IN THE COURT OF APPEALS OF THE STATE OF NEVADA

VIRGINIA CASAS-GONZALEZ,
Appellant,
vs.
JAMES RIOS,
Respondent.

No. 87190-COA

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Virginia Casas-Gonzales appeals from a district court order modifying child custody and awarding James Rios primary physical custody. Second Judicial District Court, Family Division, Washoe County; Sandra A. Unsworth, Judge.

Virginia and James were married in February 2014 and have three minor children, J.R. born December 2013, S.R. born December 2014, and M.R. born December 2015.[1] Virginia filed a complaint for divorce in March 2015. James failed to respond to the complaint, so a decree of divorce was entered by default in July 2015. Virginia and James were awarded joint legal custody of the children and Virginia was given primary physical custody of the children. Virginia resided in Reno with the children while James resided in Fallon. James had four hours of weekly parenting time on Tuesday evenings.

In March 2018, Virginia filed an ex parte motion seeking to have James's parenting time revoked. Virginia stated that James rarely

[1]We recount the facts only as necessary for our disposition.

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exercised his parenting time, so the children were not comfortable around James and his family, and that James threatened Virginia.[2] The district court denied this motion. This was the first of many custody motions filed by each party.

James filed a motion for a change of custody in May 2018. In this motion, James requested additional parenting time since he was no longer homeless. Virginia opposed the motion. In September 2018, the district court entered an order modifying custody. The court maintained the joint legal and primary physical custody arrangement, but awarded James four hours of parenting time on Tuesday evenings and 33 hours of parenting time every other weekend.

In September 2019, the Division of Child and Family Services (DCFS) opened an investigation into James after it was alleged by Virginia that he sexually abused S.R. DCFS determined that the allegation was unsubstantiated.

In September 2020, Virginia filed an ex parte emergency motion to suspend James's parenting time. Virginia asserted that S.R. had disclosed that James had touched S.R. inappropriately. Virginia also reported that S.R. had been interviewed and physically examined at the Children's Advocacy Center in Reno. Finally, Virginia asserted that all three children disclosed that they were abused by James, and they returned from his care with unexplained bruises. DCFS investigated and determined that the allegations were unsubstantiated.

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[2]We note that sometime between the parties' divorce and the 2018 motion, James married a Native American woman, and they had one child (they have since had an additional child together).

In March 2022, Virginia raised another abuse allegation against James and his wife. Since his wife is Native American and the alleged acts occurred on tribal land, the FBI handled the investigation. The investigation was closed without any charges filed and it did not result in a change of the custody arrangement.

In July 2022, James filed a motion to change custody. This is the motion that triggered the district court order now on appeal. In this motion, James requested sole physical custody of the children. James alleged that Virginia was a danger to the children and hampered the children's relationship with him. James also alleged that Virginia coached the children to say that James abused them. James attached 30 exhibits to this motion as support. These exhibits include the DCFS reports, motions previously filed with the court, text messages between the parties, and photos of the children. Virginia opposed this motion.

A one-day evidentiary hearing was held in June 2023.[3] The parties requested that the district court interview J.R. and S.R. This interview was conducted outside of the presence of the parties and the parties requested that the court give them its impression of the interviews before the hearing began. The court informed the parties that it did not deem the children, then ages nine and eight, to be of sufficient age and maturity to state a parental preference. The court also stated that the children were fantastical and inconsistent when they spoke. Before the hearing began, the district court also stated that it had reviewed James's motion to modify custody and the exhibits attached thereto and took judicial

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[3]It appears that the proceedings were delayed to wait for the outcome of the March 2022 FBI investigation.

notice of the exhibits. Neither party asked the court to clarify what it meant by taking judicial notice of all exhibits, nor did they object.

During the hearing, the children's therapist, Ms. Rasmussen, testified that S.R. showed signs of potential sexual molestation in November 2021. Ms. Rasmussen also testified that the children did not have a good relationship with James and that she did not think that Virginia coached the children. Finally, she testified that the children seemed to stabilize after they spent less time with James and that she was concerned that James did not try to build a relationship with the children.

Virginia also testified. Virginia stated she noticed that J.R. had suspicious marks on his cheeks after returning from James's care. James did not provide Virginia with an explanation for the marks, yet he called law enforcement to Virginia's home for a wellness check on the children.

