

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WILLIAM CHRISTENSEN,
Appellant,
vs.
VANESSA R. LOVETT,
Respondent.

No. 83661-COA

FILED

MAY 20 2022

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

ORDER OF AFFIRMANCE

William Christensen appeals from a post-decree order modifying child custody. Second Judicial District Court, Washoe County; Dixie Grossman, Judge.

Christensen and respondent Vanessa Lovett have one minor child together. In 2016, the Tenth Judicial District Court issued a custody order granting Christensen sole legal and physical custody of the child, with Lovett exercising parenting time in Christensen's sole discretion. The court noted that the child was in the custody of the Division of Child and Family Services (DCFS), that the child had been placed with Christensen and was doing better since then, and that Lovett had issues with her mental health, but only began seeking treatment days before the custody hearing. In 2020, after Lovett moved to modify custody, the parties agreed to share joint legal custody with Christensen exercising primary physical custody of the child, Lovett exercising parenting time every Friday through Sunday, and the parties sharing a week on/week off schedule over summer break. Additionally, Christensen was ordered to take the child to the dentist at least twice per year and to a doctor at least once per year. In March 2021,

the district court changed venue to the Second Judicial District Court, after finding that both parties and the minor child relocated to Washoe County.

In April 2021, Lovett moved to modify custody, asserting that the parties were effectively exercising a joint timeshare and that Christensen was recently incarcerated on a probation violation, such that she had de facto primary physical custody during that time. She also asserted that the child was not well-cared for at Christensen's home, that Christensen failed to provide adequate dental care for the child, resulting in an abscess and the need for an extraction, and that he refused to provide Lovett with medical and educational information despite her status as a joint legal custodian, or otherwise coparent with her. Christensen opposed, and after an evidentiary hearing, the district court granted Lovett's motion.

In its order, the district court found that, although the prior custody order indicated Christensen had primary physical custody, the parties were actually practicing a joint physical custody schedule as Lovett had custody of the child just over 146 days during the prior year. Accordingly, the court concluded that Lovett need only demonstrate modification was in the child's best interest pursuant to *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009), *overruled in part by Romano v. Romano*, 138 Nev., Adv. Op. 1, 501 P.3d 980 (2022). Regardless, the court found that even if Lovett was required to show a substantial change in circumstances and that modification was in the child's best interest, pursuant to *Ellis v. Carucci*, 123 Nev. 145, 161 P.3d 239 (2007), Lovett demonstrated a substantial change in circumstances affecting the child's welfare based on, as discussed below, Christensen's incarceration, his failure to comply with court orders pertaining to joint legal custody, his failure to comply with court orders pertaining to the child's medical and dental care, his aggression

and hostility toward Lovett, and his inability to coparent with Lovett since entry of the order for joint legal custody. All of which, the court found, affected the child's physical health, including dental health, emotional health, and stability. And after making findings as to the best interest factors pursuant to NRS 125C.0035(4), the court found that it was in the child's best interest to award Lovett primary physical custody.

In particular, the district court found that, regarding which parent would encourage frequent associations and a continuing relationship with the non-custodial parent, although Christensen testified that Lovett failed to exchange the child with him for Christmas, evidence demonstrated that was not true. The court also noted that Christensen expressed hostility and animus toward Lovett's sexuality, making derogatory comments, such that the court was concerned Christensen might denigrate mom's relationship in front of the child. Regarding the level of conflict between the parties and their ability to coparent, the court found that evidence demonstrated Christensen regularly cursed at Lovett and was demeaning toward her when she attempted to exercise her rights as a joint legal custodian, that he refused to provide Lovett with information and prevented her from attending the child's dental appointment, and that he was generally combative and unwilling to coparent or confer with Lovett. The court noted that Lovett likewise showed periods of hostility and inflammatory comments, but ultimately concluded that this factor weighed in favor of Lovett due to Christensen's unwillingness or inability to coparent in any effective manner.

