

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MONICA TOLIVER, N/K/A MONICA
LEAZER,
Appellant,
vs.
JEFFREY TOLIVER,
Respondent.

No. 85877-COA

FILED

NOV 29 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *E. Brown*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Monica Toliver, n/k/a Monica Leazer, appeals from a district court order granting a motion to modify child custody. Second Judicial District Court, Family Division, Washoe County; Bridget E. Robb, Judge.

Monica and respondent Jeffrey Toliver were divorced in 2018 and share two minor children, S.T. (born in 2009) and C.T. (born in 2012). Pursuant to a 2019 stipulation and order, the parties shared joint legal and joint physical custody on a week-on-week-off schedule.

In December 2021, Jeffrey filed a motion to modify custody and child support, seeking primary physical custody of the children based on S.T.'s preference and allegations that S.T. reported concerns and fears about the living situation at Monica's residence, including suffering from emotional abuse and name-calling; Monica's then-boyfriend, Clinton Leazer, moving into the residence with his children, resulting in S.T. and C.T. losing their rooms; and the children having to travel an hour each way to-and-from school in the car with Clinton, whom they had known for only a few weeks. S.T. also expressed that she wanted to attend therapy, which

Monica took months to approve. Monica opposed the motion, and the district court set the matter for an evidentiary hearing.

Prior to the evidentiary hearing, Jeffrey filed an ex parte emergency motion for temporary primary physical custody and attached to his motion a “letter of progress and clinical impressions” generated by Brian Crane, a licensed clinical social worker who provided therapy to S.T. beginning in March 2022. The letter detailed Crane’s observations of S.T.’s mental health, including that she demonstrated “severe levels of depression,” and detailed S.T.’s numerous concerns about living with Clinton and Clinton’s 14-year-old daughter, M.L. Thereafter, the district court granted Jeffrey temporary primary physical custody of the children.

The district court subsequently conducted a two-day evidentiary hearing on Jeffrey’s motion to modify physical custody. Jeffrey’s witnesses were S.T., whom the court interviewed in camera, and the three licensed clinical social workers who served as the children’s therapists, including Crane. Monica testified and called Clinton and M.L. as witnesses.

Crane testified that he had been S.T.’s therapist for 10 sessions, and initial screenings showed that she suffered from severe depression, which worsened when she was in Monica’s custody. However, Crane clarified that he had been unable to complete S.T.’s therapeutic assessment because, following his submission of the aforementioned progress letter, Monica filed a police report against him and a report with the Board of Social Work, accusing him of libel and texting S.T., which resulted in the termination of his treatment of S.T. Because his assessment was incomplete, Crane could only give a provisional assessment for S.T. He

suspected S.T. suffered from complex posttraumatic stress disorder and major depressive disorder or adjustment disorder. He also testified to two incidents that S.T. relayed to him where the police were called to intervene when Monica was intoxicated and described S.T.'s resulting trauma from those incidents.

Following the hearing, the district court entered a written order granting Jeffrey primary physical custody of the children, subject to Monica's parenting time on Sundays from 10:00 a.m. to 7:00 p.m. The court also narrowly modified the parties' legal custody arrangement, awarding Jeffrey primary decision-making authority "with regard to all of the children's mental health decisions" but placed no other restrictions on Monica's ability to be involved in healthcare decisions for the children, nor any limits regarding her participation in the children's education and religious training. The court found S.T.'s testimony was detailed and coherent. It found the therapists' testimony was unbiased, and that they were committed to their clients, "despite the smear tactics, retaliation, and intimidation by [Monica]." The court found Monica had interfered with the children getting necessary mental health treatment, demonstrating a lack of parental capacity, and expressed concern that she would attempt to retaliate and disrupt the children's therapeutic relationships again. Further, although the court acknowledged that "the reports from the counselors were a provisional" assessment, it concluded that there was "something significantly wrong with both children and they both need further counseling." The district court found Monica's witnesses were "far less credible," noting that Clinton made the children uncomfortable, and testimony from all parties revealed that there were cameras in Monica's

home, which was distressing to the children and demonstrated a lack of consideration of the children's feelings.