Virginia testified that she has been diagnosed with anxiety and adjustment disorder but has not been prescribed medication or therapy. Virginia also testified that she did not think the children have a good relationship with James and denied taking any actions to maliciously separate the children from James. Virginia stated that she did not take pictures of the children every time they returned from James's care; instead, she took pictures only when they had visible, unexplained injuries. Virginia stated that she made numerous reports to DCFS and included pictures of the children's injuries, but DCFS did not conduct any investigations until sexual abuse was reported.

James testified that he stopped making an effort to see the children because Virginia continued to interfere with his relationship with them. James stated that he resides in a four-bedroom house with five adults and planned on having his wife's tribe build an additional room onto the

house for J.R., S.R., and M.R. James also stated that he is unemployed and relies on the tribe to provide food for the family.

Following the conclusion of the hearing, the district court continued the order for joint legal custody, but restricted Virginia to informational rights, thereby allowing James to make all decisions for the children without consulting Virginia. The court also awarded James primary physical custody but ordered Virginia to have no parenting time for the first three months the children were in James's care and only allowed Virginia to have one supervised visit in the Family Peace Center per month after the three-month suspension of parenting time. The court ordered Virginia to undergo a psychological evaluation before exercising any potential future unsupervised parenting time.

The district court concluded that there had been a substantial change of circumstances warranting modification of the child custody arrangement because the abuse allegations against James by Virginia were unsubstantiated, the children did not raise credible abuse allegations during their interview by the court, and that Ms. Rasmussen's testimony indicated that she was concerned about the children's lack of a relationship with James. The court found that eight of the best interest factors under NRS 125C.0035(4) favored James and the rest were either neutral or not applicable. Virginia now appeals.

On appeal Virginia argues that the district court abused its discretion or erred by (1) modifying custody based on allegedly inadmissible and improper evidence (the exhibits attached to James's motion), (2)

ordering Virginia to undergo a psychological evaluation,[4] (3) effectively awarding James sole physical custody, (4) ordering the children to relocate with James without considering the statutory relocation factors,[5] and (5) denying Virginia a fair hearing (Virginia requests that the matter be reassigned to a different judge on remand). We agree that the district court awarded James sole physical custody and abused its discretion when it did so, but disagree that the district court abused its discretion or erred on the remaining issues.

The district court abused its discretion when it awarded James sole physical custody

Virginia argues that the district court erred by awarding James sole physical custody, despite calling it primary physical custody, without making the required findings separately from the best interest of the child analysis. James responds that the court sufficiently made the required findings.

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[4]We note that Virginia stated in her reply brief that she has already undergone the required psychological evaluation. Therefore, we decline to address this issue.

[5]Virginia argues that the district court abused its discretion by allowing the children to relocate to Fallon from Reno without considering the factors set forth in NRS 125C.007. James responds that he did not relocate since he has lived in Fallon since 2018, the children did not relocate because James used to exercise his parenting time in Fallon every other weekend, James traveled to Reno for most of his parenting time so Virginia would be able to maintain a relationship with the children, and Virginia failed to raise this issue below, so her argument is waived. James is correct that Virginia failed to raise any arguments related to relocation at the hearing. Accordingly, we consider her argument waived. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (explaining that issues not argued below are "deemed to have been waived and will not be considered on appeal").

We review a district court's child custody order for an abuse of discretion. *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). An abuse of discretion occurs when a district court makes an obvious error of law. *Franklin v. Bartsas Realty, Inc.*, 95 Nev. 559, 563, 598 P.2d 1147, 1149 (1979). "In a primary physical custody arrangement, a child spends most, but not all, of their time residing with one parent." *Roe v. Roe*, 139 Nev., Adv. Op. 21, 535 P.3d 274, 287 (Ct. App. 2023). This contrasts with sole physical custody where "the child resides with only one parent and the noncustodial parent's parenting time is restricted to no significant in-person parenting time." *Id.* "A district court must only enter an order for sole physical custody if it first finds either that the noncustodial parent is unfit for the child to reside with, or if it makes specific findings and provides an adequate explanation as to the reasons why primary physical custody is not in the best interest of the child." *Id.*, 535 P.3d at 288. These findings must be in writing and must be separate from the best interest findings. *Id.* The district court must "then order the least restrictive parenting time arrangement possible that is within the child's best interest." *Id.*

As a threshold matter, Virginia is correct, the district court effectively awarded James sole physical custody despite stating that it was awarding James primary physical custody.[6] The court's order suspended Virginia's parenting time for three months. Once Virginia's three-month suspension ends, Virginia is allowed only one supervised visit per month. Additionally, "[a]ny transition to unsupervised visitation shall be based in

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[6]We note that James does not argue that the district court awarded him primary physical custody and appears to agree with Virginia that he was awarded sole physical custody. Virginia does not expressly challenge the legal custody order.

part on the recommendation of the children's therapist(s) and a psychological evaluation of" Virginia. Because this order restricts Virginia's parenting time to no significant in-person parenting time for the foreseeable future, we conclude that the court awarded James sole physical custody.

