IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MAGGIE ROE, N/K/A MAGGIE COX,
Appellant,
vs.
JASON J. ROE,
Respondent.

No. 84893-COA

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

Maggie Cox appeals from a district court order modifying custody of a minor child. Eighth Judicial District Court, Family Division, Clark County; Dawn Throne, Judge.

Maggie Cox and Jason J. Roe had been divorced for approximately seven years when Maggie filed a motion to modify custody of their child, H.R., who was then eleven years old.[1] At the time, the parties shared joint physical and legal custody, with the most recent custodial order being entered by stipulation in 2017. In her motion, Maggie argued that H.R.'s behavior and attitude toward her had become increasingly and alarmingly disrespectful and aggressive, which she attributed in part to Jason's conduct and influence. In addition to seeking primary physical custody, Maggie asked the district court to also enter orders for therapy for H.R. and requested a brief focused assessment to determine the likely cause of H.R.'s change in demeanor. Jason opposed the motion and filed a countermotion for primary physical custody. The district court granted the motion for therapy, granted the brief focused assessment, and set a hearing date on the parties' motions to modify custody.

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

The therapist who conducted the brief focused assessment, Maureen Zelensky, met with H.R., Maggie, and Jason multiple times to conduct her assessment. She also reviewed the entire record of the case, spoke with attorneys, and consulted with H.R.'s personal therapist. Ms. Zelensky's final report to the district court suggested that Jason was likely engaging in parental alienation. Also, Maggie was almost certainly suffering from anxiety and possibly from post-traumatic stress disorder, which in Ms. Zelensky's opinion likely contributed to her highly emotional conduct. Based on her assessment, Ms. Zelensky recommended that the district court enter a behavior order for both parents and maintain the week-on-week-off parenting time schedule. The district court adopted the recommendations and entered an order for the parties to maintain joint physical and legal custody. The district court set a date for a status check.

Before the status check, the situation between Maggie and H.R. took a turn for the worse. On two separate occasions, H.R. was taken into custody by law enforcement for battery against Maggie while Maggie was exercising her parenting time. H.R. was found to be the primary aggressor both times and was taken from Maggie's home by the police for a 12-hour detainment period after both incidents. The record is clear that Maggie never called the police on H.R.; in the first situation, the call came from her mother, and in the second situation, the call was from Jason. The record also supports Maggie's claim that once others had called the police, she had no choice but to let H.R. be taken into custody.[2]

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[2]With exceptions, an arrest is required when police respond to a suspected battery constituting domestic violence resulting in a minimum 12-hour detainment period. *See* NRS 171.137(1); NRS 178.484(7).

Based on these incidents, Jason filed an emergency motion for sole legal and physical custody of H.R. In March 2021, the district court granted the motion, finding "something wrong with the parent who cannot manage an 11-year-old," that Maggie had been the one to call the police on H.R., and that her behavior was "histrionic." The court also found that upon H.R.'s release from custody, Maggie should have let H.R. go with Jason, despite it still being Maggie's parenting time. The district court supported this conclusion by finding that Maggie "is obviously not able to parent her son" and "it is not safe when you have the police call out to your home as somebody might get shot, and it is not safe." The district court ordered Maggie's contact with H.R. immediately restricted and limited to reunification therapy sessions conducted by Dr. Sunshine Collins and six hours of parenting time weekly. The district court also appointed a parenting coordinator and a guardian ad litem, with the costs of each split between Maggie and Jason.

A few months later, Maggie took H.R. out for a day of bowling and shopping. During the outing, H.R. ran from Maggie, hid in a bathroom at a local store, and called Jason to be picked up. Maggie believed H.R. ran after becoming upset about losing the bowling game, while Jason claimed H.R. ran because he feared that Maggie would have him arrested again.

