

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KARYL CLARKE,
Appellant,
vs.
TANESHA WHITE,
Respondent.

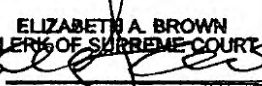
No. 86068-COA

KARYL CLARKE,
Appellant,
vs.
TANESHA WHITE,
Respondent.

No. 86069-COA

FILED

NOV 15 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

In these consolidated appeals, Karyl Clarke appeals from district court orders setting aside a default custody decree and awarding respondent Tanesha White primary physical custody of their minor child. Eighth Judicial District Court, Family Division, Clark County; Michele Mercer, Judge.

Clarke and White were never married but have one minor child together, T.C., a daughter born in 2016.¹ The couple had a tumultuous relationship, eventually separating in April 2020. The parties' separation followed an incident that occurred on April 28, 2020, when Clarke allegedly held a butcher knife to White's neck and choked her in her apartment. Clarke tried to stop White from calling for help by taking her phone, along

¹We recount the facts only to the extent necessary to our disposition.

24-43449

with her son's phone,² and blocking her from leaving the apartment. White attempted to retrieve the phones from Clarke and, during the struggle, she managed to escape, run outside, and use a stranger's phone to call the police. Clarke then took T.C. outside, placed her in the car, and as he ran around to get into the driver's seat, White pulled the child out of the vehicle. Clarke then drove away with the apartment keys, stranding both White and their child outside the locked apartment late at night. T.C. was wearing only a shirt and panties, with no pants, socks, shoes, or a jacket.

Following the April 28, 2020, incident, White obtained a temporary protection order (TPO) against Clarke, which summarily granted White "temporary physical custody of the minor child." Clarke then moved to dissolve the TPO, and on May 27, 2020, both parties attended a hearing on Clarke's motion. During the hearing, the hearing master explained that although he did not find White's claim that Clarke had held a knife to her throat credible, he found that an act of domestic violence had occurred, a threat of domestic violence existed, or Clarke posed a credible threat to the safety of White or their child. As a result, the hearing master extended the TPO for six months, until October 31, 2020. Sometime thereafter, White moved to Ohio with T.C. Clarke moved to lift the TPO before the six months expired. The TPO was dissolved on August 13, 2020, when White failed to attend another scheduled hearing to determine whether the TPO should be lifted.

Before the TPO was dissolved, on June 22, 2020, Clarke filed a complaint for custody, but Clarke was unable to locate White to personally serve her. Clarke later requested to serve White by publication, and the

²White has a son from a previous relationship.

court granted this motion on September 30, 2020. Eventually a clerk's default was entered against White on November 19, 2020, after she failed to appear in the case. In a subsequent ex parte motion for return of T.C., Clarke claimed that White had abducted T.C. and that he was unaware of their whereabouts.

About a year after the clerk's default was entered, the district court entered a default decree of custody on October 26, 2021, based on White's failure to appear in the proceedings. The default decree was issued based on the pleadings and papers submitted, with the court not considering any explanations for White's absence, as she had not appeared in the case to present any arguments. As part of the default decree, the district court found White's domestic violence allegations in her TPO application to be false and awarded Clarke sole legal and physical custody of T.C. after analyzing NRS 125C.0035(4)'s best interest factors. On the same day the court issued the default decree, the court also entered an order resolving Clarke's motion for return of T.C., which required White to produce T.C. before the court on November 17, 2021, or, in the alternative, authorized Clarke to pick up T.C. with the assistance of law enforcement provided that Clarke advised the court when he obtained physical custody. Subsequently, Clarke left Nevada and relocated to Ohio, allegedly to search for T.C.

Clarke and White reestablished communication in August 2021 after White moved back to Nevada from Ohio, approximately two months before the district court entered its default decree in October of that year. However, Clarke did not obtain physical custody of T.C. until March 31, 2022, when he traveled to Nevada and picked up the child from White's apartment in North Las Vegas with the assistance of law enforcement based on the default decree and the order returning T.C. to Clarke. Both then

returned to Clarke's home in Ohio. Clarke failed to notify the district court that he had obtained physical custody of T.C.

The day after Clarke picked up T.C., White appeared in the child custody case for the first time and filed an NRCP 60(b) motion to set aside the default decree. White claimed she was unaware of the action until Clarke showed up at her apartment with the court's pick-up order. She sought to modify custody to grant her sole legal and physical custody, arguing that she was more likely to facilitate parenting time. She also raised Clarke's history of domestic violence.

