IN THE SUPREME COURT OF THE STATE OF NEVADA

ASHLEY DAWN FRANKLIN,
Appellant/Cross-Respondent,
vs.
JOHN BRYAN FRANKLIN,
Respondent/Cross-Appellant.

No. 84334

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This is an appeal and cross-appeal from a district court divorce decree and a post-decree order denying a motion to alter or amend. Eighth Judicial District Court, Family Division, Clark County; Amy Mastin, Judge.

FACTS AND PROCEDURAL HISTORY

Appellant/cross-respondent Ashley Franklin and respondent/cross-appellant John Franklin were married in April 2012. Together the Franklins have two children. In 2019, Ashley filed a complaint for divorce, after which John filed an answer and counterclaim.

During the divorce trial, Ashley testified that John had a violent pattern of behavior. She testified specifically with respect to an incident that occurred in 2013, after which she obtained a protective order against John. Ashley also claimed that in 2019, John bear hugged her and ruptured one of her breast implants. Ashley's sister also testified regarding incidents where her ex-husband went over to John and Ashley's house to fix broken doors and police were called to their house. John denied having ever committed domestic violence against Ashley but admitted to being charged

with domestic violence and pleading to the lesser charge of disturbing the peace as to the 2013 incident.

As to finances, Ashley testified that her income did not cover her expenses, so she took out two loans to cover living expenses and attorney fees from her friend and work supervisor, Karen Brady. Ashley executed promissory notes for both loans. John testified that he believed an account he once had with Go Bank and Green Dot was for a prepaid card that he no longer used and that no longer had funds on it.

The district court found the following in entering the divorce decree: (1) the preference for joint physical custody under NRS 125C.0025 applied because each parent had a meaningful relationship with the children; (2) Ashley lacked credibility and failed to support the presumption against joint physical custody with clear and convincing evidence of domestic violence by John under NRS 125C.003(1)(c); (3) John must pay Ashley $300 per month in alimony for 36 months to afford Ashley an opportunity to engage in the workforce and advance her earning capacity; (4) the promissory note for living expenses was a community debt because John did not allege the debt constituted waste or offer another legal argument to support that it was Ashley's separate debt; (5) the promissory note for Ashley's attorney fees was not community debt; and (5) John must pay Ashley $3,400 as an offset for an unequal division of the community assets.

Ashley filed a motion for reconsideration and to amend the findings regarding domestic violence and her credibility, arguing that the district court overlooked similarities in her statements regarding the 2013 incident. In response, John argued that the iterations of Ashley's story were drastically different. Additionally, John requested $2,500 in attorney fees,

arguing that Ashley's motion "unnecessarily and vexatiously increase[d] the cost of litigation." After a hearing, the district court denied reconsideration and awarded John attorney fees without explaining its reasoning. Ashley appeals, challenging the child custody determination, the division of assets and debts, the alimony award, and the award of attorney fees to John. John cross-appeals, arguing that the district court abused its discretion in finding the loan from Karen Brady for living expenses was a community debt.[1]

DISCUSSION

We review child custody decisions for an abuse of discretion. *Rivero v. Rivero*, 125 Nev. 410, 428, 216 P.3d 213, 226 (2009), *overruled on other grounds by Romano v. Romano*, 138 Nev. 1, 6, 501 P.3d 980, 984 (2022) (*Romano* was abrogated on other grounds by *Killebrew v. State ex rel. Donohue*, 139 Nev., Adv. Op. 43, 535 P.3d 1167 (2023)). This court will not set aside a district court's factual findings 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). Evidence is substantial if a reasonable person would accept it as adequate to sustain a judgment. *Rivero*, 125 Nev. at 428, 216 P.3d at 226.