As a result of the continued conflict between Maggie and H.R., the parenting coordinator recommended in August 2021 that all contact be "paused" between Maggie and H.R. until the district court could sort out the issues between the parents. Along with her recommendation, the parenting coordinator also informed the court that Maggie, an educator, would likely be unable to pay for Dr. Collins's services. Dr. Collins was outside of Maggie's insurance network and the district court had also ordered Maggie

to pay other obligations, including child support to Jason. The parenting coordinator recommended that Jason bear some of the cost of reunification services and that he should be included in the sessions.

Jason filed an objection, in part, to the parenting coordinator's recommendation that he attend or partially pay for reunification services. In September 2021, the district court granted Jason's objection and ordered Maggie to "have [no contact]" with H.R. "outside of the therapeutic services" with Dr. Collins. At that point, Maggie had already fallen into arrears on paying for reunification therapy, and Dr. Collins was requiring Maggie to attend several individual sessions before she would be allowed to start joint sessions with H.R. Thus, when the district court granted Jason's objection, it effectively prohibited all contact of any kind between Maggie and H.R.[3]

Maggie withdrew her motion for primary custody and instead asked the court to maintain joint physical and legal custody pursuant to the 2017 order. The district court set the case for an evidentiary hearing in March 2022, now solely on Jason's motion for modification of custody. The district court advised the parties that, at the hearing, they would be restricted from introducing evidence that predated the 2017 order.

During the March 2022 hearing, evidence was introduced that showed Maggie could not afford Dr. Collins's services and that both her and Dr. Collins agreed they were not a good therapeutic fit for Maggie's individual sessions. On March 11, 2022, day two of the hearing, the district court learned that its September 2021 order had prevented Maggie from contacting H.R. on the child's birthday and that the order had also prevented Maggie from sending gifts or cards to H.R. during the holidays.

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[3]The district court's order marked the last time in the record that Maggie was allowed to spend time with H.R.

The district court referred to this order as "the no contact order of Dr. Collins." The district court then orally modified its no-contact order and allowed Maggie to send cards to, text, or call H.R.

At the close of the hearing, the district court maintained joint legal custody but granted Jason what it called primary physical custody, finding a substantial change of circumstances in the deterioration of H.R. and Maggie's relationship. The district court also considered H.R.'s best interests and found that H.R. wanted to live with Jason and that the relationship between H.R. and Jason was comparatively less fraught.[4] *See* NRS 125C.0035(4). The district court merely referred to the "March 11, 2022, Order" in setting Maggie's parenting time, ostensibly limiting Maggie's parenting time to cards, texts, and calls. Thus, in the district court's final order modifying custody, Maggie was awarded no in-person parenting time with her son.

The district court also ordered Maggie to attend individual therapy with Dr. Collins twice per month, with the goal of working towards joint sessions with H.R. If Maggie did not attend twice a month, the court ordered the downward adjustment of her child support to be terminated.[5] Dr. Collins was also given authority to determine when the expansion of Maggie's parenting time could include in-person contact with H.R. Finally,

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[4]Comparatively, the district court found that Maggie was more likely to allow H.R. to have frequent associations with Jason but "Dr. Collins will be able to address anything that Jason might say or do that is not supportive of [H.R's] relationship with Maggie . . . . This Court can also issue Orders to Enforce for Jason if necessary."

[5]Based on invoices in the record, for Maggie to visit with Dr. Collins twice a month would cost her significantly more than the downward adjustment offset.

the district court ordered Maggie to pay $11,365 in attorney fees and costs to Jason because he was the prevailing party.

On appeal, Maggie takes issue with the limitations the district court placed on her parental rights and the fairness of process below. Maggie contends that the district court: (1) did not have substantial evidence to modify child custody, as it improperly considered child testimony and abused its discretion in finding there was a substantial change of circumstances since the 2017 order; (2) demonstrated actual bias against her; (3) violated her parental rights; and (4) abused its discretion in awarding attorney fees. Maggie also argues that the district court's errors are to such a degree that this court should reverse the district court's order and remand with instructions to conduct a new evidentiary hearing presided over by a different judge.

