

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

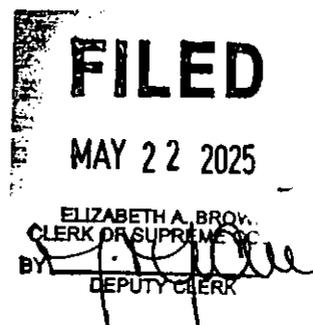
IN THE MATTER OF THE
GUARDIANSHIP OF THE MINOR
M.J.V., PROPOSED PROTECTED
MINOR

KELLY VARDEN,
Appellant,
vs.
BRENDA MESERVEY-BALA; AND
RANDY BURNS,
Respondents.

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GUARDIANSHIP OF THE MINOR
M.J.V., PROPOSED PROTECTED
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KELLY VARDEN,
Appellant,
vs.
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RANDY BURNS,
Respondents.

No. 86816-COA



No. 87710-COA

ORDER OF AFFIRMANCE

Kelly Varden¹ appeals from a district court order awarding guardianship to Brenda Meservey-Bala (Brenda) and a subsequent order clarifying the terms of the guardianship. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

¹Randy Burns was not appointed guardian or co-guardian and although listed as a party in the caption he is not a party to this appeal.

M.J.V. was born in 2017 with a radial ray malformation in her right arm, meaning she had no radial bone or thumb. Both her parents had substance abuse issues, so, Brenda (M.J.V.'s maternal grandmother) and Randy Burns (M.J.V.'s step-grandfather and Brenda's spouse) took her home from the hospital and cared for her, eventually receiving guardianship over her. For roughly five-and-a-half years, they raised her and cared for all her medical needs. They consulted with orthopedic specialists and enrolled M.J.V. in multiple early intervention programs to ensure that she met her developmental milestones. And Brenda kept detailed, handwritten notes of the results from all the doctor appointments.

Roughly five years after she was born, Kameron (M.J.V.'s father) was able to get sober and wanted to re-enter M.J.V.'s life. He originally received limited, supervised parenting time, but that parenting time grew as the relationship progressed. When the district court held a hearing to determine whether Kameron would regain custody, Brenda and Randy failed to appear because, purportedly, they were unaware of the hearing date.

The district court subsequently terminated Brenda and Randy's guardianship and awarded Kameron custody of M.J.V. During this transition, Brenda found a therapist for M.J.V. to help her cope with the reunification, and M.J.V. saw her once a week at first, and two times a week shortly thereafter. Sadly, four months later, Kameron died in a work-related accident.

Elizabeth (M.J.V.'s mother) consented to a temporary guardianship of M.J.V. with Brenda, but Brenda did not file a petition for guardianship immediately with the court. Kelly Varden, who was Kameron's mother and M.J.V.'s paternal grandmother, petitioned for

guardianship the day after Kameron passed away, and Kelly was awarded temporary guardianship by the court. Brenda and Randy discovered that Kelly was awarded temporary guardianship, and they moved for grandparent visitation, which they received every other weekend. Shortly after, however, they jointly filed their own petition for guardianship of M.J.V., and a hearing was scheduled so the district court could determine who would be awarded guardianship.

The two sets of grandparents did not have a positive relationship with each other during Kelly's temporary guardianship, which lasted until the resolution of the competing petitions. Brenda and Randy complained that Kelly restricted M.J.V.'s visitation with them to the very letter of the court order. Kelly would either say no to any extra visitation or renege on an engagement at the last minute. They also complained that Kelly barely communicated with them outside their visitation time, and the little communication they did receive was "[l]imited and late." Oppositely, Kelly disagreed with Brenda and Randy's decision to prevent M.J.V. from seeing her therapist during Brenda's visitation time. Kelly also believed that M.J.V. needed to stay with her to promote stability after Kameron passed away.

Before the hearing on the competing guardianship petitions, Brenda and Randy were being vetted as foster parents for M.J.V.'s half-brother by the Nevada Division of Child and Family Services (DCFS). To become a foster parent, DCFS investigates the prospective parents and their household. DCFS conducts numerous tours of the home, interviews the parents multiple times, and requires each parent to undergo a physical examination to ensure they are healthy enough to foster a child. Both Brenda and Randy had undergone that process, and the investigation was

nearly complete by the time of the evidentiary hearing to determine the guardianship of M.J.V.

