IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARK EDWARD SUMMIT,
Appellant,
vs.
MARGARET MARIE SUMMIT,
Respondent.

No. 84856-COA

ORDER AFFIRMING IN PART AND DISMISSING IN PART

Mark Edward Summit appeals from various district court post-divorce decree orders. Eighth Judicial District Court, Family Division, Clark County; Rhonda Kay Forsberg, Judge.

In the underlying proceeding, Mark and respondent Margaret Marie Summit were divorced by way of a divorce decree, which awarded Margaret primary physical custody of the parties' minor children, subject to Mark's parenting time, and the district court established Mark's child support obligation to Margaret in a separate order. Various disputes subsequently arose between the parties, including requests by Mark to modify the parties' custodial arrangement to primary physical custody in his favor or joint physical custody and to modify his child support obligation accordingly, which Margaret opposed. The district court's efforts to resolve these disputes eventually led to a series of appeals before this court. In the most recent prior appeal relevant to the issues presently before us, we concluded that the district court abused its discretion by denying Mark's motion to modify custody without first conducting an evidentiary hearing, and we therefore reversed and remanded the matter for further proceedings on the motion and any other issues that were pending in the case. *See*

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Summit v. Summit, No. 77804-COA, 2020 WL 362704, at *2-3, *4 n.4 (Nev. Ct. App. Jan. 21, 2020) (Order Affirming in Part, Reversing in Part and Remanding).[1]

Following the remand in Docket No. 77804-COA, the parties submitted pre-trial memoranda in which they addressed Mark's motion to modify custody and various other issues, including Margaret's request for child support arrears and modification of Mark's child support obligation. At the subsequent evidentiary hearing, the district court orally denied Mark's motion to modify custody, concluding that he failed to establish a substantial change in circumstances affecting the welfare of the children or that modifying the parties' custodial arrangement was in the children's best interest. However, the district court deferred resolution of the child support and arrears issues because Mark did not file an updated financial disclosure form (FDF) prior to the hearing, and the court directed Mark to file an updated FDF within three weeks, with copies of the following documents attached: (1) his personal and business tax returns for the preceding two years, (2) statements for his personal and business bank accounts covering the preceding 18 months, (3) proof of his expenses, and (4) an application that he submitted to obtain a business loan under the Paycheck Protection Program (PPP) of the Coronavirus Aid Relief and Economic Security Act. The district court then entered a written order memorializing those decisions.

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[1]Several different judges have presided over the underlying proceeding over the years. For clarity, Judge Forsberg was not assigned to the underlying proceeding until after Mark filed the appeal in Docket No. 77804-COA, and the case was reassigned again shortly before Mark filed the present appeal.

Shortly before the district court entered the foregoing order, Mark filed an updated FDF, his 2018 and 2019 tax returns, and sixteen months of statements for a bank account owned by his business. Margaret then filed a brief concerning the child support and arrears issues, among other things, observing that Mark did not submit all of the materials that the district court had directed him to provide. She further argued that he was attempting to conceal income and that the court should impute income to him based on testimony he provided at the evidentiary hearing concerning the salary he received from a former employer. Mark subsequently filed another appeal, which need not be discussed in detail here, aside from noting that the underlying proceeding went inactive for approximately one year until this court dismissed the appeal in *Summit v. Summit*, No. 82116-COA, 2021 WL 4472763, at *1 (Nev. Ct. App. Sep. 29, 2021) (Order Dismissing Appeal), for lack of jurisdiction. Following the dismissal of the appeal in Docket No. 82116-COA, the district court entered an order directing Mark to file an updated FDF, a copy of his PPP loan application, and profit and loss statements for his business. Mark then timely filed an updated FDF and included copies of his PPP loan application and 2020 tax return, without any of the schedules that were originally attached to the document, as well as a letter from the certified public accounting firm that prepared the return, which briefly mentioned the operating losses reported in the tax return and indicated that a tax return and profit and loss statement for the 2021 tax year had not yet been prepared for Mark.