Standard of Review

A district court's child custody order is reviewed for an abuse of discretion. *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). 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). However, this court gives no deference to conclusory findings of a district court that mask legal error. *Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015).

Substantial evidence supports the district court's finding that there was a substantial change in circumstances based on the deterioration in Maggie and H.R.'s relationship. *See Romano v. Romano*, 138 Nev., Adv. Op. 1, 501 P.3d 980, 986 (2022) (concluding that to modify custody a movant must show "there has been a substantial change in circumstances affecting

the welfare of the child" and "the modification would serve the child's best interest"). Substantial evidence also supports the district court's decision to award Jason primary physical custody based on the best interest factors found under NRS 125C.0035(4). However, we agree with Maggie that the limits imposed on her parental rights and the district court's delegation of substantive authority to Dr. Collins were an abuse of discretion. We further agree that these errors require a new limited evidentiary hearing before a different judge. In light of these conclusions, we also vacate the award of attorney fees and costs. We address each issue in turn.

The district court's decision to modify physical custody was based on substantial evidence

We begin with the issue of child testimony. Maggie alleges that testimony given at the hearing by the guardian ad litem, which recounted H.R's stated desire to live with Jason, was both inadmissible hearsay and improper child testimony under *Gordon v. Geiger*, 133 Nev. 542, 547, 402 P.3d 671, 675 (2017). *Gordon* provides "that child interviews must be recorded" and that child testimony must abide by the Uniform Child Witness Testimony by Alternative Methods Act. *Id.*; NRS 50.500-.620; *see also* NRCP 16.215.

Maggie's argument fails for three reasons. First, she does not address the effect of similar testimony being offered by Jason, H.R.'s stepmom, or Dr. Collins, and therefore, she has not shown how the admission of the guardian ad litem's testimony affected her substantial rights. *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."). Second, while *Gordon* does direct that child interviews be recorded, the facts of that case

are distinguishable and its holding is limited to interviews intended to be used in lieu of in-court child testimony. Therefore, we decline to adopt an interpretation that would require a guardian ad litem to record a child's interview when the guardian ad litem's purpose is not to garner testimony but to protect the best interest of the child. *See generally* NRCP 16.215(a), (f). Finally, Maggie has not argued that a hearsay exception, such as a statement of H.R.'s then-existing mental or emotional condition, did not apply. *See* NRS 51.105(1).

Ultimately, Maggie's argument that insufficient evidence supported the district court's findings falls short. First, the district court's finding that the substantial change in circumstances was the deteriorating relationship between H.R. and Maggie is supported by substantial evidence. It is undisputed that the interactions between the two had devolved to include H.R. lashing out physically and running from Maggie. It is also undisputed that Maggie struggled to regulate her emotions during these conflicts. While the district court's finding that Maggie was primarily at fault for H.R.'s behavior is suspect based on the evidence introduced during the hearing,[6] the court was required only to find that a substantial change in circumstances existed, not to properly diagnose the cause.

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[6]As mentioned above, Ms. Zelensky's report stated that Jason was likely engaged in parental alienation. "Parental alienation is a particular family dynamic that can emerge during divorce in which the child becomes excessively hostile and rejecting of one parent." Parental alienation is a "form of emotional child abuse." Ken Lewis, *Parental Alienation Can Be Emotional Child Abuse*, National Center for State Courts: Trends in State Courts, 46-47, (last visited May 11, 2023), https://www.ncsc.org/_data/assets/pdf_file/0014/42152/parental_alienation_Lewis.pdf. Ms. Zelensky also testified at trial about Jason's behavior she personally witnessed. The guardian ad litem testified that she was concerned H.R. was being coached by Jason. Dr. Collins testified that she

Likewise, substantial evidence supported the district court's best interest findings. Specifically, the district court found that three factors favored Jason: (1) H.R.'s wishes; (2) Jason's mental health,[7] as compared with Maggie's "highly emotionally dysregulated" disposition; and (3) the nature of H.R.'s relationship with each parent.[8] The record clearly shows that H.R. is now estranged from Maggie and prefers to live with Jason. Thus, we affirm the district court's order as to the custodial modification, yet we decline to give similar deference to its parenting time allocation.

