IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARY SNYDER,
Appellant,
vs.
MATTHEW WALKER,
Respondent.

No. 85088-COA

FILED

MAR 24 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Mary Snyder appeals from a district court order denying her request to relocate and awarding primary physical custody to Matthew Walker. Eighth Judicial District Court, Family Division, Clark County; Michele Mercer, Judge.

Mary and Matthew were never married but have one minor child together, eight-year-old T.W.[1] While living together, Mary became pregnant with a second child, five-year-old T.W.2. Matthew was listed as the father on T.W.2's birth certificate.

Mary and Matthew lived together until October 2019, when Mary moved in with her current husband, Hal, who serves in the United States Air Force. In December 2019, Mary and Matthew entered an informal joint custody arrangement without court assistance. A year later, Mary and Hal got engaged, and approximately six months later, they learned that Hal would be transferred to an Air Force base in Maryland.

In July 2021, Mary and Hal got married in Ohio. When they returned from Ohio, Matthew filed a complaint for custody seeking joint

[1]We recount facts only as necessary for our disposition and refer to the children's ages as of the time of trial.

legal and joint physical custody of both children. In August 2021, Mary filed an answer, counterclaim, and third-party complaint. In her counterclaim, Mary sought joint legal custody of T.W. and primary physical custody of T.W. for the purpose of relocation. In her third-party complaint, Mary identified another man as T.W.2's putative father, sought DNA testing to confirm her claim, and requested primary physical custody of T.W.2 and permission to relocate to Maryland.

After Mary filed a motion to establish paternity, the district court ordered DNA testing to determine T.W.2's parentage. Although Matthew took a paternity test and learned that he was not T.W.2's biological father, at the beginning of trial, Mary conceded she had no issue with the court treating Matthew as T.W.2's legal father because the man she believed was T.W.2's actual father had failed to take a paternity test or otherwise appear in the case.

In March 2022, at the district court's request, Mary filed a motion for primary physical custody, seeking permission to relocate with both children to Maryland. Matthew opposed Mary's motion and filed a countermotion for primary physical custody, seeking attorney fees and other relief. The district court held a trial to address the parties' dueling custody complaints and motions on April 4, April 5, April 19, and May 13, 2022.

In June 2022, the district court entered its findings of fact and conclusions of law along with a custody decree. The district court found that Mary had not met her burden under Nevada law to warrant relocation to Maryland, under either NRS 125C.007(1) (the threshold test) or NRS 125C.007(2) (the six relocation factors) and denied Mary's motion to relocate. In addition, the district court addressed custody, considering each

of the best interest factors contained in NRS 125C.0035(4), and awarded Matthew primary physical custody of both children. Finally, the district court made a preliminary ruling that Matthew "shall be awarded reasonable attorney fees pursuant to NRS 18.010 and [NRS] 125C.200." The court directed Matthew to file and serve redacted billing statements, gave Mary time to file and serve any objections, and stated that it would decide the amount of attorney fees thereafter. Mary timely appealed.

On appeal, Mary challenges the district court's determinations regarding relocation and custody, as well as its preliminary award of attorney fees. We address each of her arguments in turn.

The district court did not abuse its discretion in denying Mary's motion to relocate

Mary contends that the district court abused its discretion when it denied her motion to relocate. This court reviews a district court's relocation determination for an abuse of discretion. *Flynn v. Flynn*, 120 Nev. 436, 440, 92 P.3d 1224, 1227 (2004). We will not substitute our judgment for that of the district court. *Id.* To prevail on a relocation motion, the relocating parent "has the burden of proving that relocating with a child is in the best interest of the child." NRS 125C.007(3). First, the relocating parent must demonstrate to the court's satisfaction that:

> (a) There exists a sensible, good-faith reason for the move, and the move is not intended to deprive the non-relocating parent of his or her parenting time;
>
> (b) The best interests of the child are served by allowing the relocating parent to relocate with the child; and
>
> (c) The child and the relocating parent will benefit from an actual advantage as a result of the relocation.