The court also noted Christensen's refusal to allow Lovett to take the child to the dentist during his custodial time, if he was unable to do so, and despite assuring Lovett that he would take the child to her

appointment, he failed to do so. And he otherwise failed to comply with the prior custody order's requirement that he take the child to the dentist at least twice per year, resulting in the child having numerous dental issues in need of treatment. The court similarly noted Christensen's failure to comply with the prior custody order's requirement that he take the child to see a doctor once per year and his failure to sign up for Our Family Wizard, as previously ordered. The court noted that although Lovett failed to confer with Christensen regarding whether the child would return to in-person schooling, because Christensen failed to sign up for Our Family Wizard, it was unclear how Lovett was to confer with him.

The court went on to find that evidence demonstrated Christensen had pled guilty to the charge of DUI (2nd) but failed to complete the terms of a specialty court program he was ordered to complete. As a result, Christensen was arrested, incarcerated, and subject to an amended sentence, including indefinite enhanced supervision. The court also acknowledged that Lovett's past mental health struggles were well documented in the 2016 custody order, but that at the time the parties stipulated to modify custody in 2020, she had sought treatment, been continuously employed, and had been exercising custody without issue. Moreover, the court found that since the 2020 order, Lovett had continued counseling and although Christensen asserted that Lovett's mental health had not improved and that she had done nothing to address her mental health needs, he failed to offer any evidence demonstrating that Lovett's mental health was still a concern.

Regarding the physical, developmental, and emotional needs of the child, the court again noted the child's poor hygiene, including dental health, and the child's need for counseling based on both parties' testimony

that the child exhibited some behavioral issues. Finally, as to the parental abuse or neglect factor, the court noted that while it was concerned with Christensen's failure to take the child to the doctor or dentist, as noted above, his failure did not amount to medical neglect. In addition to the NRS 125C.0035(4) best interest factors, the court also considered Lovett's testimony that Christensen's extended family, with whom he resides, failed to cooperate with Lovett obtaining custody of the child while Christensen was incarcerated, requiring law enforcement to retrieve the child. The court noted that Christensen did not dispute this testimony. Based on the foregoing, the court maintained the parties' joint legal custody status and awarded Lovett primary physical custody, subject to Christensen's parenting time on the first, second, and fourth weekends of each month, with Christensen responsible for pick-up and drop-off. The court also ordered the child to attend the school Lovett was zoned for, given her status as the primary physical custodian and her limited transportation. This appeal followed.

On appeal, Christensen challenges the district court's order modifying custody, asserting that the district court abused its discretion in finding a substantial change in circumstances and by failing to consider relevant information, that the court's decision was not supported by substantial evidence, that the court abused its discretion in failing to appoint a Court Appointed Special Advocate (CASA) to represent the child's interests, and that the court was biased against him. This court reviews a child custody decision for an abuse of discretion. *Ellis*, 123 Nev. at 149, 161 P.3d at 241. In reviewing child custody determinations, this court will affirm such determinations if they are supported by substantial evidence. *Id.* at 149, 161 P.3d at 242. Substantial evidence is that which a reasonable

person may accept as adequate to sustain a judgment. *Id.* When making a custody determination, the sole consideration is the best interest of the child. NRS 125C.0035(1); *Davis v. Ewalefo*, 131 Nev. 445, 451, 352 P.3d 1139, 1143 (2015). Further, we presume the district court properly exercised its discretion in determining the child's best interest. *Flynn v. Flynn*, 120 Nev. 436, 440, 92 P.3d 1224, 1226-27 (2004).