The district court's order is inadequate as to parenting time and contrary to Nevada law and policy

Maggie argues that the district court's order infringed upon her constitutional parental rights and that the court's interlocutory and operative orders are so extreme that the district court effectively undermined her relationship with H.R. almost to the point of termination. Jason argues that Maggie's parental rights are not properly invoked

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did "not believe that alienation [was] the *primary* reason for [H.R.'s] dissatisfaction with" their relationship "today." (Emphasis added.) Maggie also offered testimony that H.R. would come back from spending time with Jason and make unusual accusations and recriminations for a young child, such as accusing Maggie of printing a fake college degree.

[7]The district court did not address in its order how this finding was affected by either Ms. Zelensky's report that Jason had been taking psychotropic medications or Jason's own testimony that he took antidepressants.

[8]A potential fourth factor, H.R.'s physical and developmental needs, cannot be viewed as supporting the custody decision because it was confusingly found to be "neutral" but still "favor[ed] Jason" because "Maggie has not yet done the things she needs to do in order to" have a relationship with H.R.

because she can simply follow the court's order, do the work as prescribed by Dr. Collins, and be reunited with H.R. as soon as Dr. Collins is satisfied with her progress.

"The district court has broad discretionary power in determining child custody," including parenting time. *Davis*, 131 Nev. at 450, 352 P.3d at 1142 (internal quotation marks omitted). However, there are three significant legal errors in the district court's order. First, the order restricts Maggie's parenting time to such a degree that it has infringed upon Maggie's parental rights and effectively awarded sole physical custody to Jason without a sufficient basis for so doing. Second, the district court improperly delegated its substantive authority to a third party, Dr. Collins. Finally, the order incorporates by reference what the district court called the "March 11, 2022, Order" which was its oral modification to "the no contact order of Dr. Collins" made midway through the hearing as its final parenting time order. No other findings or information is included as to how the "March 11, 2022, Order" controls Maggie's parenting time, so the final order is facially unenforceable. We address each point in turn.

"[T]he parent-child relationship is a fundamental liberty interest." *In re Parental Rights as to S.L.*, 134 Nev. 490, 494-97, 422 P.3d 1253, 1257-59 (2018) (holding that when making custodial determinations a district court must consider the services offered to support a parent and whether additional services would be beneficial); *see, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Rico v. Rodriguez*, 121 Nev. 695, 704, 120 P.3d 812, 818 (2005) (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000), in concluding that parents have a fundamental interest in the care, custody, and control of their children). A permanent change to parenting time affects

a parent's fundamental right concerning the custody of their child. *Gordon*, 133 Nev. at 546, 402 P.3d at 674. Even parents deemed highly emotionally dysregulated retain their fundamental rights. *Cf. Santosky v. Kramer*, 455 U.S. 745 (1982) (concluding that parents retain constitutional rights even if they are found to be unfit).

To protect a parent's fundamental rights, judicial discretion is tempered by this state's policy of supporting "frequent associations and a continuing relationship" between parent and child after the parents' relationship has ended. NRS 125C.001(1). Accordingly, a district court abuses its discretion when its custodial order unnecessarily restricts the parent-child relationship. *See, e.g.*, *Davis*, 131 Nev. at 453-54, 352 P.3d at 1144-45 (concluding the district court abused its discretion and violated Nevada's policy of frequent association by restricting the child from traveling out of the country to visit his father); *Mosley v. Figliuzzi*, 113 Nev. 51, 62, 930 P.2d 1110, 1117 (1997) (explaining that district courts should "be striving to impose as little change from the intact two-parent family as possible after parents separate"), *overruled on other grounds by Castle v. Simmons*, 120 Nev. 98, 86 P.3d 1042 (2004); *Herzog v. Herzog*, No. 73160, 2018 WL 4781619, at *2 (Nev. Oct. 2, 2018) (Order Affirming in Part, Reversing in Part and Remanding) (concluding it is legal error for a district court to severely limit parenting time to a degree that "could virtually destroy [a parent's] relationship with [her] child").

