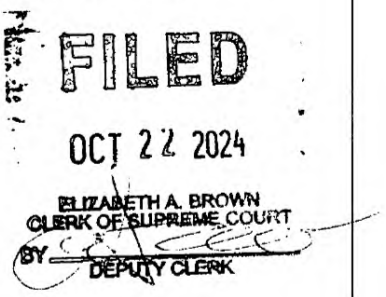
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DORY MIZRACHI,
Appellant,
vs.
ELIEZER MIZRACHI, JR.,
Respondent.

No. 86508-COA



ORDER OF AFFIRMANCE

Dory Mizrachi appeals from a district court order granting a motion to modify child custody. Eighth Judicial District Court, Family Division, Clark County; Dawn Throne, Judge.

Dory and respondent Eliezer Mizrachi, Jr. (Eli) were previously married and share one child in common.[1] The child, J.M., was born in 2008. The parties divorced in 2012, and in the decree of divorce, the district court awarded the parties joint legal and physical custody of J.M. In addition, the court established a timeshare, awarding the parties parenting time each week with alternating weekends and holidays.

In 2020, Eli moved to modify the custody order. Eli contended that modification of the custody order was warranted based on J.M.'s assertions that Dory had physically struck him, used inappropriate language toward him, and engaged in inappropriate conversations with J.M. Eli also asserted that Dory sometimes left the residence during the night hours, leaving J.M. unsupervised during that time. Based on the aforementioned allegations, Eli contended that there had been a substantial

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

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change in circumstances affecting the welfare of J.M. and that modification of the custody order to award him primary physical custody was in J.M.'s best interest.

Dory opposed the motion and filed a countermotion seeking review of child support. In her opposition, Dory denied mistreating J.M. and discussed allegations of domestic violence she asserted Eli committed during their marriage. Dory also urged the district court to maintain the previously ordered joint legal and physical custody arrangement.

Both parties also filed several supplemental documents concerning their respective positions. In light of the information contained in the parties' motions and supplemental documents, the district court directed the child to undergo counseling and for the therapist to present a report to the court. The presiding district court judge, Hon. Mary Perry, later held an evidentiary hearing in which J.M. and the therapist testified. The court subsequently issued a written order in March 2022, noting that the parties had reached an agreement as to the timeshare until resolution of the motion to modify custody, and it accordingly issued a temporary order directing the parties to maintain the previous timeshare but permitted J.M., who had aged considerably since entry of the 2012 decree, to exercise some discretion as to how long he would stay with each parent so long as that discretion was not abused.

The parties subsequently discussed changing the child's therapist. The district court found that J.M. should attend therapy but stated that the new therapist would be for the child's benefit and would not present testimony or reports to the court concerning J.M.

The district court also issued a scheduling order concerning the later evidentiary hearing proceedings. The order provided that the

evidentiary hearing concerning the financial issues related to child support was set for September 12 and 13, 2022, but the evidentiary hearing concerning the custodial issues would occur at a later date.

The district court subsequently conducted the evidentiary hearing concerning the financial issues on September 12, 13, and 27. However, on September 29, Judge Perry informed the parties that she had recently requested Dory's counsel to aid her courtroom clerk with a court issue. Judge Perry acknowledged that the request was improper and offered to recuse herself. Eli requested Judge Perry to recuse herself and Dory did not object. Judge Perry thereafter recused herself and this matter was reassigned to Hon. Dawn Throne.

Judge Throne thereafter conducted a status check as the presiding district court judge. Judge Throne informed the parties that she had not yet had the opportunity to review the entire record but understood the outstanding issues. Judge Throne offered to review the previously presented testimony but she also inquired if the parties wished to again present testimony from witnesses that had previously testified. However, neither party wished to recall witnesses. Rather, Dory urged Judge Throne to review the video recordings depicting the testimony. Both parties acknowledged that the previously presented testimony pertained to the financial matters. Judge Throne thereafter informed the parties that she would review the recordings of the previously presented testimony.