The district court held a hearing on White's motion to set aside the default decree on April 18, 2022. White appeared in person, while Clarke appeared by videoconference from Ohio. At the hearing, White admitted she had left Nevada with T.C. and was living in Ohio following the April 28, 2020, domestic violence incident for which she had obtained a TPO. White explained that she brought their child back to Nevada from Ohio in April 2021 and later reconnected with Clarke in August 2021. During the hearing the district court learned that T.C. was in Ohio with Clarke. The court questioned him as to why he failed to inform the court that he obtained physical custody of the child and removed the child from Nevada. Clarke asserted that he had initially moved to Ohio to facilitate his search for T.C. and once he obtained custody he took T.C. to Ohio because the court instructed him to locate her and to obtain custody, and that's where he was living at the time.

After argument, the district court orally found that White had wrongfully withheld T.C., relocated to Ohio, and concealed her from Clarke between June 2020 and August 2021. The court also determined that Clarke had improperly removed T.C. from Nevada in violation of earlier

orders, including the October order for production. The district court directed Clarke to bring T.C. to Nevada and return her to White's custody. The parties were also directed to attend a hearing on April 25, 2022, to determine whether the default decree should be set aside.

At the April 25, 2022, hearing, both parties were present, and White represented that Clarke had transferred custody of T.C. over to her prior to the hearing. The district court considered White's motion to set aside the default decree, in which she argued that she had been unaware of the child custody action. Notably, Clarke did not file an opposition to White's motion. After finding that it was in the "best interest of the child to proceed . . . on the merits and make a decision with both [parents] having a voice," the court granted White's motion. Following the hearing, the district court issued an order on June 1, 2022, setting aside the default decree and granting White temporary primary physical custody of T.C. until a permanent custody arrangement could be established. The district court orally explained to both parties that its decision to set aside the default was based on its determination that resolving custody on the merits was in T.C.'s best interest.³

Following an evidentiary hearing on October 27, 2022, the district court entered a first amended decree of custody on November 27, 2022, wherein it awarded White primary physical custody of T.C. In doing so, the court expressly analyzed the best interest factors under NRS

³If an order granting an unopposed motion concerns child custody, as the June 1, 2022, order did, the order shall be construed as including findings that the court's decision is in the best interest of the child. EDCR 5.702. Therefore, Clarke's failure to file an opposition leads to these implied findings as well as a basis for granting White's motion to set aside the default judgment.

125C.0035(4), finding that five out of the seven non-neutral factors favored White. As relevant to this appeal, the court found that White had committed an act of abduction by disappearing with T.C. for approximately 22 months. The court also found that Clarke was the party most likely to facilitate frequent associations between T.C. and the noncustodial parent after comparing the extent to which each parent allowed the other parent to contact T.C. during the times they each removed her from Nevada. In addressing the allegations of abduction against White, the district court found that, by White's own admissions, she had committed abduction by willfully concealing or removing T.C. to intentionally hinder Clarke's efforts to establish or maintain a meaningful relationship with her. Having found an act of abduction perpetrated by White, the district court applied the NRS 125C.0035(7) presumption against White, meaning that, presumptively, joint or sole custody by White was not in T.C.'s best interest.

However, the district court found that White successfully rebutted this presumption with her testimony that Clarke had committed domestic violence. To support that decision, the court found that Clarke's inappropriate conduct had negatively affected his relationship with T.C.⁴ and that incidents of abuse/domestic violence significantly weighed against Clarke.⁵ The court found White's testimony credible regarding the April 18,

⁴In conducting its analysis, the district court found that Clarke's inappropriate conduct included excessively long video calls with T.C., making crude remarks about family members, and threatening to take T.C. away from White forever.

⁵In supporting its finding of domestic violence, the district court referenced the April 28, 2020, incident; Clarke's more recent conduct involving repeated and incessant calls to White; and White's fearful demeanor during the evidentiary hearing.