The district court held a three-day evidentiary hearing pursuant to NRS 159A.061(8). Both parties presented their cases, and each provided evidence against the other party and in support of themselves. Both the guardian ad litem (GAL) and the Advocates for Children of Rural Nevada (ACORN) representative recommended that Kelly receive the guardianship. Additionally, evidence was presented about the health of the prospective guardians, the living conditions, the ability for each to provide M.J.V. medical care, and which party would facilitate M.J.V.'s relationship with the other party.

The hearing concluded, and the district court orally announced that it would award Brenda the guardianship and that Kelly would only receive visitation every other weekend and on holidays. The court memorialized its decision in its first written order. Five months later, the district court filed a second order which included multiple findings in support of its decision.

The district court stated in the second written order that it heard testimony from all the witnesses, including the GAL and ACORN representative, and it found both parties credible but that each set of grandparents had serious animosity issues with each other which impacted their ability to cooperate to meet the needs of M.J.V. It also found that each set of grandparents loved M.J.V. and would be willing to care for her. But importantly, the court found that: (1) Brenda would be more likely to facilitate a good relationship between M.J.V. and Kelly; (2) Brenda was better equipped and organized to handle M.J.V.'s medical needs; (3) Brenda could provide better living conditions for M.J.V.; and (4) Brenda was in

better physical and mental condition to care for M.J.V. The district court used these four findings as justification for its award of guardianship to Brenda. Kelly appeals from both the first and second orders.

Kelly argues that the district court abused its discretion when it awarded Brenda guardianship because it made factual findings not supported by the record, it did not properly consider the testimony of the GAL and ACORN representative, and it incorrectly weighed certain factors when making its determination. Specifically, she challenges three findings that the district court made. First, she argues that the district court abused its discretion when it found that Brenda was more likely to facilitate a relationship between M.J.V. and Kelly. Second, she argues that the district court abused its discretion when it found that Brenda was better equipped to handle M.J.V.'s healthcare. And third, she argues that the district court abused its discretion when it found that Brenda was in better physical and mental condition to be appointed as guardian.² She further argues that the district court erred when it awarded "sole custody" over M.J.V. and that the court did not adequately consider NRS 125C.0035(4)(g)-(h). We will address each argument in turn.

"Absent a showing of abuse, we will not disturb the district court's exercise of discretion concerning guardianship determinations." *In re Guardianship of L.S. & H.S.*, 120 Nev. 157, 163, 87 P.3d 521, 525 (2004). "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." *Skender v. Brunsonbuilt Constr. & Dev. Co.*, 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006) (internal quotation marks omitted). In addition, this court defers to

²She does not challenge the finding that Brenda could provide better living conditions.

the district court's factual findings and must uphold them if they are not clearly erroneous and are supported by substantial evidence. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009). Substantial evidence "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). Further, this court presumes that the district court properly exercised its discretion when determining the best interest of a child. *Flynn v. Flynn*, 120 Nev. 436, 440, 92 P.3d 1224, 1226-27 (2004). Lastly, appellate courts are "not at liberty to weigh the evidence anew, and where conflicting evidence exists, all favorable inferences must be drawn towards the prevailing party." *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 238, 955 P.2d 661, 664 (1998).

When seeking a guardianship, "[t]he petitioner has the burden of proving by clear and convincing evidence that the appointment of a guardian of the person, of the estate, or of the person and estate is necessary." NRS 159A.055(1); *see also* NRS 159A.061(8) ("[A]ny finding of unsuitability of a parent of the proposed protected minor must be found by clear and convincing evidence . . ."). Moreover, "[i]f the court finds that the proposed protected minor is not in need of a guardian, the court shall dismiss the petition." NRS 159A.054(1). "In determining whether to appoint a guardian of the person or estate of a proposed protected minor and who should be appointed, the court must always act in the best interests of the proposed protected minor." NRS 159A.061(9).

A parent or a proposed guardian of a proposed protected minor is presumed unfit if they cannot provide food, shelter, clothing, medical care, and education to the minor or if they pose a significant safety risk to

the minor. NRS 159A.061(4)(a)-(b).³ After those factors are considered, the district court may consider anything else to determine what would be in the best interest of the child. *Cf.* NRS 125C.0035(4) (identifying a non-exclusive list of factors to determine the best interest of a child in a custody matter). Other than the factors stated in NRS 159A.061(3)-(6), no factor is binding, and the court must make a determination to achieve the best interest of the child. *See* NRS 159A.061(9).