NRS 125C.007(1). Only if the relocating parent satisfies all three parts of this "threshold test" must the district court consider "the six relocation factors" under NRS 125C.007(2). *See Monahan v. Hogan*, 138 Nev., Adv. Op. 7, 507 P.3d 588, 589-90 (Ct. App. 2022).

Mary only directly argues that the district court abused its discretion in analyzing two of the three threshold test factors—the "sensible, good faith reason" factor under NRS 125C.007(1)(a) and the "actual advantage" factor under NRS 125C.007(1)(c). But Mary had the burden of establishing *all three* threshold factors—including that the best interests of her children were served by the relocation under NRS 125C.007(1)(b). *See Monahan*, 138 Nev., Adv. Op. 7, 507 P.3d at 589-90. Further, under NRS 125C.007(2), the district court *still* had to be convinced that the relocation factors weighed in favor of her request to relocate.

In this case, the district court found that it was not in the children's best interests to relocate under NRS 125C.007(1)(b) and determined that the six relocation factors under NRS 125C.007(2) weighed against relocation. The district court's findings were supported by substantial evidence in the record, and we are not persuaded by Mary's vague and unsupported claims of judicial bias.[2] Even if the district court erred in analyzing two of the three threshold factors, Mary has not shown

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[2]Although Mary cites *Canarelli v. Eighth Judicial District Court*, 138 Nev., Adv. Op. 12, 506 P.3d 334, 338 (2022), as a basis to attack the district court's factual findings, that case is inapposite. *Canarelli* involved the limited question of when a motion to disqualify should be granted "where the alleged bias originates from the judge's performance of her judicial duties rather than from an extrajudicial source." *Id.* at 337. No motion to disqualify was ever filed in this case.

that such errors would establish bias, let alone require us to disregard the district court's extensive factual findings in this case.

Because Mary failed to meaningfully challenge the district court's findings under NRS 125C.007(1)(b), or at all under (2), and because the district court's findings under those subsections provided alternative grounds for the district court's decision, Mary cannot establish that the district court abused its discretion when it denied her request to relocate. *See Hung v. Berhad*, 138 Nev., Adv. Op. 50, 513 P.3d 1285, 1288 (Ct. App. 2022) ("[B]ecause [appellants] did not challenge each and every one of the district court's independent alternative grounds for [relief], we summarily affirm based on those unchallenged grounds."); *see also Greenlaw v. United States*, 554 U.S. 237, 243 (2008) ("[I]n both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decisions and assign to courts the role of neutral arbiter of matters the parties present.").

The district court did not abuse its discretion in awarding physical custody to Matthew

Next, Mary contends that the district court abused its discretion by finding it to be in the children's best interest to be placed in Matthew's primary care, which forced her to choose between her husband and her children. We review custody determinations made by the district court for abuse of discretion. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007). In making a custody determination, the district court's sole consideration is the best interest of the child, NRS 125C.0035(1), and the court must consider the "best interest factors" set forth in NRS 125C.0035(4).

The district court's "order must tie the child's best interest, as informed by specific, relevant findings respecting the [best interest factors]

and any other relevant factors, to the custody determination made." *Davis v. Ewalefo*, 131 Nev. 445, 451, 352 P.3d 1139, 1143 (2015) (emphasis added). Findings of fact are given deference and will not be set aside unless they are clearly erroneous or are not supported by substantial evidence. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009).

Mary contends that the district court abused its discretion when it awarded Matthew primary physical custody "by ignoring extensive unrebutted evidence . . . , by making findings inconsistent with that unrebutted evidence, and by forcing Mary to choose between her husband and her children." Specifically, Mary takes issue with the district court's findings on the following best interest factors: (c), (d), (e), (f), (g), and (k) of NRS 125C.0035(4).