The district court did not abuse its discretion in concluding that Ashley's domestic violence allegations were not supported by clear and convincing evidence and thus there was no presumption against joint physical custody

The district court found Ashley failed to establish by clear and convincing evidence that John had committed domestic violence against

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[1]A panel of this court originally issued an order in this appeal. *Franklin v. Franklin*, No. 84334, 2023 WL 8435987 (Dec. 4, 2023) (Order Affirming in Part and Reversing in Part). That order was withdrawn when the en banc court granted reconsideration. *See Franklin v. Franklin*, Docket No. 84334 (Order Granting En Banc Reconsideration, Feb. 23, 2024).

her. Ashley argues the district court erred in determining her allegations of domestic violence were not established by clear and convincing evidence and thus holding the presumption against joint physical custody did not apply, because she testified in detail to the domestic violence, her sister and neighbors testified about the volatile nature of John and Ashley's relationship, and she introduced evidence regarding temporary protection orders Ashley was granted against John.

In determining physical custody, "there is a preference that joint physical custody would be in the best interest of a minor child if . . . [a] parent has demonstrated . . . an intent to establish a meaningful relationship with the minor child." NRS 125C.0025(1)(b). However, joint physical custody is presumed not to be in the children's best interest when clear and convincing evidence demonstrates that a parent has committed domestic violence against another parent. NRS 125C.003(1)(c).

This court has observed that the burden of providing clear and convincing evidence can be satisfied by the victim's testimony alone. *See Keeney v. State*, 109 Nev. 220, 229, 850 P.2d 311, 317 (1993) (recognizing, in the sexual assault context, that prior bad act evidence may be admitted if the incident was proved by clear and convincing evidence, and that the clear and convincing standard was met based on a prior victim's testimony), *overruled on other grounds by Koerschner v. State*, 116 Nev. 1111, 1114, 13 P.3d 451, 454 (2000) (*Koerschner* was modified on other grounds by *State v. Eighth Jud. Dist. Ct. (Romano)*, 120 Nev. 613, 623, 97 P.3d 594, 600-01 (2004)). However, a witness's credibility impacts the weight of their testimony and this court will not reweigh credibility determinations on appeal, as that duty is solely the province of the trier of fact. *Castle v. Simmons*, 120 Nev. 98, 103, 86 P.3d 1042, 1046 (2004) (declining to reweigh

the district court's credibility determinations of the witnesses who testified about domestic violence despite some of the testimony being internally inconsistent or contradicted); *see Wolff v. Wolff*, 112 Nev. 1355, 1359, 929 P.2d 916, 918-19 (1996) (holding that the rationale for an appellate court not substituting its own judgment for that of the district court is because "the district court has a better opportunity to observe parties and evaluate the situation").

Here, we perceive no abuse of discretion in the district court's determination that the domestic violence allegations were not supported by clear and convincing evidence. *In re Discipline of Arabia*, 137 Nev. 568, 575, 495 P.3d 1103, 1112 (2021) (recognizing that to be clear and convincing, "evidence need not possess such a degree of force as to be irresistible, but there must be evidence of tangible facts from which a legitimate inference . . . may be drawn" (internal quotation marks omitted)); *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1260 n.4, 969 P.2d 949, 957 n.4 (1998) (observing that clear and convincing evidence "is beyond a mere preponderance of the evidence" (internal quotation marks omitted)). In reaching that determination, the district court considered inconsistencies in Ashley's statements about the alleged incidents of domestic violence and interpreted much of Ashley's testimony as generalized allegations lacking in specificity. The district court further found, and the record supports, that the more specific examples Ashley provided, indicating an alleged power and control dynamic, were abated by contradictory evidence Ashley provided. With respect to the 2013 incident, the district court determined, and the record supports, that Ashley's accounts varied "in the who, what, where, when and why with each re-telling of the story." With respect to the other specific instance of domestic violence, the district court found Ashley's

failure to provide medical records of the alleged surgery for a ruptured breast implant damaged her credibility. Given this failure and Ashley's material inconsistencies as to the allegations of domestic violence, we conclude that the district court did not abuse its discretion in determining that Ashley failed to meet the clear and convincing standard of proof needed for the custody presumption to apply.[2]