Kelly first argues that the district court abused its discretion when it found that Brenda was more likely to facilitate a good relationship with M.J.V. and Kelly.⁴ She argues that the record shows that Kelly had made multiple attempts to facilitate M.J.V.'s relationship with Brenda whereas Brenda would cut off communication with people she deemed to be "passive aggressive."

Brenda responds that the record supported the district court's factual finding because Kelly barely communicated with Brenda, was overly restrictive with visitation beyond the court order, admitted that sharing M.J.V.'s time with Brenda was difficult for her, and reneged on planned

³Although NRS 159A.061(4) only references the parent of the proposed minor, NRS 159A.061(6) discusses the factors to consider whether any "qualified person is most suitable" to be awarded guardianship, and it states that the applicable factors listed in NRS 159A.061(4)(b) should be considered.

⁴This is a factor under NRS 125C.0035(4)(c). NRS 125C.0035(4) applies to the best interest factors for a parent's physical custody determination. *Kelley v. Kelley*, 139 Nev., Adv. Op. 39, 535 P.3d 1147, 1152 (2023). And although a court may use those factors when considering the best interest of the child for competing guardianship claims under NRS 159A.061(9), they are not mandatory considerations under a plain reading of the law. *See id.*; *see also* NRS 159A.061.

visitation dates. Brenda also contends she had a history of facilitating relationships, especially because she acquiesced to Kameron's initial parenting time and sent M.J.V. to therapy to ease her transition to the new living situation with her father.

The record demonstrates there was substantial evidence showing that Brenda would be more likely to facilitate M.J.V.'s relationship with Kelly. First, Kelly stated that it had "been difficult for [her] to navigate giving [Brenda and Randy] the time that they're asking for all the time." Second, Kelly rigidly restricted Brenda's time to the strict confines of the court-ordered visitation by refusing nearly all of Brenda's requests to visit M.J.V., and the one time she acquiesced, she reneged at the last moment. Lastly, although Kelly communicated with Brenda about M.J.V. and the events and activities she partook in, that communication tended to be "[l]imited and late."

In addition, while Brenda did not contact Kelly during the first five-and-a-half years she and Randy cared for M.J.V., Kelly similarly did not reach out to Brenda during that time. Otherwise, Brenda let M.J.V.'s other family members come and visit M.J.V., often on consecutive weekends. Most importantly, when Kameron first tried to reinitiate his relationship with M.J.V., Brenda cautiously allowed him to do so despite her initial misgivings.

Thus, there is substantial evidence in the record supporting the district court's finding that Brenda would be more likely to facilitate contact between M.J.V. and Kelly, and that finding is not clearly erroneous. And because we do not reweigh evidence when there is conflicting evidence, *see Yamaha Motor Co., U.S.A.*, 114 Nev. at 238, 955 P.2d at 664, we conclude that the district court did not abuse its discretion when it made this finding.

Second, Kelly argues that the district court abused its discretion by finding that Brenda was better equipped to care for M.J.V.'s health needs. She specifically argues that Brenda did not have a dedicated pediatrician for M.J.V. Brenda responds that the district court rightly concluded that there was "overwhelming evidence" that she would be able to adequately care for the health needs of M.J.V., and that M.J.V.'s incidents of sickness had risen while she has been in Kelly's care.

Here, there is evidence in the record that both grandparents would be able to care for M.J.V. Initially, although Kelly did not understand the purpose of M.J.V.'s wrist brace, she knew she had one, and there is some contradictory evidence presented by both Brenda and Randy about when and how M.J.V. would need the brace replaced and where M.J.V.'s current brace was located. Further, the increase in incidents of M.J.V.'s sickness does not indicate Kelly's inability to care for her, and if anything, her consistently getting medical care for M.J.V. during those illnesses shows that she is attentive to M.J.V.'s needs.

Nevertheless, the record also showed that Brenda provided for M.J.V.'s medical needs for five-and-a-half years. That includes general physical and dental care, surgical specialists for M.J.V.'s physical disability, the multiple early intervention programs she enrolled M.J.V. in, and her therapy when M.J.V. was transitioning between Brenda and Kameron. She further offered into evidence years of handwritten calendars of M.J.V.'s appointments. And Brenda testified that M.J.V. had a dedicated pediatrician, but that pediatrician moved out of Nye County, and M.J.V. was otherwise healthy. Likewise, although Brenda skipped the therapy appointments during her visitation time, she based part of her decision on

a desire to find a more qualified alternative therapist, specifically, a clinical psychologist, for M.J.V.

