred subsequent to the entry of the district court order. *See Douglas*, 123 Nev. at 557 n.6, 170 P.3d at 512 n.6.

knowledge, Kristin was without identification or a driver's license at the time of the hearing and had never sought treatment for her drug use. Kristin admitted that she did not have a job at the time of the hearing and that she had not had mental health treatment despite having insurance to do so. Kristin testified that she felt Maria and Vicky prefer her not to visit the children but admitted they have allowed her visitation and that she could not remember the last time she asked for permission. As such, the district court had appropriate reasons for finding Kristin unsuitable and it therefore did not abuse its discretion in doing so. *See* NRS 159A.061(4)(a) (stating that parents are presumed unsuitable guardians if they cannot "provide for any or all of the basic needs of the proposed protected minor").

The Luceros then argue that the district court erred by failing to consider the "[custody] best interest factors outlined by the Nevada [L]egislature." The Luceros argue that separating the children into two "homes without any plan for sibling contact" was not in their best interests.[11] Paternal grandparents counter that they testified that they keep the children in frequent contact and would continue to do so. The Luceros reply that it was in the children's best interests for the Luceros to have guardianship because they provided medical insurance, primarily had custody of the children since birth, encouraged P.S. to have a relationship with the McGrews after TJ's death, "bought the lion-share of their clothes," and are the only petitioners who followed up on the children's health needs.

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[11]As part of this argument, the Luceros assert that, though paternal grandparents testified visitation would be liberally granted, no visitation has occurred since the order appointing paternal grandparents as guardians "and the conflict is higher than ever." However, that argument was not before the district court and we therefore do not consider it here. *See Douglas*, 123 Nev. at 557 n.6, 170 P.3d at 512 n.6.

Foremost, again, we need not consider the Luceros' argument because they provide no authority to support it. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38. They also do not identify which best interest factors they are referring to. *See id.* Assuming they mean the NRS 125C.0035(4) custody factors, Nevada law only requires the court to "act in the best interests of the proposed protected minor" in determining guardianship. NRS 159A.061(9). No authority requires the court to consider NRS 125C.0035(4) custody factors or other statutory best interest factors in making that determination. *See* NRS 125C.0035 (locating the factors under the provision concerning physical custody); *see also Monahan v. Hogan*, 138 Nev., Adv. Op. 7, ___ P.3d ___, ___ (Ct. App. 2022) (declining to require that courts apply any particular statutory best interest factors in interpreting subsection (1)(b) of NRS 125C.007, Nevada's child relocation statute).

In fact, the guardianship provisions prescribe their own set of considerations in determining which potential guardian is most "suitable" separate and apart from any best interest factors. *See, e.g.*, NRS 159A.061(1) (establishing a parental preference); NRS 159A.061(3) (requiring courts in a guardianship matter to consider who already has physical custody, ability to provide for the children, history of substance abuse, criminal history, and domestic violence); NRS 159A.061(6) (requiring courts to consider nomination by parent, request of the minor if 14 or older, relationship by blood, and recommendations by a master of the court, DCFS, a guardian ad litem, or other interested persons, "among other factors"). Therefore, the district court did not abuse its discretion by failing to apply each of the best interest factors in NRS 125C.0035(4).

Regardless of whether the NRS 125C.0035(4) factors applied to

the district court's guardianship determination,[12] the hearing transcript indicates that the factors would weigh against the Luceros. And even if certain NRS 125C.0035(4) custody factors weighed in the Luceros' favor, the Luceros still fail to demonstrate why those factors would outweigh the findings the district court made in favor of granting guardianship to paternal grandparents. Therefore, assuming arguendo that the NRS 125C.0035(4) factors were required, the Luceros have not established that applying and weighing the best interest factors would have necessitated a different guardianship result. As such, any error was harmless, and the district court did not abuse its discretion in determining guardianship. *See Abid*, 133 Nev. at 776, 406 P.3d at 481; *cf.* NRCP 61.

Next, the Luceros argue that the district court should have made specific best interest findings but failed to do so in its order. Paternal grandparents counter that the district court's order was adequate.

