

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LANCE DELON ALVARADO,
Appellant,
vs.
JACQUELINE DAWN ALVARADO,
Respondent.

No. 62794

FILED

NOV 05 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a Decree of Divorce entered by the district court following a bench trial. Second Judicial District Court, Washoe County; Bridget Robb Peck, Judge.

RELEVANT FACTS AND PROCEDURAL HISTORY

On November 8, 2011, Respondent Jacqueline Alvarado obtained a Temporary Protection Order Against Domestic Violence ("TPO") against Appellant Lance Alvarado. Subsequently, in the Order extending the TPO, the Hearing Master ordered that Lance was to only correspond in writing with Jacqueline and only regarding the children or the divorce. There were multiple motions filed with the Hearing Master relating to the TPO and visitation. Jacqueline then filed her Complaint for Divorce on July 26, 2012. During the litigation, there were numerous motions filed, hearings, and interim orders issued, mostly regarding Lance's failure to pay child support and his violation of the protection order. Notably, Lance appeared in proper person throughout the litigation until the time of trial. Additionally, throughout the litigation, the district court informed Lance that he must use the appropriate discovery methods

provided by the Nevada Rules of Civil Procedure, and encouraged Lance to seek the advice of counsel or the self-help center.

A bench trial was held on February 5, 2013. Based upon the evidence entered and testimony elicited during the bench trial, the district court made numerous findings of fact relating to the best interest of the children.¹ The parties were then divorced by way of Decree of Divorce filed March 1, 2013 and entered nunc pro tunc to February 7, 2013. Pursuant to the Decree, Jacqueline was granted primary physical custody and sole legal custody of the parties' three minor children. This appeal followed.

ANALYSIS

District courts have broad discretion to determine child custody cases and we review the district court's determinations for an abuse of discretion. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007) (citing *Rico v. Rodriguez*, 121 Nev. 695, 701, 120 P.3d 328, 330 (2005)). Similarly, on appeal, we presume the district court properly exercised its discretion in determining the best interest of the children. *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996) (citing *Culbertson v. Culbertson*, 91 Nev. 230, 233, 533 P.2d 768, 770 (1975)). Thus, we will not disturb the district court's factual findings if they are supported by substantial evidence. *Ellis*, 123 Nev. at 149, 161 P.3d at 242 (citing *Rico*, 121 Nev. at 701, 120 P.3d at 816 and *Williams v. Williams*, 120 Nev. 559, 566, 97 P.3d 1124, 1129 (2004)).

¹Because the parties are familiar with the facts, we do not recount them further except as necessary to our disposition.

On appeal, Lance argues that: (1) the district court abused its discretion in finding a presumption that the best interest of the children would not be served by a grant of joint physical custody; (2) the district court abused its discretion in awarding sole legal custody of the children; (3) the district court abused its discretion in finding Lance was willfully under-employed; (4) the district court abused its discretion in allowing the trial to move forward without allowing time to conduct discovery; and (5) the district court's decisions were biased against Lance, necessitating reassignment of the case on remand to the district court. We address each argument in turn.

The district court did not abuse its discretion in finding a rebuttable presumption against joint physical custody pursuant to NRS 125.480(5)

In Nevada, the primary concern in child custody matters is the best interest of the child. *Ellis*, 123 Nev. at 150, 161 P.3d at 242. Pursuant to NRS 125.480(1), the best interest of the child is the *sole* consideration of the court.²

Additionally, although the Nevada Legislature has indicated a preference for an award of joint physical custody in some cases, *see e.g.* NRS 125.490, the converse is true if the district court finds by clear and convincing evidence that either parent has committed an act of domestic

²We note that the Nevada Legislature repealed NRS 125.480 during the 2015 session, but it seems to have simply moved the content of this statute to NRS 125C, which relates to custody and visitation matters. 2015 Nev. Stat., ch. 445. This amendment, however, does not alter the analysis in this matter as all of the issues presented on appeal arose prior to this recent amendment and there is nothing to suggest this amendment would apply retroactively instead of taking effect on October 1, 2015 as indicated by the legislation. Therefore we use the NRS designations that were in effect at the time of the proceedings in district court.

violence against the child or the other parent. In that case, there is a rebuttable presumption that sole or joint custody of the child by the perpetrator of domestic violence is not in the child's best interest. NRS 125.490(1); NRS 125.480(5). Should a district court so find, it must set forth findings of fact supporting its determination that an act of domestic violence occurred and that the custody order adequately protects the child and parent or other victim of domestic violence. NRS 125.480(5)(a)-(b). Notably, pursuant to NRS 125.480(10)(b), "domestic violence" has the meaning ascribed to it under NRS 33.018, which includes a "knowing, purposeful or reckless course of conduct intended to harass the other person" and this may include, but is not limited to, assault, battery, stalking, trespassing, and destruction of property.

