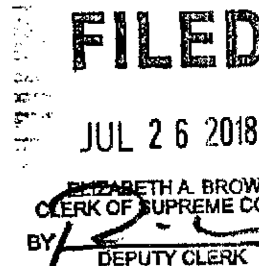
IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE PARENTAL RIGHTS AS TO Y.V.; A.V.; AND T.V., MINORS.

ARLENE O.,
Appellant,
vs.
JOAQUIN V., JR.,
Respondent.

No. 74314



ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition to terminate parental rights. Eighth Judicial District Court, Family Court Division, Clark County; Rebecca Burton, Judge.

Respondent Joaquin V., Jr., has three children with Victoria O.—Y.V., A.V., and T.V. Joaquin was sentenced to prison for domestic violence against Victoria, but Victoria and the children kept in contact and visited him during his incarceration. While Joaquin was still in prison, Victoria passed away due to complications from substance abuse. Victoria's mother, appellant Arlene O., gained custody of the children after Victoria's death and moved with the children from New Mexico to Las Vegas, Nevada. Arlene ceased all contact with Joaquin for the remainder of his incarceration and probation. Arlene eventually petitioned the district court to terminate Joaquin's parental rights so she could adopt the children. The district court conducted a three-day trial over the course of five months, at the end of which it denied Arlene's petition, finding that Joaquin had taken significant steps to reform his behavior while in prison and that the

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children's best interests would not be served by having their father and his side of the family absent from their lives.

Arlene appeals, arguing that the district court abused its discretion in (1) overlooking Joaquin's violations of rules of evidence and civil procedure, (2) determining that Dr. Lisa Shaffer was not qualified as an expert witness, and (3) finding that Joaquin rebutted the presumption that he abandoned the children.

The district court did not abuse its discretion in ruling on Joaquin's alleged violations of the rules of evidence and civil procedure

Arlene argues that the district court was overly concerned by Joaquin's pro se status and inequitably applied the rules of evidence and civil procedure in his favor. "We review a district court's determination regarding the admissibility of evidence for an abuse of discretion." *In re Parental Rights as to J.D.N.*, 128 Nev. 462, 468, 283 P.3d 842, 846 (2012).

The witness and exhibit disclosures

Pursuant to the district court's trial management order, the parties were to exchange any proposed trial exhibits and lists of witnesses on or before December 1, 2016. On the first day of trial, Arlene's counsel informed the court that he had received Joaquin's proposed exhibits and witness list only the previous day. However, Joaquin stated that he had also mailed the documents and witness list to Arlene's counsel approximately four months earlier. Arlene's counsel stated that what he received was "just an envelope stuffed with documents," not a list of proposed exhibits and witnesses. The court did not directly rule on the admission of Joaquin's trial exhibits and witnesses at that time but, rather, stated that the evidence and witnesses would be admitted if the documents were provided and that it would "deal with them as they come up."

Arlene argues on appeal that Joaquin violated the trial management order by failing to serve upon her counsel the required documents by the appropriate deadline. Arlene argues that this prejudiced her case because she was unable to contest the admissibility of Joaquin's evidence prior to trial. We disagree.

Arlene's counsel confirmed that he at least received an envelope of documents from Joaquin prior to the disclosure deadline, and it was within the district court's discretion to deem that a satisfactory disclosure. *See In re J.D.N.*, 128 Nev. at 468, 283 P.3d at 846. Moreover, courts have "a duty to ensure that pro se litigants do not lose their right to a hearing on the merits of their claim due to ignorance of technical procedural requirements." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Additionally, we conclude that Arlene cannot show resulting prejudice. Arlene merely argues that she was unable to contest the admissibility of the evidence prior to trial, and that the length of time between trial dates affected the court's recollection of its prior rulings and her ability to preserve objections. But the length of time between trial dates would have afforded Arlene plenty of time to file written motions objecting to any of Joaquin's proposed trial exhibits and witnesses thus curing any prejudice from Joaquin's alleged late disclosure. Accordingly, we conclude that the district court did not abuse its discretion when it failed to penalize Joaquin regarding his evidentiary disclosure.