The district court found that there was a substantial change in circumstances based on the testimony of the therapists and S.T. The court then went on to analyze the statutory best interest factors and concluded they demonstrated that joint legal and joint physical custody were not in the children's best interest. The court found the children wished to reside with Jeffrey and determined that five other best interest factors weighed in favor of Jeffrey, two were neutral, two did not apply, none favored Monica, and two were not specifically addressed. With respect to NRS 125C.0035(4)(k), the domestic violence factor, the court, having heard about three events which it generally determined constituted domestic violence, concluded that there was a presumption against joint physical custody, which Monica failed to rebut. This appeal followed.

Legal custody over decisions regarding the children's mental health

On appeal, Monica first argues that the district court violated her due process rights by modifying the parties' legal custody arrangement when Jeffrey's motion to modify requested only a change to physical custody.

The district court has broad discretion in determining child custody. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007). However, substantial evidence must support the district court's findings. *Id.* at 149, 161 P.3d at 242. Substantial evidence is "evidence that a reasonable person may accept as adequate to sustain a judgment." *Id.* This court reviews issues regarding procedural due process de novo. *Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007).

“Litigants in a custody battle have the right to a full and fair hearing concerning the ultimate disposition of a child.” *Wiese v. Granata*, 110 Nev. 1410, 1412-13, 887 P.2d 744, 746 (1994) (quoting *Moser v. Moser*, 108 Nev. 572, 576, 836 P.2d 63, 66 (1992)). A party “threatened with the loss of parental rights must be given the opportunity to disprove the evidence presented.” *Id.* at 1413, 887 P.2d at 746 (quoting *Moser*, 108 Nev. at 577, 836 P.2d at 66). Due process requires that a district court give a parent notice before affecting custodial rights. *See id.* at 1412, 887 P.2d at 745-46. General notice that there will be a hearing is insufficient; rather, the parent must have “prior specific notice” that, at the hearing, the court may make the custody determination that it ultimately does make. *See Dagher v. Dagher*, 103 Nev. 26, 28, 731 P.2d 1329, 1330 (1987) (reversing a custody determination made at a hearing because, as relevant here, a parent did not receive “prior specific notice” that the particular hearing might involve a change in custody).

As an initial matter, Monica did not provide this court with the complete transcripts of the evidentiary hearing, so we cannot ascertain what, if anything, was raised concerning legal custody at the evidentiary hearing or whether Monica objected to the court considering this issue at the hearing given that it had not been squarely set forth in Jeffrey’s motion.¹ Under these circumstances, we necessarily presume that the missing transcripts support the district court’s determination. *See* NRAP 9(b)(1)(B) (requiring pro se litigants who request transcripts and have not been

¹Monica submitted only the transcript of Crane’s testimony, rather than the transcripts for the entirety of the two-day hearing.

granted in forma pauperis status to file a copy of their completed transcripts with the court clerk); *see also Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (noting that it is appellant's burden to ensure that a proper appellate record is prepared and that, if the appellant fails to do so, "we necessarily presume that the missing [documents] support[] the district court's decision").

We need not resolve this issue solely based on the missing transcripts, however. Here, Monica is correct that Jeffrey's motion sought only a modification to physical custody of the children. But the district court's order modified the parties' joint legal custody designation in the narrowest manner. The district court gave Jeffrey primary decision-making legal custody only as to the children's mental health decisions; it did not exclude Monica from participating like a sole legal custody order would do. *See Cristos v. Tolagson*, No. 84167-COA, 2023 WL 3031389, at *6 (Nev. Ct. App. Apr. 20, 2023) (Order of Affirmance and Limited Remand to Correct Clerical Error) (noting that "joint legal custody does not require that the parents have equal decision-making power"). In fact, the order specified that "[a]ll other orders not currently addressed herein shall remain in effect," and the parties' 2018 divorce decree had provided that the parties shared joint legal custody, which the court indicated meant making major decisions for the children including regarding their health, education, and religious upbringing. The parties' 2019 stipulated order modifying custody retained the joint legal custody provision. Thus, the instant order continued Monica's ability as a joint legal custodian to be involved in other healthcare decisions for the children, as well as their education and religious training.

Therefore, the district court imposed a hybrid joint legal custody arrangement.