Once more, we need not consider the Luceros' argument because they provide no authority to support it. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38. In any event, the district court made specific findings relating to the children's best interests and tied them to its guardianship conclusion. The district court found, "[b]ased upon the voluminous testimony provided[,] . . . that it is in the best interest[s] of the children that [the Fergusons] be appointed as the legal guardians of [C.F.]

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[12]Specifically, the Luceros' argument might implicate NRS 125C.0035(4)(c) (which parent is more likely to allow frequent associations and a continuing relationship with the noncustodial parent), NRS 125C.0035(4)(d) (the level of conflict between the parents), NRS 125C.0035(4)(g) ("[t]he physical, developmental and emotional needs of the child"), and NRS 125C.0035(4)(i) (the ability to maintain a relationship with a sibling).

and [the McGrews] be appointed as the legal guardians of [P.S.]" The court made numerous findings that justify that conclusion: the Luceros' tendency to cause conflict, chaotic household, bankruptcy, law enforcement issues, and a substantiated DCFS report. In contrast, the court made findings justifying its conclusion that appointing paternal grandparents was in the children's best interests: the McGrews' efforts to reconcile with the Luceros and organized household, the Fergusons' ability to get along with everyone, and all paternal grandparents' lack of bankruptcy or criminal history. Therefore, the district court order included findings tied to its conclusion that the awarded guardianship was in the children's best interest. *See Davis v. Ewalefo*, 131 Nev. 445, 451, 352 P.3d 1139, 1143 (2015) ("Nevada law . . . requires express findings as to the best interest of the child in custody and visitation matters."). Each of those findings was supported by substantial evidence, as stated above. As such, the district court's order does not amount to an abuse of discretion.

The district court did not abuse its discretion by allowing paternal grandparents' and the children's attorneys to remain in this case despite previous involvement with the Lucero family

The Luceros argue that the district court erred by finding that neither paternal grandparents' attorney nor the children's attorney should have been conflicted out of this case. The Luceros argue that paternal grandparents' attorney's former representation of their grandson "set the tenor of the trial and" was "the basis of the inquiry into DCFS actions against the Luceros." Similarly, they argue that the children's attorney's former representation of the victim elicited the DCFS reports from an NRS Chapter 432B child protection action, and that they were owed an opportunity to question the Luceros' grandson's alleged victim on the stand.

Paternal grandparents counter that neither paternal grandparents' nor the children's attorney represented the Luceros themselves in a previous matter. They also argue that the Luceros have not alleged or shown that representing paternal grandparents or the children in this action is adverse to the interests of the former clients or that information relating to the previous representation was used to the former client's disadvantage. The Luceros reply that the conflicts of interest caused this case to be more about their background and less about the best interests of the children.

Before reaching the merits, we must first note that the Luceros appear to lack standing to assert either conflict. *Liapis v. Second Judicial Dist. Court*, 128 Nev. 414, 420, 282 P.3d 733, 737 (2012) (stating that a court must decide standing before reaching the merits of a conflicts issue and the burden is on the party alleging a conflict to prove a conflict). Generally, only an attorney's present or former client has standing to seek his or her disqualification. *Id.* However, the supreme court has recognized an applicable exception for an ethical breach that "so infects the litigation in which disqualification is sought that it impacts the [nonclient] moving party's interest in a just and lawful determination of her claims." *Id.* (alteration in original) (internal quotation marks omitted). Either way, "[t]he party seeking to disqualify bears the burden of establishing that it has standing to do so." *Id.*

Here, the Luceros did not address the standing issue. Even if they had, the Luceros are not the former client; their grandson and the victim from the 432B proceeding are. And they are not the present client; paternal grandparents and the children are. As such, the Luceros generally would lack standing to request disqualification of attorneys for paternal

grandparents and the children. Turning to the applicable exception, as discussed below the Luceros have not provided sufficient evidence of an ethical breach, let alone one that impacts their interest in a just and lawful determination of their guardianship claim. Therefore, the Luceros failed to meet their burden of establishing standing to seek disqualification of paternal grandparents' and the children's attorneys.