First, Christensen argues that there was no permanent substantial change in circumstances warranting modification and that the parties were not exercising what was effectively a joint physical custody arrangement as Lovett only had the child for 128 days per year, but the district court failed to consider his argument in this regard, instead relying on Lovett's unsupported testimony. But Christensen's argument is belied by the record. The record indicates that the district court considered both parties' testimony, the current custody order, the time Lovett had the child during spring break, and the uncontroverted evidence that Lovett had custody of the child during Christensen's incarceration to determine that the parties were exercising a de facto joint physical custody arrangement. Thus, we cannot conclude that the district court abused its discretion in finding that the parties were exercising a de facto joint physical custody arrangement. *See Ellis*, 123 Nev. at 149, 161 P.3d at 241-42; *see also Rivero*, 125 Nev. at 427, 216 P.3d at 225 (explaining that, when determining the parties' timeshare for purposes of a modification request, the district court should calculate the time each party has physical custody of the child over one calendar year as well as any deviations from the arrangement, including emergencies, holidays, and vacations); *Bluestein v. Bluestein*, 131 Nev. 106, 111-13, 345 P.3d 1044, 1047-49 (2015) (explaining that once a party moves to modify an existing custody agreement, the parties'

definitions no longer control and the court must use Nevada law to determine the custody arrangement the parties are practicing, and that *Rivero's* 40 percent guideline (or 146 days per year) for joint custody "should not be so rigidly applied that it would preclude joint physical custody when the court has determined . . . that such a custodial designation is in the child's best interest").

As to Christensen's assertion that the district court erred in modifying custody because his incarceration was temporary, such that there was no permanent substantial change in circumstances warranting modification, we likewise discern no error in the district court conclusion. The district court specifically found that even if a substantial change in circumstances was required, Lovett demonstrated the same as the evidence showed not only that Christensen was incarcerated, but also that he failed to comply with the court's orders pertaining to joint legal custody, and to the child's medical and dental care. Moreover, the court found that Christensen exhibited aggression and hostility toward Lovett, and that he was unable to coparent with Lovett since entry of the order granting joint legal custody, all of which negatively impacted the child's physical and emotional health and stability. Based on these findings, the district court did not abuse its discretion in finding there was a substantial change in circumstances affecting the welfare of the child.¹

¹While Christensen argues there was no permanent substantial change in circumstances, as his incarceration was temporary, he has failed to offer any cogent argument or authority, and our research has revealed no authority, demonstrating that the substantial change in circumstances must be permanent. See *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider claims that are not cogently argued). And as noted above, the

We similarly discern no abuse of discretion in the district court's conclusion that it was in the child's best interest to modify custody, considering the court's numerous and detailed findings regarding the same. See *Ellis*, 123 Nev. at 149, 161 P.3d at 241; *Flynn*, 120 Nev. at 440, 92 P.3d at 1226-27. Although Christensen asserts that the district court's findings were not supported by substantial evidence, his argument is based on his assertion that there was conflicting testimony and evidence presented, such that the district court should have made different findings than it did. But this court does not reweigh witness credibility or the weight of the evidence on appeal. See *Ellis*, 123 Nev. at 152, 161 P.3d at 244 (refusing to reweigh credibility determinations on appeal); *Quintero v. McDonald*, 116 Nev. 1181, 1183, 14 P.3d 522, 523 (2000) (refusing to reweigh evidence on appeal). Thus, because the district court's findings were supported by substantial evidence, Christensen has not demonstrated a basis for relief as to this issue. *Ellis*, 123 Nev. at 149, 161 P.3d at 241-42; *Flynn*, 120 Nev. at 440, 92 P.3d at 1226-27.

Next, Christensen contends that the district court abused its discretion in refusing to admit his evidence and that there was relevant information relating to Lovett's past mental health that the court should have considered. In particular, he asserts that the district court failed to properly consider an interim report, provided by DCFS and containing information regarding Lovett's mental health and past drug use, that the Tenth Judicial District Court considered in making its initial custody determination. This court reviews the district court's ruling on the

district court found that several factors constituted a substantial change in circumstances, not just Christensen's incarceration. Thus, Christensen's argument in this regard does not warrant relief.

admissibility of evidence for an abuse of discretion. *In re J.D.N.*, 128 Nev. 462, 468, 283 P.3d 842, 846 (2012). A file created by DCFS, including reports, does not automatically become part of the district court record in cases filed in the family division, and such evidence is only admissible if it complies with Nevada's rules of evidence. *Id.* at 469-70, 283 P.3d at 847.

