IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MINH NGUYET LUONG,
Appellant,
vs.
JAMES W. VAHEY,
Respondent.

No. 83929-COA

FILED

NOV 30 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Minh Nguyet Luong appeals from a district court post-decree order denying a motion for relief under NRCP 60(a) and (b)(1). Eighth Judicial District Court, Family Court Division, Clark County; Dawn Throne, Judge.[1]

During their marriage, Luong and respondent James W. Vahey established college tuition savings accounts, pursuant to 26 U.S.C. § 529 (referred to herein as 529 accounts), for each of their three minor children. During the underlying divorce action, the parties disputed how to distribute the 529 accounts, which were funded by Luong, her family, and Vahey. The district court conducted an evidentiary hearing on the issue in 2020, along with other financial matters, and approximately six months later, the court entered a decree of divorce. In the decree, the district court found that Vahey contributed approximately 25 percent of the funds that were invested

[1]The underlying district court case has been reassigned multiple times over the course of the proceedings. Judge Throne entered the specific order challenged in this appeal, but District Court Judge T. Arthur Ritchie, Jr., entered the decree of divorce from which Judge Throne declined to grant relief under NRCP 60(a) or (b)(1).

in the 529 accounts and that Luong, along with her family, contributed approximately 75 percent of the funds that were invested in the 529 accounts. And the district court determined that it was appropriate to divide the 529 accounts between the parties, to be managed on behalf of their children, based on these capital contributions—specifically Vahey received 25 percent of the 529 accounts and Luong received 75 percent of the 529 accounts.

Approximately one year after the 2020 evidentiary hearing, Luong obtained a report from a financial consultant, who determined that Luong and her family contributed 77.11 percent of the funds that were invested in the 529 accounts while Vahey contributed 22.89 percent of the funds that were invested in the 529 accounts. Based on the financial consultant's report, Luong moved to correct the portion of the divorce decree addressing the 529 accounts pursuant to NRCP 60(a) or to set it aside pursuant to NRCP 60(b)(1). Vahey opposed the motion, arguing that the district court allocated the 529 accounts based on the evidence and testimony presented at trial, that Luong elected not to present an expert report concerning the 529 accounts at trial, and that relief was unwarranted under NRCP 60(a) or (b)(1) because the district court's decision concerning the 529 accounts did not reflect a clerical error or mistake, inadvertence, surprise, or excusable neglect. In his opposition, Vahey also requested that the district court enter an order directing Luong to turn their children's passports over to him, asserting that Luong might leave the country with the children if various issues in the underlying proceeding were not resolved in her favor and that she had the means to do so because she had undisclosed cash and family outside the country. Luong opposed the request.

At the hearing that followed, the district court found that the court issued a "very clear, intentional order" regarding the 529 accounts following an adequate discovery period and evidentiary hearing and that there was no excuse for Luong waiting until a year after the evidentiary hearing to have a financial consultant complete a forensic analysis of the accounts. As a result, the district court orally denied Luong's request for NRCP 60(a) relief, reasoning that there was no clerical error with respect to the 529 accounts, as well as her request for NRCP 60(b)(1) relief, reasoning that it was untimely because it was not filed within six months of the divorce decree's entry and that there was no mistake, inadvertence, surprise, or excusable neglect. Moreover, the district court concluded that Luong's request for NRCP 60(a) and (b)(1) relief was frivolous and vexatious because she sought a de minimis adjustment to the allocation of the 529 accounts, which the parties did not own, but instead managed as fiduciaries for their children. With respect to the passport issue, the district court determined that it was appropriate to split the children's passports between the parties to prevent either parent from unilaterally removing the children from the country, and as a result, it directed Luong to surrender the passports for two of the parties' children to Vahey's counsel while permitting her to retain the passport for the parties' remaining child. Thereafter, the district court entered a written order memorializing these decisions in a summary manner.[2] This appeal followed.

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[2]Given the summary nature of the district court's order, we look to the district court's oral findings, as set forth in the transcript from the relevant hearing, to interpret it. *See Holt v. Reg'l Tr. Servs. Corp.*, 127 Nev. 886, 895, 266 P.3d 602, 608 (2011) (recognizing that an appellate court may consult the record giving rise to a district court order to construe its meaning when the order is ambiguous).

On appeal, Luong initially challenges the denial of her request for relief under NRCP 60(a), arguing that the decree of divorce included a clerical error with respect to the 529 accounts. This court reviews the district court's refusal to make a clerical correction for an abuse of discretion. *Mack v. Estate of Mack*, 125 Nev. 80, 93, 206 P.3d 98, 107 (2009); *see also Frontier Ins. Serv., Inc. v. State*, 109 Nev. 231, 239, 849 P.2d 328, 333 (1993) (noting that NRCP 60(a) *permits* the district court to correct clerical mistakes).