Joaquin's photographs

Arlene argues that the district court improperly permitted Joaquin to show Dr. Shaffer photographs that were not admitted into evidence until later in the trial. During his cross-examination of Dr. Shaffer, Joaquin asked her to review photographs of himself with the children. The photographs were meant to contradict Dr. Shaffer's testimony

that the children were afraid of their father, or to show that their fear must have been caused at some point after the pictures had been taken. Arlene's counsel objected to the photographs on the basis that they had not been admitted into evidence and were beyond the scope of the direct examination. The district court overruled the objection, stating that, although the photographs would not be admitted into evidence, Joaquin could show them to Dr. Shaffer and ask questions about them.

Arlene does not cite to any authority to demonstrate that Dr. Shaffer's review of the photographs violated any rules of evidence. Instead, Arlene argues substantively that it was "ludicrous" for the district court to believe that the photographs could undermine Dr. Shaffer's testimony, and that the district court erred when it did not believe Dr. Shaffer's opinion that the children were afraid of their father. As the trier of fact, the district court was entitled to evaluate the credibility of Dr. Shaffer's testimony and determine the weight it should be given. *See Young v. Nev. Title Co.*, 103 Nev. 436, 441, 744 P.2d 902, 904 (1987) ("It is the prerogative of the trier of facts to evaluate the credibility of witnesses and determine the weight of their testimony, and it is not within the province of the appellate court to instruct the trier of fact that certain witnesses or testimony must be believed.").

Regardless, we conclude that the district court properly overruled Arlene's objection because the photographs were relevant to Dr. Shaffer's testimony. NRS 48.015 states that "'relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Because Dr. Shaffer testified that the children feared their father, the cheerful photographs of the children with

their father were relevant to the issue of whether the children were afraid, or whether their fear manifested only after they were in Arlene's care. Accordingly, we conclude that the district court did not abuse its discretion in allowing Dr. Shaffer to review the photographs Joaquin provided to her on cross-examination.

The district court's suggestion that Joaquin call Arlene as a witness

At the conclusion of the first day of trial, the district court asked Joaquin, "[D]o you have any witnesses that you're intending to call?" After Joaquin listed the witnesses he intended to call, the district court asked, "[A]re you calling [Arlene]?" Joaquin indicated that he was not sure whether he was going to call Arlene. Arlene's counsel objected on the grounds that Joaquin had not included Arlene in his witness list, but the district court informed him that a party may always call the opposing party as a witness.

Arlene argues that the district court's suggestion was an abuse of discretion as it led to Joaquin calling Arlene as a witness and questioning her for over three hours, which delayed the proceedings and resulted in a third day of trial. Arlene further argues that "Joaquin's abusive trial practice[ ]" allowed him the advantage of calling additional witnesses on the third day of trial that were unavailable to testify on the second day.

We conclude that that the district court did not abuse its discretion. Despite Arlene's characterization, the district court merely asked Joaquin if he was intending to call Arlene as a witness.

The district court's guidance of Joaquin's witness examination

At one point during Joaquin's direct examination of Arlene, he was revisiting and challenging the facts behind his prior domestic violence incidents involving Victoria. The district court stated that it was more interested in what had happened since Joaquin had been released from

prison rather than the factual basis behind his past crimes. In another instance, when Joaquin was testifying on his own behalf and began to give a long, narrative-like statement, the district court redirected Joaquin to talk about the exhibits he was attempting to have admitted.

Arlene argues that it was inappropriate for the district court to guide Joaquin's testimony and raise its concerns, when the court never raised its concerns at trial regarding issues it had with Arlene's expert's testimony. We disagree. The district court did not tell Joaquin what to say or supply him with information; it merely directed a pro se litigant to address the salient issues of the case. Thus, we conclude that there was no abuse of discretion by the district court.

The district court did not abuse its discretion when it determined that Dr. Shaffer was not qualified to testify as an expert witness

"This court reviews a district court's decision to allow expert testimony for abuse of discretion." *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008). In its order, the district court concluded that Dr. Shaffer, the therapist treating the children, was not apprised of several important facts of the case such as Joaquin's letters to the children, his rehabilitation, Arlene's animosity toward Joaquin, and Victoria's own depression and self-harm that occurred before she ever met Joaquin. Additionally, the district court concluded that Arlene had not asked the court to qualify Dr. Shaffer as an expert nor had she laid sufficient foundation for her expert testimony. Thus, the district court chose to treat Dr. Shaffer as a percipient witness rather than as a qualified expert.