As to factor (c), which addresses the likelihood that each parent would foster a "continuing relationship" with the noncustodial parent, Mary contends that the district court ignored her unrebutted testimony that: (1) Matthew did not allow her to take the children during his custody time on several occasions, despite the fact that she was willing to give him extra time on request; (2) Matthew prevented her from speaking to the children when she was in Ohio for two weeks in 2020; and (3) Matthew "restricted her time" with the children for the first two months that she moved in with Hal in 2019. However, the district court did not find Mary's or Hal's testimony to be credible, and repeatedly indicated as much in its order. The district court was not obligated to believe all of Mary's assertions, regardless of whether Matthew addressed them in his own testimony. Ultimately, the court concluded—based on evidence presented by Matthew—that the factor favored Matthew because it was "readily apparent that Mary intend[ed] to use the relocation to weed Matthew out of the children's lives." Thus, the

district court did not err when it determined that this factor favored Matthew because its finding was supported by substantial evidence. *See Ellis*, 123 Nev. at 152, 161 P.3d at 244 ("[W]e leave witness credibility determinations to the district court and will not reweigh credibility on appeal.").

As to factor (d), which addresses the level of conflict between the parents, Mary contends that the district court erred by finding in favor of Matthew after "improperly focus[ing] on the irrelevant evidence of Mary's alleged infidelity during [her] and Matthew's relationship." However, the record reflects that Mary's own attorney questioned Matthew extensively about Mary's infidelity and attempted to tie Matthew's testimony about her infidelity to best interest factor (d). In asking these questions, Mary's attorney demonstrated that it *was* relevant to the argument she was trying to present, that there was a high level of conflict between the parties due to Matthew's anger about Mary's infidelity. In any event, because Mary's attorney introduced the evidence and attempted to tie it to best interest factor (d), we decline to consider this "invited error" on appeal. *See Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) ("The doctrine of 'invited error' embodies the principle that a party will not be heard to complain on appeal of errors which he himself induced or provoked the court or the opposite party to commit." (quoting 5 Am. Jur. 2d Appeal and Error § 713 (1962))).

Next, Mary argues that the district court "appears to have desired to 'stand up' for Matthew by assisting him during his testimony and by participating extensively with its own questions during Mary and Hal's cross examinations without allowing the undersigned to lodge legitimate objections to the Court's questioning as is required by NRS 50.145(2)."

However, Mary does not sufficiently explain how the district court "assist[ed]" Matthew during his testimony, nor does the record reflect that the district court ever precluded Mary's attorney from objecting to any of the court's questioning. Contrary to Mary's claim, the district court expressly advised Mary's attorney, "[y]ou're allowed to state whatever you want on the record." Further, Mary does not identify any improper evidence that came in during the court's questioning, and she failed to object to any of the evidence elicited by the court "prior to the submission of the cause." *Cf.* NRS 50.145(2) (providing "[t]he judge may interrogate witnesses" and "[t]he parties may object to questions so asked and to evidence thus adduced at any time prior to the submission of the cause").

Ultimately, the district court found that the level of conflict between Matthew and Mary was "low" but that the factor favored Matthew because Hal along with Mary created conflict between the two parents. Because the district court's finding was supported by substantial evidence in the record, the district court did not err when it decided this factor in Matthew's favor. *See Ellis*, 123 Nev. at 152, 161 P.3d at 244.

With respect to factor (e), the ability of the parents to cooperate to meet the needs of the child, Mary contends that the court's lack of findings shows "its improper focus on the parties themselves rather than on the minor children." The district court found that

> [t]his factor favors Dad. Mom testified that she tries to cooperate with Matthew. However, the Court believes that her definition of cooperating is for Dad to allow her to do everything her own way. Hal appears to domineer over Mary and he instigates conflict with Matthew. The Court believes that if Hal would not pressure Mary to co-parent in accordance with his directives, the parties would be able to cooperate much better.

