

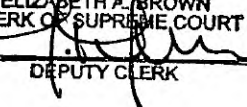
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAVIER RAMIREZ RIVAS,
Appellant,
vs.
MAYRA E. ARREGUIN,
Respondent.

No. 84723-COA

FILED

APR 27 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Javier Ramirez Rivas appeals from a district court post-divorce decree order denying his motion to modify custody. First Judicial District Court, Carson City; James Todd Russell, Judge.

The protracted custody proceedings underlying this appeal eventually resulted in the district court awarding respondent Mayra E. Arreguin primary physical custody of the parties' two minor children subject to Rivas's limited parenting time, and the court later modified that arrangement by making Rivas's limited parenting time subject to the children's discretion. Most recently, Rivas moved to, among other things, modify the parties' custodial arrangement to joint physical custody, arguing that the children's attendance at school and academic performance had declined during the COVID-19 pandemic. The district court denied that motion, reasoning that preserving the existing custodial arrangement was in the children's best interest. However, this court reversed and remanded that decision after concluding that the district court abused its discretion by denying Rivas's motion without specifically addressing whether there had been a substantial change in circumstances affecting the welfare of the children or making any findings with respect to NRS 125C.0035(4)'s best

interest factors. *See Rivas v. Arreguin*, No. 82508-COA, 2022 WL 214016, at *1-2 (Nev. Ct. App. Jan. 24, 2022) (Order of Reversal and Remand).

On remand, the district court conducted a hearing in April 2022 where it questioned the parties' children regarding their wishes and took testimony from their Court-Appointed Special Advocate (CASA). Following the hearing, the district court entered another order denying Rivas's motion, which included detailed findings indicating that there had not been a substantial change in circumstances affecting the welfare of the children and that the best interest factors did not support modifying the parties' custodial arrangement. This appeal followed.

This court reviews a child custody determination for an abuse of discretion. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007). In evaluating motions to modify custody, the district court must consider whether "(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*, 128 Nev., Adv. Op. 1, 501 P.3d 980, 982 (2022) (internal quotation marks omitted). This court will affirm the district court's child custody determinations if they are supported by substantial evidence, which is evidence that a reasonable person may accept as adequate to sustain a judgment. *Ellis*, 123 Nev. at 149, 161 P.3d at 242. However, we review questions of law, including constitutional challenges, de novo. *Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007).

On appeal, Rivas essentially challenges the order denying his motion to modify custody by arguing that the district court should not have applied the best-interest standard because that standard violates his substantive due process right to make decisions concerning the care, custody, and control of the children. But as detailed above, in resolving

Rivas's appeal in Docket No. 82508-COA, this court expressly directed the district court to apply the best-interest standard insofar as we reversed and remanded for specific findings with respect to the best interest factors. And because Rivas did not challenge that decision by way of a petition for rehearing or review, *see* NRAP 40; NRAP 40B, it became the law of the case, meaning that the district court was required to apply the best-interest standard on remand. *See Hsu v. County of Clark*, 123 Nev. 625, 629-30, 173 P.3d 724, 728 (2007) ("When an appellate court states a principle or rule of law necessary to a decision, the principle or rule becomes the law of the case and must be followed throughout its subsequent progress, both in the lower court and upon subsequent appeal." (alteration and internal quotation marks omitted)). We recognize that there are circumstances when a court may revisit a prior ruling notwithstanding the law-of-the-case doctrine, including in situations where, as relevant here, the prior decision is "so clearly erroneous that continued adherence to [it] would work a manifest injustice." *Clem v. State*, 119 Nev. 615, 620, 81 P.3d 521, 525 (2003). However, Rivas has not demonstrated that the present case presents such a situation.

Rivas specifically contends that the best-interest standard is inconsistent with the United States Supreme Court's decision in *Troxel v. Granville*, which recognized that parents have a fundamental right "to make decisions concerning the care, custody, and control of their children," and determined that a state nonparental visitation statute, which imposed no limitations on who may petition for visitation and the circumstances in which a petition may be granted, was unconstitutional as applied in a proceeding where a request for visitation by a child's grandparents was granted over a fit parent's objection. 530 U.S. 57, 66, 68, 72-73 (2000).