2020, incident with the knife and did not believe Clarke's denial of holding a knife to White's throat. The court applied NRS 200.359(2) to support its finding. NRS 200.359(2) is a criminal statute that allows for an abduction to be excused if a parent with joint legal and physical custody can show that their actions were intended to protect the child or themselves from domestic violence. After applying NRS 200.359(2), the district court determined White's abduction was excused because she demonstrated to the court that her departure from Nevada was necessary to protect herself and T.C. from domestic violence, which was established by clear and convincing evidence. These consolidated appeals followed.

Clarke filed an initial appeal in Docket No. 86068-COA to challenge the June 1, 2022, order to set aside the default decree that awarded him sole legal and physical custody. Then Clarke filed an appeal in Docket No. 86069-COA to challenge the November 27, 2022, amended custody decree granting both parties joint legal custody and White primary physical custody. Clarke requests that this court vacate both orders and reinstate the original default decree and its custody arrangement.

The district court did not abuse its discretion in setting aside the default decree

On appeal, Clarke argues that the district court abused its discretion in setting aside the default decree because it did not provide any legal basis to support its decision. *See Cook v. Cook*, 112 Nev. 179, 181-82, 912 P.2d 264, 265 (1996) (providing that a decision to grant or deny a motion to set aside a judgment under NRCP 60(b) is reviewed for an abuse of discretion). Clarke's main contention is that the June 1, 2022, order setting aside the default was deficient because it failed to analyze the controlling procedural authority regarding NRCP 60(b). As an initial matter, the district court has wide discretion in deciding whether to grant or deny a

motion to set aside a judgment under NRCP 60(b). *Rodriguez v. Fiesta Palms, LLC*, 134 Nev. 654, 656, 428 P.3d 255, 257 (2018). But the district court's broad discretion "cannot be sustained where there is no competent evidence to justify the court's action." *Lukey v. Thomas*, 75 Nev. 20, 22, 333 P.2d 979, 979 (1959). Additionally, this court's policy preference favoring adjudication on the merits is heightened during domestic relations cases, particularly when child custody is at issue. *Price v. Dunn*, 106 Nev. 100, 105, 787 P.2d 785, 788 (1990).

Here, the order setting aside the default decree provided no supporting written explanation other than the district court was granting White's motion, which was brought under NRCP 60(b). However, the district court orally explained its decision during the April 25, 2022, hearing, emphasizing that granting White's motion would be in T.C.'s best interest because the court could then resolve the custody dispute on the merits after hearing from both parties. *See id.*; *see also Devries v. Gallio*, 128 Nev. 706, 710-11, 290 P.3d 260, 263 (2012) ("Although the district court did not explain in its order which method it applied to reject an allocation of a community property interest . . . its failure to include this information does not invalidate the order so long as the reasons for the [order] are readily apparent elsewhere in the record and are sufficiently clear to permit meaningful appellate review." (internal quotation marks omitted)).

Further, although not specifically mentioned in the district court's order, White moved to set aside the default decree pursuant to NRCP 60(b), and the district court granted that motion. NRCP 60(b) contains a catch-all provision, allowing a court to relieve a party from a final judgment, order, or proceeding for "any other reason that justifies relief." NRCP 60(b)(6). The Nevada Supreme Court has held that relief under the catch-

all is only warranted in extraordinary circumstances and is unavailable when relief could be sought under other provisions of NRCP 60(b). *Vargas v. J Morales, Inc.*, 138 Nev. 384, 388-89, 510 P.3d 777, 781 (2022). Here, the district court set aside the default decree on grounds that proceeding on the merits was in the best interest of the child. This basis for granting NRCP 60(b) relief would only be available under NRCP 60(b)(6). *See Jones v. Jones*, 591 S.W.3d 831, 833-34 (Ark. Ct. App. 2019) (holding the district court abused its discretion in denying relief to set aside a default custody award, as the best interest of the child can qualify as an “other reason justifying relief” under Arkansas’ analog of NRCP 60(b)(6)); *cf. Pereira v. Eisenberg*, No. 86792-COA, 2024 WL 2783776, at *3-4 (Nev. Ct. App. May 29, 2024) (Order Affirming in Part, Reversing in Part and Remanding) (concluding that the district court erred in denying the motion to set aside a default custody decree under NRCP 60(b) and emphasizing that the policy favoring decisions on the merits is heightened in child custody cases). Further, the need to hear from both parties to determine the child’s best interest is paramount in child custody cases, *see Bluestein v. Bluestein*, 131 Nev. 106, 112, 345 P.3d 1044, 1049 (2015), and was an extraordinary circumstance warranting relief given the facts of this case. Consequently, the district court did not abuse its discretion in setting aside the default decree under the analysis of NRCP 60(b)(6).⁶