NRCP 60(a) authorizes the district court to "correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." The rule applies when a district court's decision includes "a mistake or omission by a clerk, counsel, or judge, or printer which is not the result of the exercise of a judicial function" and "cannot reasonably be attributed to the exercise of judicial consideration or discretion." *Channel 13 of Las Vegas, Inc. v. Ettlinger*, 94 Nev. 578, 580, 583 P.2d 1085, 1086 (1978) (emphasis and internal quotation marks omitted).

Luong attempts to demonstrate that the decree of divorce included the type of mistake or omission encompassed by NRCP 60(a) by asserting that, although the district court stated in its minutes following the 2020 evidentiary hearing that the 529 accounts would be divided "based upon the contribution of percentage," the court omitted this language from the decree. As a preliminary matter, minute orders addressing the merits of a case are ineffective because they are "impermanent" and "[t]he court remains free to reconsider the decision and issue a different written judgment." *See Div. of Child & Family Servs. v. Eighth Judicial Dist. Court*, 120 Nev. 445, 451, 454, 92 P.3d 1239, 1243, 1245 (2004) (explaining that

dispositional court orders that address the merits of a case "must be written, signed, and filed before they become effective"). Nevertheless, while the district court did not use the precise language that was included in the minutes from the 2020 evidentiary hearing in the decree of divorce, it expressly stated in the decree that it was allocating the 529 accounts between the parties "pursuant to [their] capital contributions," which is the import of the language that the district court used in the minutes.

Although Luong further asserts that the district court failed to allocate the 529 accounts according to the parties' respective contributions, her assertion is based on the report that she obtained from a financial consultant more than one year after the 2020 evidentiary hearing, which she uses to suggest that the district court incorrectly found that she contributed 75 percent of the funds invested into the accounts rather than 77.11 percent of the funds. But even assuming that the district court's finding was incorrect, Luong has failed to establish the type of mistake or omission encompassed by NRCP 60(a), as the court's finding was based on its evaluation of the evidence before it at the time of the 2020 evidentiary hearing—an act of judicial consideration or discretion.[3] *See Channel 13 of Las Vegas*, 94 Nev. at 580, 583 P.2d at 1086. Consequently, the district court did not abuse its discretion by denying Luong's motion for NRCP 60(a) relief. *See Mack*, 125 Nev. at 93, 206 P.3d at 107.

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[3]Luong did not provide this court with a copy of the transcript from the 2020 evidentiary hearing, and as a result, we presume that it supports the district court's decision to deny her request for NRCP 60(a) relief. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (explaining that it is appellant's burden to ensure that a proper appellate record is prepared and that Nevada's appellate courts presume that materials missing from the trial court record support the district court's decision).

Luong next challenges the denial of her request for NRCP 60(b)(1) relief on two bases. First, Luong asserts that the request was timely because it was filed within six months of the date of service of written notice of entry of the divorce decree. Second, Luong argues that the district court failed to consider the appropriate factors for evaluating NRCP 60(b)(1) motions. This court reviews district court orders denying relief pursuant to NRCP 60(b) for an abuse of discretion. *See Ford v. Branch Banking & Tr. Co.*, 131 Nev. 526, 528, 353 P.3d 1200, 1202 (2015).

As a preliminary matter, NRCP 60(b)(1), authorizes the district court to set aside a judgment or order due to "mistake, inadvertence, surprise, or excusable neglect." However, this is not a case involving an allegation that some oversight during the underlying proceeding affected its outcome. *See Stoecklein v. Johnson Elec., Inc.*, 109 Nev. 268, 271, 849 P.2d 305, 307 (1993) (explaining that the policy underlying NRCP 60(b)(1) is that cases should be resolved on their merits whenever possible). To the contrary, Luong's motion to set aside the divorce decree's provision concerning the 529 accounts was based on evidence that she obtained after the 2020 evidentiary hearing, which she sought to use to demonstrate that the accounts should have been allocated differently in the divorce decree notwithstanding the evidence presented at the evidentiary hearing. Such requests for relief are governed by NRCP 60(b)(2), which allows the district court to set aside a judgment or order based on "newly discovered evidence." While Luong attempted to couch her motion in terms of NRCP 60(b)(1), we construe motions based on their substance rather than their titles. *Cf. State Farm Mut. Auto. Ins. Co. v. Wharton*, 88 Nev. 183, 186, 495 P.2d 359, 361 (1972) (explaining "that it is the nature of the grievance rather than the form of the pleadings that determines the character of the action"); *State v.*

Shade, 110 Nev. 57, 61 n.1, 867 P.2d 393, 395 n.1 (1994) (rejecting an argument that criminal defendants could entitle their motions in a manner that would allow them to circumvent the NRAP's rules governing appealable determinations, reasoning that the substance of an order resolving a motion, rather than its caption, determines whether the order is appealable). Thus, given that Luong sought to establish that newly discovered evidence demonstrated that the divorce decree allocated the 529 accounts incorrectly, we construe her motion as one for NRCP 60(b)(2) relief, and we analyze her appellate arguments concerning the denial of that motion accordingly.

