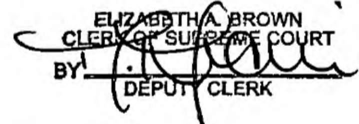
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

XOCHITL SUSANA LOZANO-DONOHUE,
Appellant,
vs.
JERRY T. DONOHUE,
Respondent.

No. 84261-COA

FILED

DEC 13 2023



ORDER OF REVERSAL AND REMAND

Xochitl Susana Lozano-Donohue appeals from a district court divorce decree establishing child custody.[1] Eighth Judicial District Court, Family Division, Clark County; Stacy Michelle Rocheleau, Judge.

Xochitl and respondent Jerry T. Donohue were married and have two minor children. In 2016, the parties separated. Following the parties' separation, the children initially resided with Jerry for a relatively short period; however, they eventually began residing with Xochitl instead and had minimal contact with Jerry going forward.

Xochitl commenced the underlying divorce proceeding in 2017, which resulted in a custodial dispute that largely focused on Jerry's allegation that Xochitl had alienated the children from him. Due to extenuating circumstances that need not be addressed here, the matter did

[1]On appeal, Xochitl only challenges the child custody determination, but does not challenge the other portions of the divorce decree. Thus, this order is limited to only the challenged child custody portion of the divorce decree.

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not proceed to trial until 2021. At trial, the district court heard extensive testimony from a licensed marriage and family therapist, Donna Wilburn, who, by court appointment, participated in this case between late 2017 and early 2018 in connection with efforts to reunify the children with Jerry, which were ultimately unsuccessful. Most notably, Wilburn testified regarding reports that she prepared in which she attributed the children's alienation from Jerry to Xochitl, indicated that Xochitl was resistant to the reunification process, and recommended that the children be temporarily removed from Xochitl's care to facilitate their reunification with Jerry.

Following the trial, the district court entered a divorce decree in which it, as relevant here, awarded Jerry sole physical custody of the children; established a plan for gradually transitioning them from Xochitl's care; and directed that, once the custodial arrangement was fully implemented, Xochitl was to have no contact with the children until her therapist determined that she could recognize and manage her behaviors that led to the children's alienation from Jerry, at which point the custodial arrangement could be modified. To support that decision, the district court determined that a statutory presumption against joint physical custody applied against Xochitl because she had engaged in pathogenic parenting behavior and emotional abuse of the children such that she was unfit and unable to adequately care for the children at least 146 days a year. *See* NRS 125C.003(1)(a) (providing that joint physical custody is presumed to not be in a child's best interest when a parent is unable to adequately care for the child at least 146 days per year). And for largely similar reasons, the district court also determined that the best interest factors favored the

custodial arrangement. This appeal, which challenges only the physical custody determination, followed.

This court reviews the district court's child custody determinations for an abuse of discretion, but "the district court must have reached its conclusions for the appropriate reasons." *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241-42 (2007). And although we review the district court's decisions deferentially, the district court must apply the correct legal standard in reaching its conclusions, and no deference is owed to legal error or findings so conclusory they may mask legal error. *Davis v. Ewalefo*, 131 Nev. 445, 450-51, 352 P.3d 1139, 1142-43 (2015); *Williams v. Waldman*, 108 Nev. 466, 471, 836 P.2d 614, 617-18 (1992).

On appeal, Xochitl challenges the award of sole physical custody to Jerry by arguing that the district court placed undue weight on Wilburn's testimony, improperly declined to consider the children's wishes, and made inconsistent findings concerning Jerry's use of alcohol.[2] We need not reach those issues, however, because the district court's resolution of the parties' physical-custody dispute did not comport with the requirements for awarding a party sole physical custody set forth in this court's recent opinion in *Roe v. Roe*, 139 Nev., Adv. Op. 21, 535 P.3d 274 (Ct. App. 2023).

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[2]Because the parties' older child has turned 18, we limit our discussion of the physical-custody issue to the parties' younger child and deem the appeal moot as to the parties' older child. *See Davis*, 131 Nev. at 452, 352 P.3d at 1143 ("A child custody determination, once made, controls the child's and the parents' lives until the child ages out . . . ."); *see also* NRS 129.010 (providing that "[a]ll persons of the age of 18 years who are under no legal disability . . . are, to all intents and purposes, held and considered to be of lawful age").

