

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

EDGAR HERNANDEZ-BASILIO,
Appellant,
vs.
MARIA MARQUEZ-HERNANDEZ,
Respondent.

No. 84487-COA

FILED

OCT 13 2023

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

ORDER OF AFFIRMANCE

Edgar Hernandez-Basilio appeals from a decree of divorce. Eighth Judicial District Court, Family Division, Clark County; Rebecca Burton, Judge.

Edgar and respondent Maria Marquez-Hernandez were married in 2014 and have two minor children together. In September 2020, the parties were involved in an altercation. During this incident, Edgar, who was intoxicated, accused Maria of having sexual intercourse with another man, called her derogatory names, and hit her arm while she was holding both children. Maria called the police and Edgar was subsequently arrested for battery related to domestic violence, although formal charges were never filed. Maria obtained a temporary protection order (TPO) the following day, and it was extended multiple times.

Shortly thereafter, Edgar initiated divorce proceedings seeking joint physical custody. In January 2021, the district court entered a temporary order, following a hearing, awarding Edgar temporary parenting time from Fridays at 3:00 p.m. to Mondays at 8:00 a.m. and ordering him to

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pay \$415 per month in child support, based on his unemployment income at that time.

Over the course of four dates spanning from October 2021 through February 2022, the district court held a trial on the divorce and child custody claims. Following the trial, the district court entered a 58-page divorce decree. Pursuant to the terms of the decree, in relevant part, Maria was awarded primary physical custody of the parties' minor children, subject to Edgar's parenting time from 3:00 p.m. on Fridays to 8:00 a.m. on Mondays for three weekends out of the month. In reaching its physical custody determination, the court applied the domestic violence presumption against joint physical custody in NRS 125C.003(1)(c) after finding that Maria proved, by clear and convincing evidence, that Edgar committed multiple acts of domestic violence against her by pushing, hitting, and slapping her, grabbing her by the neck, and engaging in sexual assault on at least one occasion. The district court also awarded Maria the child tax credit and found Edgar was dishonest about his income relating to the prior \$415 per month pre-decree temporary child support order, resulting in a lower payment than was required by law. Consequently, the court did not order Maria to reimburse Edgar for half of the COVID-19 stimulus money she received. Finally, the court ordered Edgar to pay \$1,118 per month in child support. Edgar now appeals.

On appeal, Edgar argues that the district court abused its discretion by (1) awarding Maria primary physical custody, (2) failing to offset Maria's income when it determined the pre-decree temporary child support award, (3) assigning an arbitrarily low income to Maria, (4)

awarding Maria the child tax credit, and (4) failing to award him half of the COVID-19 stimulus payments. He also alleges that the district court was biased against him. We address each contention in turn.

First, with regard to Edgar's challenge to the district court's award of primary physical custody to Maria, he contends the court's order was not supported by substantial evidence, that joint physical custody was proper, and that Maria failed to prove her allegations of domestic violence.

Child custody decisions are reviewed for an abuse of discretion. *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). A district court abuses its discretion when its decision is clearly erroneous. *See Bautista v. Picone*, 134 Nev. 334, 336, 419 P.3d 157, 159 (2018). Additionally, this court "will not set aside the district court's factual findings if they are supported by substantial evidence, which is evidence that a reasonable person may accept as adequate to sustain a judgment." *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007). In determining child custody, "the sole consideration of the court is the best interest of the child." NRS 125C.0035(1). And when determining the best interest of the child, a court is required to consider and make findings regarding the non-exhaustive list of best interest factors set forth in NRS 125C.0035(4).

Here, the district court considered the required best interest factors and made findings on each of these factors before ultimately concluding that it was in the children's best interest for Maria to have primary physical custody. Notably, the court found that two of the best

interest factors “favor[ed] both parties,” two “favor[ed]” Maria, four “weigh[ed] against Edgar,” three did not apply, and one was neutral.

The district court also correctly applied the NRS 125C.003(1)(c) domestic violence presumption against Edgar receiving joint physical custody. While Edgar alleges that Maria failed to prove the domestic violence allegations, the court expressly found Maria’s testimony regarding these allegations credible, *see Castle v. Simmons*, 120 Nev. 98, 103, 86 P.3d 1042, 1046 (2004) (stating that appellate courts do not reweigh the credibility of witnesses on appeal), and concluded that she demonstrated that Edgar committed acts of domestic violence against her on multiple occasions, sometimes in front of the children, by clear and convincing evidence. Further, the court concluded that Edgar failed to rebut this presumption.

Here, because Edgar failed to provide this court with transcripts from the divorce proceedings,¹ we presume these missing portions of the record support the district court’s determination and therefore we must conclude substantial evidence supports the district court’s findings with regard to both the best interest factors and the domestic violence presumption. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (holding that appellant is

¹Although Edgar requested the transcripts in this case, he has failed to file them with this court. *See* NRAP 9(b)(1)(B) (requiring pro se litigants, who have not been granted in forma pauperis status and have requested transcripts, to file a copy of their completed transcript with the clerk of the court).

responsible for making an adequate record on appeal and when “appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court’s decision”). Under these circumstances, we can discern no abuse of discretion in the district court’s decision to award Maria primary physical custody of the parties’ two minor children. *See Rivero v. Rivero*, 125 Nev. 410, 430, 216 P.3d 213, 227 (2009), *overruled on other grounds by Romano v. Romano*, 138 Nev. 1, 5, 501 P.3d 980, 983 (2022), *abrogated in part by Killebrew, Tr. of Killebrew Revocable Tr., 5TH ADM 1978 v. State ex rel. Donohue*, 139 Nev., Adv. Op. 43, ___, ___ P.3d ___ (2023).