Arlene first argues that the district court should have considered Dr. Shaffer an expert witness because she demonstrated at trial that Dr. Shaffer had a strong educational background, had ten years of experience, and specializes in trauma and abuse. Arlene then argues that

because Joaquin did not produce his own expert or any competing evidence to refute Dr. Shaffer's theory, the district court abused its discretion by ruling contrary to Dr. Shaffer's testimony.

We conclude that the district court did not abuse its discretion in treating Dr. Shaffer as a percipient witness.

> To testify as an expert witness under NRS 50.275, the witness must satisfy the following three requirements: (1) he or she must be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification requirement); (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue" (the assistance requirement); and (3) his or her testimony must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement).

Hallmark, 124 Nev. at 498, 189 P.3d at 650 (alteration in original). In disqualifying Dr. Shaffer as an expert witness, the district court explained in its order that she had not interviewed either party and was not apprised of many of the most important facts of the case. Although the district court did not cite to specific authority to support its decision, we conclude that its ruling falls under *Hallmark*'s assistance requirement—her testimony would not "assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.* (internal quotation marks omitted).

Similarly, we conclude that the district court did not abuse its discretion in ruling against the substance of Dr. Shaffer's testimony. This was a bench trial, and the district court was within its authority as the trier of fact to evaluate Dr. Shaffer's credibility and determine the weight to be given to her testimony. *See Young*, 103 Nev. at 441, 744 P.2d at 904.

The district court did not abuse its discretion in concluding that Joaquin overcame the presumption that he abandoned the children

"This court closely scrutinizes whether the district court properly preserved or terminated parental rights, but will not substitute its judgment for that of the district court and will uphold the lower court's decision if it is supported by substantial evidence." *In re Parental Rights as to M.F.*, 132 Nev., Adv. Op. 19, 371 P.3d 995, 1000-01 (2016). "Substantial evidence is that which a reasonable person would accept as adequate to sustain a judgment." *Id.* at 1001.

NRS 128.105 sets forth several grounds for which a district court may terminate parental rights, in addition to requiring the termination to be in the best interests of the children. The district court analyzed and disposed of the four bases that Arlene relied upon in her petition to terminate Joaquin's parental rights: (1) abandonment the children; (2) neglect of the children; (3) unfit parent; and (4) risk of serious physical, mental, or emotional injury to the children.

On appeal, Arlene challenges only the district court's ruling on the abandonment of the children, arguing that despite properly identifying a presumption of abandonment that Joaquin had the burden of overcoming, the district court abused its discretion in finding that Joaquin had adequately rebutted that presumption. Arlene contends that Joaquin only presented "self-serving testimony" that "was devoid of credibility." Arlene also disputes the district court's finding that she had reported Joaquin's attempt to contact her to his probation officer, arguing that it is only supported by the testimony of Joaquin and his sister, which she describes as "unreliable on its face." Joaquin argues that Arlene has prevented his entire family from having any contact with the children.

NRS 128.012(1) defines abandonment of a child as "any conduct of one or both parents of a child which evinces a settled purpose on the part of one or both parents to forego all parental custody and relinquish all claims to the child." Normally, "[a] party petitioning to terminate parental rights must establish by clear and convincing evidence that (1) termination is in the child's best interest, and (2) parental fault exists." *In re Parental Rights as to A.J.G.*, 122 Nev. 1418, 1423, 148 P.3d 759, 762 (2006). However, NRS 128.012(2) states that "[i]f a parent or parents of a child leave the child in the care and custody of another without provision for the child's support and without communication for a period of 6 months, . . . the parent or parents are presumed to have intended to abandon the child." When the presumption under NRS 128.012(2) is raised, "the burden of proof shifts to the parent to prove that he did not abandon his children." *In re Parental Rights as to C.J.M.*, 118 Nev. 724, 734, 58 P.3d 188, 195 (2002). While the parties do not argue what level of proof overcomes the presumption raised by NRS 128.012(2), we have held that a similar statutory presumption can be overcome by a preponderance of the evidence.[1]