Dory also moved for permission to present testimony from the child's new therapist, and Eli opposed the motion. At the beginning of the subsequent hearing, Judge Throne stated that she had reviewed the record in this matter and noted that Judge Perry had previously informed the parties that J.M.'s new therapist would not be permitted to testify at the

evidentiary hearing. Judge Throne announced that she would not overrule Judge Perry's decision and denied Dory's request to present testimony from J.M.'s new therapist.

The parties proceeded to present evidence concerning their custody dispute. Both parties and J.M. testified at the hearing and presented significant evidence concerning J.M.'s relationship with both parties. Dory attempted to present testimony concerning pre-divorce acts of domestic violence allegedly committed by Eli. Eli objected, and the district court sustained the objection, finding that the allegations were not relevant to the current custody matters as they allegedly occurred prior to entry of the decree of divorce and because this court's decision in *Nance v. Ferraro*, 134 Nev. 152, 163, 418 P.3d 679, 688 (Ct. App. 2018), had no bearing upon the admissibility of pre-decree allegations of domestic violence.

The district court thereafter entered a written order in which it concluded that the evidence established that there had been a substantial change in circumstances affecting the welfare of J.M. since entry of the original custody decision contained within the 2012 decree, in particular the deterioration in the relationship between J.M. and Dory. The court also found that several of the best interest factors under NRS 125C.0035(4) favored awarding Eli primary physical custody. Based on the evidence presented and the district court's findings, the court concluded it was in J.M.'s best interest to award Eli primary physical custody. However, the court concluded that the parties should continue to share joint legal custody. The court also provided Dory with parenting time overnight on each Tuesday to Wednesday and on every other weekend, and entered a holiday timeshare. This appeal followed.

First, Dory argues that the district court's March 2022 order, which incorporated the parties' agreement concerning the custody matters, was a final order concerning Eli's motion to modify custody such that the court should not have conducted additional hearings concerning Eli's request to modify custody. However, "a final order [is] one that disposes of all issues and leaves nothing for future consideration." *Sandstrom v. Second Jud. Dist. Ct.*, 121 Nev. 657, 659, 119 P.3d 1250, 1252 (2005). As explained previously, the March 2022 order stated that it was a temporary order that incorporated the parties' agreement concerning custody during review of Eli's motion to modify custody. The order temporarily directed the parties to maintain the previous timeshare and permitted J.M. to have some teenage discretion concerning the parties' parenting time. The order also explained that the district court would again review the custody matters at a later date. The order is also consistent with the relevant hearing, where the court stated it had been informed that the parties reached a temporary solution to the custody matters and the parties placed the terms of their temporary solution on the record. Accordingly, the March 2022 order plainly stated it was temporary and left matters for future consideration, *cf. Nev. Gaming Comm'n v. Wynn*, 138 Nev. 164, 168, 507 P.3d 183, 187 (2022) ("For an order to be final, it must dispose of all the issues presented in a case."), and Dory does not demonstrate that the agreement to continue the current custody arrangement was actually an agreement for final custody nor that the March 2022 order was final such that the court should not have conducted any further hearings concerning the custody matters.

Second, Dory argues that Judge Perry erred by recusing herself from this matter. A judge's decision regarding recusal is given substantial weight and is not overturned absent a clear abuse of discretion. *Rivero v.*

Rivero, 125 Nev. 410, 439, 216 P.3d 213, 233 (2009), *overruled on other grounds by Romano v. Romano*, 138 Nev. 1, 6, 501 P.3d 980, 984 (2022), *abrogated in part on other grounds by Killebrew v. State ex rel. Donohue*, 139 Nev., Adv. Op. 43, 535 P.3d 1167, 1171 (2023). "A judge, upon the judge's own motion, may disqualify himself or herself from acting in any matter upon the ground of actual or implied bias." NRS 1.230(3).

As stated previously, Judge Perry offered to recuse herself after acknowledging that she requested Dory's counsel to aid her courtroom clerk and it was improper. Eli requested Judge Perry to recuse herself, Dory did not object, and Judge Perry thereafter recused herself from this matter. Dory did not object to the judge's decision to recuse herself, and as a result, she has waived this issue and we need not consider it. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

Third, Dory argues that Judge Throne should have restarted the evidentiary hearing proceedings after this matter was reassigned to her. Dory also argues that Judge Throne erroneously failed to review the proceedings that had taken place prior to her assignment to this matter.