Although *Troxel's* elucidation of the fundamental rights of parents with respect to their children is instructive here, Rivas's reliance on the case is nevertheless misplaced, as the present case involves a custodial dispute between parents rather than an encroachment on fundamental parental rights in favor of a third party. Importantly, in cases involving custodial disputes between fit parents, a tension exists between each parent's fundamental parental rights. As the Nevada Supreme Court has recognized, under such circumstances, "each fit parent's constitutional right neutralizes the other parent's constitutional right, leaving, generally, the best interests of the child as the *sole standard* to apply to these types of custodial disputes." *Rico v. Rodriguez*, 121 Nev. 695, 705, 120 P.3d 812, 818 (2005) (quoting *McDermott v. Dougherty*, 869 A.2d 751, 770 (Md. 2005)).

Based on the reasoning articulated above, Rivas has not demonstrated that application of the best-interest standard violated his substantive due process rights under the circumstances presented here. *See Callie*, 123 Nev. at 183, 160 P.3d at 879. Thus, our decision in Docket No. 82508-COA requiring the district court to apply the best-interest standard was not clearly erroneous, meaning that the law-of-the-case doctrine applies and that Rivas's constitutional challenge to the application of the best interest factors does not establish a basis for relief. *See Clem*, 119 Nev. at 620, 81 P.3d at 525.

Turning to Rivas's remaining challenges to the order denying his motion to modify custody, he asserts that the district court ignored his concerns regarding the children's academic performance. However, both the challenged order and the transcript from the April 2022 hearing demonstrate that the district court was cognizant of Rivas's concerns, but determined that modification was unwarranted because there had not been

a substantial change in circumstances affecting the welfare of the children and their best interests would not be served by modification.¹ *Romano*, 128 Nev., Adv. Op. 1, 501 P.3d at 982. And the only finding supporting that determination that Rivas specifically challenges is the district court's determination that his mental and physical health has suffered. But that finding was based on the district court's observations of Rivas's courtroom behavior and his statement that he sustained a head injury that caused him to suffer from migraines, which is supported by the transcript from April 2022. *See Ellis*, 123 Nev. at 149, 161 P.3d at 242.

Rivas further contends that he was not allotted sufficient time to present evidence and cross-examine the children's CASA who testified at the April 2022 hearing. However, the transcript from the hearing reflects that the district court permitted Rivas an opportunity to cross-examine the CASA and to present any other information that he believed pertinent to his motion, but that Rivas largely used that opportunity to argue with the CASA and did not request any additional time to present evidence or testimony. Thus, this argument lacks merit.

¹Rivas also asserts that the district court ignored testimony from one of the children's teachers in resolving his motion to modify custody. But no teacher testified at the April 2022 hearing. And although a teacher may have testified at the hearing on Rivas's motion to modify custody that preceded his appeal in Docket No. 82508-COA (the January 2021 hearing), we cannot fully evaluate Rivas's argument as it relates to any testimony presented at the January 2021 hearing because he did not request a copy of the transcript from the hearing. Thus, we presume that the missing transcript supported the district court's decision to deny Rivas's motion to modify custody. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (noting that it is appellant's burden to ensure that a proper appellate record is prepared and that, if the appellant fails to do so, "we necessarily presume that the missing [documents] support[] the district court's decision").

Lastly, Rivas asserts that the district court was biased against him due to his gender and race, but he has failed to offer any cogent argument explaining how this alleged bias purportedly affected the district court's decision. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (holding that the court need not consider claims that are not cogently argued). Moreover, we presume that the district court is unbiased and, based on our review of the record, we discern no basis for relief on these grounds. *See Rivero v. Rivero*, 125 Nev. 410, 439, 216 P.3d 213, 233 (2009) (explaining that the burden is on the party asserting bias to establish sufficient factual grounds for disqualification), *overruled on other grounds by Romano*, 138 Nev., Adv. Op. 1, 501 P.3d 980.

Thus, because Rivas does not present any other challenges to the district court's order denying his motion to modify custody, he has failed to demonstrate that the court abused its discretion in reaching that decision. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. James Todd Russell, District Judge
Javier Ramirez Rivas
Mayra E. Arreguin
Carson City Clerk