

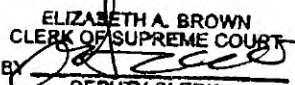
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHRISTOPHER FISHER,  
Appellant,  
vs.  
ELIA COBIAN,  
Respondent.

No. 85203-COA

**FILED**

AUG 16 2023

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE AND REMANDING TO CORRECT  
FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER*

Christopher Fisher appeals from a district court's findings of fact, conclusions of law, and order establishing child custody. Fourth Judicial District Court, Elko County; Mason E. Simons, Judge.

Christopher and Elia Cobian were never married but were involved in a romantic relationship in 2018.<sup>1</sup> At or near this time, Christopher pleaded guilty to driving under the influence of alcohol (DUI). While the two were living together, Elia became pregnant. The parties separated during Elia's pregnancy, and Christopher moved to Utah. After their initial separation, the parties proceeded to have an on-again-off-again relationship. Subsequently, the parties' minor child, L.F., was born in May 2019. Christopher and Elia's relationship ended when they had a physical altercation in April 2020. Christopher contends that Elia physically assaulted him, while Elia contends that Christopher assaulted her. The incident did not result in any arrests or charges against either party. However, four days later, Elia sought a temporary protection order (TPO)

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<sup>1</sup>We recount the facts only as necessary for our disposition.

from the Elko Justice Court, requesting sole legal and physical custody of L.F., which was granted.

Christopher filed a complaint in district court in May 2020, seeking sole legal custody of L.F. for himself, but primary physical custody of L.F. for Elia. Elia filed an answer and counterclaim to the complaint seeking sole legal and primary physical custody of L.F. Christopher then filed an emergency motion for sole legal and physical custody of L.F., or in the alternative temporary joint legal and physical custody. Elia filed an opposition and countermotion for sole legal and primary physical custody. During a hearing in December 2020, a temporary parenting time schedule was set in which Christopher had parenting time on Sunday at 2:00 p.m. through Tuesday at 2:00 p.m. Although the parties attempted to reach an agreement in mediation, they were unable to as Elia continued to seek primary physical custody of L.F. while Christopher sought joint physical custody.

The district court set a date for an evidentiary hearing to determine custody of L.F. The court also ordered a custody evaluation, directing the evaluator to prepare a written recommendation regarding custody and to examine the parents and the minor child. The report was prepared and filed with the district court in December 2021, with the evaluator recommending that the parties exercise joint legal and joint physical custody. The matter proceeded to a two-day evidentiary hearing in February 2022.

At the evidentiary hearing, the district court considered testimony regarding Christopher's DUI conviction from December 2018, prior to the birth of the minor child. Elia testified as to Christopher's ongoing alcohol abuse, the alcohol use of Christopher's partner, Christopher's

refusal to provide Elia with his address, Christopher's estranged relationships with his children from a previous relationship, issues related to L.F.'s health, and Christopher's failure to inform Elia when he was travelling with L.F. out of town. The parties also testified as to the TPO issued in favor of Elia. At the close of evidence, the district court issued its findings.

In considering the enumerated best interest of the child factors under NRS 125C.0035(4), the district court found the following factors favored Elia: "[w]hich parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent;" "[t]he ability of the parents to cooperate to meet the needs of the child;" "[t]he mental and physical health of the parents;" "[t]he physical, developmental and emotional needs of the child;" "[t]he nature of the relationship of the child with each parent;" "[t]he ability of the child to maintain a relationship with any sibling;" "[a]ny history of parental abuse or neglect of the child or a sibling of the child;" and "[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." See NRS 125C.0035(4)(c), (e), (f), (g), (h), (i), (j), (k). As a result, the court awarded Elia primary physical custody and awarded Christopher parenting time Sunday at 7:00 a.m. through Tuesday at 5:00 p.m., every other week.

