

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRITTANY LEE ANAYA-ALVARADO,
N/K/A JASPER EDWARDS,
Appellant,
vs.
CARLOS ALBERTO ANAYA-
ALVARADO,
Respondent.

No. 84869-COA

FILED

FEB 15 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Brittany Lee Anaya-Alvarado, now known as Jasper Edwards (Jasper), appeals from a district court order modifying custody of minor children. Eighth Judicial District Court, Family Division, Clark County; Charles J. Hoskin, Judge.

Jasper¹ and Carlos Alberto Anaya-Alvarado (Carlos) were married from 2013 until 2017.² They had two minor children during their marriage: S.A., born in 2014, and A.A., born in 2016.

After their divorce, the parties filed a joint stipulation and order in October 2017 granting Jasper sole legal and physical custody of the children. Then, in June 2019, the parties filed a joint stipulation and order permitting Jasper and their new husband to relocate to Hampton, Virginia, with the children.

¹At the time of the marriage, Jasper (born biologically female) was known as Brittany. Jasper identifies as gender fluid/transgender and prefers masculine or androgynous pronouns. Therefore, we refer to Jasper herein and may also use the pronoun “they” where appropriate.

²We recount the facts only as necessary to our disposition.

In January 2021, Carlos filed a motion to modify custody that was based, primarily, on his concerns about the children's gender fluidity³ and Jasper's decision to support the use of some strong psychiatric medications that had been prescribed to S.A. in 2020.

On May 16, 2021, the district court entered a temporary order granting Carlos joint legal custody that directed Jasper to "keep [Carlos] apprised of the children's medical treatments." Jasper's attorney prepared this written order, which was later signed by the district court. Although the written order recited that "there has been a substantial [change of] circumstance affecting the welfare of the children, and their best interest may be at issue," it failed to identify any changed circumstances and it did not identify or analyze the best interest factors supporting a change of legal custody. However, Jasper did not object to the temporary order, nor did they seek a stay or other relief.

In the fall of 2021, Jasper and Carlos had a disagreement over whether to vaccinate the children against COVID-19. Jasper wanted to vaccinate the children; Carlos did not. In addition, the controlling June 2019 physical custody order entitled Carlos to parenting time with the children in Las Vegas for Christmas 2021; but Jasper was concerned about the children visiting Carlos and his new wife, Alexandria, because they were both unvaccinated. Therefore, in November 2021, in advance of the upcoming planned December visit, Jasper filed a motion and request for an order shortening time seeking the district court's permission to vaccinate the children against COVID-19, or alternatively, to postpone the children's upcoming visit to Las Vegas. In early January 2022, the district court denied

³The record reflects that Carlos was aware of the children's gender fluidity before he agreed to the June 2019 stipulation and order.

Jasper's motion; however, by that time, Jasper had already withheld Carlos's Christmas 2021 parenting time in violation of the June 2019 custody order. Then, immediately after the district court denied Jasper's motion, Jasper vaccinated and boosted the children against COVID-19 in violation of the district court's temporary order and against Carlos's wishes.

In May 2022, the district court held a full-day evidentiary hearing, where it again addressed Carlos's January 2021 motion to modify custody but this time for the purpose of determining permanent custody. The district court heard testimony from Jasper, Carlos, Alexandria, and Dr. Joel Mishalow, a clinical psychologist that the parties had jointly retained to evaluate the children. After the hearing, the district court issued a 39-page order with detailed findings of fact and conclusions of law, awarding Carlos primary physical custody of the children and providing that both parents would continue to share joint legal custody. The district court disagreed that the children's gender fluidity was a substantial change of circumstance affecting the welfare of the children. However, it found that Jasper's violation of court orders regarding COVID-19 vaccination and withholding parenting time from Carlos during Christmas 2021 *did* satisfy the requirement of changed circumstances. The district court then evaluated each of the best interest factors enumerated in NRS 125C.0035(4), ultimately determining that it was in the children's best interest for Carlos to have primary physical custody and for both parents to have joint legal custody. Because the change of physical custody would necessarily require the children to relocate from Virginia to Nevada, the district court also

addressed the standards for relocation set forth in NRS 125C.007 and found that relocation was warranted.⁴

On appeal, Jasper contends that the district court erred or abused its discretion by: (1) awarding Carlos temporary joint legal custody without adequate written findings, rendering that temporary order void; (2) finding a substantial change in circumstances due to Jasper's violation of court orders that Jasper contends were either void or unenforceable; (3) modifying custody to punish Jasper for violating the court's orders, while not penalizing Carlos for violating a prior order; and (4) modifying custody due to the court's bias or prejudice against Jasper's transgender status and parenting style. In response, Carlos disputes all of Jasper's arguments and contends that the district court did not err or abuse its discretion when it modified custody, and that Jasper has made frivolous assertions of bias against the district court without supporting evidence in the record. We address each of these arguments in turn.