⁶Because Clarke failed to oppose White’s motion to set aside the default decree, the district court had an alternative basis for granting White’s motion under EDCR 5.702(d), which addresses unopposed motions concerning child custody. In doing so, the June 1, 2022, order setting aside the default decree can be construed to include findings that granting the motion is in the best interest of the child, *see* EDCR 5.702(d), and these implied findings provide an alternative basis for granting White relief in addition to the relief provided under NRCP 60(b)(6).

Clarke next contends that in evaluating whether to set aside the default decree, the district court should have applied the standard for modifying physical custody, and claims it should have considered the best interest factors under NRS 125C.0035(4) before modifying the sole custody of the child previously awarded to him in the default decree.⁷ We disagree because Clarke has failed to provide any authority to support that setting aside a default custody order constitutes a modification of custody. See *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks support by relevant authority). Indeed, when the district court set aside the default decree it vacated Clarke's award of sole legal and physical custody such that the award no longer existed and therefore there was no custody award to modify. See *Comes v. Comes*, 178 N.W. 403, 405 (Iowa 1920) ("The [divorce] decree rests upon the finding that defendant is in default, and, if the default be set aside, the decree necessarily goes with it. The sole purpose of setting aside the default is to open the cause for the defense."); *Ostling v. Loring*, 33 Cal. Rptr. 2d 391, 397 (Ct. App. 1994) ("Vacating [a] default judgment . . . returns the defendant to the default status *quo ante*."); *P.H.L. Dev. Corp. v. Smith*, 329 S.E.2d 545, 546 (Ga. Ct. App. 1985) ("Once a default judgment is set aside, the case returns to the posture it occupied prior to entry of default judgment.").

⁷To modify physical custody, the moving party must demonstrate, "(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 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).

Thus, the district court was not required to find a substantial change in circumstances or analyze NRS 125C.0035(4)'s best interest factors when setting aside the default decree. Accordingly, we conclude that the district court did not abuse its discretion in failing to analyze the requirements of modifying Clarke's sole custody award when determining whether to set aside the default decree.

The district court did not abuse its discretion in awarding White primary physical custody

Clarke raises two issues on appeal regarding the district court's alleged abuse of discretion in entering the November 27, 2022, amended decree of custody awarding White custody. *See Roe v. Roe*, 139 Nev., Adv. Op. 21, 535 P.3d 274, 284 (Ct. App. 2023) (reviewing a district court's child custody order for an abuse of discretion). We address each in turn.

The district court properly considered the prior incident of domestic violence against White

Clarke argues that the district court abused its discretion in granting primary physical custody to White in the November 27, 2022, amended custody decree because the court was not permitted to reconsider previously "dismissed" domestic violence issues. Clarke argues that the district court's new findings regarding domestic violence as they relate to a prior domestic violence claim violates *Nance v. Ferraro*, 134 Nev. 152, 157, 418 P.3d 679, 684 (Ct. App. 2018). *Nance* holds that a party seeking to modify physical custody cannot use evidence of domestic violence known to the parties or the court at the time the prior custody order was put in place to demonstrate a substantial change in circumstances warranting a modification of custody. *Id.* at 159-60, 418 P.3d at 685-86.

In its analysis of the best interest factors in the November custody order, the district court revised its earlier findings regarding

domestic violence set forth in the default decree. Previously, but without any input from White who had not yet appeared in the custody proceeding, the district court determined that White lied about the allegations of domestic violence in the TPO as a basis for awarding sole legal and physical custody to Clarke. However, in the November 27, 2022, amended decree of custody, which was issued after White appeared and the district court had the opportunity to consider her testimony, the court deemed White's testimony credible to support a finding of clear and convincing evidence of domestic violence. *See Franklin v. Franklin*, No. 84334, 2024 WL 3085490, at *2 (Nev. June 20, 2024) (Order Affirming in Part, Reversing in Part, and Remanding) (recognizing that the clear and convincing evidence standard "can be satisfied by the victim's testimony alone"). In light of our holding that the district court set aside rather than modified the default decree, we conclude that the limitations imposed by *Nance* when reviewing prior incidents of domestic violence do not apply here.