Subsequently, the district court issued its findings of fact, conclusions of law, and order awarding Elia primary physical custody.<sup>2</sup> After retaining new counsel, Christopher filed a motion for a new trial

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<sup>2</sup>We note that the district court awarded the parties joint legal custody, and this is not challenged on appeal.

under NRCP 59, arguing that his trial counsel failed to present any evidence on his behalf. The district court denied his motion and this appeal followed.

On appeal, Christopher argues that the district court (1) abused its discretion in awarding Elia primary physical custody, (2) abused its discretion in considering events and factors predating the birth of L.F., and (3) committed judicial error and violated Christopher's due process rights by permitting introduction of allegations that were not properly noticed in the pleadings. Conversely, Elia contends that Christopher's argument fails as substantial evidence supported the district court's decision to award her primary physical custody, and that the district court properly considered all the best interest factors. Elia also argues that the district court did not violate Christopher's due process rights because issues concerning his substance abuse and relationships with his other children were raised in multiple pleadings prior to the evidentiary hearing.<sup>3</sup>

*The district court did not abuse its discretion in awarding Elia primary physical custody of L.F.*

This court reviews a child custody decision for an abuse of discretion. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007). In reviewing child custody determinations, this court will affirm such determinations if they are supported by substantial evidence. *Id.* Substantial evidence is that which a reasonable person may accept as adequate to sustain a judgment. *Id.* When making a custody determination, the sole consideration is the best interest of the child. NRS

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<sup>3</sup>To the extent Christopher contends that the district court committed judicial error in considering allegations which were not properly noticed, we note that Christopher failed to argue this alleged error below. See *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be consider on appeal."). Thus, we decline to address this issue.



125C.0035(1); *Davis v. Ewalefo*, 131 Nev. 445, 451, 352 P.3d 1139, 1143 (2015). Further, we presume the district court properly exercised its discretion in determining the child's best interest. *Flynn v. Flynn*, 120 Nev. 436, 440, 92 P.3d 1224, 1226-27 (2004).

NRS 125C.001 states that it is this state's policy of supporting "frequent associations and a continuing relationship" between parents and child after the parents' relationship has ended. Generally, as noted in NRS 125C.0015, parents share joint legal and physical custody unless otherwise determined by the court. "When a court is making a determination regarding the physical custody of a child, there is a preference that joint custody would be in the best interest of a minor child" under certain circumstances. NRS 125C.0025(1). However, NRS 125C.003(1) provides that "[a] court may award primary physical custody to a parent if the court determines that joint physical custody is not in the best interest of a child." Further, "[a]n award of joint physical custody is presumed not to be in the best interest of the child if . . . [t]he court determines by substantial evidence that a parent is unable to adequately care for a minor child for at least 146 days of the year." NRS 125C.003(1)(a).

Here, Christopher argues that the district court lacked the authority to even consider granting Elia primary physical custody, until it first considered the preference to award joint physical custody pursuant to NRS 125C.001, NRS 125C.0015, NRS 125C.0025, NRS 125C.003 before analyzing the best interest factors under NRS 125C.0035(4). He argues that if the district court had properly considered these statutes, the court would have awarded joint physical custody of L.F. to Christopher and Elia. However, as noted above, the sole consideration of the court when making a custody determination is the best interest of the child. *Ellis*, 123 Nev. at

149, 161 P.3d at 242.<sup>4</sup> Although the court did not explicitly cite to NRS 125C.001, NRS 125C.0015, NRS 125C.0025, NRS 125C.003, the court recognized the preference in granting joint custody but specifically found that “joint custody was not appropriate” when viewing the totality of the circumstances based on the best interest factors. The court evaluated each best interest factor under NRS 125C.0035(4) and set forth specific findings. *See Lewis v. Lewis*, 132 Nev. 453, 459-60, 373 P.3d 878, 882 (2016) (requiring that district courts set forth specific findings as to all of the statutory best-interest factors). The district court found that eight of the twelve best interest factors weighed in favor of Elia and that the remaining factors were either neutral or inapplicable.