We review questions of law resulting from decisions made under the Nevada Rules of Civil Procedure de novo. *See Power Co. v. Henry*, 130 Nev. 182, 186, 321 P.3d 858, 860-61 (2014). If a judge that conducted a hearing is not able to proceed "any other judge may proceed upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties." NRCP 63. However, "[i]n a hearing or a nonjury trial, the successor judge must, at a party's request, recall any witness whose testimony is material and disputed and who is available to

testify again without undue burden. The successor judge may also recall any other witness." *Id.*

Here, after she was assigned to this matter, Judge Throne acknowledged that several days of the evidentiary hearing had already occurred and that she would have to review the video recordings of the testimony presented at the previous hearings. Judge Throne also inquired as to whether the parties wished to recall any of the previously presented witnesses but neither party wished to do so. Dory instead urged Judge Throne to review the video recordings of the previously presented testimony, and Judge Throne agreed to review those recordings.

At the beginning of the subsequent evidentiary hearing, Judge Throne informed the parties that she had the opportunity to review "a lot of things" and that she was ready to proceed with the evidentiary hearing concerning the custody matters. In addition, Judge Throne referenced the child's prior testimony and the testimony from the child's first therapist at the hearing. Judge Throne acknowledged that she had not reviewed all the exhibits related to the parties' finances as the issue of child support was not the subject of that proceeding. In light of the foregoing, we conclude that Dory fails to demonstrate that Judge Throne was not familiar with the record. Dory also does not demonstrate any prejudice stemming from Judge Throne's presiding over the completion of the child custody matter. Accordingly, Dory fails to establish that Judge Throne should have started the evidentiary hearing anew or that she was unable to preside over the evidentiary hearing concerning the custody matters at issue in this case. *See* NRCP 63.

To the extent Dory argues Judge Throne did not actually review evidence or was not sufficiently familiar with the record, Dory raised no

objections concerning those issues and did not argue during the evidentiary hearing that Judge Throne was not familiar enough with the record to make a decision concerning the child's custody. As a result, she has waived this argument and we need not consider it. *See Old Aztec Mine, Inc.*, 97 Nev. at 52, 623 P.2d at 983.

Fourth, Dory argues that the district court abused its discretion by modifying the physical custody order. This court reviews district court decisions concerning child custody for an abuse of discretion. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007). In reviewing child custody determinations, this court will affirm the district court's factual findings if they are supported by substantial evidence. *Id.* at 149, 161 P.3d at 242. When making a custody determination, the sole consideration is the best interest of the child. NRS 125C.0035(1); *Davis v. Ewalefo*, 131 Nev. 445, 451, 352 P.3d 1139, 1143 (2015). Further, we presume the district court properly exercised its discretion in determining the child's best interest. *Flynn v. Flynn*, 120 Nev. 436, 440, 92 P.3d 1224, 1226-27 (2004).

To establish that a custodial modification is appropriate, the moving party must show that "(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*, 138 Nev. at 5, 501 P.3d at 983 (internal quotation marks omitted). A court may award one parent primary physical custody if it determines that joint physical custody is not in the best interest of the child. NRS 125C.003(1).

At the evidentiary hearing, J.M. testified at length concerning his relationships with the parties. J.M. testified that Dory uttered harmful remarks at times and explained that she had slapped him. J.M. further testified that Dory had called the police concerning him multiple times and

he expressed his concern that the police had often come into his life. In contrast, J.M. explained that he had a good relationship with Eli and that Eli supports his needs. J.M. also explained that he enjoys spending time with Eli's other son, his half-sibling. For those reasons, J.M. explained that he wished to reside with Eli.

Both parents also testified at the evidentiary hearing. Of note, both parties testified at length concerning J.M.'s Bar Mitzvah ceremony, in which Dory interrupted J.M.'s remarks and also called the police. The parties explained that the events of the ceremony caused stress to J.M. and were difficult for him to endure.

In addition, Dory admitted that she slapped J.M. on two occasions and acknowledged that their relationship had become strained. Dory also explained that she has participated in parenting classes to help her to parent J.M. better. Dory stated she called the police concerning J.M. due to his discipline issues and because he made attempts to flee her residence or vehicle. Dory acknowledged that calling the police may have caused unintended or adverse consequences to J.M.