The temporary legal custody order was not void

Jasper contends that the district court erred by awarding Carlos temporary joint legal custody without setting forth specific findings of fact in writing, rendering the May 2021 temporary custody order void. Carlos responds that Jasper is precluded from challenging the court's award of temporary legal custody because Jasper failed to object in the district court.

⁴In addition, the district court's order addressed parenting time, schooling, and therapy for the children, including an evaluation for possible medication related to the children's Attention Deficit Disorder and Pervasive Developmental Disorder, and evaluation by an occupational therapist related to the children's potential motor skill deficiencies. The district court also modified the child support obligation such that Jasper would begin paying \$80 a month and Carlos would no longer be required to pay child support.

We first note that Carlos is correct that Jasper failed to object or challenge the temporary award of joint legal custody and thereby waived this issue on appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (holding issues not argued below are “deemed to have been waived and will not be considered on appeal”). At the April 7, 2021 hearing, when the district court advised the parties that it was temporarily modifying legal custody to joint legal custody, Jasper did not ask the court to make any additional factual findings to support the custody determination, nor did Jasper object to the temporary order. Furthermore, Jasper recognized the validity of the temporary custody order when filing a motion seeking permission to vaccinate the children against COVID-19. Put differently, Jasper understood that the temporary custody order required cooperation in making medical decisions affecting the children. And in the motion itself, Jasper conceded that they were “not asking this Court to award them sole legal custody at this time, but to allow them to make an executive decision for the children’s wellbeing.” Because Jasper treated the temporary legal custody order as valid throughout the proceedings below, we are not persuaded by Jasper’s argument that the temporary order was void or invalid. *See id.*

In any event, Jasper fails to identify any controlling authority that says a *temporary order* modifying legal custody is automatically “void” when it does not set forth specific findings of fact supporting the modification. Additionally, the record supports the district court’s decision and Jasper does not point to any persuasive evidence in the record indicating that temporary joint legal custody was inappropriate under the facts and circumstances of this case, particularly in light of the statutory preference for joint legal custody. *See, e.g.*, NRS 125C.0015, .002.

Jasper cites *Davis v. Ewalefo*, 131 Nev. 445, 352 P.3d 1139 (2015), and *Arcella v. Arcella*, 133 Nev. 868, 407 P.3d 341 (2017), to argue that the district court's temporary order was void at its inception and therefore cannot be enforced. Yet, *Davis* and *Arcella* are distinguishable. In *Davis*, the Nevada Supreme Court reversed a *final* appealable custody order that lacked "specific findings to connect the child's best interests to the restrictions imposed." 131 Nev. at 446, 352 P.3d at 1140. In doing so, the court did not hold that the order was "void" at the time it was issued, much less that the parties were free to disregard the order before it was reversed on appeal. Rather, the court reversed and remanded, instructing the district court to "reopen the proceedings and take evidence and make [the necessary] findings." *Id.* at 455, 352 P.3d at 1145. Likewise, *Arcella* involved a direct appeal from a final appealable custody order that remained valid and enforceable until the supreme court reversed it on appeal. Like *Davis*, *Arcella* reversed and remanded the district court's school placement determination for an evidentiary hearing and specific factual findings. 133 Nev. at 873, 407 P.3d at 347. Neither case supports Jasper's contention that the district court's temporary custody order was "void" at the time it was rendered, or that Jasper could ignore it without consequence. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (stating this court need not consider an argument that is not cogently argued or lacks support of relevant authority).

The district court did not abuse its discretion when it found a substantial change in circumstances based on Jasper's violation of valid and enforceable court orders

Jasper contends that the district court erred when it modified legal and physical custody, arguing that the determination was based in part on Jasper's violation of three "void" or "unenforceable" orders, including the

May 2021 temporary legal custody order, the June 2019 stipulation and order, and the January 2022 order.

