

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ZACHARY BARTON,
Appellant,
vs.
SARAH BARTON,
Respondent.

No. 86753-COA

FILED

JAN 31 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Zachary Barton appeals from district court orders modifying child custody and denying post-judgment relief. Eighth Judicial District Court, Family Division, Clark County; Heidi Almase, Judge.

Zachary and respondent Sarah Barton were divorced in 2021 and have three minor children together. While the parties share joint legal custody of the children, the stipulated divorce decree awarded Sarah primary physical custody of the children, subject to Zachary's parenting time each weekend from Friday evening to Sunday evening. In January 2022, Zachary filed a motion for primary physical custody or, alternatively, joint physical custody, and requested that the court conduct interviews of the children. In that motion, Zachary alleged, among other things, that a change in custody would be in the children's best interest as Sarah's new boyfriend was abusive to them. Sarah opposed and filed a countermotion for sole physical custody. The district court thereafter opened discovery, set a calendar call for the trial for December 5, 2022, at 8:15 a.m., and scheduled a non-jury trial for December 19, 2022, at 1:30 p.m.

As relevant here, Zachary failed to file a pretrial memorandum or appear at the December 5, 2022, calendar call.¹ After waiting approximately 15 minutes for Zachary to appear or otherwise inform the court that he would not be attending, the court heard testimony from Sarah regarding the abuse allegations, and ultimately entered default judgment in Sarah's favor, awarding her sole physical custody of the children. Approximately one week after, Zachary filed a post-judgment motion to reconsider or set aside the district court's order, generally arguing that default judgments are inappropriate in child custody matters as it does not take the best interest of the children into account, and that he did not willfully miss the calendar call due to a misunderstanding of the court's scheduling system.² Sarah opposed, and filed a countermotion for supervised visitation and anger management courses for Zachary.

The district court resolved the pending motions on its chambers calendar and without oral argument, denying the parties' requests for relief. As pertinent here, the court found that Zachary had failed to meet his burden of demonstrating that the court's prior order was clearly erroneous under the reconsideration standard of NRCP 59, or that he was entitled to NRCP 60(b) relief. Accordingly, the court found that "notwithstanding a preference to decide issues on substantive merits rather than procedural default" under *Blanco v. Blanco*, 129 Nev. 723, 311 P.3d 1170 (2013),

¹In the proceedings below, Sarah's counsel also contended that Zachary failed to participate in discovery.

²Specifically, despite the district court's previous orders stating that calendar call started at 8:15 a.m., Zachary attached an exhibit purportedly showing that the Bluejeans link obtained from the court stated that the hearing would start at 4:15 p.m. (UTC), causing him to attempt to attend the hearing at the wrong time.

Zachary failed to demonstrate that relief is warranted. Zachary now appeals, arguing that the district court abused its discretion by entering a default judgment on the child custody issues, and denying his request for post-judgment relief.

Having reviewed the record before us and the issues raised in Zachary's fast track statement, we conclude that the district court abused its discretion when it entered its December 5, 2022, order awarding sole physical custody to Sarah by default. *See Roe v. Roe*, 139 Nev., Adv. Op. 21, 535 P.3d 274, 284 (Ct. App. 2023) ("A district court's custody order is reviewed for an abuse of discretion."). Our supreme court has previously recognized that default judgments in matters of child custody are "simply not permissible" and that "child custody matters must be decided on their merits." *Cf. Blanco*, 129 Nev. at 730, 311 P.3d at 1174 (holding that case-concluding discovery sanctions were not appropriate in child custody and support matters).

Here, although the district court entered default against Zachary after a brief canvass of Sarah related to some of the best interest of the children factors under NRS 125C.0035(4), its order did not contain any discussion of the same, but rather only relied upon Zachary's failure to appear at the calendar call and the court's ability to sanction that failure under EDCR 2.69(c) (stating that failure to appear at a calendar call may result in sanctions, including default judgment) to support its award of sole physical custody to Sarah. "But given the statutory and constitutional directives that govern child custody and support determinations, resolution of these matters on a default basis without addressing the child's best interest and other relevant considerations is improper," *Blanco*, 129 Nev. at


731, 311 P.3d at 1175, and we therefore conclude that the district court abused its discretion by awarding sole physical custody to Sarah by default.

Accordingly, we reverse the order of the district court awarding sole physical custody to Sarah, and for the same reasons, also necessarily reverse the order of the district court denying Zachary's request for post-judgment relief and remand this matter for further proceedings consistent with this order, including, if necessary, an evidentiary hearing on the issue of child custody.

It is so ORDERED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Heidi Almase, District Judge, Family Division
Patricia A. Marr, Ltd.
Sarah Barton
Eighth District Court Clerk