Following a hearing, the district court entered an order granting Margaret's motion to modify child support and for child support arrears, which increased Mark's monthly child support obligations from

$200 to $1,887.98, effective from the date of the evidentiary hearing discussed above, and determined that Mark owed Margaret $33,966 in child support arrears based on the modified support obligation and the period that elapsed since its effective date.[2] In doing so, the district court essentially found that Mark failed to submit most of the financial documents that he had been directed to provide, aside from his most recent FDF, 2020 tax return, and PPP loan application, and was therefore attempting to delay the proceedings and prevent the court from correctly determining his child support obligation. But because the district court found that Mark's 2020 tax return was "wholly incomplete and inadequate" due to the missing financial documents, the district court focused on representations that Mark made in his FDF and PPP loan application to calculate his gross monthly income and corresponding child support obligations and arrears.

In the foregoing order, the district court also briefly addressed attorney fees and costs, which Margaret had requested. In so doing, the district court partially granted Margaret's request for attorney fees and costs, but instructed her to file a memorandum addressing the remainder of her request, which the court indicated it would consider at a later date. This appeal followed.

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[2]Specifically, in determining that Mark owed $33,966 in arrears, the district court rounded Mark's modified child support amount to $1,887 and multiplied the figure by the 18 months of payments that became due between the modification's effective date and the date that the court resolved the child support and arrears issues. In doing so, the district court did not address whether Mark was current or in arrears for his required $200 in monthly payments under the prior support order when it made its determination as to the total arrearage.

On appeal, Mark primarily challenges the district court's order denying his motion to modify custody. This court reviews a child custody determination for an abuse of discretion. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007). In evaluating motions to modify custody, 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 v. Romano*, 138 Nev.1, 3, 501 P.3d 980, 982 (2022) (internal quotation marks omitted). We will not disturb the district court's factual findings when "they are supported by substantial evidence, which is evidence that a reasonable person may accept as adequate to sustain a judgment." *Ellis*, 123 Nev. at 149, 161 P.3d at 242 (internal footnote omitted). However, this court gives no deference to findings so conclusory that they may mask legal error. *Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142-43 (2015).

With respect to custody, Mark essentially argues that he presented evidence during the underlying proceeding sufficient to establish that a modification of the parties' custodial arrangement was warranted, but the district court nevertheless ruled against him because it ignored or failed to properly weigh the evidence that was before the court. In making this argument, Mark fails to recognize that, although he submitted extensive materials during the underlying proceeding as attachments to his motion practice, many of those materials were not admitted into evidence at the evidentiary hearing, meaning that the district court could not properly consider them in resolving his motion to modify custody. *See*

EDCR 5.205(g)[3] (providing that exhibits attached to the parties' motion practice "may be deemed offers of proof but shall not be considered substantive evidence until admitted"); *Ellis*, 123 Nev. at 149, 161 P.3d at 242 (providing that the district court's factual findings must be supported by substantial evidence); *see also Cramer v. State, Dep't of Motor Vehicles*, 126 Nev. 388, 395, 240 P.3d 8, 12 (2010) (recognizing that, in resolving questions of admissibility, the district court serves a "gatekeeping" function).

Because Mark does not offer any specific argument concerning the district court's reasoning for admitting or excluding certain materials or testimony from evidence, he has waived any challenge to the district court's evidentiary determinations. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that arguments not raised on appeal are deemed waived). And while we recognize that Mark is dissatisfied with how the district court weighed the materials and testimony that were admitted into evidence, this court does not reweigh the evidence or witness credibility on appeal. *See Quintero v. McDonald*, 116 Nev. 1181, 1183, 14 P.3d 522, 523 (2000) (refusing to reweigh the evidence on appeal); *see also Ellis*, 123 Nev. at 152, 161 P.3d at 244 (refusing to reweigh credibility determinations on appeal).