First, Jasper claims that the May 2021 temporary custody order was void because “it failed to set forth the factual determinations necessary for that order to be valid and enforceable.” But as explained previously, Jasper has not shown that the May 2021 temporary legal custody order was void at the time it was issued, and Jasper’s failure to object or seek other relief from the order precludes them from arguing on appeal that they were not bound by that order. *See, e.g., Emperor’s Garden Rest.*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38; *Old Aztec Mine, Inc.*, 97 Nev. at 52, 623 P.2d at 983.

Next, Jasper argues that the June 2019 stipulation and order, providing that Carlos was entitled to Christmas parenting time, was “ambiguous” and unenforceable because “the order’s language requiring a Christmas visit did not state a date range, time frame, or any other language necessary for the [p]arties to comply with that order.” Although the June 2019 order did not expressly indicate the beginning or end date when Carlos’s 2021 Christmas parenting time was supposed to occur, the order did specify that in odd years, beginning in 2021, the children would spend “a week in Las Vegas, [Nevada,] for Christmas.” At a minimum, Jasper knew that Carlos was entitled to have the children with him for Christmas, or Jasper would not have sought the court’s permission to postpone the Christmas 2021 visit.

Finally, Jasper contends that the district court’s January 2022 order, denying Jasper permission to vaccinate the children against COVID-19, or in the alternative, to postpone Carlos’s Christmas 2021 parenting time, was similarly ambiguous and unenforceable. But even if the order did not expressly prohibit Jasper from ever vaccinating the children, the order

clearly denied Jasper's request for permission to vaccinate the children over Carlos's objection, at a time when Carlos had joint legal custody of the children. Furthermore, Jasper admitted that immediately after receiving the court's order, Jasper had both children vaccinated and boosted against Carlos's wishes. So, even if Jasper were correct that the January 2022 order was ambiguous, Jasper's unilateral decision to vaccinate both children against COVID-19 knowingly against Carlos's wishes and immediately after the district court denied them permission to do so, necessarily violated Carlos's rights under the May 2021 temporary custody order.

Jasper has not shown that the three orders in question were void or unenforceable. Nevertheless, Jasper contends that the district court could not properly consider Jasper's violations of those orders when making a final custody determination because the orders were not clear enough to serve as the basis for a contempt-of-court finding. Citing *Cunningham v. Eighth Judicial District Court*, 102 Nev. 551, 559-60, 729 P.2d 1328, 1333-34 (1986), Jasper argues that a party may only be held in contempt of court if the order violated is plain in its language, and the order must spell out the details of compliance in clear, specific, and unambiguous terms so that the person will readily know what duties or obligations are imposed on him. But the district court did not hold Jasper in contempt in this case; rather, the court considered Jasper's violation of the three orders in connection with the court's custody determination. Therefore, *Cunningham* is inapposite here and the district court did not abuse its discretion.

The district court did not modify custody to punish Jasper for violating the court's temporary orders

Next, Jasper contends that the district court ran afoul of *Sims v. Sims*, 109 Nev. 1146, 865 P.2d 328 (1993), when it modified custody "to punish" Jasper for violating the same three orders. In *Sims*, the Nevada

Supreme Court ruled that “a court may not use changes of custody as a sword to punish parental misconduct” and reversed a custody award that was made “not because it was in the best interests of the child, but because the mother admittedly did not obey a questionable, if not absurd court order.” *Id.* at 1148-49, 865 P.2d at 330.⁵ Carlos responds that the district court did not make its custody determination based on Jasper’s violation of court orders, but instead applied the standards set forth in *Ellis v. Carucci*, 123 Nev. 145, 150, 161 P.3d 239, 242 (2007), *Romano v. Romano*, 138 Nev., Adv. Op. 1, 501 P.3d 980 (2022), and NRS 125C.0035.

When determining custody under *Ellis* and *Romano*, the district court must consider whether “(1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the child’s best interest is served by the modification.” *Romano*, 138 Nev., Adv. Op. 1, 501 P.3d at 982 (quoting *Ellis*, 123 Nev. at 150, 161 P.3d at 242). In considering the child’s best interest, the court must look to the factors in NRS 125C.0035(4).

