

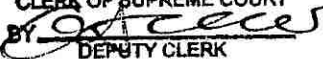
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL C. XAVIER,
Appellant,
vs.
ELYSE N. XAVIER,
Respondent.

No. 86767-COA

FILED

JAN 30 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Michael C. Xavier appeals from an order of the district court denying motions to modify custody. First Judicial District Court, Carson City; James Todd Russell, Judge.

Michael C. Xavier and respondent Elyse N. Xavier were previously married and share two minor children in common. The parties jointly petitioned for a summary decree of divorce and, in their joint petition, requested joint legal custody of the children and for Elyse to have primary physical custody of the children. The district court subsequently entered a decree of divorce adopting the parties' requests contained within the joint petition. In the years following entry of the decree of divorce, the parties filed several motions seeking modifications to the custodial orders. The district court had most recently ordered that both parties share joint legal and physical custody of the minor children.

In 2023, Michael filed several motions requesting modification of the custody order. Michael alleged that the oldest child's school performance was declining. Michael also alleged that the oldest child engaged in sexual activity with his girlfriend at Elyse's home. For those reasons, Michael contended that the parties' oldest child was not receiving

appropriate supervision under Elyse's care. He therefore sought primary physical custody of both minor children. Elyse opposed the motion, and Michael filed a reply.

The district court conducted an evidentiary hearing concerning Michael's request for a change in custody and both parents testified at the evidentiary hearing. Michael stated the oldest child's grades have worsened because Michael is not able to help with homework when the child is staying with Elyse. Michael expressed his concerns as to the youngest child's schoolwork. Michael further explained his belief that Elyse is too permissive with the children and stated that he is better able to set appropriate expectations for their behavior. Elyse testified that she believes Michael is too strict and had been physically and emotionally abusive toward the children. In addition, Elyse stated that she believes the children should have the freedom to choose which parent they should spend time with. The court discussed these issues with the oldest child and explained that the child wished to keep the current custodial arraignment.

At the hearing, the district court initially expressed its intention to modify the custody order but, after further discussing the matter with both parties, announced it decided to deny Michael's request for primary physical custody.

The court subsequently entered a written order denying Michael's request for modification of custody. In its order, the court noted that to alter the previously entered custodial order, it had to consider whether there had been a substantial change in circumstances affecting the welfare of the children and the children's best interest. The court found it was in the children's best interest to leave its prior order of joint physical custody in place, but it did not make findings concerning the best interest

of the children factors as required by NRS 125C.0035(4) or whether there had been a substantial change in the circumstances affecting the welfare of the children. The court also directed the parties to work together to ensure that the children improve their grades and direction in life. And the court directed Elyse to permit Michael to help the children with homework when they are staying at her home and ordered the children to attend counseling. Finally, the district court noted that it would reconsider its custody order if the children's grades did not improve. This appeal followed.

On appeal, Michael argues the district court abused its discretion by denying his request for primary physical custody and contends that the court did not consider the best interest of the children. In addition, Michael contends that the court was biased against him.

We review a district court's custody determinations for an abuse of discretion. *Rivero v. Rivero*, 125 Nev. 410, 428, 216 P.3d 213, 226 (2009), *overruled in part on other grounds by Romano v. Romano*, 138 Nev. 1, 3, 501 P.3d 980, 982 (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). A court may modify a physical custody arrangement only when the movant demonstrates that "(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 the modification." *Romano*, 138 Nev. at 5, 501 P.3d at 983 (quoting *Ellis v. Carucci*, 123 Nev. 145, 150, 161 P.3d 239, 242 (2007)). Moreover, the district court's "order must tie the child's best interest, as informed by specific, relevant findings respecting the [best interest factors] and any other relevant factors, to the custody determination made." *Davis v. Ewalefo*, 131 Nev. 445, 451, 352 P.3d 1139, 1143 (2015). Without specific findings and an adequate explanation for the custody determination, this

court cannot determine with assurance whether the custody determination was appropriate. *Id.* at 452, 352 P.3d at 1143.

Having reviewed the briefs of the parties and the record on appeal, we conclude that the district court's order is facially insufficient to support its custody determination, or to allow meaningful appellate review of the court's reasons for denying Michael's request to modify custody. In its order, the district court not only failed to address whether there had been a substantial change in circumstances affecting the welfare of the children under *Romano*, it also failed to engage in discussion or analysis of the best interest of the children factors as required by NRS 125C.0035(4) and *Davis*. Indeed, the district court's summary findings on the matter only state that it "believes it is in the Minor Children's best interest for the Court's previous order of joint physical custody to remain in place."¹ Because the district court failed to make the required findings when evaluating a motion to modify custody, we cannot determine whether the court's custody determination was appropriate. *See Davis*, 131 Nev. at 452, 352 P.3d at 1143.

For these reasons, we reverse the district court's order and remand this matter for further proceedings. On remand, we direct the district court to fully and properly address whether modification of the physical custody arrangement is warranted under the framework outlined in *Romano*, including addressing whether a substantial change in circumstances affecting the welfare of the children occurred. *See Romano*,

¹Although specific written findings regarding the best interest factors are required, our review of the transcript from the evidentiary hearing in this matter similarly reveals that the district court did not make oral findings as to the best interest factors during the evidentiary hearing.

138 Nev. at 5, 501 P.3d at 983. If the court finds that there has been a substantial change in circumstances, it must also address the best interest findings as required by NRS 125C.0035(4) and tie the ultimate custody determination to the children's best interest. *See id.*; *Davis*, 131 Nev. at 451, 352 P.3d at 1143. For these reasons, we reverse the district court's order and remand this matter for further proceedings.²

Finally, Michael argues that the district court was biased against him. We conclude that relief is unwarranted on this point because Michael has not demonstrated that the court's decisions in the underlying case were based on knowledge acquired outside of the proceedings and the court's 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) (internal quotation marks omitted) (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 and which reflects deep-seated favoritism or antagonism that would render fair judgment impossible); *see In re Petition to Recall Dunleavy*, 104 Nev. 784, 789, 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 (stating that the burden is on the party asserting bias to establish sufficient factual

²Pending 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).

grounds for disqualification). Therefore, Michael is not entitled to relief based on this claim. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.³


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. James Todd Russell, District Judge
Michael C. Xavier
Elyse N. Xavier
Carson City Clerk

³Insofar as the parties raise 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.