We begin by addressing Luong's assertion that the district court incorrectly determined that her motion was untimely. A motion for relief pursuant to NRCP 60(b)(1)-(3) must be filed "within a reasonable time" and "no more than 6 months after the date of the [relevant] proceeding or the date of service of written notice of entry of the judgment or order, whichever date is later."[4] NRCP 60(c)(1). Here, the district court did not specifically address whether Luong's motion was filed within a reasonable time, but instead, concluded that it was untimely because it was not filed within six months of the divorce decree's entry. This suggests that the district court concluded that NRCP 60(c)(1)'s six-month outer limit was measured from the date of entry of the divorce decree from which she sought relief. But the six-month period is not triggered by the entry of a judgment or order, rather, it begins on the date of service of written notice of entry of the order from which relief is sought or the date of the relevant proceeding, whichever is later. *See* NRCP 60(c)(1). In the present case, the six-month period began

[4]Thus, our analysis of the timeliness issue would be the same even if Luong's motion could properly be treated as an NRCP 60(b)(1) motion.

on the date that written notice of entry of the divorce decree was served since service of the notice occurred after the 2020 evidentiary hearing that gave rise to the divorce decree. *See id.* And as Luong correctly observes, she filed her request to set aside the divorce decree's provision concerning the 529 accounts within less than six months after written notice of entry of the divorce decree was served.

Given the foregoing, the six-month outer limit for seeking relief pursuant to NRCP 60(b)(1)-(3) did not provide an appropriate basis to deny Luong's request for such relief. Moreover, absent any specific findings from the district court concerning whether Luong brought her request within a reasonable time, we are constrained to conclude that it abused its discretion to the extent it denied Luong's request as untimely—particularly since Vahey makes no attempt to address Luong's assertion that her request was timely under the circumstances presented here. *See Ford*, 131 Nev. at 528, 353 P.3d at 1202; *see also Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (concluding that respondents confessed error by failing to respond to appellant's argument); *cf.* NRAP 31(d)(2) (providing that the appellate courts may treat a respondent's failure to file an answering brief as a confession of error).

Turning to Luong's argument concerning the district court's evaluation of the merits of her request to set aside the divorce decree's provision concerning the 529 accounts, she maintains that it improperly failed to consider the factors set forth in *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982), *overruled on other grounds by Epstein v. Epstein*, 113 Nev. 1401, 1405, 950 P.2d 771, 773 (1997). Those factors are: "(1) a prompt application to remove the judgment; (2) the absence of an intent to delay the proceedings; (3) a lack of knowledge of procedural

requirements; and (4) good faith." *Id.* However, the district court is only required to consider the *Yochum* factors when evaluating requests for relief under NRCP 60(b)(1), *see id.*, and because—as discussed above—the relief sought in Luong's motion is more properly treated as seeking relief under NRCP 60(b)(2) as opposed to NRCP 60(b)(1), the district court was not required to consider the *Yochum* factors under these circumstances.[5] Instead, the district court was required to consider whether the forensic analysis proffered by Luong constituted "newly discovered evidence," which, for purposes of NRCP 60(b)(2), is "evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)."

Here, the district court followed Luong's lead in analyzing the motion as one for relief under NRCP 60(b)(1), and as a result, it did not phrase its findings in terms of whether Luong's forensic analysis constituted "newly discovered evidence" for purposes of NRCP 60(b)(2). Nevertheless, the district court found that there was no excuse for Luong to wait until approximately one year after the 2020 evidentiary hearing to obtain a forensic analysis of the 529 accounts and that her request to set aside the divorce decree's provision concerning those accounts was frivolous and vexatious. This is consistent with a determination that, with

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[5]If Luong's motion had truly been one seeking relief pursuant to NRCP 60(b)(1), then the district court would have not only been required to consider the *Yochum* factors, it would have also been required to make specific findings concerning those factors—things the court here failed to do. *See Willard v. Berry-Hinckley Indus.*, 136 Nev. 467, 471, 469 P.3d 176, 180 (2020) (holding "that district courts must issue explicit and detailed findings, preferably in writing, with respect to the four *Yochum* factors to facilitate this court's appellate review of NRCP 60(b)(1) determinations for an abuse of discretion").

reasonable due diligence, Luong could have obtained the forensic analysis of the 529 accounts well before the time to move for a new trial under NRCP 59(b), which precludes relief under NRCP 60(b)(2). And because Luong has never presented any argument or explanation, either below or on appeal, as to why she waited until approximately one year after the 2020 evidentiary hearing to obtain the forensic analysis of the 529 accounts, *see Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011); *Old Aztec Minc, 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."); *see also Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that appellate courts need not consider issues unsupported by cogent argument), we discern no abuse of discretion in the district court's denial of her request to set aside the divorce decree's provision concerning those accounts. *See Ford*, 131 Nev. at 528, 353 P.3d at 1202; *see also Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987) (providing that Nevada's appellate courts "will affirm the order of the district court if it reached the correct result, albeit for different reasons").