Here, while the district court's custody order expressly awarded "primary physical custody" to Jason, as a practical matter, it effectively awarded him sole physical custody, given that Maggie's "parenting time" is

limited to cards, texts, and calls.[9] By so doing, the district court restricted Maggie's parenting time so severely that she has less parenting time than other parents in cases this court and the supreme court have addressed who were incarcerated or residing at in-person rehabilitation programs.[10] The record contains no evidence to suggest that Maggie has any criminal history, any history of substance abuse, any history of domestic violence, or has ever been incarcerated. Additionally, she is gainfully employed in public service as an educator, and she has actively been in treatment with a therapist covered by her insurance plan. Yet, by order of the district court, Maggie has been prohibited from exercising any in-person parenting time with H.R. for more than one year. We also note that the indirect effect of the district court's ruling has been to effectively terminate H.R.'s relationship with his half sibling in Maggie's care.

Further, the district court's order put such a strangle on Maggie's parenting time, assigned her significant financial liabilities, and tied any possible relief to her now limited financial resources that it has nearly terminated Maggie's fundamental right concerning the custody of her child. *See Gordon*, 133 Nev. at 546, 402 P.3d at 674. There is little explanation in the final order for why such a restriction on Maggie's rights was warranted, which is expected when a district court ratchets a restriction on a parent's rights this tightly. *Cf.* NRS 128.005 (providing that the public policy of Nevada is to preserve and strengthen family life, thus

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[9]The term "sole physical custody" is commonly used when describing custodial arrangements where a parent cannot exercise any physical control over their child.

[10]*See, e.g.*, *Herzog*, No. 73160, 2018 WL 4781619, at *2; *Bohannon*, No. 69719, 2017 WL 1080066, at *1.

severance of a parent-child relationship "is a matter of such importance" that it requires "judicial determination"); NRS 432B.330 and NRS 432B.390 (describing the circumstances under which a child is or may be in need of protection, none of which are present here, thereby allowing removal from the home).

By failing to consider a less-restrictive parenting time arrangement, and by implementing a plan with conditions making the plan unachievable, the district court violated Nevada's public policy, issued an order inconsistent with Nevada jurisprudence, and violated Maggie's parental rights. And it did so without explaining why a near termination of parental rights was necessary.[11] As a result, the district court abused its discretion in establishing parenting time. Thus, we reverse this portion of the order.

Turning now to the district court's delegation of authority to Dr. Collins, we note that district courts have "the ultimate decision-making power regarding custody determinations, and that power cannot be delegated." *Bautista v. Picone*, 134 Nev. 334, 337, 419 P.3d 157, 159 (2018). Although the district court may delegate some of its authority "by appointing a third party to perform quasi-judicial duties," *Harrison v.*

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[11]"Without an explanation of the reasons or bases for a district court's decision, meaningful appellate review, even a deferential one, is hampered because we are left to mere speculation." *Jitnan v. Oliver*, 127 Nev. 424, 433, 254 P.3d 623, 629 (2011) (explaining why deferential review does not mean no review or require adherence to the district court's decision); *see also In re Guardianship of B.A.A.R.*, 136 Nev. 494, 500, 474 P.3d 838, 844 (Ct. App. 2020) ("[B]ecause it is not clear that the district court would have reached the same conclusion . . . had it applied the correct [legal] standard[,] . . . we must reverse the district court's decision and remand for further proceedings.").

Harrison, 132 Nev. 564, 572, 376 P.3d 173, 178 (2016), the "decision-making authority [that is delegated] must be limited to nonsubstantive issues . . . and it cannot extend to modifying the underlying custody arrangement," including making significant changes to the timeshare for either parent, *Bautista*, 134 Nev. at 337, 419 P.3d at 159-60.