The district court abused its discretion in excluding photos of Ashley's injuries

The district court declined to admit a photograph depicting an injury to Ashley's face that allegedly resulted from John striking her, finding that Ashley was unable to properly authenticate the photo. Ashley argues the court abused its discretion in doing so because her testimony sufficiently established that the photo was what she claimed it to be. Authentication or identification is a condition precedent to the admissibility

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[2]While our dissenting colleagues point to evidence presented and district court findings that could support a conclusion that the clear and convincing standard was met, the district court was the fact-finder charged with making a decision on this point and we do not perceive an abuse of discretion in its conclusion that "one or more acts of domestic violence" by John were not established by Ashley by clear and convincing evidence. NRS 125C.003. We also note that the language from the district court's order quoted in the dissent regarding increasing violence and forced nonconsensual sex during the marriage, while contained in the order's section entitled "Findings of Fact," is actually a summary by the court of Ashley's testimony and thus subject to the credibility concerns the district court had regarding Ashley. It would be better for the district court to clearly distinguish its findings from such a summary, but the context here shows that it was not a court finding. Because we perceive no abuse of discretion in the district court's determination that the clear and convincing standard was not met, and that the presumption against awarding John joint physical custody thus did not apply, we need not address Ashley's arguments as to John rebutting that presumption.

of evidence. NRS 52.015(1). This condition precedent "is satisfied by evidence or other showing sufficient to support a finding that the matter in question is what its proponent claims." *Id.* "Authentication represent[s] a special aspect of relevancy . . . in that evidence cannot tend to make the existence of a disputed fact more or less likely if the evidence is not that which its proponent claims." *Rodriguez v. State*, 128 Nev. 155, 160, 273 P.3d 845, 848 (2012) (alteration in original) (internal quotation marks omitted). If a witness has personal knowledge that a matter is what it claims to be, their testimony is sufficient for authentication. NRS 52.025.

In presenting the district court with the photograph, Ashley could not describe the alleged physical violence preceding the taking of the photo, nor could she specify when the photo was taken other than it must have been before 2017. However, Ashley testified that the photograph fairly and accurately depicted what was shown in the picture and what she claimed it to be—a photo of her face after she was struck by John before 2017. We conclude that Ashley's testimony was sufficient to authenticate the photo because she testified that it fairly and accurately depicted her physical state after an alleged incident of domestic violence. NRS 52.025. Therefore, we conclude the district court abused its discretion in excluding the photograph based on insufficient authentication. *Klabacka v. Nelson*, 133 Nev. 164, 174, 394 P.3d 940, 949 (2017) (stating that "[t]his court review[s] a district court's decision to admit or exclude evidence for abuse of discretion" (alteration in original) (internal quotation marks omitted)). However, the photograph was not included in the record on appeal and we thus cannot evaluate whether the exclusion thereof affected Ashley's substantial rights or was harmless. *Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) (recognizing that an error is harmless unless it

"affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached"); *see also Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 600, 172 P.3d 131, 133 (2007) (reiterating "that appellant bears the responsibility of ensuring an accurate and complete record on appeal and that missing portions of the record are presumed to support the district court's decision"). Accordingly, we conclude that the erroneous exclusion of the photograph was harmless.

The district court did not abuse its discretion in excluding police reports pertaining to alleged domestic violence incidents

Ashley sought admission of a computer-aided dispatch (CAD) report documenting calls to police between 2013 and 2018 from an address where the parties lived together. The district court excluded the reports as hearsay, as no testimony or affidavit from the custodian of the record or another qualified person was provided and the requirements of NRS 51.135 were not met. Ashley argues the business record exception applied to the CAD report because she recognized the document and testified that it was a fair depiction of the CAD report she received.