Mary contends that the district court should have given greater weight to *her* testimony, specifically testimony that (1) Mary believed T.W. had "something wrong with him" and "Matthew simply swept it under the rug" for many years; (2) Mary scheduled the children's medical appointments because "Matthew won't do it and is not interested;" (3) Matthew "resisted" giving T.W. medication for ADHD; and (4) Mary "offered to" help Matthew participate in the children's medical treatments on the military base after she changed the children's pediatrician. She further argues that the district court should have weighed Matthew's testimony against him, specifically his admission that he "often refuses to speak to Mary because he feels like he is speaking to Hal;" and his admission that he kept T.W. out of school during one day of the parties' trial rather than ask Mary—who was also in trial—to help out. Here again, Mary is asking this court to reweigh the evidence and assess the credibility of her testimony over Matthew's testimony, and she has not demonstrated error by the district court. *See id.* at 152, 161 P.3d at 244.

As to factor (f), the mental and physical health of the parents, Mary concedes that the district court "properly considered Mary's mental health diagnoses of anxiety and depression at a young age" when it analyzed this factor. Nevertheless, Mary contends that the district court erred by ignoring her testimony that "she has been on medications for many years" such that her diagnoses "did not affect her ability to parent." However, the district court was not obligated to credit Mary's claim that her diagnoses did not affect her parenting. *Id.* Based on Matthew's testimony, there was substantial evidence to support the court's finding that Mary's "depression

and anxiety . . . has caused issues in the past where she withdraws from everyone, including the children."

The court also considered evidence of Hal's mental health when it pointed out that "on or about September 9, 2020, Hal threatened to commit suicide with a firearm during a domestic dispute with Mary." Mary contends that Hal's mental health was "irrelevant under the statute's plain language" because he is not a parent. But even if the court erred in addressing Hal's mental health under NRS 125C.0035(4)(f), Mary cannot show that the mental health of her children's stepfather (including a threat to use a firearm to take his own life) is irrelevant to the children's best interest. *Davis*, 131 Nev. at 451, 352 P.3d at 1143 (stating that in evaluating a child's best interest, "the list of [best interest] factors . . . is nonexhaustive" and "[o]ther factors, beyond those enumerated . . . may merit consideration"). The court did not err in finding this factor favored Matthew.

As to factor (g), the children's physical, developmental and emotional needs, Mary contends that the district court "disregarded almost all of the evidence presented in support thereof" when it found the factor to be neutral. The district court found that

> [t]his factor is neutral. [T.W.] is 8 years old and [T.W.2] is 5 years old. They are still young and require significant attention for their developmental needs. Matthew is more than capable of providing the level of care necessary for the boys. He already works extra with [T.W.] regarding his diagnosis of ADHD. He maintains frequent contact with [T.W.'s] teachers and other school staff for that purpose as well. Mary also testified that [T.W.] has been diagnosed with high-functioning autism as well. However, neither parent discussed it much during their testimony.

Mary contends that the court ignored evidence that (1) Matthew feeds the children unhealthy foods like pizza, when T.W. has childhood obesity; (2) T.W. has "poor grades;" (3) Matthew gives the boys access to "age-inappropriate" materials on their tablets and unrestricted internet access; (4) Mary and Hal were the ones who got T.W.2 diagnosed with hearing loss; and (5) Matthew failed to attend a doctor's appointment to address the hearing loss. But here again, Mary is asking this court to reweigh evidence and assess credibility, and she has not shown that the district court's findings on this factor were not based on substantial evidence. *See Ellis*, 123 Nev. at 152, 161 P.3d at 244.

Finally, as to factor (k), which addresses domestic violence in the home, Mary takes issue with the district court's finding in favor of Matthew. Here, the court found that

> [t]his factor favors Dad. According to the incident referenced above in September 2020, Hal and Mary had a domestic dispute in which physical violence and guns were involved. Indeed, Mary called 911 and told them that her husband is abusive toward her and punches her. Furthermore, Hal threatened to commit suicide. Given that Hal and Mary are married and Hal will be residing with the children if they relocate to Maryland, this is deeply disconcerting.