As outlined above, the district court ordered that Dr. Collins ultimately determine Maggie's parenting time. The determination of child custody is a substantive decision that rests solely within the district court's authority. *See generally Romano*, 138 Nev., Adv. Op. 1, 501 P.3d at 986. Accordingly, the district court abused its discretion in tethering any increase of Maggie's parenting time to Dr. Collins's discretion.

We now turn to the district court order's lack of specificity. An order awarding visitation must "[d]efine that right with sufficient particularity to ensure that the rights of the parties can be properly enforced and that the best interest of the child is achieved," and not use terms which are "susceptible to different interpretations by the parties." NRS 125C.010(1)(a), (2). Generally, a court's oral pronouncement from the bench is ineffective. *Nalder v. Eighth Judicial Dist. Court*, 136 Nev. 200, 208, 462 P.3d 677, 685 (2020) (quoting *Millen v. Eighth Judicial Dist. Court*, 122 Nev. 1245, 1251, 148 P.3d 694, 698 (2006)). Furthermore, a district court's written order must "specify the compliance details in unambiguous terms." *Div. of Child & Family Servs. v. Eighth Judicial Dist. Court*, 120 Nev. 445, 454-55, 92 P.3d 1239, 1245 (2004) (concluding that an order for contempt "must spell out the details of compliance in clear, specific and unambiguous terms so that the person will readily know exactly what duties or obligations are imposed on [them]").

Here, the district court's final parenting time order incorporated, by reference only, its oral, mid-hearing direction to modify "Dr. Collins's order" by allowing Maggie to send cards to, text, or call H.R. The details of the district court's mid-hearing pronouncement were never reduced to writing, so there is nothing in the final order outlining the scope of the "March 11, 2022, Order." Thus, there is no way to enforce the final order, and so it follows that the district court's final order is ineffective.

Therefore, on remand, we instruct the district court to enter an interim order consistent with Nevada jurisprudence, thus returning Maggie's parenting time to minimally what she could exercise following the emergency motion—at least weekly contact, even if supervised, with the goal of achieving "frequent associations and a continuing relationship." *See* NRS 125C.001(1). Thereafter, we direct the district court to retain its substantive decision-making authority and enter a final enforceable order that has the requisite level of specificity to comply with NRS 125C.010(1)(a), (2).

On remand, this case must be reassigned to a different district court judge

Maggie argues that the district court displayed bias against her by: (1) ignoring the evidence in the record about who was responsible for H.R.'s arrests; (2) ignoring H.R.'s personal therapist's recommendation that H.R. would benefit from physical time with Maggie; (3) questioning her excessively and rebuking her; and (4) predetermining the outcome before the close of the evidentiary hearing. Jason responds that the district court was not biased because it was Dr. Collins who recommended the ultimate outcome—no contact—and the guardian ad litem had also recommended that contact be paused.

"[A] judge is presumed to be impartial . . . ." *Ybarra v. State*, 127 Nev. 47, 51, 247 P.3d 269, 272 (2011). However, a judge must "act at all times in a manner that promotes public confidence in the . . . impartiality of the judiciary." NCJC Rule 1.2. A judge who "entertains actual bias or prejudice for or against one of the parties" must not preside over a proceeding. NRS 1.230(1). If a "judge's impartiality might reasonably be questioned," then that judge should disqualify. NCJC Rule 2.11(A).

The test for judicial bias is a question of law and the burden is on the party asserting bias to establish the factual basis. *Ybarra*, 127 Nev. at 51, 247 P.3d at 272. Ultimately, 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 evaluating if a case should be reassigned on remand, we consider the following factors:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

Smith v. Mulvaney, 827 F.2d 558, 562-63 (9th Cir. 1987); *see, e.g.*, *Luong v. Eighth Judicial Dist. Court*, No. 84743-COA, 2022 WL 3755881, at *3 (Nev. Ct. App. Aug. 29, 2022) (Order Granting in Part and Denying in Part Petition for Writ of Mandamus and Denying Petition for Writ of Prohibition)

(applying *Mulvaney* factors to reassign remanded family law case to a different district court judge).