Hearsay is a statement that is offered to prove the truth of the matter asserted, NRS 51.035, and is generally inadmissible, NRS 51.065. Despite this general rule,

> report[s], record[s] or compilation[s] of data, in any form of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony or affidavit of the custodian or other qualified person, is not inadmissible under the hearsay rule.

NRS 51.135. Because Ashley did not meet NRS 51.135's requirement to have a records custodian or other qualified person testify or provide an

affidavit authenticating the report, we conclude that the district court did not abuse its discretion in excluding the report as hearsay.[3]

The district court acted within its discretion in awarding the parties joint physical custody

Ashley argues that the district court abused its discretion by not making separate factual determinations about domestic violence as (1) providing a presumption against joint physical custody under NRS 125C.003(1)(c) when shown by clear and convincing evidence, and (2) being a factor that weighs on the best interest analysis but does not require clear and convincing evidence to apply. Ashley also argues that because the district court found that it was more likely than not that John engaged in domestic violence against Ashley, it was required to apply NRS 125C.0035(5)(b), which requires findings that the custody arrangement adequately protects the children and parent. She contends that the district court further abused its discretion by failing to make findings that the timeshare was in the best interests of the children, especially because John did not request the weekly timeshare until the end of trial.

Here, in determining physical custody, the district court addressed each of the 12 best interest factors in NRS 125C.0035(4). With respect to domestic violence, the district court found, and the record

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[3]While Ashley asserts that she could have authenticated the report by recognizing the document and testifying that it was a fair depiction of the report she received from police, she offers no meaningful argument as to how she would be a qualified person or why she should not have to comply with the authentication requirement of NRS 51.135. Therefore, we need not address this argument. *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

supports, that Ashley's allegations were more likely true than not—i.e., that Ashley met NRS 125.0035(4)(k)'s preponderance of the evidence standard for considering domestic violence in assessing the children's best interests, even though her proof fell short of the clear and convincing evidence of domestic violence that NRS 125C.003(1)(c) requires to negate the presumption in favor of joint physical custody. It therefore expressly concluded that NRS 125C.0035(4)(k), the factor concerning domestic violence, favored Ashley. However, the mere fact that one factor favored Ashley does not foreclose an award of joint physical custody. The district court properly considered all of the factors in the best-interest-of-the-children analysis, and substantial evidence in the record supports its findings in that regard.[4] *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241-42 (2007) (reviewing a district court custody order for an abuse of discretion and explaining that the district 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" (footnote omitted)). While Ashley points to the parties' conflicts, the record, including testimony and video evidence, supports the district court's findings that both parties contributed to the conflict, that neither party showed superior parenting or conflict resolution skills, and that neither party would be more likely to foster the other's

[4]Ashley also argues that the district court abused its discretion by not making express findings regarding adequate protection of the children under NRS 125C.0035(5)(b). That argument fails, however, as the district court found, and the record supports, that Ashley did not prove domestic violence by the requisite clear and convincing standard to trigger the requirement for specific findings under NRS 125C.0035(5)(b).

relationship with the children. Taken together, we conclude that the district court did not abuse its discretion in analyzing the best interest of the children as it did and in awarding joint physical custody.[5]

The district court acted within its discretion in dividing community property and debts

Ashley challenges the district court's distribution of accounts held with Go Bank and Green Dot to John as his sole property, and its assignment of the Brady attorney fees promissory note to Ashley as her sole debt, arguing that the accounts and promissory note are community assets and debts. John challenges the assignment of the Brady promissory note for living expenses as a community debt.