The district court has “broad discretionary powers to determine child custody matters, and [this court] will not disturb the district court’s custody determinations absent a clear abuse of discretion.” *Ellis*, 123 Nev. at 149, 161 P.3d at 241. Nevertheless, the district court must make its determinations “for the appropriate reasons.” *Id.* at 149, 161 P.3d at 241-42

⁵The mother in *Sims* left her 10-year-old daughter at home alone in violation of a court order that required her to “be present with the minor child at all times, and the child is not to be left alone for even 5 minutes.” *Id.* at 1147-48, 865 P.2d at 329. The district court relied almost exclusively on the mother’s disobedience of the court order as a basis to change custody status, while failing to address the best interests of the child. *Id.* at 1149, 865 P.2d at 330. The supreme court deemed this to be an abuse of discretion requiring reversal, and remanded for a redetermination of custody. *Id.* at 1150, 865 P.2d at 331.

(citing *Rico v. Rodriguez*, 121 Nev. 695, 701, 120 P.3d 812, 816 (2005), and *Sims*, 109 Nev. at 1148, 865 P.2d at 330). And the district court's findings must also be "supported by substantial evidence, which is evidence that a reasonable person may accept as adequate to sustain a judgment." *Id.* at 149, 161 P.3d at 242 (internal footnote omitted). Here, the district court properly applied the two-part test outlined in *Ellis* and *Romano* and did not modify custody to punish Jasper in violation of *Sims*.

Jasper has not shown that the district court erred in applying the first part of the *Ellis* and *Romano* test, which requires a substantial change in circumstances affecting the welfare of the child. This requirement "serves the important purpose of guaranteeing stability unless circumstances have changed to such an extent that a modification is appropriate." *Ellis*, 123 Nev. at 151, 161 P.3d at 243. "[A]ny change in circumstances must generally have occurred since the last custody determination." *Id.*

In this case, the district court provided a detailed analysis of the substantial change of circumstances requirement. When evaluating this requirement, the court rejected Carlos's argument that the children's gender fluidity was a "substantial change of circumstances" because it predated the controlling June 2019 custody order. And Jasper contends that this particular finding was correct. However, the court further determined that Jasper's "pattern of violating Court orders regarding medical issues and withholding visitation" from Carlos (both of which occurred *after* the June 2019 custody order) constituted "a substantial change of circumstances, affecting the welfare of the children." Based on Jasper's testimony, the district court found that Jasper would continue violating court orders and undermining Carlos's joint legal custody rights if Jasper thought it best to do so, and that this constituted a change in circumstances. We decline to

second-guess the district court's factual findings. See *State v. Rincon*, 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006) ("the district court is in the best position to adjudge the credibility of the witnesses and the evidence, and 'unless this court is left with the definite and firm conviction that a mistake has been committed,' this court will not second-guess the trier of fact") (quoting *State v. McKellips*, 118 Nev. 465, 469, 49 P.3d 655, 658-59 (2002)).

As for the second part of the *Ellis* and *Romano* test, the district court addressed in detail the best interest factors set forth in NRS 125C.0035(4). Unlike the court's order in *Sims* which merely "recit[ed] that the change was in the best interest of the child" while focusing almost entirely on the mother's disobedience of "a questionable, if not absurd, court order," 109 Nev. at 1149, 865 P.2d at 330, here the district court addressed each best interest factor and determined that it was in the children's best interest to modify physical custody. Thus, although the court considered Jasper's violation of its prior orders, there were other persuasive factors supporting custody modification in favor of Carlos.

In applying the best interest factors, the district court found several factors to be either neutral or inapplicable based on the evidence presented, including: NRS 125C.0035(4)(a) (the wishes of the children);⁶ NRS 125C.0035(4)(b) (any nomination of a guardian); NRS 125C.0035(4)(e) (the ability of the parents to cooperate to meet the needs of the child); NRS 125C.0035(4)(f) (the mental and physical health of the parents); NRS 125C.0035(4)(i) (the ability to maintain a relationship with any sibling); NRS 125C.0035(4)(j) (any history of parental abuse or neglect of the child or a sibling of the child); NRS 125C.0035(4)(k) (whether either parent has

⁶The district court found that the children were too young to intelligently express a preference.

engaged in an act of domestic violence); and NRS 125C.0035(4)(l) (whether either parent has engaged in an act of abduction).