Eli testified that he and J.M. have a great relationship and that J.M. has a bond with his younger half-sibling. Eli also testified that J.M.'s mood had recently changed and that J.M. expressed concern with returning to Dory's home for her parenting time.

Following presentation of the evidence, the district court found that there had been a substantial change in circumstances affecting the welfare of J.M. The court found that J.M. was three years old when the 2012 decree was entered and, as he had aged to nearly 14, he had entered a different developmental state and had very different needs as compared to 2012. The court also found that the relationship between J.M. and Dory

had seriously deteriorated, which included Dory's actions making repeated unnecessary calls to the police for help with J.M. The court further noted that the level of distrust and dysfunction between J.M. and Dory did not exist when the first custody decision was entered. Finally, the district court noted that J.M. had a strong desire to reside with Eli given the deterioration in his relationship with Dory.

The district court also evaluated the relevant best interest factors from NRS 125C.0035(4) and found that several favored Eli. Specifically, the court found that J.M. was nearly 14 years of age and he was of sufficient age and capacity to form an intelligent preference as to his physical custody. The court also noted that J.M. articulated that difficulties had arisen in his relationship with Dory and that he wished to reside with Eli. The court further found that, while Dory contended that Eli coached J.M. into favoring him, it saw no evidence of coaching. Thus, the district court concluded that the child's wishes factor favored Eli. *See* NRS 125C.0035(4)(a).

Next, the court noted that J.M. had entered in a new state of development and he sought increased autonomy. However, Dory's reaction to J.M.'s new behavior had not helped their relationship and that their relationship had instead worsened over time. Thus, the court found that Eli was best able to help J.M. with his physical, developmental, and emotional needs. *See* NRS 125C.0035(4)(g).

The district court also found that the relationship between J.M. and Dory had become dysfunctional. In contrast, J.M. viewed Eli as his hero. The court noted that the parties shared some contribution to the current problems and that they should engage in family therapy. However,

the court found that evidence demonstrated that the nature of the relationship of J.M. with each parent favored Eli. *See* NRS 125C.0035(4)(h).

In addition, the district court found that the ability of J.M. to maintain a relationship with his half-sibling favored Eli. *See* NRS 125C.0035(4)(i). However, the court explained that factor merely favored Eli because he had another child and it did not bear upon its ultimate decision concerning J.M.'s physical custody.

Finally, the district court explained that J.M.'s wish to reside with Eli, Eli's ability to help J.M. with his needs, and the nature of J.M.'s relationship with each parent were the dispositive factors in evaluating the best interest of J.M. Based on those factors, the district court concluded that it was in J.M.'s best interest to award Eli primary physical custody.

The district court's factual findings made in support of these determinations are supported by substantial evidence in the record, *see Ellis*, 123 Nev. at 149, 161 P.3d at 242, and this court will not second guess a district court's resolution of factual issues involving conflicting evidence or reconsider its credibility findings, *see Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 366, 212 P.3d 1068, 1080 (2009). Accordingly, we discern no abuse of discretion by the district court modifying the custody order and awarding Eli primary physical custody. *See Ellis*, 123 Nev. at 149, 161 P.3d at 241.

Fifth, Dory argues that the district court abused its discretion by declining to permit testimony concerning pre-divorce acts of domestic violence allegedly committed by Eli. We review a district court's decision to exclude evidence for an abuse of discretion. *M.C. Multi-Family Dev., L.L.C. v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008). The district court's exercise of discretion will not be disturbed "absent a showing

of palpable abuse." *Id.* "Questions of law, however, we review de novo." *Nance v. Ferraro*, 134 Nev. 152, 156, 418 P.3d 679, 683 (Ct. App. 2018). "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 has been a substantial change in circumstances," but litigants are not prevented "from using previously known evidence of domestic violence defensively to argue modification is not in the child's best interest." *Id.* at 163, 418 P.3d at 688.