As to the accounts, John testified that he no longer had or used the accounts or had any assets therein. We perceive no abuse of discretion by the district court in this regard, as John's testimony, in the absence of contrary evidence, was sufficient to support the designation of the prepaid bank accounts as the sole and separate property of John. *Williams v. Williams*, 120 Nev. 559, 566, 97 P.3d 1124, 1129 (2004) (observing that we review a district court's divorce decree decisions for an abuse of discretion and that those decisions supported by substantial evidence will be affirmed); *see Wolff*, 112 Nev. at 1359, 929 P.2d at 918-19; *Shane v. Shane*, 84 Nev. 20, 22, 435 P.2d 753, 755 (1968) ("Before the appellate court will

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[5]Ashley also argues that the district improperly struck the holiday schedule in the parenting plan. But the plan provides that the provisions altered were subject to subsequent court orders and Ashley fails to otherwise present meaningful argument as to how the schedule changes amount to an abuse of discretion. Therefore, we need not consider this argument. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (noting that this court need not consider claims unsupported by cogent argument and relevant authority).

interfere with the trial judge's disposition of the community property of the parties or an alimony award, it must appear on the entire record in the case that the discretion of the trial judge has been abused.").

As to Ashley's position that the district court should have included the attorney fees promissory note in the community debt, we conclude that the district court's finding that the promissory note was not a community debt is supported by substantial evidence. The record supports the proposition that the debt owed to Brady was not acquired for the benefit of the community and was acquired after the parties had separated, and thus the district court properly concluded that the debt belonged to Ashley rather than the community. *See Barry v. Linder*, 119 Nev. 661, 671, 81 P.3d 537, 543 (2003) (holding that the district court properly categorized a loan for legal expenses as not community debt because substantial evidence supported the position that the loan was not acquired for the benefit of the community and was acquired after the parties separated), *superseded by rule on other grounds as stated in LaBarbera v. Wynn Las Vegas, LLC*, 134 Nev. 393, 395, 422 P.3d 138, 140 (2018). As to John's argument that the district court erred in finding the promissory note for living expense was community debt because it was excessive compared to reasonable "necessities of life," and thus violated a preliminary injunction, we conclude that John waived the argument by not raising it at trial. *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, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

Finally, we are not persuaded by Ashley's contention that the district court abused its discretion by directing John to pay $3,400 to equalize the division of property and that the debts were disposed of

unevenly. In dividing former community property, the district court detailed the disposition and value of each asset that it awarded to John and Ashley as sole and separate property. It then ordered John to pay Ashley $3,400 to offset the difference in value of distributed assets. We conclude that the district court therefore provided adequate detail in splitting the assets and substantial evidence in the record supports the distribution and offset calculation. *Williams*, 120 Nev. at 566, 97 P.3d at 1129.

The district court did not abuse its discretion in awarding alimony

Ashley contends the district court abused its discretion in awarding alimony in the amount of $300 per month for 36 months instead of the $3,000 per month for 60 months she requested. We disagree.

"The decision of whether to award alimony is within the discretion of the district court." *Kogod v. Cioffi-Kogod*, 135 Nev. 64, 66, 439 P.3d 397, 400 (2019) (citing *Buchanan v. Buchanan*, 90 Nev. 209, 215, 523 P.2d 1, 5 (1974)). A district court may award alimony to either spouse should it appear just and equitable after the consideration of the 11 factors listed in NRS 125.150(9). *See* NRS 125.150(1)(a) ("In granting a divorce, the court . . . [m]ay award such alimony to either spouse, in a specified principal sum or as specified periodic payments, as appears just and equitable . . . ."). We review a district court's alimony award for abuse of discretion. *Shane*, 84 Nev. at 22, 435 P.2d at 755.

The district court properly considered the factors listed in NRS 125.150(9)-(10) in determining whether and how much to grant in alimony. The district court found, and the record supports, that an award of periodic alimony was appropriate under the NRS 125.150 factors because of (1) the disparity in the parties' incomes, education, earning capacities, and health issues that impact working abilities; (2) Ashley's contribution to the marriage as a homemaker; (3) John improving his earning potential by

obtaining certifications and training during the marriage; (4) Ashley not receiving any meaningful property in the divorce; and (5) the length of the marriage (nine years). The record further supports the district court's findings with regard to the amount of alimony, including that the parties had a modest lifestyle, that John earns roughly $11,000 per month and would have to pay significant child support, and that periodic alimony of $300 for 36 months was appropriate to afford Ashley time to join the workforce and advance her earning capacity. The district court also noted Ashley had been receiving temporary spousal support of $412 per month since August 2020. As substantial evidence supports the district court's findings, we conclude that the district court's award of alimony was not an abuse of discretion.