In light of the foregoing, the district court's finding was based on substantial evidence, and it properly exercised its discretion to weigh competing evidence when making its factual finding. Again, we do not reweigh competing evidence or second-guess the district court's findings so long as they were based on substantial evidence. *See Yamaha Motor Co., U.S.A.*, 114 Nev. at 238, 955 P.2d at 664. Accordingly, we conclude the district court did not abuse its discretion when finding that Brenda was better able to care for the health needs of M.J.V.

Third, Kelly argues that the district court abused its discretion when it found that Brenda was in better physical and mental condition than Kelly. Kelly contends her conditions had no meaningful impact on her ability to care for M.J.V. and notes Brenda has been routinely attending therapy. Conversely, Brenda argues that Kelly has multiple life-long physical conditions requiring prescription medication whereas Brenda was deemed physically fit to be a foster parent by the DCFS.

Here, the record shows that Kelly is diagnosed with two chronic disorders: fibromyalgia and lupus. The former requires amelioration with doctor-prescribed oxycodone, which Kelly has been taking at various times for over a 10-year period. And, although Kelly has not had a fibromyalgia flare-up recently and she states that it has not affected her ability to care for M.J.V., she testified that an issue with fibromyalgia could occur and that her mood would be affected by the constant pain.

In addition, the record demonstrates Brenda was required to submit to a physical exam for her foster care license, and she testified that she did not have any medical conditions that would impact her ability to

care for M.J.V., and the physical showed no conditions that would disqualify her from being a foster parent for the DCFS. And although she attends therapy sessions, that alone is insufficient to demonstrate that Brenda has a mental condition that would impact her ability to care for M.J.V.⁵ Thus, there was substantial evidence for the district court to find that Brenda was in a better physical and mental condition to care for M.J.V., and the district court did not abuse its discretion when making that finding.

Kelly also argues that the district court failed to address all the factors under NRS 125C.0035(4), especially NRS 125C.0035(4)(g)-(h),⁶ and that the district court did not adequately consider, and in fact disregarded, the GAL's and ACORN representative's opinions recommending Kelly for the guardianship. Brenda responds that the district court judge, and not the GAL and ACORN representative, was the most appropriate person to make the guardianship determination because the judge could see the entire picture, rather than one small subset of the case.

Starting with the physical custody factor argument, NRS 125C.0035(4) applies to the best interest factors for a parent's physical custody determination. *See Kelley*, 139 Nev., Adv. Op. 39, 535 P.3d at 1152. And although a court may use those factors when considering the best interest of the child for competing guardianship claims under NRS 159A.061(9), they are not mandatory considerations under a plain reading of the law. *See id.*; *see generally* NRS 159A.061. Thus, there was

⁵There is no testimony as to why Brenda is currently seeing a therapist.

⁶These two factors are respectively: (g) "The physical, developmental and emotional needs of the child," and (h) "The nature of the relationship of the child with each parent."

no requirement—and no error—if the court did not explicitly consider factors NRS 125C.0035(4)(g)-(h), and this argument provides no basis for relief. Further, the district court order suggests that it did consider these factors, just without explicitly naming them.

Likewise, the district court was required to consider the recommendations of M.J.V.'s GAL and ACORN representative, NRS 159A.061(6)(e)(1)-(2), but each recommendation is only one of many factors that the district court must weigh when determining which guardianship option is in the best interest of the child and neither recommendation is binding as a matter of law. *See id.* And Kelly provides no legal authority that the district court must follow the recommendations of the GAL or child advocate. *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).⁷

Here, the district court stated in its written and oral order that it heard and considered the testimony from all the witnesses, including the GAL and ACORN representative. Thus, it satisfied its required considerations under NRS 159A.061(6)(e)(1)-(2). And it made other factual

⁷We note that the GAL and the ACORN representative made their recommendations in favor of Kelly following sexual abuse allegations that were raised against Randy and after their interview with M.J.V. The Nye County Sheriff's Office investigated the accusations, performing two forensic interviews, and it declined to pursue any charges finding insufficient evidence. The district court heard extensive testimony on these issues and ruled similarly. Nevertheless, the district court did not grant Randy's request to be appointed co-guardian and imposed restrictions on him. Further, the district court allowed the parties to file post hearing motions if necessary to address related issues. Finally, Kelly has not raised any arguments on appeal on these issues so we do not address them further.

findings considering the health of the child, the health of the guardians, the living condition of the guardians, and the ability of the guardians to facilitate a relationship with the other party, all of which are supported by substantial evidence. Here, the district court's factual findings made in support of its guardianship determination are supported by substantial evidence, *see Ogawa*, 125 Nev. at 668, 221 P.3d at 704, and we accordingly conclude that Kelly does not demonstrate that the district court abused its discretion in reaching its decision, *see In re Guardianship of L.S. & H.S.*, 120 Nev. at 163, 87 P.3d at 525.