Conduct typifying abandonment includes "the withholding of parental presence, love, care, filial affection and support and maintenance." *Sernaker v. Ehrlich*, 86 Nev. 277, 280, 468 P.2d 5, 7 (1970). "Intent is the

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[1]NRS 128.109(2) states that, in the NRS Chapter 432B context, "[i]f a child . . . has resided outside of his or her home . . . for 14 months of any 20 consecutive months, the best interests of the child must be presumed to be served by a termination of parental rights." We have held that "the burden of proof for a parent attempting to rebut an NRS 128.109 presumption is a preponderance of the evidence." *In re Parental Rights as to J.D.N.*, 128 Nev. 462, 472, 283 P.3d 842, 849 (2012).

decisive factor in abandonment and may be shown by the facts and circumstances." *In re Parental Rights as to Montgomery*, 112 Nev. 719, 727, 917 P.2d 949, 955 (1996), *superseded by statute on other grounds as recognized in In re Termination of Parental Rights as to N.J.*, 116 Nev. 790, 798-800, 8 P.3d 126, 131-32 (2000). "[V]oluntary conduct resulting in incarceration does not alone establish an intent to abandon a minor child." *In re Parental Rights as to Q.L.R.*, 118 Nev. 602, 606, 54 P.3d 56, 58 (2002).

Here, the district court correctly concluded that Joaquin's conduct raised the statutory presumption of abandonment, and the burden of proof shifted to Joaquin to rebut said presumption. The district court found that during his incarceration, Joaquin had monthly contact with the children until Victoria's death, and he wrote letters to them that showed his interest, love, and intent to reunify with the children. Once Joaquin was released, Arlene's move to Nevada put considerable distance between Joaquin and the children. When Joaquin did try to contact Arlene, she called his probation officer to prevent contact and cause trouble for Joaquin. The district court also found that the New Mexico guardianship court only allowed visitation with the children at Arlene's discretion, and that although Joaquin was prohibited from contacting the children as a condition of his parole, he petitioned the New Mexico court for joint legal custody and visitation with the children once he was legally able to do so. Additionally, regarding Joaquin's financial support of the children, the district court determined that

> Joaquin initiated garnishment of his wages for child support. The [c]ourt accepts Joaquin's explanation that he did not know the garnishment of his wages was going elsewhere as it has been this [c]ourt's experience that sometimes happens when

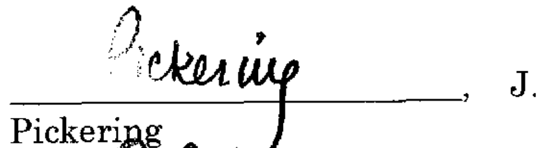
there is more than one child support case against
the same obligor.

The district court ultimately concluded that Joaquin had rebutted the presumption that he had abandoned the children and that it was in the children's best interest not to terminate Joaquin's parental rights.

Because the district court's decision is supported by substantial evidence, we hold that the district court did not abuse its discretion in finding that Joaquin rebutted the presumption of abandonment by a preponderance of the evidence, and that the children's best interests would not be served by termination of Joaquin's parental rights. *See In re M.F.*, 132 Nev., Adv. Op. 19, 371 P.3d at 1000-01.

Accordingly, for the reasons set forth above, we

ORDER the judgment of the district court AFFIRMED.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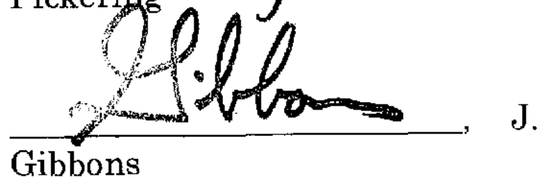
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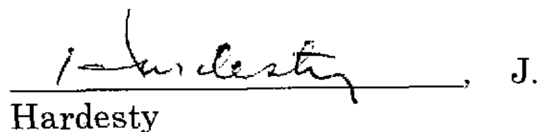
_________________________, J.
Hardesty

cc: Hon. Rebecca Burton, District Judge, Family Court Division
Lucas A. Grower
Joaquin V., Jr.
Eighth District Court Clerk