

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JERALDINE MICHELLE ADKINS,
N/K/A MICHELLE KASHUBA,
Appellant,
vs.
KEVIN JAMES ADKINS,
Respondent.

No. 69829

FILED

SEP 16 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Tracie K. Lindeman*
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order concerning child custody and support. Eighth Judicial District Court, Family Court Division, Clark County; Denise L. Gentile, Judge.

After a four-year period of joint legal and physical custody, appellant moved for primary physical custody of the parties' minor child. Respondent opposed the motion and also sought primary physical custody of the child. After multiple interviews with the child and a two-day evidentiary hearing, the district court awarded primary physical custody to respondent. The district court also later denied appellant's motion for a new trial or, alternatively, rehearing. This appeal followed.

Appellant's first argument on appeal is that the district court erred by not considering the recent domestic violence respondent had allegedly committed against his current wife. Respondent asserts the district court did consider appellant's argument in this regard and

correctly concluded that there was no clear and convincing evidence of domestic violence. In its initial order, the district court stated that no domestic violence occurred based on the child's statements and the fact that the current wife did not testify. In its order denying appellant's motion for a new trial/rehearing, the district court elaborated on this point and found that there was conflicting evidence on the issue, but, based on the totality of the evidence, it found no clear and convincing evidence of domestic violence.¹

Initially, we agree with respondent that the district court considered appellant's argument on this issue as appellant both testified about her belief that there was domestic violence in the home and also submitted documentary evidence to support her assertions, which the district court did not exclude. And, while appellant submitted evidence showing that respondent was arrested for domestic violence, further evidence showed that he was not convicted on that charge, his wife was not subpoenaed and therefore did not testify that there was any domestic

¹This court may consider the district court's order denying rehearing as it is properly part of the record on appeal of this matter and neither party asserts it is not properly before this court. *See Arnold v. Kip*, 123 Nev. 410, 417, 168 P.3d 1050, 1054 (2007) (providing that "if the reconsideration order and motion are properly part of the record on appeal from the final judgment, and if the district court elected to entertain the motion on its merits," then an appellate court may consider them in rendering its decision on appeal).

violence against her, and the minor child and respondent denied that there was any domestic violence.² Based on the foregoing, we conclude that substantial evidence supports the district court's conclusion that there was a lack of clear and convincing evidence that respondent committed domestic violence and, thus, the district court properly refused to impose a rebuttable presumption³ against respondent having custody

²Appellant separately argues that the district court improperly relied on the minor child's statement that he had not witnessed any domestic violence with respondent's current wife to find that no such violence occurred. Assuming, without deciding, that relying on the child's testimony in this matter was improper, any such error was harmless, as the child's statement was only one of the bases upon which the district court found that no clear and convincing evidence supported a finding that domestic violence occurred with respondent's current wife. Therefore, because substantial evidence still supports the district court's finding in this regard, even without the child's statement, the district court did not abuse its discretion. *See Castle v. Simmons*, 120 Nev. 98, 103, 86 P.3d 1042, 1046 (2004) (reviewing a domestic violence allegation in a custody case for substantial evidence); *see also Wright v. State, Dep't of Motor Vehicles*, 121 Nev. 122, 125, 110 P.3d 1066, 1068 (2005) (providing that substantial evidence can be shown inferentially by a lack of certain evidence).

³The district court alternatively found that, even if this presumption applied, it had been rebutted by the remainder of the evidence, contradicting appellant's argument that the district court never applied the presumption. However, because appellant makes no further argument as to this issue, and because we agree that substantial evidence supports the district court's conclusion regarding a lack of clear and convincing evidence, we need not address this issue further.

on this basis. See NRS 125C.230(1) (stating that a finding “by clear and convincing evidence” that the parent seeking custody committed domestic violence against another party in the home creates a rebuttable presumption against that parent having sole or joint custody); *Castle v. Simmons*, 120 Nev. 98, 103, 86 P.3d 1042, 1046 (2004) (declining, in a custody case alleging domestic violence, to reweigh the district court’s assessment as to the credibility of witnesses and upholding a finding regarding domestic violence based on substantial evidence); see also *Wright v. State, Dep’t of Motor Vehicles*, 121 Nev. 122, 125, 110 P.3d 1066, 1068 (2005) (providing that substantial evidence is that which a reasonable person might accept as adequate to support a conclusion and that substantial evidence can be shown inferentially by a lack of certain evidence). Accordingly, the district court did not abuse its discretion in declining to award primary physical custody to appellant on this basis. See *Castle*, 120 Nev. at 101, 86 P.3d at 1045 (reviewing a child custody award for a clear abuse of discretion).