Lastly, Kelly also argues that the district court abused its discretion by "awarding sole custody" to Brenda. It is unclear whether Kelly means sole physical custody, sole legal custody, or the awarding of the guardianship when making this argument,⁸ but we assume that she is

⁸All three awards are different. Legal custody is the parent's "fundamental right to manage the care, custody, and control of their children." *Kelley*, 139 Nev., Adv. Op. 39, 535 P.3d at 1151 (internal quotation marks omitted). Physical custody determines which parent the minor child resides with. *See Roe v. Roe*, 139 Nev., Adv. Op. 21, 535 P.3d 274, 280 (Ct. App. 2023). And guardianship occurs when a parent is deemed unfit to care for the minor child, and it can be filled by other family members, non-family members, or even the state. *See generally* NRS Chapter 159A.

Kelly mentions "sole physical custody" in her opening brief, but that standard is inapplicable here because "sole physical custody" is a fundamental right of the parent only, *see Roe*, 139 Nev., Adv. Op. 21, 535 P.3d at 280, and neither Kelly nor Brenda are M.J.V.'s biological parent. Further, Kelly was awarded significant in-person time with MJV rebutting the idea of sole physical custody because "[s]ole physical custody is a custodial arrangement 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.*

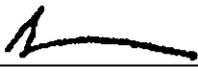
referring to sole legal custody because the court's written order awards "sole legal custody" to Brenda to make medical, educational, and religious decisions for M.J.V.

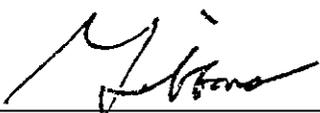
"Parents have a fundamental right to manage the care, custody, and control of their children. When divorced parents have joint legal custody, they are both responsible for making decisions regarding the children's health, education, and religious upbringing." *Kelley*, 139 Nev., Adv. Op. 39, 535 P.3d at 1151 (citation and internal quotations marks omitted). However, legal custody applies only to parents through their substantive due process rights. *Id.* "A guardian of the person has the care, custody and control of the person of the protected minor, NRS 159A.079, but that statutory provision does not specifically describe such an award as legal custody. However, as a legal guardian, the person awarded a guardianship has the responsibility to act in the best interest of the minor, including the authority to provide medical care, make medical decisions, and provide for the education of the minor. NRS 159A.079(1) (describing the duties of a guardian).

Here, the district court may have been mistaken in its terminology when it awarded Brenda "sole legal custody" to allow her to make medical, educational, and religious decisions for M.J.V. because she is not M.J.V.'s biological parent, but that alleged mistake would be a harmless error because the court awarded Brenda guardianship, which functionally allows her to legally make decisions for M.J.V. as if she had sole legal custody. See NRS 159A.079. Further, the court was very concerned with Kelly and Brenda not cooperating with each other, especially on medical issues, which implies that joint legal custody would not be practical.

Further, Kelly does not show how this terminology affected her substantial rights or how it would have altered the outcome of the order or the case had it not been used. See *Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010); 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.”). Thus, this argument is not a basis for relief. Otherwise, Kelly does not make any other cogent argument as to why this was error. See *Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38. Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁹


_____, C.J.
Bulla


_____, J.
Gibbons


_____, J.
Westbrook

⁹During oral argument, Kelly advised the court of the recent opinion of *In re H.B., III*, 141 Nev., Adv. Op. 15, 566 P.3d 562 (2025). That case confirms that a district court must consider the applicable NRS 159A.061(3) factors when appointing a guardian. But the case does not specifically mention the NRS 125C.0035(4) best-interest child custody factors nor involve recommendations from a GAL or child advocate.

Additionally, insofar as Kelly has raised 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.

cc: Hon. Robert W. Lane, District Judge
Dickinson Wright PLLC/Las Vegas
Newvine Law, LLC
Nye County Clerk