Lastly, Luong argues that the district court improperly required her to surrender the passports for two of the parties' children to Vahey's counsel, arguing that she was not a flight risk and that the district court failed to support its decision with a best interest determination. In the present case, the district court had two avenues to resolve the parties' dispute concerning the children's passports, which essentially involved an allegation by Vahey that there was a risk that Luong would abduct the children. In particular, the district court could have analyzed the issue through the lens of the Uniform Child Abduction Prevention Act (UCAPA),

which is codified in Nevada as NRS Chapter 125D. That act permits the district court to order abduction prevention measures based on a credible risk of abduction—including an order requiring the nonmoving party to surrender a child's passport. *See* NRS 125D.150 (authorizing the district court to order abduction prevention measures based on a credible risk of abduction, either sua sponte or on the petition of certain individuals, including a party to a child custody determination); NRS 125D.190(3)(d)(2) (providing that an abduction prevention order may include several restrictions with respect to a child's passport, including a requirement that the nonmoving party surrender to the court or petitioner's attorney any passport in the child's name). Alternatively, the district court could have evaluated whether it was in the children's best interest for Luong to be the sole holder of the children's passports. *See* NRS 125C.0045(a)(1) (stating that the district court may make any "order for the custody, care, education, maintenance and support of the minor child as appears in his or her best interest" during any stage of the proceeding); *Davis v. Ewalefo*, 131 Nev. 445, 451, 352 P.3d 1139, 1143 (2015) ("In making a child custody determination, the sole consideration of the court is the best interest of the child." (internal quotation marks omitted)); *see also* NRS 125C.0035(4) (setting forth the factors that the district court must consider in evaluating the children's best interest).

In the present case, neither party discussed the UCAPA, and insofar as Vahey alleged that Luong may abduct the children, he only addressed the issues pertinent to whether a credible risk of abduction exists to a limited extent without presenting any supporting evidence. *See* NRS 125D.180 (setting forth the evidence that the district court must consider in determining whether to issue an abduction prevention order based on a

credible risk of abduction); NRS 125D.190(2) (requiring the district court to issue an abduction prevention order if it finds a credible risk of abduction). As a result, the district court did not discuss the UCAPA at the relevant hearing, although it determined that there was no evidence before it that either party was a flight risk, which foreclosed the possibility of an abduction prevention order issuing. *See* NRS 125D.190(2).

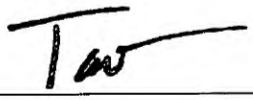
Instead, the district court concluded that it was appropriate to divide the children's passports between the parties to reduce the risk that either party could unilaterally remove the children from the country based on what the district court described as an adverse inference against both parties. But in doing so, the district court did not make a determination with respect to the children's best interest, much less make any findings concerning the best interest factors. Consequently, we cannot say with assurance that the district court's resolution of the parties' dispute concerning the children's passports was made for the correct legal reasons. *See Davis*, 131 Nev. at 450, 352 P.3d at 1142 (explaining that, although the district court's discretion in determining child custody is broad, "deference is not owed to legal error or to findings so conclusory they may mask legal error" (internal citations omitted)); *Williams v. Waldman*, 108 Nev. 466, 471, 836 P.2d 614, 617-18 (1992) (providing that the district court must apply the correct legal standard in reaching a determination). Consequently, further proceedings are required with respect to the parties' dispute concerning the children's passports.

Thus, given the foregoing, we affirm the challenged order insofar as it denied Luong's requests for NRCP 60(a) and (b)(2) relief from the decree of divorce, but reverse and remand the challenged order to the

extent that it directed Luong to surrender the passports for two of the parties' children to Vahey's counsel.[6]

It is so ORDERED,

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
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cc: Chief Judge, Eighth Judicial District Court
Presiding Judge, Eighth Judicial District Court, Family Division
Eighth Judicial District Court, Family Division, Dept. Q
Hon. Dawn Throne, District Judge, Family Court Division
Israel Kunin, Settlement Judge
Page Law Firm
The Dickerson Karacsonyi Law Group
Eighth District Court Clerk

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[6]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 our disposition of this appeal.