Appellant next argues that the district court erred in concluding that it could not consider allegations of domestic violence that occurred prior to the entry of the previous custody order. Specifically, appellant asserts that respondent committed domestic violence against her while the parties were married and that the court was required to consider this allegation in making its decision. Respondent asserts that the court did consider the allegations and properly found that appellant

failed to prove her allegations by clear and convincing evidence. The district court concluded that it was barred from considering what occurred prior to the entry of the previous custody order, but later clarified that it had considered appellant's evidence, but that any presumption against awarding custody to respondent had been rebutted by the remainder of the evidence.

We conclude that the district court abused its discretion in its evaluation of the domestic violence factor as it pertained to appellant's allegations of domestic violence against her. *See id.*; *see also* NRS 125C.0035(4)(k) (requiring the district court to evaluate whether a parent has engaged in domestic violence against a parent of the child when evaluating a custody modification). While the district court stated that it had considered appellant's evidence and that any presumption against awarding respondent custody had been rebutted by the remainder of the evidence, it failed to provide specific findings as to whether respondent had committed domestic violence against appellant and, if so, what evidence rebutted NRS 125C.230(1)'s presumption that respondent having

primary physical custody was not in the child's best interest.⁴ See *Lewis v. Lewis*, 132 Nev. ___, ___, 373 P.3d 878, 882 (2016) (concluding that the district court abused its discretion by modifying child custody without explicitly entering "specific factual findings as to each of the statutory best-interest-of-the-child factors"); *Davis v. Ewalefo*, 131 Nev. ___, ___, 352 P.3d 1139, 1143 (2015) (providing that specific findings are necessary for

⁴The district court also stated that it did not even need to consider appellant's assertions of domestic violence against her, although it ultimately did, because those allegations occurred prior to the entry of the previous custody order, citing *McMonigle v. McMonigle*, 110 Nev. 1407, 887 P.2d 742 (1994) (providing that a court should not consider actions that occurred prior to the entry of a previous custody order in making a new custody determination). *McMonigle* has been overturned in part, however, and now the district court must consider evidence of domestic violence, even if it predates a prior custody order, so long as either a party or the court was unaware of the alleged domestic violence when the previous order was entered. See *Castle*, 120 Nev. at 104-06, 86 P.3d at 1047 (stating that "[t]he court must hear *all* information regarding domestic violence in order to determine the child's best interests," even when the alleged violence occurred prior to the entry of a previous custody order, so long as the information was "unknown to one of the parties or the court when the prior determination was made"). And, to the extent the district court found that appellant's allegations of domestic violence were considered by the court that entered the previous custody order, that finding is erroneous as the prior custody order stated that no evidence regarding domestic violence had been presented in those proceedings. Thus, the alleged domestic violence that predated the prior custody order was "unknown" to the court, and the court was therefore required to consider the evidence raised by appellant below. See *id.*


an appellate court's review of a custody order because, without such findings, appellate courts are unable to assure "that the custody determination was made for appropriate legal reasons"); *see generally Castle*, 120 Nev. at 105, 86 P.3d at 1047 (noting that the Legislature has stated that "domestic violence poses a very real threat to a child's safety and well-being"). Thus, we must reverse and remand this case for the district court to make specific findings regarding appellant's allegations of domestic violence against her and to consider whether those findings alter its determination that respondent having primary physical custody is in the child's best interest.⁵ And, although child support was not challenged on appeal, because it was predicated on the custody arrangement, if the court alters its custody award, it will necessarily need to reevaluate its


⁵Respondent briefly asserts that domestic violence that predates the prior custody order can only be reviewed by the court if there are also post-order allegations of domestic violence, but this is a misstatement of the holding in *Castle*, 120 Nev. at 105-06, 86 P.3d at 1047-48 (providing that post-order allegations should be considered along with allegations that pre-date a prior custody order, but also that "[e]ven previously litigated acts of domestic violence may need to be reviewed if additional acts occur").

award of child support.

It is so ORDERED.⁶


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Denise L. Gentile, District Judge, Family Court Division
McFarling Law Group
Zernich Law Office
Eighth District Court Clerk

⁶Appellant also argues that the district court failed to initially review the case with a presumption that joint custody would be in the child's best interest. A preference for joint custody only applies, however, if the parties have agreed to such or if a parent has demonstrated, or has attempted to demonstrate and been obstructed by the other parent, an intent to establish a meaningful relationship with the child. See NRS 125C.0025(1). Because neither scenario occurred in this matter, appellant's argument in this regard fails.