As stated previously, the district court concluded that evidence of domestic violence that allegedly occurred prior to entry of the 2012 decree was not relevant to the 2022 custody proceedings and found that this court's decision in *Nance* had no bearing upon the admissibility of pre-decree acts of domestic violence. However, Dory could potentially have used evidence of domestic violence to show that modification was not in J.M.'s best interest. *See id.* Thus, evidence of prior acts of domestic violence may have been relevant to whether it was in the child's best interest to award Eli primary physical custody. *See* NRS 125C.0035(4)(k); *see also* NRS 48.015 (defining relevant evidence as "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").

However, even assuming that any failure to admit evidence concerning allegations of domestic violence constituted error, Dory fails to meet her burden to demonstrate that the error was prejudicial and not harmless. *See Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) (explaining that, to establish an error is not harmless and reversal is warranted, "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"). Dory generally alleges that domestic violence occurred during the parties' marriage but she does not provide factual explanation concerning her allegations or argue that consideration of evidence of domestic violence would have reasonably resulted in a different outcome.[2] Moreover, the district court made detailed findings concerning the best interest factors, and, in particular, focused on the dysfunctional relationship between Dory and J.M. and how that issue bore upon the child's welfare and J.M.'s custody preference. Accordingly, even assuming, without deciding, that the failure to admit evidence of pre-divorce domestic violence constituted error, any such error was harmless because Dory did not meet her burden to establish that it was prejudicial. *See id.* at 465, 244 P.3d at 778 ("When an error is harmless, reversal is not warranted."); *cf.* NRCP 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.").

Sixth, Dory argues that the district court abused its discretion by excluding testimony from J.M.'s new therapist at the evidentiary hearing. Dory contends that Judge Throne erroneously relied upon Judge Perry's earlier decision in which Judge Perry concluded that the new therapist would not be permitted to testify.

As stated previously, we review a district court's decision to exclude evidence for an abuse of discretion and will not disturb its exercise

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[2]We note that Dory does not argue that NRS 125C.0035(5)'s presumption against granting physical custody to a perpetrator of domestic violence should have applied in this matter, and thus she has waived any argument related to the same. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that issues an appellant does not raise on appeal are waived).

of discretion "absent a showing of palpable abuse." *M.C. Multi-Family Dev.*, 124 Nev. at 913, 193 P.3d at 544. Moreover, "[w]e review de novo whether the law-of-the-case doctrine applies but review a district court's application of the doctrine for an abuse of discretion." *Litchfield v. Tucson Ridge Homeowners Ass'n*, 140 Nev., Adv. Op. 57, 555 P.3d 267, 269 (2024). "[T]he law-of-the-case doctrine applies even to issues decided in interlocutory orders" and thus, "a successor judge should not revisit an issue previously decided by a different judge in the same proceeding unless" an exception to the law-of-the-case doctrine applies. *Id.* at 270-71.

Here, Judge Throne found that Judge Perry had previously decided that J.M.'s new therapist would not be permitted to testify at the evidentiary hearing. Judge Throne concluded that the issue as to whether the new therapist would testify was already decided and that the issue should not be revisited.

Because the issue of whether the new therapist would testify was already decided, the law-of-the-case doctrine applied to that issue. *See id.* Dory appears to contend that the issue should have been revisited because the child's therapist could have testified to new information. *See id.* (stating that an exception to the law-of-the-case doctrine occurs when "subsequent proceedings produce substantially new or different evidence"). However, Dory does not identify that information, explain how that information could have reasonably altered the proceedings, or explain why Judge Throne should have departed from a previously issued decision. In light of the foregoing, we conclude that Dory fails to demonstrate that Judge Throne's decision to deny her request to present testimony from the child's second therapist was arbitrary, capricious, or exceeded the bounds of law or reason. *See Skender v. Brunsonbuilt Constr. & Dev. Co.*, 122 Nev. 1430,

1435, 148 P.3d 710, 714 (2006) ("An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." (internal quotation marks omitted)).

In light of the foregoing analysis, we

ORDER the judgment of the district court AFFIRMED.[3]

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Dawn Throne, District Judge, Family Division
Law Offices of F. Peter James, Esq.
Jacobson Law Office, Ltd.
Smith Jain Stutzman
Eighth District Court Clerk

[3]Insofar as Dory raises arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.