While we acknowledge that the district court did not have the benefit of *Roe*'s guidance at the time it entered the divorce decree, and that Xochitl likewise did not have the benefit of that opinion when she filed her opening brief, for the reasons set forth below, we conclude reversal of the challenged order is necessary.[3]

In *Roe*, this court explained that, before the district court awards a parent sole physical custody, it must "first find[ ] either that the noncustodial parent is unfit for the child to reside with" or "make[ ] specific findings and provide[ ] an adequate explanation as to the reasons why primary physical custody is not in the best interest of the child." *Id.* at 288. These findings must be in writing "and are separate and in addition to the best interest findings required under NRS 125C.0035(4)." *Id.* After making these findings, the district court is next required to order "the least restrictive parenting time arrangement possible that is within the child's best interest." *Id.* In the event that a less restrictive parenting time arrangement exists, the district court must explain how the child's best interest is served by the more restrictive arrangement. *Id.* And in establishing such arrangements, the district court may not delegate its

[3]Jerry did not file an answering brief in this matter, which we may treat as a confession of error. *See* NRAP 31(d)(2)(providing that the appellate courts may treat a respondent's failure to file an answering brief as a confession of error); *Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (concluding that respondents confessed error by failing to respond to appellant's argument). However, we decline to do so in light of the facial defects in the district court's order that are discussed below.

decision-making power to modify the arrangement to a third party. *Id.* at 290.

In the present case, the district court made the finding needed to support an award of sole legal custody to Jerry, as it specifically determined that Xochitl was an unfit parent. *See id.* at 288. However, this aspect of the divorce decree was not fully consistent with *Roe*'s guidance as the court found that Xochitl was an unfit parent in the context of its analysis of NRS 125C.003(1)(a)'s presumption and the best interest factors, rather than in a separate sole-physical-custody analysis, as contemplated by *Roe*. *See id.* Even if we were to conclude that this deficiency could be excused as harmless error, however, *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 award of sole physical custody to Jerry deviates from *Roe*'s guidance in two more significant respects.

First, the district court directed that Xochitl initially have no contact with the child once the child was transitioned to Jerry's sole physical custody, before eventually transitioning to supervised visitation, even though Wilburn testified that she recommended permitting Xochitl to initially have weekly, recorded Facetime calls with the child following the transition, which would then transition to supervised visitation. In doing so, the court failed to acknowledge that its parenting time arrangement was more restrictive than the one proposed by Wilburn and did not explain how the more restrictive arrangement served the child's best interest. *Roe*, 139 Nev., Adv. Op. 21, 535 P.3d at 288. As a result, we cannot say with assurance that the district court implemented the foregoing custodial

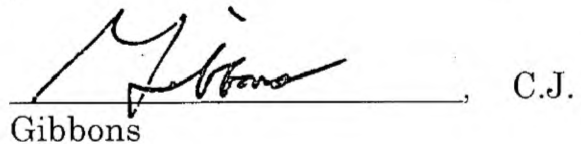
arrangement for the correct legal reasons. *See Davis*, 131 Nev. at 450-51, 352 P.3d at 1142-43; *Williams*, 108 Nev. at 471, 836 P.2d at 617-18.

Second, insofar as the district court directed that, once Xochitl's therapist indicated that she made progress in therapy, she would be permitted to have supervised parenting time with the child, the court essentially assigned Xochitl's therapist the role of determining when a parenting time adjustment would be appropriate. Such action constituted an improper delegation of the district court's decision-making authority with respect to substantive matters. *Id.* at 290 (explaining that the district court's delegation of decision-making authority cannot extend to substantive issues—including custodial modification—and concluding that the district court abused its discretion by vesting a child's therapist with authority to determine when the noncustodial parent's parenting time could be expanded to in-person contact with the child); *see also Herzog v. Herzog*, No. 73160, 2018 WL 4781619, at *1-2 (Nev. Oct. 2, 2018) (Order Affirming in Part, Reversing in Part and Remanding) (concluding that, insofar as language in a divorce decree indicating that visitation could be increased, as recommended by a child's therapist, could be read as a delegation of decision-making authority, the delegation was improper).

Thus, given the foregoing deficiencies, we conclude that the district court abused its discretion in resolving the parties' dispute with respect to physical custody of the child. *See Ellis*, 123 Nev. at 149, 161 P.3d at 241-42. Accordingly, we reverse that aspect of the divorce decree and remand this matter to the district court for further proceedings based on

the principles, rules, and requirements articulated in *Roe* or other proceedings as deemed necessary by the district court.[4]

It is so ORDERED.[5]



______________________, C.J.
Gibbons

______________________, J.
Bulla

______________________, J.
Westbrook

cc: Hon. Stacy Michelle Rocheleau, District Judge, Family Division
Ocampo Wiseman Law
Jerry T. Donohue
Eighth District Court Clerk

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[4]Pending further proceedings on remand, we leave in place the current custody arrangement, subject to modification by the district court to comport with the current circumstances. *See Davis*, 131 Nev. at 455, 352 P.3d at 1146 (leaving certain provisions of a custody order in place pending further proceedings on remand).

[5]Although Xochitl is represented by pro bono counsel in this matter, because Jerry is proceeding pro se and has not filed a brief as part of this appeal, no oral argument will be scheduled.