The testimony at the evidentiary hearing supported the district court’s findings. Specifically, the parties testified at length about Christopher’s alcohol use, Christopher’s partner’s alcohol use, Christopher’s refusal to provide Elia with his residential address, Christopher’s estranged

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<sup>4</sup>To the extent Christopher contends that the district court abused its discretion or committed error in considering events and circumstances prior to the birth of L.F., we note that Christopher did not object to the discussion of his past at the evidentiary hearing, and thus waiver applies. *See Old Aztec Mine*, 97 Nev. at 52, 623 P.2d at 983. Nevertheless, we are not persuaded that the district court abused its discretion. This court has previously determined that the district court may consider a parent’s past conduct when determining the best interest of the child. *See, e.g., McKee-Blackham v. Maley*, No. 70555, 2018 WL 2059532, at \*2 (Nev. Ct. App. Apr. 25, 2018) (Order of Affirmance) (noting that the district court “may consider evidence relevant to a parent’s conduct, including misconduct, because a parent’s conduct is relevant to what custody arrangement is in the child’s best interest”). Moreover, independent of the references to Christopher’s past, the district court made numerous findings as to the current custodial circumstances to support awarding Elia primary physical custody. *See* NRS 125C.0035(4)(a-l). Thus, we conclude any error was harmless.

relationships with his other daughters, problems related to L.F.'s health when she would return from Christopher's parenting time, and Christopher's multiple failures to inform Elia when he was travelling out of town with L.F. Christopher also acknowledged there was an incident with his daughter from a previous relationship, in which the Utah Division of Child and Family Services substantiated an abuse and neglect charge against him.

As noted above, this court will not reweigh credibility determinations or other evidence on appeal. *See Ellis*, 123 Nev. at 152, 161 P.3d at 244 (refusing to reweigh credibility determinations on appeal); *see also Quintero v. McDonald*, 116 Nev. 1181, 1183, 14 P.3d 522, 523 (2000) (refusing to reweigh evidence on appeal). Furthermore, our review of the record demonstrates that substantial evidence supports the district court's findings. Accordingly, we conclude that the court did not abuse its discretion in awarding Elia primary physical custody.<sup>5</sup> However, we note that the court's findings of fact, conclusions of law, and order contains a clerical error at page 12 which erroneously refers to awarding Christopher

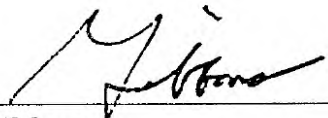
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<sup>5</sup>Although Christopher asserts that this court should apply the substantial change in circumstances requirement to initial custody proceedings, this claim is belied by Nevada Supreme Court jurisprudence, which only requires a substantial change in circumstances when modifying custody and not upon an initial determination. *See Romano v. Romano*, 138 Nev. 1, 9, 501 P.3d 980, 986 (2022) ("[A] court may modify a joint or primary physical custody arrangement only if (1) there has been a substantial change in circumstances affecting the welfare of the child and (2) the modification serves the best interest of the child."). Thus, we see no basis for reversal as to this issue.

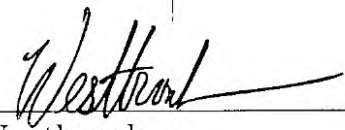
primary physical custody and must be corrected on remand. See NRCP 60(a).<sup>6</sup>

Accordingly, we

ORDER the judgment of the district court AFFIRMED but REMAND for the limited purpose of correcting the clerical error.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Bulla

  
\_\_\_\_\_, J.  
Westbrook

cc: Hon. Mason E. Simons, District Judge  
Roberts Stoffel Family Law Group  
Pecos Law Group  
Walsh & Friedman, Ltd.  
Elko County Clerk

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<sup>6</sup>Insofar as the parties have raised arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief or need not be reached given the disposition of this appeal.