With regard to Monica's due process arguments, it is undisputed that Monica had notice of the hearing, was aware that custody was at issue, and that the children's mental health and treatment would be central topics. *See Wiese*, 110 Nev. at 1412, 887 P.2d at 745-46. Monica attended the hearing, was represented by counsel, and had the opportunity to respond to Jeffrey's allegations and confront the witnesses, particularly the therapists who testified about her conduct concerning the children's therapy and the resulting harm to the children. *See id.* at 1412-13, 887 P.2d at 746. Under these circumstances, we conclude that the district court did not violate Monica's due process rights by narrowly modifying legal custody with respect to the children's mental health decisions. *See* NRS 125C.0045(1)(a) (providing that, in any action for determining the custody of a minor child, the court may, "[d]uring the pendency of the action, at the final hearing or at any time thereafter," "make such an order for the custody, care, education, maintenance and support of the minor child as appears in his or her best interest").

Moreover, given the circumstances surrounding Jeffrey's motion to modify custody and the evidence presented at trial regarding Monica's interference with the children's treatment, we cannot conclude the district court's decision in this regard was improper. In determining legal custody should be modified so that Jeffrey had primary decision-making authority regarding the children's mental health, the court found that Monica engaged in smear tactics, retaliation, and intimidation against the children's treating therapists; that Monica attempted to prevent the

children from getting necessary mental health treatment; and that both children needed further counseling. *See id.* Further, the district court expressed concern that Monica would retaliate and interfere with their treatment again.

And the district court's findings on this point are supported by substantial evidence—particularly Crane's testimony regarding instances where Monica retaliated against him or interfered with S.T.'s therapy sessions, which ultimately left him unable to finish his evaluation and provide an assessment of S.T. Thus, for the reasons set forth above, we conclude that Monica's challenge to the district court's partial modification of legal custody is without merit, and we affirm that decision.

Modification of physical custody

Next, Monica asks this court to overturn the district court's order modifying physical custody. Here, Monica argues that the district court abused its discretion by relying on Crane's letter as a custody evaluation and finding that she committed domestic violence. When a party seeks to modify child custody, the movant must show "(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 modification." *Romano v. Romano*, 138 Nev. 1, 5, 501 P.3d 980, 983 (2022), *abrogated in part on other grounds by Killebrew v. State ex rel. Donohue*, 139 Nev., Adv. Op. 43, 535 P.3d 1167, 1171 (2023).

Here, Monica does not challenge the district court's finding that there was a substantial change in circumstances based on the testimony from the three therapists and S.T. Therefore, we do not disturb that determination.

We next turn to Monica's argument that the district court abused its discretion by relying on Crane's letter as a custody evaluation. On this point, Monica argues that Crane was not qualified to perform a child custody evaluation as he is not a psychologist and is not unbiased.

NRCP 16.22 governs custody evaluations and provides, in pertinent part, that a district court may, for good cause, order a custody evaluation on motion or on its own after notice to all parties. NRCP 16.22(a)(1), (2). But both parties agree that they did not seek, and the district court did not order, a custody evaluation. Other than the fact that Crane generated a letter based on his therapy sessions with S.T., Monica points to nothing in the record that shows his letter was intended to be, or was considered as, a custody evaluation. Notably, Crane testified that the letter was simply his written evaluation at that point in time, but that it was incomplete, and he was only able to offer a provisional assessment because his sessions with S.T. were terminated due to Monica's retaliation. He further explained that Jeffrey requested that he prepare a progress report for the settlement conference, which he did, in the form of the letter he submitted, further undermining Monica's assertion that it was a custody evaluation. Accordingly, we reject Monica's argument that the district court improperly utilized Crane's letter as a custody evaluation.

Turning to Monica's argument that the district court abused its discretion in making a domestic violence finding against her, she contends both that the district court's order did not identify the specific instances of domestic violence it relied on to find she committed domestic violence, and that all of the allegations presented below had been previously litigated without findings of domestic violence.

When determining whether a custody modification is in the children's best interest, the district court must articulate specific findings regarding the nonexhaustive list of best interest factors set forth by statute. See NRS 125C.0035(4); *Lewis v. Lewis*, 132 Nev. 453, 459-60, 373 P.3d 878, 882 (2016). In making this determination, a court must consider, amongst the factors, "[w]hether either parent or any other person seeking 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." NRS 125C.0035(4)(k).