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[3]Following entry of the order denying Mark's motion to modify custody, EDCR 5.205(g) was amended and renumbered, effective June 10, 2022. *See In re Amendment of Part I and V of the Rules of Practice for the Eighth Judicial Dist. Court*, ADKT No. 0590 (Order Amending Part I and V of the Rules of Practice for the Eighth Judicial District Court, April 11, 2022). For clarity, we cite to the pre-2022 version of EDCR 5.205(g), which is the version that was in effect when the district court entered the challenged order.

Instead, as discussed above, we deferentially review district court orders resolving motions to modify custody, focusing on whether the district court "reached its conclusions for the appropriate reasons" and whether its factual findings were "supported by substantial evidence." *Ellis*, 123 Nev. at 149, 161 P.3d at 241-42. Here, the transcript from the evidentiary hearing and the district court's detailed 25-page written order demonstrate that the district court gave due consideration to the issues and evidence that were properly before it and denied Mark's motion to modify custody for appropriate reasons. *See id.* In particular, the district court determined that there had not been a substantial change in circumstances affecting the welfare of the children and that modification was not in the children's best interest. *See Romano*, 138 Nev. at 3, 501 P.3d at 982. Moreover, the court's conclusion that modification was not in the children's best interest was based on an evaluation of each of the best interest factors set forth in NRS 125C.0035(4), including a thorough examination of whether Margaret committed domestic violence against Mark, which the district court found that Mark failed to establish. *See Lewis v. Lewis*, 132 Nev. 453, 459-60, 373 P.3d 878, 882 (2016) (recognizing that the district court must consider the best interest factors in making custody determinations). And with respect to each of the foregoing, the challenged order includes specific factual findings, which are supported by substantial evidence, and an adequate explanation concerning the court's decision that, as a whole, the best interest factors weighed against modifying the parties' custodial arrangement. *See Davis*, 131 Nev. at 452, 352 P.3d at 1143 (explaining that specific findings—particularly with respect to the best interest factors—and an adequate explanation are required for custody

determinations since, "[w]ithout them, this court cannot say with assurance that the custody determination was made for appropriate legal reasons").

While Mark attempts to overcome the foregoing by asserting that the district court's decision in this respect demonstrates that the court was biased against him, he has not demonstrated a basis for relief because he has not established that the decision was based on knowledge acquired outside of the underlying proceeding, and the decision does not otherwise reflect "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Canarelli v. Eighth Judicial Dist. Court*, 138 Nev. 104, 107, 506 P.3d 334, 337 (2022) (internal quotation marks omitted) (providing that, unless an alleged bias has its origins in an extrajudicial source, disqualification is unwarranted absent a showing that the judge formed an opinion based on facts introduced during official judicial proceedings, which reflect deep-seated favoritism or antagonism that would render fair judgment impossible); *In re Petition to Recall Dunleavy*, 104 Nev. 784, 789, 769 P.2d 1271, 1275 (1988) (providing that rulings made during official judicial proceedings generally "do not establish legally cognizable grounds for disqualification"); *see also Rivero v. Rivero*, 125 Nev. 410, 439, 216 P.3d 213, 233 (2009) (stating that the burden is on the party asserting bias to establish sufficient grounds for disqualification), *overruled on other grounds by Romano*, 138 Nev. at 5, 501 P.3d at 984. Thus, for the foregoing reasons, we conclude that Mark has failed to demonstrate that the district court abused its discretion by denying his motion to modify custody, and we therefore affirm that decision. *See Ellis*, 123 Nev. at 149, 161 P.3d at 241.

Mark next challenges the district court's order granting Margaret's motion to modify his child support obligation and for child support arrears. This court reviews child support orders for an abuse of

discretion. *Romano*, 138 Nev. at 7, 501 P.3d at 985. As with custody orders, this court will not disturb the factual findings underlying a child support order if they are supported by substantial evidence, which "is evidence that a reasonable person may accept as adequate to sustain a judgment." *Rivero*, 125 Nev. at 428, 431, 216 P.3d at 226, 228 (internal quotation marks omitted). Nevertheless, this court will not defer to conclusory findings that may mask legal error. *Davis*, 131 Nev. at 450, 352 P.3d at 1142.