Since the district court awarded James sole physical custody, the court was required to make written findings that either Virginia was unfit for the children to reside with or provide an adequate explanation as to why primary physical custody is not in the best interest of the children. *Roe*, 535 P.3d at 288. James argues that the district court's finding that Virginia was coaching the children; subjected them to interviews, examinations, and observations after raising abuse allegations; and engaging in parental alienation shows that Virginia was unfit for the children to reside with. This argument is unpersuasive. First, the court never actually concluded that these findings meant that Virginia was unfit for the children to reside with. Second, these findings were included in the court's analysis of the best interest factors supporting primary physical custody. The district court was required to make additional findings supporting sole physical custody separate from the best interest findings. *See id.*

James makes no argument that the court made an adequate explanation as to why primary physical custody is not in the best interest of the children. A careful review of the order reveals that the district court included no explanation, most likely because it purported to award James primary physical custody not sole custody. Accordingly, we conclude that the court abused its discretion by awarding James sole physical custody without making the necessary findings or including the necessary

explanation.[7] Therefore, we reverse the district court's order regarding sole physical custody.

The district court did not abuse its discretion when it considered James's exhibits to reach its decision to modify custody

Virginia argues that the district court's decision to modify custody is not supported by substantial evidence because the court relied on motions, exhibits, and documents that were not admitted into evidence; relied on evidence that had already been raised, litigated, and adjudicated in previous proceedings; and that the evidentiary errors were prejudicial. James responds that no objection was raised below and that the order is supported by substantial evidence and the evidence was either admitted, admissible, or supported by sworn testimony.

We review a district court's child custody order for an abuse of discretion. *Wallace*, 112 Nev. at 1019, 922 P.2d at 543. "An abuse of discretion occurs when a district court's decision is not supported by substantial evidence or is clearly erroneous." *Bautista v. Picone*, 134 Nev. 334, 336, 419 P.3d 157, 159 (2018). Factual findings of the district court will not be set aside if "supported by substantial evidence, which is evidence that a reasonable person may accept as adequate to sustain a judgment." *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007) (footnote omitted). Additionally, we look to see whether the district court "reached its conclusions for the appropriate [legal] reasons" and whether its factual findings were "supported by substantial evidence." *Id.* at 149, 161 P.3d at

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[7]We also note that the district court order does not demonstrate that the court considered any less restrictive parenting time options as required by *Roe*. *See* 535 P.3d at 288 ("[I]f a less restrictive parenting time arrangement is available, or proposed but rejected, the district court must provide an explanation as to how the best interest of the child is served by the greater restriction.").

241-42; *see also Sims v. Sims*, 109 Nev. 1146, 1148, 865 P.3d 328, 330 (1993) (stating that this court "must be satisfied that the [district] court's determination was made for the appropriate reasons").

A court may take judicial notice of facts that are in issue and "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." NRS 47.130(1), (2)(b). "Litigants who are seeking to modify primary physical custody may not use facts known to the parties at the time the prior custody order was entered to demonstrate there was a substantial change of circumstances," but district courts may review "the facts and evidence underpinning their prior ruling" when "deciding whether the modification of a prior custody order is in the child's best interest." *Nance v. Ferraro*, 134 Nev. 152, 163, 418 P.3d 679, 688 (Ct. App. 2018). Additionally, Nevada has a "'one family, one judge' rule, which was enacted to keep family law cases before a single judge who would be familiar with all facts and history in the case and be better informed when rendering subsequent decisions." *Id.* at 159, 418 P.3d at 685 (referring to NRS 3.025(3)).