Here, the district court heard substantial evidence and set forth findings that Lance committed acts of domestic violence against Jacqueline and that there was a history of abuse/neglect between Lance and one of the children. The court also found that, despite the protection order, Lance continued to engage in a pattern of severe harassment, and that the parties' communication should be limited. Based on our review of the record, we conclude the district court did not abuse its discretion in applying the presumption under NRS 125.480(5). Although the district court's order does not include the precise language set forth in NRS 125.280(5)(b), it is clear from the detailed findings in paragraphs 6-25 of the order – including that Lance has been violent toward Jacqueline and one child, and that his contact should be limited – that the court's custody order would protect Jacqueline and the children. Furthermore, even if it could be said that the district court erred in failing to use the exact language provided by NRS 125.280(5)(b) that the custody order

“adequately protects the child and the parent,” this error was harmless. Had the court not considered the rebuttable presumption against joint physical custody based on the domestic violence, the court still properly considered the best interest of the children and made several findings pursuant to NRS 125.480(4) in favor of granting Jacqueline primary physical custody. The past domestic violence issue was but one of many factors the court considered and it does not appear the presumption was the court’s sole consideration in making its custody award. Therefore, the district court did not abuse its discretion in awarding primary physical custody to Jacqueline.

The district court did not abuse its discretion or violate Lance’s fundamental liberty interests in awarding Jacqueline sole legal custody of the minor children

Legal custody relates to the legal responsibility for a child and making major decisions regarding the child’s health, education, and religious upbringing. *Rivero v. Rivero*, 125 Nev. 410, 420, 216 P.3d 213, 221 (2009) (citing *Mack v. Ashlock*, 112 Nev. 1062, 1067, 921 P.2d 1258, 1262 (1996)). This is different from physical custody, the time the child physically spends with each parent, during which parents make day-to-day decisions. *Id.* at 421-422, 216 P.3d at 222. Sole legal custody vests the right of legal responsibility with only one parent. *Id.* It is true that the United States Supreme Court has said parents have a fundamental liberty interest in caring for and the custody of their children. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). However, it is also true that joint legal custody requires the parents be able to cooperate, communicate, and compromise to act in the child’s best interest. *Rivero*, 125 Nev. at 420-21, 216 P.3d at 221 (citing *Mosley v. Figliuzzi*, 113 Nev. 51, 60-61, 930 P.2d 1110, 1116 (1997)).

Here, the district court heard evidence from both parties at trial and made numerous findings of fact, some of which included: that Lance did not make decisions in the children's best interest, but rather put his own interests before the children; that Lance was unable to maintain appropriate parent/child boundaries, particularly when he sent the children inappropriate Facebook messages; that Lance lacked insight as to how his actions impact the children; that Lance did not take any affirmative action to exercise visitation/parenting time with his children; and that there was a history of parental abuse/neglect by Lance with respect to one of the children. Plus as noted before, the district court properly determined domestic violence had occurred; thus the communication between the parties required for joint legal custody might be difficult to manage. Therefore, the district court properly applied the best interest of the child standard and we cannot say the district court abused its discretion in awarding Jacqueline sole legal custody.³

The district court did not abuse its discretion in finding Lance was willfully under-employed and imputing his earning potential

Parents are required to support their children, and when a parent is willfully under-employed to avoid paying child support the district court must order child support in an amount based on that parent's earning potential. NRS 125B.020(1); NRS 125B.080(8). NRS 125B.080(8) requires a finding that the parent be willfully under-

³With regard to Lance's argument that the district court's custody award violated his fundamental liberty interest, it is not clear whether Lance is making an equal protection claim, due process claim, or both. Regardless of which he is alleging, we have considered both claims and determined they are without merit. Thus, the district court did not violate Lance's fundamental rights by awarding Jacqueline sole legal custody.

employed for the purpose of avoiding child support. But when the district court hears evidence of willful under-employment, a rebuttable presumption arises that the purpose of the under-employment is to avoid the support obligation. *Minnear v. Minnear*, 107 Nev. 495, 498, 814 P.2d 85, 86-87 (1991) (citing *People v. Sorenson*, 437 P.2d 495, 500 (Cal. 1968)). Additionally, this court reviews child support orders for an abuse of discretion. *Wallace*, 112 Nev. at 1019, 922 P.2d at 543.

Here, the district court heard substantial evidence supporting its finding that Lance was willfully under-employed and imputing a potential earning capacity of \$25 per hour for 30 hours per week. In particular, Lance testified that he had physical and mental issues that sometimes affected his ability to work; that he was spending a significant amount of time litigating the underlying divorce action and litigating his criminal charges arising from alleged violations of the TPO, which affected his ability to search for work; and that he tried to work side jobs for friends when he could, but that money went directly to his own necessities and to his mother, with whom he resided.

However, the district court also heard testimony that when Lance worked for friends he was always paid \$25-\$35 per hour by those people; that he did not apply for any jobs during the pendency of the litigation; and that he only asked friends if they had side-work he could complete. Additionally, the district court heard testimony that Lance declined a full-time job offer from a friend who knew of Lance's pending criminal matter and that he might go to jail, but Lance's reason for turning down the job was that he did not know if he would go to jail and subsequently lose the job. Lance also advised the court during litigation that he was to start a job, but then failed to start that job because he fell

ill; however, the district court heard testimony that Lance fell ill on a Tuesday but was supposed to start the job on that prior Monday, he did not call the employer until later in the week to advise he was ill, and he never followed up to see if the work was still available upon getting better.