Here, the record indicates that the district court did not admit the subject report before issuing the first custody order in the Tenth Judicial District Court proceeding. And although Christensen attempted to offer the report into evidence during the instant evidentiary hearing, the district court did not abuse its discretion in excluding the report as Christensen failed to timely disclose it. *See id.*; *see also* NRCP 16.205(d), (g) (providing that parties must disclose any exhibits they intend to offer as evidence at trial and permitting the district court to exclude the introduction of such evidence if not timely produced).

To the extent Christensen contends the district court erred in failing to consider the contents of the report, inasmuch as it formed the basis of the district court's initial custody determination awarding Christensen sole custody, we likewise discern no error. Despite Christensen's contention, he goes on to admit, and the record indicates, that the district court did consider the facts giving rise to the district court's initial custody determination and how things had changed over time, based on the parties' testimony. Thus, we cannot conclude that the district court abused its discretion in its consideration of the evidence presented and the history of the case. *See Ellis*, 123 Nev. at 149, 161 P.3d at 241.

Next, Christensen contends that the district court erred in failing to sua sponte appoint a CASA to represent the child's interests due to the animosity between the parties and the high conflict nature of the

case. The record demonstrates, and Christensen concedes, that he failed to raise any arguments regarding the appointment of a CASA below. Therefore, he has waived any such challenge on appeal.² *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).

Finally, Christensen contends that the district court was biased against him as evidenced by the alleged errors and because the district court noted Christensen's hostility towards Lovett's sexuality and his denigrating comments regarding the same. Although a judge entertaining actual bias or prejudice against one of the parties shall not preside over a matter pursuant to NRS 1.230(1), we presume judges are unbiased. *Rivero*, 125 Nev. at 439, 216 P.3d at 233. Additionally, "rulings and actions of a judge during the course of official judicial proceedings do not establish legally cognizable grounds for disqualification." *In re Petition to Recall Dunleavy*, 104 Nev. 784, 789, 769 P.2d 1271, 1275 (1988). Thus, this court reviews a district court's decision not to recuse itself for an abuse of discretion. *Rivero*, 125 Nev. at 439, 216 P.3d at 233. Further, the party seeking disqualification carries the burden to establish sufficient factual grounds warranting disqualification, must allege the bias stemmed from an extrajudicial source, and must show the bias resulted in an opinion based

²To the extent Christensen asserts that the district court's failure to sua sponte appoint a CASA in this matter amounts to a violation of the child's constitutional rights, and otherwise summarily asserts that the district court's order violates his constitutional rights, he has likewise failed to offer any cogent argument as to how the order amounts to a constitutional violation and we therefore discern no basis for relief. See *Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

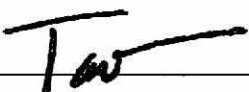
on something other than what the judge learned from participating in the action. *Id.*

Here, the record does not demonstrate that Christensen sought to disqualify the district court judge due to bias in the proceedings below; thus, he has waived this issue on appeal. *Old Aztec Mine, Inc.*, 97 Nev. at 52, 623 P.2d at 983. Nevertheless, we note that Christensen fails to establish, or even argue, that the court's ruling was based on something other than what the judge learned from participating in the case; indeed, the opposite is true—Christensen alleges that the bias stemmed from what the judge learned during the hearings and from rulings made in this matter. Therefore, Christensen fails to establish any legally cognizable grounds for disqualification, and there is no basis for concluding the judge was biased. *See Rivero*, 125 Nev. at 439, 216 P.3d at 233.

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED.³


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

³Insofar 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. We likewise deny any other requests for relief currently pending before this court.

cc: Hon. Dixie Grossman, District Judge
William Christensen
Bittner Legal LLC
Washoe District Court Clerk