Regardless, the Luceros' conflicts arguments fail. "The district court has broad discretion in attorney disqualification matters, and this court will not overturn its decision absent an abuse of that discretion." *Waid v. Eighth Judicial Dist. Court*, 121 Nev. 605, 609, 119 P.3d 1219, 1222 (2005). Disqualification of an attorney based on their representation of a former client is governed by RPC 1.9.

Pursuant to RPC 1.9(a), "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent." The party seeking disqualification bears the burden of establishing that the representation violates RPC 1.9(a). *See Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 123 Nev. 44, 50, 152 P.3d 737, 741 (2007). To determine whether a former and present matter are substantially related, the trial court must

> (1) make a factual determination concerning the scope of the former representation, (2) evaluate whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters, and (3) determine whether that information is relevant to the issues raised in the present litigation.

Waid, 121 Nev. at 610, 119 P.3d at 1223. Additionally, "a superficial similarity between the two matters is not sufficient to warrant disqualification." *Id.*

Here, the district court found that paternal grandparents' attorney formerly represented the Luceros' grandson in a juvenile delinquency matter, which the Luceros were not parties to. That delinquency matter later became the basis for a substantiated DCFS report of neglect against the Luceros. However, the district court determined that the delinquency matter and this present guardianship case were not substantially related. Turning to the *Waid* factors, the district court found the scope of the former representation was limited to the delinquency matter, and it was reasonable to infer the Luceros' grandson gave paternal grandparents' attorney confidential information, but the confidential information was not relevant to the current guardianship proceeding.

Paternal grandparents' attorney testified that he only represented the Luceros' grandson in his delinquency matter. He testified that he did not learn anything in that juvenile case that was adverse to the Luceros. He testified that he did not learn of the substantiated DCFS report through the former representation either. Rather, he sent a blanket subpoena for any substantiated report against the Luceros, which revealed that report. He did not know what the subpoena produced until the DCFS records custodian testified at the hearing. Therefore, the district court did not abuse its discretion in finding paternal grandparents' attorney's current representation in this guardianship action was not substantially related to his former representation of the Luceros' grandson in a delinquency matter. Even if it was, the Luceros offered no evidence indicating that their grandson's interests are materially adverse to paternal grandparents'. As

such, the district court did not abuse its discretion in determining paternal grandparents' attorney could continue representing them in this guardianship case.

Regarding the children's attorney, the district court asked counsel if she also was involved in the delinquency case, to which she responded that she was not. Rather, she informed the court that she represented a victim in the 432B action that flowed from the delinquency matter. The court found that the children's attorney had learned confidential information through her representation of the victim, but that it was not relevant to the issues raised in this case. It does not appear that the district court made a finding on the record as to the scope of the former representation. The court also never expressly found that the attorney's former representation of the victim was not substantially related to this matter. Nonetheless, there can be no conflict because the Luceros offered no evidence indicating that the 432B victim's interests are materially adverse to C.F. and P.S.'s interests in this case. It was the Luceros' burden to do so. As such, the district court did not abuse its discretion in allowing the children's attorney to proceed with the representation.

A conflict will also arise when an attorney uses "information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known." *See* RPC 1.9(c)(1). Similarly, an attorney creates a conflict if he or she reveals information relating to the former representation except as the RPC permit or require. *See* RPC 1.9(c)(2).

Here, both paternal grandparents' attorney and the children's attorney testified that they did not need to disclose any confidential

information about their former clients to adequately represent their current ones. There is nothing in the record to the contrary. Therefore, the district court did not abuse its discretion by declining to disqualify either attorney.

Finally, the Luceros argue that allowing the attorneys' representations to proceed was not harmless because it led to the district court obtaining DCFS reports against them. But even if that were true, as stated above, substantial evidence supported the district court's decision to appoint paternal grandparents as guardians without the DCFS reports. The Luceros also appear to argue that the conflict caused DCFS to be biased against them. But they do not indicate how paternal grandparents' or the children's attorneys would be responsible for that. Therefore, any error in allowing paternal grandparents' attorney to proceed would not have made a difference to the ultimate resolution of the case. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[13]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

[13]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

cc: Hon. Kriston N. Hill, District Judge
Amens Law, LLC
Hillewaert Law Firm
Kristin S.
Gerber Law Offices, LLP
Elko County Clerk