Next, Edgar challenges the propriety of the pre-decree temporary child support payment amount of \$415 per month under the district court’s January 2021 order. He argues that he overpaid child support because the court erroneously failed to offset the amount by 22 percent of Maria’s income since the parties purportedly shared joint physical custody at that time. Maria, by contrast, asserts that the parties did not share joint physical custody and, therefore, the district court was not required to offset the award.

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.

Even ignoring the district court's finding that Edgar was dishonest about the amount of income he was receiving at the time the pre-decree temporary support amount was set, there is nothing in the record before us indicating that Edgar ever presented this argument regarding the temporary support amount below. Therefore, we conclude that this argument is waived.² See *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (explaining that issues not argued below are "deemed to have been waived and will not be considered on appeal").

Edgar also raises a cursory challenge to the district court's assignment of income to Maria. He alleges the \$3,000 per month income attributed to Maria was arbitrarily low, which financially burdened him while benefitting Maria. However, he does not tie this assertion to any of the issues he has raised on appeal, or otherwise explain which—if any—aspects of the court's decision in the underlying case he believes should be reversed on this basis. Under these circumstances, we conclude that Edgar has not presented any cogent argument on this point, and thus, we need not consider it. See *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that the appellate courts need not consider claims unsupported by cogent argument).

²To the extent Edgar may have orally raised this issue before the district court as part of the trial of the underlying case, as noted above, he failed to provide a copy of the trial transcript, and thus we presume this missing document supports the district court's determination. See *Cuzze*, 123 Nev. at 603, 172 P.3d at 135.

Next, Edgar challenges the district court's order allocating the child tax credit to Maria, arguing it should have been shared equally. A district court's order allocating the child tax credit is reviewed for an abuse of discretion. *Sertic v. Sertic*, 111 Nev. 1192, 1197, 901 P.2d 148, 151 (1995) (concluding that the district court "should have broad discretion" over allocating the child tax credit). Under 26 U.S.C. § 152(e)(4), when dependent children's parents are divorced or separated, the custodial parent—which is defined as "the parent having custody for the greater portion of the calendar year"—receives the tax credit, subject to certain exceptions. *Sertic*, 111 Nev. at 1197, 901 P.2d at 151. As set forth above, the district court properly awarded Maria primary physical custody of the children, and on appeal, Edgar does not dispute that Maria is the children's custodial parent. Moreover, he presents no cogent argument explaining why, under these circumstances, he should nonetheless be awarded the tax credit. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38. Accordingly, the district court properly awarded Maria the child tax credit, and Edgar has failed to demonstrate that such an award was an abuse of discretion. *See Sertic*, 111 Nev. at 1197, 901 P.2d at 151.

We next turn to Edgar's claim that the district court should have awarded him half of the \$7,000 in COVID-19 pandemic stimulus money that Maria received. A court must make an equal disposition of community property but may make an unequal disposition "as it deems just if the court finds a compelling reason to do so and sets forth in writing the reasons for making the unequal disposition." NRS 125.150(1)(b). This court

reviews a district court's disposition of community property for an abuse of discretion. *Kogod v. Cioffi-Kogod*, 135 Nev. 64, 75, 439 P.3d 397, 406 (2019).

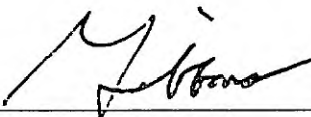
Here, the district court found that the stimulus money was community property and, as such, Edgar was entitled to half of these funds. However, the court also found that the evidence presented at trial showed Edgar was initially dishonest about his income, resulting in the \$415 monthly temporary child support payment, when the payment should have been \$700 per month based on his unreported additional income. Accordingly, the district court determined that Edgar underpaid child support for 16 months (from December 2021 through March 2022) and should have paid Maria an extra \$4,560 in child support. The district court concluded that Edgar's underpayment of child support based on his own dishonesty was a compelling reason for the unequal distribution of the stimulus payment, and therefore Maria was not required to reimburse Edgar for half the amount. Because Edgar failed to provide this court with the trial transcript, we presume these documents support the district court's findings regarding Edgar's underpayment of child support, *see Cuzze*, 123 Nev. at 603, 172 P.3d at 135, and thus we conclude substantial evidence supports the district court's findings on this point. Under these circumstances, we discern no abuse of discretion in the court's decision regarding the stimulus money. *See Kogod*, 135 Nev. at 75, 439 P.3d at 406.

Finally, Edgar alleges that the district court was biased against him because it favored Maria. However, relief is unwarranted because Edgar merely disagrees with the district court's ultimate conclusions and has not demonstrated that any alleged bias was based on knowledge


acquired outside of the proceedings, 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) (explaining 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 reflects deep-seated favoritism or antagonism that would render fair judgment impossible); *In re Petition to Recall Dunleavy*, 104 Nev. 784, 789-90, 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*, 125 Nev. at 439, 216 P.3d at 233 (noting that the burden is on the party asserting bias to establish sufficient factual grounds for disqualification).

Accordingly, for the reasons set forth above, we

ORDER the judgment of the district court AFFIRMED.³


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

³Insofar 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.

cc: Presiding Judge, Eighth Judicial District Court, Family Division
Department C, Eighth Judicial District Court, Family Division
Edgar Hernandez-Basilio
Hofland & Tomsheck
Eighth District Court Clerk