Importantly, however, the district court found several best interest factors weighed in favor of Carlos, including the following: NRS 125C.0035(4)(c) (which parent is more likely to allow the children to have 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) (the physical, developmental, and emotional needs of the children); and NRS 125C.0035(4)(h) (the nature of the relationship of the child with each parent).

In reviewing these factors, the district court addressed concerns that did not relate to Jasper's violation of court orders. For instance, when discussing the level of conflict between the parents, NRS 125C.0035(4)(d), the court noted that Jasper had threatened to accuse Carlos of kidnapping after sending the children to stay with him and found that if "[Jasper] does not obtain what is requested, [Jasper] will not hesitate to cause additional conflict." When evaluating the ability of both parents to meet the children's physical, developmental, and emotional needs under NRS 125C.0035(4)(g), the court noted that the children both suffered from mental and physical issues, but that Jasper had done nothing to address their needs since December 2020, and struggled to articulate the children's learning disabilities. And when addressing the nature of the children's relationship with both parents under NRS 125C.0035(4)(h), the district court determined that the factor favored Carlos because there was no direct testimony about the children's relationship with Jasper, Carlos described a "fun and loving" relationship with the children that involved "going to the park and doing affirmations," and Jasper was unconcerned about Carlos's relationship with their children. Based upon the foregoing, we conclude that the district court

did not clearly abuse its discretion or make its final custody determination for an inappropriate reason. *See Ellis*, 123 Nev. at 149, 161 P.3d at 241; *cf. Sims*, 109 Nev. at 1148, 865 P.2d at 330.

Jasper has not shown that the district court modified custody due to bias or prejudice against Jasper's transgender status and parenting style

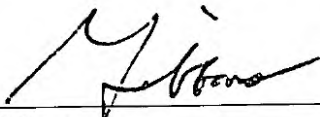


Finally, Jasper contends that the district court's rulings in this case may demonstrate a bias or prejudice against Jasper's transgender status and parenting style. As evidence of the district court's alleged bias, Jasper points to statements made by Carlos at the evidentiary hearing about their "biologically male" children "wearing girl's clothing," Carlos's testimony about his church teachings, and Carlos's inability to accept the children's gender fluidity because it conflicts with his values. Yet, Jasper fails to explain how statements made by a party litigant indicate bias on the part of the district court in this case in reaching its decision, particularly where "judicial rulings alone *almost never* constitute a valid basis for bias or partiality motion." *Whitehead v. Nev. Comm'n on Judicial Discipline*, 110 Nev. 380, 427, 873 P.2d 946, 975 (1994) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)).

Jasper also asserts that the district court's order "punished" Jasper for their violation of court orders while failing to analyze the possible harm to the children that occurred when Carlos violated the June 2019 custody order by unilaterally discontinuing S.A.'s psychiatric medication. However, the district court did consider Carlos's violation of the June 2019 custody order as evidence against Carlos when evaluating the ability of the parents to cooperate to meet the needs of the children under NRS 125C.0035(e), but rather found that because both parties violated court

orders this was a neutral best interest factor.⁷ Jasper's remaining allegations of bias are neither cogently argued nor supported by relevant authority, and therefore we need not consider them. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.⁸

Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁹

		
	_____, C.J.	
	Gibbons	
		
_____, J.		_____, J.
Bulla		Westbrook

⁷The district court recognized that *both parties* had violated court orders, thus it could not say the factor weighed more heavily in favor of Jasper or Carlos: "[Carlos] admits to stopping the child's medication, when [Jasper] maintained sole legal custody, without consulting with [Jasper]. [Carlos] also cut the child's hair without consulting [Jasper]. [Jasper] unilaterally vaccinated the children for Covid without [Carlos's] permission (while the parties had joint legal custody) and contrary to court order. [Jasper] also withheld Christmas 2021 visitation unless [Carlos] and his wife received vaccinations. This factor is neutral."

⁸Carlos asks this court to sanction Jasper for wrongfully accusing the district court of bias and prosecuting their appeal "in a frivolous manner." *In re Herrmann*, 100 Nev. 149, 152, 679 P.2d 246, 247 (1984); *see* NRAP 38. Although Jasper's argument regarding judicial bias on the part of the district court is unsupported and unfounded, Jasper's appeal in its entirety is not frivolous, nor does it appear to have been undertaken solely for purposes of delay. Therefore, we deny Carlos's request for sanctions.

⁹Insofar 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. Charles J. Hoskin, District Judge, Family Division
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