The district court's order relies on the exhibits attached to James's motion to modify custody in support of many of its factual findings. Some of these exhibits contain information that was referenced by the parties during their testimony. Neither party moved to admit these exhibits into evidence, but the district court took judicial notice of the exhibits at the outset of the hearing. Nevertheless, even as James notes, it is very challenging to tell from the record on appeal what the district court meant when it took judicial notice when that amounted to the possible consideration of hundreds of pages of reports, court records, and other items encompassed within the 30 exhibits attached to James's motion. The court provided no explanation, and while the order states the exhibits were not

admitted at the hearing, it is clear that the court thoroughly reviewed the exhibits since they are discussed in detail in the order.

Virginia did not object to the district court taking judicial notice of the exhibits attached to James's motion and failed to object later when the exhibits were discussed during the hearing. *See* NRS 47.160 ("A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter to be noticed."). Further, she did not object to the consideration of events that occurred prior to the entering of the most recent custody order. Accordingly, Virginia has waived these arguments on appeal, and the court need not consider them. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (explaining that issues not argued below are "deemed to have been waived and will not be considered on appeal"). However, plain error can be considered as to evidentiary issues. NRS 47.040(2) (providing that a court may consider plain errors affecting substantial rights even though they were not brought to the attention of the judge). Virginia provides no cogent argument regarding plain error, as she does not explain why the court could not review these documents to decide whether modification of the previous order was in the children's best interest. Accordingly, this court need not consider the argument. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority).

Additionally, Virginia has failed to show how judicial notice was improper and that these exhibits were unfairly prejudicial since both parties testified about them and Virginia had the opportunity to explain any concerns she had about them or to use them to advocate her position. Accordingly, Virginia has failed to demonstrate that the result would have

been different if the court had not reviewed the alleged improper documents within the exhibits.[8] *See Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) ("To establish that an error is prejudicial, the movant must show that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached.").

Virginia argues that substantial evidence does not support a modification of custody. Virginia's argument rests on her evidentiary concerns discussed above. Accordingly, since Virginia waived these issues, we conclude that substantial evidence supports the court's order. Additionally, Virgina raises no other concerns with the evidence, and the district court made detailed findings in its order. Nevertheless, because the sole physical custody order has been reversed, a new custody order consistent with the guidelines prescribed in *Roe* is to be entered upon remand.

The matter does not need to be reassigned to a new judge on remand

Virginia argues that the district court made its custody determination prior to the evidentiary hearing, made conclusions prior to the start of the evidentiary hearing, the court's examination of Virginia and Ms. Rasmussen was hostile and biased, and the court's staff pulled documents from the case file for the court to rely on without showing the parties the documents. James responds that Virginia has failed to prove judicial bias.

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[8]Additionally, the district court was allowed to review "the facts and evidence underpinning their prior ruling" when "deciding whether the modification of a prior custody order is in the child's best interest." *Nance*, 134 Nev. at 163, 418 P.3d at 688. This is exactly what the court did in the present matter.

"A judge is presumed to be impartial . . . ." *Ybarra v. State*, 127 Nev. 47, 51, 247 P.3d 269, 272 (2011). Additionally, "[t]he test for judicial bias is a question of law, and the burden is on the party asserting bias to establish the factual basis." *Roe*, 535 P.3d at 291. "[A] judge should be disqualified if a reasonable person, knowing all the facts, would harbor reasonable doubts about the [judge's] impartiality." *Id.* (alteration in original) (internal quotation marks omitted). When deciding whether to reassign a case to a different judge on remand we consider whether (1) it is reasonably expected that the original judge would have substantial difficulty in putting any previously expressed views or findings determined to be erroneous or based on rejected evidence out of mind, "(2) reassignment is advisable to preserve the appearance of justice," and (3) "reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." *Id.* at 291 (quoting *Smith v. Mulvaney*, 827 F.2d 558, 562-63 (9th Cir. 1987)).

First, Virginia has failed to meet her burden of proof. Virginia's assertion that the court had already reached a custody determination is not supported by the record nor did she object below. While the court began the hearing by informing the parties about its thoughts following the private interview it conducted with the children and stating the outcome of the abuse allegations, these statements do not show that the court was biased. Instead, these statements were either prompted by the parties (in the case of the statements about the children's interviews) or a statement of information that both parties should have already been aware of. Additionally, the record does not reveal that the district court's questioning of Virginia and Ms. Rasmussen was hostile, biased, or adversarial. *See* NRS 50.145(2) (stating the court may interrogate witnesses and the parties may object). Further, Virginia does not identify any improper questions besides

stating that the court asked Ms. Rasmussen to identify "consistencies" in the children's stories. Finally, Virginia fails to explain how the pulling of files shows bias. Accordingly, we need not consider this argument. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38. We thus conclude that Virginia has failed to meet her burden of proof.