Mary contends that the district court "based nearly its entire decision" on this incident and takes issue with the court's credibility finding that "Hal and Mary both lied about it." However, "we leave witness credibility determinations to the district court and will not reweigh credibility on appeal." *Ellis*, 123 Nev. at 152, 161 P.3d at 244.

Mary also argues that the domestic violence factor should not weigh against her because "Matthew's own actions immediately following the alleged incident demonstrate that he did not believe the incident to be

significant enough to warrant keeping the children away from Mary or Hal." But again, this argument goes to the weight of the evidence and the credibility of the witnesses, which we decline to reweigh on appeal. *Id.*

Mary further contends that the district court erred by considering the September 2020 domestic violence incident at all, because in her view, NRS 125C.0035(4)(k)[3] only applies to domestic violence by parents or other persons seeking physical custody of minor children. Because Hal was not personally seeking custody of the children and merely lived with Mary, Mary contends that it is "irrelevant" whether Hal ever engaged in domestic violence toward Mary. However, in *Castle v. Simmons*, 120 Nev. 98, 105, 86 P.3d 1042, 1047 (2004), the Nevada Supreme Court explained that "courts must hear *all* information regarding domestic violence in order to determine the child's best interests." And in *Myers v. Haskins*, 138 Nev., Adv. Op. 51, 513 P.3d 527, 534 (2022), this court relied on NRS 125C.0035(4)(k) to conclude that evidence that the father's current wife "struck a child living with [the parties' child] in front of [the parties' child]" was relevant to whether there existed a change in circumstances warranting a modification of custody.

The district court was still required to consider all information implicating the children's best interest, and the existence of domestic violence in Mary's home is certainly relevant to the children's safety as a general matter, even if it did not fit within factor (k). *See Davis*, 131 Nev. at 451, 352 P.3d at 1143.

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[3]NRS 125C.0035(4)(k) requires the court to consider, "[w]hether either parent or any other person seeking physical custody has engaged in an act of domestic violence against the child, a parent of the child or any other person residing with the child."

Finally, to the extent Mary argues that the district court had to find evidence of domestic violence by "clear and convincing evidence" before weighing NRS 125C.0035(4)(k) against her, we have previously determined otherwise. As we recently concluded in *Calderon v. Stipp*,

> A plain reading of the statute, particularly subsection (k), does not require the court to utilize a clear and convincing standard when analyzing the best interest factors when not invoking the custody presumption in NRS 125C.0035(5).

No. 81888-COA, 2022 WL 1090290, 507 P.3d 1236, *3 (Order of Affirmance, April 11, 2022). Here, the district court did not apply any custody presumption against Mary. Just as in *Calderon*, Mary failed to provide any authority to support her position that allegations of domestic violence must be proven by clear and convincing evidence before a district court can evaluate such allegations under NRS 125C.0035(4)(k).

Because Mary has not demonstrated that if any individual factor had not been decided in Matthew's favor, the result would have been different, she has not shown reversible error. *See Wyeth v. Rowatt,* 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) ("To establish that an error is prejudicial, the movant must show that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached."). Regardless, because a review of the record reveals that the district court's findings with respect to the best interest factors are supported by substantial evidence, the district court did not abuse its discretion in awarding Matthew primary physical custody of both children. *Ellis*, 123 Nev. at 149, 161 P.3d at 241-42 (reviewing a district court order modifying custody for an abuse of discretion and explaining that the court's factual findings in a custody matter will not be

disturbed "if they are supported by substantial evidence, which is evidence that a reasonable person may accept as adequate to sustain a judgment").[4]

Therefore, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Michele Mercer, District Judge, Family Division
Leavitt Law Firm
Mills & Anderson Law Group
Eighth District Court Clerk

[4]To the extent Mary challenges the award of attorney fees and costs, her appeal is premature because the district court has not yet awarded any attorney fees and costs.