Based on the testimony, it was within the district court's discretion to find Lance's testimony was not credible and find Lance was willfully under-employed. See *Ellis*, 123 Nev. at 152, 161 P.3d at 244 (“[W]e leave witness credibility determinations to the district court and will not reweigh credibility on appeal.”). Upon such a finding, it was also within the court's discretion to impute Lance's potential earning capacity as \$25 per hour at 30 hours per week, which amounts were supported by testimony that Lance was frequently paid \$25-\$35 per hour and that his work varied, but he never worked 40 hours per week. Thus, it appears the court gave Lance the benefit of the doubt and imputed the lowest wage considered based on the testimony. Because there was substantial evidence supporting the district court's findings, we conclude the district court did not abuse its discretion in finding Lance was willfully under-employed and imputing Lance's potential earning capacity to determine the child support obligation.

Additionally, Lance argues the district court erred by failing to consider whether he could provide services to the children other than financial child support, pursuant to NRS 125B.080(9). NRS 125B.080(9) provides a list of factors the district court shall consider when it deviates from the statutory formula determining the child support obligation. During trial it does not appear Lance offered any evidence of a monetary value for his offers to provide other necessary expenses or services to the children, nor did Lance argue he actually contributed services or supplies

to the children; he only stated he could have provided food, school supplies, and shelter based on the generosity of his church. Thus, the court did not abuse its discretion by finding these offers were insufficient to warrant a deviation from the statutory formula for child support.

The district court did not abuse its discretion in allowing the trial to move forward without allowing more time for discovery

NRCP 16.2(g) requires parties appearing in proper person to comply with the same discovery rules as those parties represented by counsel. Additionally, we will not disturb a district court's decision regarding discovery absent a clear abuse of that discretion. *In re Adoption of a Minor Child*, 118 Nev. 962, 968, 60 P.3d 485, 489 (2002) (citing *Diversified Capital v. City N. Las Vegas*, 95 Nev. 15, 23, 590 P.2d 146, 151 (1979)).

In this case, Lance did not request a continuance of the trial. Instead, he only stated in his trial statement that he did not conduct discovery and was not prepared for trial. Additionally, Lance obtained counsel for trial and his counsel did not request a continuance to allow more time for discovery. Further, based on a review of the record provided, it appears that during litigation the court explained in its order denying Lance's Motion for Production of Documents the proper procedure for requesting the production of documents, and that Lance did not file any subsequent motions to compel discovery or alleging discovery violations. Trial commenced and Lance submitted evidence relating to his employment history and ability to work. Lance was required to follow the same discovery rules as all other parties but failed to do so. Based on the record provided, we cannot say the district court abused its discretion when it proceeded to trial in this matter.

There is no evidence the district court was biased, and case reassignment is unnecessary


Although a judge entertaining actual bias or prejudice against one of the parties shall not preside over a matter pursuant to NRS 1.230(1), we presume judges are unbiased. *Rivero*, 125 Nev. at 439, 216 P.3d at 233 (citing *Goldman v. Bryan*, 104 Nev. 644, 649, 764 P.2d 1296, 1299 (1988)). Additionally, “rulings and actions of a judge during the course of official judicial proceedings do not establish legally cognizable grounds for disqualification.” *In re Petition to Recall Dunleavy*, 104 Nev. 784, 789, 769 P.2d 1271, 1275 (1988). Thus, this court reviews a district court’s decision not to recuse itself for an abuse of discretion. *Id.* Further, Lance carries the burden to establish sufficient factual grounds warranting disqualification, must allege the bias stemmed from an extrajudicial source, and must show the bias resulted in an opinion based on something other than what the judge learned from participating; otherwise, the request to disqualify the judge should be denied. *Rivero*, 125 Nev. at 439, 216 P.3d at 233 (citing *In re Petition to Recall Dunleavy*, 104 Nev. 784, 789-90, 769 P.2d 1271, 1274-75 (1988)).

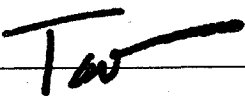
Here, Lance fails to establish, or even argue, there was a bias stemming from an extrajudicial source or that the court’s ruling was based on something other than what the judge learned from participating in the case; in fact, quite the opposite is true – Lance alleges that the bias stemmed from what the judge learned during prior hearings and rulings made in this matter. Therefore, Lance fails to establish any legally cognizable grounds for disqualification, and there is no basis for finding the judge was biased or reassigning this case to another district court judge.


CONCLUSION

Substantial evidence supported the district court's findings that joint physical custody was not in the children's best interest pursuant to NRS 125.480(5); that awarding Jacqueline sole legal custody was in the children's best interest; that Lance was willfully under-employed; and that additional time for discovery was not necessary. Further, there is no evidence the district court was biased against Lance and case reassignment is not warranted. Therefore, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Bridget Robb Peck, District Judge
Lance Delon Alvarado
Kainen Law Group
Washoe District Court Clerk