From the record, it appears that the district court's impartiality can be reasonably questioned as early as the entry of the temporary order in March 2021 when it found that Maggie "obviously [cannot] parent [H.R.]" and "[t]here is something wrong . . . with the parent who cannot manage an 11-year-old." In the same order, the district court erroneously found that Maggie called the police on H.R, despite the record demonstrating that others had called. By the pretrial conference, the district court said on the record that Maggie was "in a bad position." During trial, before Maggie presented any of her evidence, the district court stated, "I don't think there's a whole bunch more that . . . needs to be said."

There are also extrajudicial concerns in the record, which originated outside of this case, such as: (1) the district court expressed repeatedly on the record its highly favorable opinion of Dr. Collins, which was based on Dr. Collins's work in other cases the court was familiar with, and then forced Maggie to see only Dr. Collins for reunification therapy, despite Dr. Collins's concession that it was not a good match; (2) the district court considered pre-2017 evidence, including asking Maggie before she gave her direct testimony a series of questions related to incidents that took place before the stipulated custody order, even though the court limited pre-2017 evidence at the outset of the hearing; (3) the district court made a statement that being a stepmother was more challenging than being a biological mother;[12] and (4) the district court shared its opinion that H.R. was better behaved with his father because children listen better to men, in

[12]Alexandra, H.R's stepmother and Jason's wife, testified against Maggie at the evidentiary hearing.

part because men have deeper voices and there is an underlying threat of "fisticuffs" should a child not listen to a man.

The above examples are nonexhaustive. The record is replete with additional expressed views and findings that are either erroneous or based on evidence predating the 2017 order.[13] Undoubtedly, the district court's restrictive interlocutory orders swiftly aided the devolution of H.R. and Maggie's relationship by prohibiting any form of contact between the two for months on end and by restricting physical contact for more than one year. Further, the district court did so without directing supervised parenting time, offering Maggie only a single opportunity to resume seeing her child—requiring her to attend regular and frequent appointments with Dr. Collins, a therapist who was not covered by Maggie's insurance, whom she could not afford to see, and who admittedly was not a good therapeutic fit for her. Moreover, if Ms. Zelensky was correct in her assessment that Jason likely had engaged in parental alienation, then the district court's order appears to have rewarded his behavior.

Given the district court's strong opinions of Maggie, as well as its shared-on-the-record extrajudicial opinions, any duplication necessary by reassignment of this case to a different judge is not out of proportion to the requisite fairness demanded in child custody proceedings. Thus, on

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[13]The district court sustained several objections to the relevance of the parties offering pre-2017 evidence during the evidentiary hearing, yet did not sustain the objection when Maggie's counsel objected to the relevance of the district court asking her several questions about pre-2017 events. *See* NRS 50.145(2) (a party may object to questions during court conducted interrogation); *McMonigle v. McMonigle*, 110 Nev. 1407, 887 P.2d 742 (1994) (providing that a party moving for a change in custody must show that circumstances have substantially altered since the last custodial order).

remand, we direct the chief judge or presiding judge to reassign this case to a different department to consider the issues related to Maggie's parenting time and the financial issues previously discussed and as discussed next.[14]

The award of attorney fees and costs must be vacated

The district court awarded Jason attorney fees and costs under both NRS 18.010 and NRS 125C.250. The district court also cited EDCR 7.60(b)(3) as a basis for the award. NRS 18.010 allows a prevailing party to recover attorney fees and costs but requires the district court to first find that "the claim . . . or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party." NRS 18.010(2)(b). NRS 125C.250 allows for the recovery of reasonable attorney fees in child custody actions. EDCR 7.60(b)(3) allows a district court to order sanctions, including an award of attorney fees, if a party, "without just cause," "multiplies the proceedings in a case as to increase costs unreasonably and vexatiously."