The district court abused its discretion in awarding John attorney fees on Ashley's motion for reconsideration

NRS 18.010(2)(b) permits the district court to award attorney fees when a party brings or maintains a claim "without reasonable ground or to harass the prevailing party." This court reviews an award of attorney fees for an abuse of discretion. *Rivero*, 125 Nev. at 440-41, 216 P.3d at 234. Here, pursuant to NRS 18.010, the district court, without further explanation, awarded John attorney fees incurred in opposing Ashley's motion for reconsideration regarding the domestic violence findings. We conclude that the district court abused its discretion in awarding attorney fees pursuant to NRS 18.010(2)(b) without supported findings that Ashley's motion was unreasonable or brought to harass John. Although Ashley did not prevail on her custody argument, that alone does not warrant a finding that the motion was frivolous or meant to harass John. Thus, we conclude the district court abused its discretion in awarding John attorney fees.

For the foregoing reasons we,

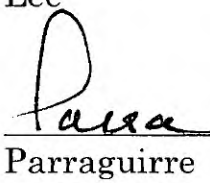
ORDER the judgment of the district court AFFIRMED IN PART as to the determinations on child custody, alimony, and division of community property and debt, REVERSED IN PART as to the award of attorney fees to John in opposing the motion for reconsideration, AND REMAND this matter to the district court for proceedings consistent with this order.

_____, C.J.
Cadish

_____, J.
Pickering

_____, J.
Herndon

_____, J.
Lee



_____, J.
Parraguirre

BELL, J., with whom STIGLICH, J. agrees, concurring in part and dissenting in part:

While I concur with most of the majority's order, I write separately because I conclude the district court abused its discretion in finding that the domestic violence allegations were not supported by clear and convincing evidence. The district court's findings, on their own, demonstrate clear and convincing evidence of domestic violence if the court were to apply the correct standard. Accordingly, I dissent and would reverse and remand the child custody determination for the district court to engage in the full NRS 125C.003(1)(c) analysis.

NRS 125C.003(1)(c) creates a rebuttable presumption against joint physical custody where one party has proven, "by clear and convincing evidence that a parent has engaged in one or more acts of domestic violence against the child, a parent of the child or any other person residing with the child." This court has previously addressed the mechanism of a rebuttable presumption, holding,

> In general, rebuttable presumptions require the party against whom the presumption applies to disprove the presumed fact. The presumed fact is the factual conclusion created by the presumption. A presumption is established by proof of the basic facts. An opposing party may attempt to rebut the presumption by adducing evidence, independent of the basic facts, that tends to disprove the presumed fact.

Law Offs. of Barry Levinson, P.C. v. Milko, 124 Nev. 355, 366, 184 P.3d 378, 386 (2008) (footnotes omitted).

By the plain text of NRS 125C.003(1)(c), once a single instance of domestic violence has been established by clear and convincing evidence, the presumption against joint physical custody applies. *See Republican*

Att'ys Gen. Ass'n v. Las Vegas Metro. Police Dep't, 136 Nev. 28, 31, 458 P.3d 328, 332 (2020) ("Where a statute is clear and unambiguous, this court gives effect to the ordinary meaning of the text's plain language without turning to other rules of construction."). Nevada defines domestic violence expansively, to encompasses domestic battery, assault, coercion, sexual assault, false imprisonment, pandering, and "[a] knowing, purposeful or reckless course of conduct intended to harass." NRS 33.018(1)(a)-(g). NRS 33.018(1)(e) references several examples of harassing conduct, including "[d]estruction of private property." NRS 33.018(1)(e)(5).