In the challenged order, the district court made a summary finding that there were three unspecified instances of domestic violence, which the court concluded raised the presumption against joint physical custody. The court further found that Monica failed to rebut this presumption. But in making these findings, the district court failed to provide any detail regarding the incidents it relied on to conclude that domestic violence had occurred, including whether, as Monica alleges, certain of the incidents predated the earlier custody decisions and had been previously litigated. We conclude this was error. See *Davis v. Ewalefo*, 131 Nev. 445, 452, 352 P.3d 1139, 1143 (2015) ("Specific findings and an adequate explanation of the reasons for the custody determination are crucial to enforce or modify a custody order and for appellate review." (internal quotation marks omitted)); see also *Nance v. Ferraro*, 134 Nev. 152, 159-60, 418 P.3d 679, 685-86 (Ct. App. 2018) (explaining that the district court's "evaluation of whether modification is in the child's best interest will necessarily be informed by the findings and conclusions that resulted in the prior custody determination" but a party may not rely on acts that the district court previously determined did not constitute

domestic violence to support a subsequent custody modification). And this error was compounded by the district court's failure to properly apply NRS 125C.0035(5)'s presumption against joint physical custody based on domestic violence as it did not address whether the allegations of domestic violence had been proven by clear and convincing evidence, make findings of fact to support that the acts occurred, or find that the custody arrangement protected the children and Jeffrey.

But the district court's best interest findings regarding the alleged domestic violence and its application of the domestic violence presumption were not the only bases on which the court determined that custody should be modified to give Jeffrey primary physical custody of the children, subject to Monica's parenting time. In addressing the remaining NRS 125C.0035(4) best interest factors, the district court determined that several other factors favored modification, none favored Monica, and she does not challenge these findings on appeal.

Notably, the district court found that the children wished to live with Jeffrey and that S.T. did not feel safe with Monica (NRS 125C.0035(4)(a) (wishes of the child)). The court also made findings that Monica damaged the coparenting relationship and disparaged Jeffrey (NRS 125C.0035(4)(d) (level of conflict between the parties)); that she sabotaged the needs of the children and was not able to cooperate (NRS 125C.0035(4)(e) (ability of the parents to cooperate and meet needs of the child)); that she ignored the children's wishes and developmental needs by keeping cameras in her home, interfering with S.T.'s therapy, and minimizing past events and calling the children liars when they remembered such events differently than she did (NRS 125C.0035(4)(g))

(physical, developmental and emotional needs of the child)); and that she used S.T.'s future stepsibling to spy on S.T. (NRS 125C.0035(4)(i)).


Monica presents no arguments regarding the district court's findings on these points, such that any challenge to these findings has been waived. 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). Nonetheless, these findings are supported by substantial evidence in the record, including Crane's testimony regarding his treatment of S.T. See *Ellis*, 123 Nev. at 149, 161 P.3d at 242. Our conclusion that substantial evidence supports these findings is further bolstered by Monica's failure to provide the full transcripts of the evidentiary hearing, as we necessarily presume these missing portions of the record support the district court's determination. See *Cuzze*, 123 Nev. at 603, 172 P.3d at 135.


Thus, notwithstanding the district court's errors in addressing the domestic violence best interest factor and in applying the domestic violence presumption, the district court's findings regarding the remaining best interest factors provide sufficient grounds, in and of themselves, to uphold the district court's modification of physical custody. See *Ellis*, 123 Nev. at 149, 161 P.3d at 242. And under the circumstances of this case, Monica has not demonstrated nor argued that the court's errors regarding the domestic violence findings and presumption would have changed the result had the errors not been made. 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."). We therefore conclude that the district court's errors in this

regard are harmless, *see Abid v. Abid*, 133 Nev. 770, 776, 406 P.3d 476, 481 (2017) (concluding error was harmless and reversal was not warranted where the error did not affect the district court's custody decision); *cf.* NRCP 61 (requiring the court, at every stage of a proceeding, to disregard errors that do not affect a party's substantial rights), and we affirm the district court's order modifying physical custody.

It is so ORDERED.²


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Bridget E. Robb, District Judge
Monica Toliver
Attorney Marilyn D. York, Inc.
Washoe District Court Clerk

²Insofar 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.