Beginning with NRS 18.010 as a basis for an award of attorney fees, the district court did not make findings that Maggie's claims or defenses were either unreasonable or meant to harass, as is required by the statute. Being a prevailing party alone is not a sufficient basis for an award of attorney fees. Further, as a portion of this case is reversed and remanded, we necessarily vacate the combined attorney fees and costs. *See* NRS 18.020(1-5) (stating certain enumerated costs must be allowed to the prevailing party, none of which were found by the district court to be

[14]Though we direct the assignment of this case on remand to a new district court judge, we do not agree with Maggie's argument that the proceedings were so infected by bias that an entirely new evidentiary hearing is required.

present); *see also Iliescu v. Reg'l Transp. Comm'n of Washoe Cty.*, 138 Nev., Adv. Op. 72, 522 P.3d 453, 462 (Ct. App. 2022) (vacating an award of attorney fees because the underlying judgment was reversed in part); *Halbrook v. Halbrook*, 114 Nev. 1455, 1460, 971 P.2d 1262, 1266 (1998) (reversing an award of attorney fees because the district court's order was reversed).

Turning to NRS 125C.250, the district court did not make a sufficient determination as to the reasonableness of the fees and costs, considering the order mandates Maggie to solely pay for reunification services and individual sessions with Dr. Collins, which the evidence indicates she is largely unable to afford and further suggests Jason's conduct is a contributing factor necessitating the reunification services. *See Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) (providing the framework for a district court to make findings on "the reasonable value of an attorney's services").

Finally, the district court could not properly sanction Maggie under EDCR 7.60(b)(3) without notice and opportunity to be heard and finding that Maggie had multiplied the cost of litigation without just cause and did so unreasonably and vexatiously. Undoubtedly, there has been significant litigation in this case, but duration alone does not show that a litigant is per se unjust, unreasonable, or vexatious.[15] Thus, the district

[15]Also, as to the equity and reasonableness of EDCR 7.60 as a basis for this award, the record is replete with questionable conduct from Jason's counsel. As a limited example, in Jason's original opposition and countermotion where the parties argue about the restrictive COVID-19 protocols, counsel for Jason opines in a footnote that "[t]he hope is that [H.R.] will contract the virus and then he will pass it on to Maggie." In the same document, he calls Maggie offensive, sexist, and demeaning names. *Cf.* NRCP 12(f) (allowing a district court to strike from a pleading

court's findings did not support an award of attorney fees under NRS 18.010, NRS 125C.250, or EDCR 7.60(b)(3), and therefore, the award of fees and costs must be vacated.[16]

Accordingly, we

AFFIRM the district court's modification of custody, REVERSE as to the parenting time allocation and improper delegation of the district court's authority, VACATE the award of attorney fees and costs, and REMAND the case for reassignment to a different district court judge and proceedings consistent with this order.

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

"scandalous matter[s]"). He also has taken liberties by inaccurately describing H.R.'s release from custody, including accusing Maggie of trying to get Jason killed via law enforcement. Should the district court award attorney fees to Jason on remand, in addition to what is discussed in the body of this order, it should consider when deciding the amount of fees, whether Jason's counsel's language and behavior has unreasonably and vexatiously multiplied the cost of litigation in this case without just cause. EDCR 7.60(b)(3); *see also* NRPC 3.1, 3.2(a), 3.4(e) (outlining a lawyer's ethical duty to raise meritorious contentions, to make reasonable efforts to expedite litigation, and to be fair to the opposing party); *Creed of Professionalism and Civility*, STATE BAR OF NEVADA, https://nvbar.org/for-lawyers/ethics-discipline/creed-of-professionalism-and-civility/ (last visited May 16, 2023).

[16]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.

cc: Hon. Dawn Throne, District Judge, Family Division
Chief Judge, Eighth District Court
Presiding Judge, Family Division
Israel Kunin, Settlement Judge
Roberts Stoffel Family Law Group
Page Law Firm
Eighth District Court Clerk