The district court's order demonstrates clear and convincing evidence of domestic violence. The district court took judicial notice of two temporary protection orders granted to Ashley against John. The first involved allegations of John abusing Ashley while one of her children was in the home and was extended for one year in a subsequent proceeding. The second TPO involved allegations that John broke into the home and threatened violence. *See Hayes v. Gallacher*, 115 Nev. 1, 7, 972 P.2d 1138, 1141-42 (1999) (relying on an extended TPO as evidence of domestic violence and critiquing the district court's failure to engage in a full analysis, asserting, "if domestic violence is proven, a rebuttable presumption arises that sole or joint custody of the child by the perpetrator of the domestic violence is not in the best interest of the child").

In addition to the past protection orders, the district court's findings of fact expressly credited testimony of "John punching a hole in the wall at their residence," and acknowledged a police report generated when Metro responded to the residence "reflect[ing] law enforcements' observations that Ashley had 'small scratches' on her right hand and right forearm and a bruise on her bicep." The court further stated in its findings

of fact: "John's anger and the resulting violence worsened after parties' marriage. After they married, John would force Ashley into non-consensual sex and would take sexually explicit videos without Ashley's consent." The language of this final statement stands in contrast to other recitations of fact where the district court clearly questioned the credibility of the underlying testimony by couching the statement with "Ashley testified" or "Ashley claimed."

The majority suggests these findings represent merely a summary of the testimony heard. On the contrary, findings of fact constitute "the ultimate judgment on a mass of details" and are more than a mere recitation of evidence presented. *Baumgartner v. United States*, 322 U.S. 665, 670 (1944); *see also United States v. Adams*, 73 U.S. 101, 102 (1867) (noting lower courts are bound to make "a *finding of the ultimate facts* or propositions which the evidence shall establish, . . . and *not* the evidence on which these ultimate facts are founded"). The majority assumes we should look to vague signals of the district court's intent to interpret the proffered "FINDINGS OF FACT" as something other than that. This is a slippery slope. The district court was free to offer a summary of the testimony heard, but on appellate review, this court must interpret all statements contained in a district court's findings of fact as the ultimate truth of the case. *See Finding of Fact, Black's Law Dictionary* (11th ed. 2019) (defined in part as "[a] determination by a judge, jury, or administrative agency of a fact supported by the evidence in the record"); *Determination, Black's Law Dictionary* (11th ed. 2019) (defined in part as "[t]he act of deciding something officially; esp., a final decision by a court"). To the extent the majority disregards certain factual allegations contained in the district court's findings of fact in their consideration of the domestic

violence proven, they, ironically, do not give the proper deference to the district court's stated findings. *See Reed v. Reed*, 4 Nev. 395, 397 (1868) ("The findings reported by the judge below must therefore be received by this court as the established facts of the case.").

As written, the district court's findings certainly rise to the level of clear and convincing evidence of domestic abuse, particularly when looking at the broad definition of domestic violence under NRS 33.018(1). At one point, the district court notes specific instances of John coercing Ashley, "such as making her drop/reduce a battery charge, forcing her to drop the divorce case, [and] making her let him move back in after their separation." Yet, the district court failed to conclude that Ashley proved domestic violence by clear and convincing evidence, applying an overly exacting standard. Two errors are evident from the face of this record.