In challenging the district court's resolution of the child support and arrears issues, Mark essentially argues that the district court improperly relied on his PPP loan application when it calculated his gross monthly income even though he submitted the other financial documents that the court directed him to produce, and notwithstanding that the loan application was outdated because his business purportedly shut down for an unspecified period during the COVID-19 pandemic.[4] To begin, insofar as Mark asserts that he submitted all of the financial documents that the

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[4]As discussed above, when the district court determined that Mark owed $33,966 in arrears, it did not address whether he was current on his prior $200 per month child support obligation. We do not address this issue however, because Mark has not presented any argument regarding whether he was current on this obligation, or asserted that the district court failed to account for such payments in its arrearages calculations. *See Powell*, 127 Nev. at 161 n.3, 252 P.3d at 672 n.3. Nevertheless, if the district court incorrectly failed to credit Mark for any payments that he made during the relevant period in calculating his arrearages, nothing precludes him from seeking relief before the district court. *See* NRCP 60(a) (providing that "[t]he court may 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"); *see also Carroll v. Carroll*, No. 73534-COA & 75425-COA, 2019 WL 2027208 at *4 n.5 (Nev. Ct. App. May 7, 2019) (Amended Order of Affirmance) (treating similar issues with the district court's calculation of a judgment as clerical mistakes and recognizing that the district court could correct them at any time pursuant to NRCP 60(a)).

district court directed him to produce, his assertion is belied by the record. Indeed, although the district court gave Mark two opportunities to file the relevant financial documents, he only partially complied with the district court's directive to provide 18 months of statements for his business's bank account, he did not provide any bank statements for his personal bank account(s), and he did not provide proof of his business's expenses. Moreover, although Mark initially submitted his 2018 and 2019 tax returns with the schedules that were originally attached to those documents, including Schedule C which addressed profits or losses from his business, when he later updated the submission by filing his 2020 tax return, which was the most recent tax return that had been prepared for Mark at the time the district court resolved the child support and arrears issues, he failed to provide any of the schedules that were originally attached to that document.

Under these circumstances, we conclude that, insofar as the district court found that Mark failed to submit *all* of the financial documents that the court directed him to provide, its finding was supported by substantial evidence. *Rivero*, 125 Nev. at 428, 431, 216 P.3d at 226, 228. And by extension, substantial evidence supported the district court's finding that Mark was intentionally attempting to delay the proceedings and prevent the court from correctly determining his child support obligation by failing to provide the required documentation. *Id.*

We recognize that, when the district court resolved the child support and arrears issues, it overlooked the financial documents that Mark filed prior to the appeal in Docket No. 82116-COA, including his 2018 and 2019 tax returns, as well as the 16 months of statements for his business's bank account. As a result, we are confronted with the question of whether Mark was prejudiced by this oversight. *Cf.* NRCP 61 ("At every stage of the

proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.").

The resolution of that question turns on whether Mark can demonstrate that the documents that the district court failed to consider may have warranted a different result on the child support and arrears issues than the one that the court reached. *Cf. id.* As discussed above, in resolving the child support and arrears issues, the district court focused on Mark's 2020 tax return wherein he reported receiving no taxable income during the 2020 tax year and his PPP loan application wherein he certified that his business received $133,000 in net revenue during the 12 months preceding January 31, 2020. In particular, the court essentially concluded that the 2020 tax return was insufficient to support Mark's assertion that he was living on modest income from his rental properties[5] due to his failure to submit the other financial documents that the court had directed him to provide, and the court further determined that the $133,000 in net revenue that Mark reported in the PPP loan application represented income to Mark that needed to be included in his gross monthly income for purposes of determining his child support and arrears obligations.