Finally, Virginia argues that the district court's "fixation" on the "case file" affected her substantial rights and denied her a fair hearing because she had no ability to confront the evidence, object to it, or explain it. James replies that Virginia lacks legal authority to support her argument and fails to address the effect of sworn testimony on the evidence that she now complains about.

Virginia seems to suggest that the court file was treated as evidence, yet the record citations provided in her brief refer to documents that were included as part of James's motion to modify custody. The district court took judicial notice of these documents at the beginning of the hearing without any objection from Virginia. As discussed above, Virginia had the opportunity to confront this evidence, object to it, or explain it. Additionally, Virginia has failed to present a cogent argument on this issue, so we need not consider it. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38. Therefore, we conclude that Virginia received a fair hearing and this matter does not need to be assigned to a new judge.

Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[9]

_____, C.J.
Gibbons

_____, J.
Westbrook

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[9]Additionally, we grant James's motion to strike the supplemental appendix except to the extent that we discussed the issues at oral argument.

We also deny Virginia's motion for a limited remand, which she requested so that the district court could grant her motion to adopt its May 31, 2024, temporary emergency custody order as a permanent order. The motion before this court failed to indicate "if the district court state[d] either that it would grant the motion or that the motion raise[d] a substantial issue" as required by NRAP 12A(a). *See also Mack-Manley v. Manley*, 122 Nev. 849, 854, 138 P.3d 525, 529 (2006) (providing that, while an appeal of a custody order is pending, "[i]f the district court is inclined to grant the motion [to modify custody], then it may certify its inclination to [the appellate] court," after which "the moving party would file a motion in [the appellate] court for remand to the district court").

Pending further proceedings on remand, we leave in place the current temporary custody order, subject to modification by the district court to comport with the current circumstances. *See Davis v. Ewalefo*, 131 Nev. 445, 455, 352 P.3d 1139, 1146 (2015) (leaving certain provisions of a custody order in place pending further proceedings on remand).

Insofar as the parties have raised arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

BULLA, J., concurring in part and dissenting in part:

While I concur with the majority in reversing the award of sole custody for the reasons set forth in the majority order, I respectfully disagree with the decision to affirm the remainder of the district court order before us on appeal, and instead would grant a limited remand for the purpose of allowing the district court to determine whether it should adopt its temporary emergency custody order entered after the appeal was filed as a permanent custody order.[1] This course of action is particularly persuasive to me as the district court entered the emergency order transferring custody from respondent to appellant to protect the children's welfare and security. While I recognize appellant's motion for remand contains deficiencies, the circumstances warrant flexibility. *See* NRAP 2 ("On the court's own [motion] the court may—to expediate its decision or for other good cause—suspend any provision of these Rules in a particular case and order proceedings as the court directs."). This court initially denied respondent's motion to strike (without prejudice) the information concerning the emergency proceedings involving the change of custody after the appeal was filed. I would not revisit our decision on the motion to strike

[1]The temporary emergency custody order was entered after this appeal was docketed with the Nevada Supreme Court. *See Mack-Manley v. Manley*, 122 Nev. 849, 856, 138 P.3d 525, 530 (2006) ("Although the district court lacks jurisdiction to revisit a child custody order that is on appeal, the district court's jurisdiction to make short-term, temporary adjustments to the parties' custody arrangement, on an emergency basis to protect and safeguard a child's welfare and security, is not impinged when an appeal is pending.").

as the emergency order granting appellant custody was discussed at length at oral argument and from my perspective directly impacts the custody issues on appeal. Thus, despite certain procedural deficits in bringing the issue regarding the emergency change of custody to this court, I would grant a limited remand.[2]

_____, J.
Bulla

cc: Hon. Sandra A. Unsworth, District Judge, Family Division
Robison, Sharp, Sullivan & Brust
Brownstein Hyatt Farber Schreck, LLP/Las Vegas
Washoe District Court Clerk

[2]*See, e.g., Mack-Manley*, 122 Nev. at 856, 138 P.3d at 530 ("If the district court's emergency order will necessitate a longer-term custody change or will implicate the custody issues on appeal, then the party seeking the change must immediately move for a remand from this [appellate] court and attach to that motion the district court's emergency order.").