First, the district court erroneously understood clear and convincing evidence to be an "extremely high burden of proof." This is not the case. *See Addington v. Texas*, 441 U.S. 418, 425 (1979) (labeling clear and convincing evidence an "intermediate standard"). Clear and convincing evidence "is beyond a mere preponderance of the evidence." *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1260 n.4, 969 P.2d 949, 957 n.4 (1998). At the same time, clear and convincing is a lower standard than beyond a reasonable doubt. *See In re Parental Rts. as to N.J.*, 125 Nev. 835, 849, 221 P.3d 1255, 1264 (2009) (noting the termination of parental rights must be proved by clear and convincing evidence under Nevada law, and the higher, beyond-a-reasonable-doubt standard under the Indian Child Welfare Act). Clear and convincing evidence "need not possess such a degree of force as to be irresistible, but there must be evidence of tangible facts from which a legitimate inference . . . may be drawn." *In re Discipline*

of Drakulich, 111 Nev. 1556, 1566, 908 P.2d 709, 715 (1995) (omission in original) (internal quotation marks omitted). The facts here easily rise to the requisite level as a victim's testimony regarding domestic violence, alone, can establish clear and convincing evidence. *Rose v. State*, 123 Nev. 194, 203, 163 P.3d 408, 414 (2007) (finding a victim's testimony alone can satisfy the highest evidentiary standard of beyond a reasonable doubt so long as "the victim . . . testif[ies] with *some* particularity regarding the incident" (internal quotation marks omitted)).

Second, the district court seems to erroneously read NRS 125C.003(1)(c) to require a showing of domestic violence sufficient to justify a diminishment of custody prior to applying the rebuttable presumption. The district court's credibility findings implicate only the extent of domestic violence alleged by Ashley, not the underlying existence of any domestic violence. For example, the district court found "[t]he nature and extent of John's abuse cannot be discerned from the evidence presented"; "[t]here was little context to [Ashley's] allegations and nothing specific enough that the Court could consider it for purposes of invoking NRS 125C.003(1)(c)"; and "I do believe that there were acts of domestic violence. I think they were exaggerated to an extent. That's part of the credibility issue with Plaintiff. But I do find that there were acts of domestic violence."

Determinations regarding the number of incidents or the severity of domestic abuse are largely irrelevant to the initial application of NRS 125C.003(1)(c)'s presumption. *See Castle v. Simmons*, 120 Nev. 98, 106, 86 P.3d 1042, 1048 (2004) ("The legislature intended that courts *presume* that *any* domestic violence negatively impacts the best interests of the children.") (quoting *Heck v. Reed*, 529 N.W.2d 155, 164 (N.D. 1995)). Once domestic violence is established, the presumption against joint

custody applies. The nature and extent of domestic abuse should inform the district court's decision regarding whether the offending parent has rebutted the presumption and what custody arrangement serves the best interests of the child.

The majority cannot vindicate a procedurally defective application of the statute merely because they agree with the district court's conclusion that joint custody is ultimately in the best interest of the children at issue. The Legislature created a rebuttable presumption against custody for perpetrators of domestic violence in recognition of the danger domestic violence poses to a child's safety and well-being. *See id.* at 101-02, 86 P.3d at 1045. Still, the court does a great disservice to victims of domestic violence by not recognizing the validity of their experience, even in cases where it finds the presumption ultimately rebutted.

I do not seek to reevaluate the district court's credibility determinations as to the type and degree of abuse John inflicted on Ashley. I write separately only to indicate, by its own terms, the district court found domestic violence existed, triggering the statutory presumption. After such a finding, the law required the district court to determine whether John had successfully rebutted the presumption against joint custody. *See* NRS 47.180 (establishing procedures for rebutting an established presumption). The district court did not engage in such an analysis.

As a result, I would reverse the district court's finding that domestic violence was not proven by clear and convincing evidence and

remand for the district court to engage in the full NRS 125C.003(1)(c) analysis, looking towards the overarching best interests of the children to consider whether the presumption against joint custody has been rebutted.

_____, J.
Bell

I concur:

_____, J.
Stiglich

cc: Hon. Amy Mastin, District Judge, Family Division
Israel Kunin, Settlement Judge
Burton & Vazquez
McFarling Law Group
Patricia A. Marr, Ltd.
Eighth District Court Clerk