Although Mark seeks reversal of this decision on the basis that the district court reached it without considering several financial documents that he filed, he offers no argument or explanation as to how those documents show that he received no taxable income during the 2020 tax year, that he lived on income from his rental properties, or that the $133,000 in net revenue that he reported in the PPP loan application did

[5]Mark testified at trial that he received $1,200 per month from the rental properties, but indicated in his most recent financial disclosure that he only received $1,050 per month from the properties.

not represent income to him. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (declining to consider issues that are not supported by cogent argument). To the contrary, Mark himself describes the $133,000 figure as a "projection of [his] income in 2019" in his informal brief,[6] although he proceeds to argue that the projection was outdated when the court resolved the child support and arrears issues in 2022 because his business purportedly shut down for an unspecified period during the COVID-19 pandemic, such that his financial circumstances had changed. However, once again, Mark offers no argument or explanation as to how the documents that the district court failed to consider show that his business shut down during the COVID-19 pandemic or otherwise demonstrate that his financial circumstances changed after he submitted his PPP loan application. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38. Moreover, Mark did not provide this court with a copy of the transcripts from the hearing where the district court considered the child support and arrears issues, meaning that this court cannot discern what arguments Mark raised with respect to any of the documents that the district court failed to consider. *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 record support the district court's decision).

[6]In presenting his argument this way, Mark fails to raise any argument that net revenue cannot properly be equated with income. Indeed, by describing this net revenue figure as a "projection of [his] income," he effectively concedes this point. *See Powell*, 127 Nev. at 161 n.3, 252 P.3d at 672 n.3.

Because this court generally declines to consider issues unsupported by cogent argument and presumes that documents missing from the record support the district court's decision, *see Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38; *see also Cuzze*, 123 Nev. at 603, 172 P.3d at 135, we conclude that Mark has failed to demonstrate that he was prejudiced by the district court's failure to consider all of the financial documents that he submitted in connection with the child support and arrears issues. *Cf.* NRCP 61. Thus, in light of the foregoing and since Mark does not challenge the district court's resolution of the child support and arrears issues on any other bases, he also has not demonstrated that the district court abused its discretion by granting Margaret's motion to modify his child support obligation and for arrears, *see Romano*, 138 Nev. at 7, 501 P.3d at 985, and we therefore affirm that decision.

Mark's final challenge on appeal concerns the portion of the order granting Margaret's motion to modify Mark's child support obligation and for arrears that addressed her request for attorney fees and costs. However, our review of the documents before us demonstrates that this court lacks jurisdiction over this portion of Mark's appeal. This court has jurisdiction to consider an appeal only when the appeal is authorized by statute or court rule. *Brown v. MHC Stagecoach, LLC*, 129 Nev. 343, 345, 301 P.3d 850, 851 (2013). Although NRAP 3A(b)(8) authorizes an appeal from a post-judgment order awarding attorney fees and costs, *see Winston Prods. Co., Inc. v. Deboer*, 122 Nev. 517, 525, 134 P.3d 726, 731 (2006) (recognizing that a post-judgment order awarding attorney fees and costs is substantively appealable as a special order after final judgment), the portion of the challenged order addressing Margaret's request for attorney fees and costs was not final, *see Rennels v. Rennels*, 127 Nev. 564, 569, 257

P.3d 396, 399 (2011) (providing that a final order "disposes of the issues presented" leaving "nothing for the future consideration of the court" (internal quotation marks omitted)). In particular, although the challenged order granted a portion of Margaret's request for attorney fees and costs, it also contemplated further proceedings with respect to the remainder of Margaret's request. Because no statute or court rule authorizes an appeal from such a decision, this portion of Mark's appeal is premature and we therefore lack jurisdiction to consider it. Accordingly, we dismiss this portion of Mark's appeal.

In light of the foregoing, we affirm the district court's orders denying Mark's motion to modify custody and granting Margaret's motion to modify Mark's child support obligation and for arrears, and we dismiss Mark's appeal from the portion of the child support and arrears order that partially addressed Margaret's request for attorney fees and costs.

It is so ORDERED.[7]

_____, C.J.
Gibbons

_____, J.
Westbrook

_____, Sr.J.
Silver

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

The Honorable Abbi Silver, Senior Justice, participated in the decision of this matter under a general order of assignment.

cc: Hon. Rhonda Kay Forsberg, District Judge, Family Division
Mark Edward Summit
Roberts Stoffel Family Law Group
Eighth District Court Clerk