Alternatively, Clarke argues that if the district court was allowed to consider the prior incident of domestic violence, its finding that he engaged in domestic violence is not supported by clear and convincing evidence. We disagree.

White testified that a serious physical altercation took place in front of the minor child, during which Clarke held a knife to her neck, choked her, and locked both White and T.C. out of White's apartment on the evening the altercation occurred. Further, the district court found that Clarke harassed White by repeatedly texting and calling her, ignoring her requests to stop. Together, this evidence constituted substantial support for the district court's finding of domestic violence by clear and convincing evidence. *See id.*; *see also Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d

699, 704 (2009) (“The district court’s factual findings . . . are given deference and will be upheld if not clearly erroneous and if supported by substantial evidence.”). Insofar as Clarke contends that a contrary finding was warranted based on his conflicting testimony, the district court found that White’s testimony was credible, and it did not find Clarke’s version of the April 28, 2020, domestic violence incident believable. This court generally will not reweigh witness credibility. *Castle v. Simmons*, 120 Nev. 98, 103, 86 P.3d 1042, 1046 (2004). Therefore, we conclude that substantial evidence supports the district court’s finding of domestic violence by clear and convincing evidence and thus Clarke is not entitled to relief.

The district court did not abuse its discretion in finding that White rebutted NRS 125C.0035(7)’s abduction presumption

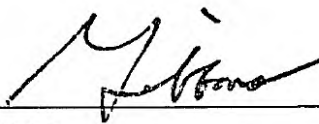
Second, Clarke argues that the district court incorrectly applied NRS 200.359(2) to permit White to rebut the presumption against joint or sole physical custody for a parent who commits abduction under NRS 125C.0035(7). However, even assuming that the district court erred in applying NRS 200.359(2) to rebut NRS 125C.0035(7)’s abduction presumption, the error was harmless. *Cf.* NRCP 61 (providing that “all errors and defects that do not affect any party’s substantial rights” are harmless); *see also 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.”). Indeed, the district court did not need to rely on NRS 200.359(2) as authority to conclude that White overcame the abduction presumption by showing that she concealed T.C. from Clarke to protect herself or T.C. from domestic violence. To the contrary, the district court was permitted to consider the circumstances of White’s decision to conceal T.C. based on its broad

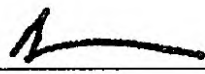
discretion to determine child custody. *See Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015) (“The district court has broad discretionary power in determining child custody.” (internal quotation marks omitted)).

Here, in the exercise of its broad discretion, the district court specifically concluded that White successfully rebutted the abduction presumption under NRS 125C.0035(7) by clear and convincing evidence, demonstrating to its satisfaction that her actions to conceal T.C. were taken to protect herself or T.C. from domestic violence. Moreover, the district court also conducted a complete analysis of the applicable best interest factors under NRS 125C.0035(4), finding most non-neutral factors favored White and that Clarke’s aggressive and violent behavior significantly influenced the court’s findings. *See Kelly v. Kelly*, 129 Nev., Adv. Op. 39, 554 P.3d 1147, 1152 (2023) (holding the district court must consider the best interest factors when deciding child custody). The district court’s findings, both with respect to the rebuttable presumption and the best interest factors, are supported by substantial evidence, including White’s testimony about Clarke’s domestic violence and other misconduct. Although Clarke questions White’s credibility based on the earlier findings from the default decree, we will not reweigh the credibility of witnesses on appeal, as that duty rests within the trier of fact’s sound discretion. *See Castle*, 120 Nev. at 103, 86 P.3d at 1046. Here, the district court found White credible.

Thus, given the foregoing, we discern no prejudice to Clarke from the district court’s reliance on NRS 200.359(2) in its analysis of NRS 125C.0035(7)’s abduction presumption, and we therefore conclude that Clarke has failed to establish a basis for reversing the district court’s decision to award White primary physical custody. *Cf. NRCP 61; see also Wyeth*, 126 Nev. at 465, 244 P.3d at 778. Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁸


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Michele Mercer, District Judge, Family Division
Paul C. Ray, Chtd.
Garman Turner Gordon LLP
Eighth District Court Clerk

⁸Insofar as Clarke raises arguments that are not specifically addressed in this order, we have considered the same and conclude they do not present a basis for relief.