IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TIFFANY R. SULLIVAN,
Appellant,
vs.
JAMES D. SULLIVAN,
Respondent.

No. 87424-COA

FILED
JUN 06 2024
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Tiffany R. Sullivan appeals from a district court order modifying child custody, as well as a post-trial order denying a motion for new trial and amending the findings.[1] Eighth Judicial District Court, Family Division, Clark County; Dawn Throne, Judge.

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[1]With respect to the post-trial orders, we note that an order denying a motion to amend findings of fact and conclusions of law is not appealable pursuant to NRAP 3A. *See Casino Operations, Inc. v. Graham*, 86 Nev. 764, 765, 476 P.2d 953, 954 (1970) (concluding that an order denying a motion to amend findings is not appealable under former NRCP 72(b)). That being said, a final order that is altered or amended may be appealable if those amendments substantively alter the final order. *See* NRAP 4(a)(5). Here, the district court granted Tiffany's motion in part and amended two of its findings, but neither of those amendments substantively altered its final custody determination. Furthermore, Tiffany identifies this issue on appeal only summarily and makes no argument. We therefore need not consider the post-trial amendments. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that arguments not raised on appeal are deemed waived). Nevertheless, we address the amended findings in our discussion of the best interest factors in this order. As to the motion for new trial, *Powell* also applies, and Tiffany does not make a cogent argument, so this court need not consider the order denying the new trial on appeal. *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). We address these post-trial orders only to the extent necessary to contextualize the proceedings below.

Tiffany and respondent James D. Sullivan were married in Las Vegas in October 2009, and G.S. was born in January 2011. James filed for divorce from Tiffany in February 2012. In the June 2012 decree of divorce, the parties stipulated to joint legal and physical custody.

James subsequently filed multiple motions to modify his physical custody from joint to primary. In his first motion, filed in February 2013, James argued that there were three changes in circumstance sufficient to warrant modification. First, Tiffany had been admitted to the hospital on a legal 2000 hold following a Klonopin overdose in which she made suicidal statements. Second, there had been an incident in which Tiffany's nephew had engaged in "sexually abusive behavior" towards one of G.S.'s female cousins. Third, Tiffany had allowed "[in]appropriate caregivers" (namely, her current boyfriend, Zac) to watch G.S. James concluded that it was in G.S.'s best interest to live primarily with him to reduce the risk of harm from exposure to these situations.

Tiffany responded that her hospitalization stemmed from an "accidental overuse of prescription sleeping medication," and that she did not attempt suicide; that her nephew had never attempted any harm towards G.S.; that G.S. was never left unsupervised with Tiffany's nephew; and that Zac had watched G.S. for only brief periods while G.S. was asleep. James ultimately dismissed his motion for modification in consideration of a stipulation and order in which Tiffany agreed that she would not leave G.S. at her sister's house or leave G.S. alone in her sister's care if her nephew was present.

In August 2016, James filed a second motion to modify his physical custody from joint to primary. This motion was partly based on an incident in which Tiffany allegedly had violated the June 2013 stipulation

and order and left G.S. alone with her sister while her nephew was present. After almost a year of settlement negotiations, the parties entered a stipulation and order in August 2017 that vacated the evidentiary hearing and left in place the joint legal and physical custody arrangement.

James filed a third motion to modify his physical custody from joint to primary in April 2022, and the current appeal stems from the order resulting from this motion. According to James, modification was warranted based on three changes in circumstance.

The first change in circumstance was based on an October 2021 domestic violence incident between Tiffany and her then-boyfriend, Martin. Although the events surrounding the incident are disputed, all parties agree that Martin physically restrained Tiffany on her couch, and that Tiffany hit Martin in the face with her cell phone before calling 9-1-1. At least six officers arrived at the scene. They arrested Martin and removed Tiffany, G.S., and V.H. (Tiffany's daughter with her ex-fiancé, Daniel, and G.S.'s younger half-sister). James alleged he later learned that, on the day of the incident, Tiffany instructed G.S. not to discuss what had happened with James. Tiffany ended her relationship with Martin and obtained multiple protective orders against Martin shortly thereafter. Martin violated these protective orders, which resulted in a felony conviction for aggravated stalking.

The second change in circumstance stemmed from a conversation James and his current wife recorded with G.S. in February 2022. In this conversation, G.S. stated that Tiffany often leaves her alone to care for V.H.; that Tiffany does not prepare breakfast or lunch for G.S.; that Tiffany does not help G.S. get ready for school; and that G.S. would prefer to live with James but does not want to hurt Tiffany's feelings.

The third change in circumstance was related to G.S.'s physical health. Specifically, James alleged that G.S. was neglected and malnourished for her age. According to James, G.S., who was 11 at the time and weighed approximately 60 pounds, was in the bottom third percentile for weight for her age group. One of G.S.'s former babysitters, Shannon, also confided in James that Tiffany does not feed G.S. or care for her children.

In support of his motion, James also included a declaration from Tiffany's ex-boyfriend, Martin, in which Martin stated he was concerned for G.S.'s welfare; that Tiffany was violent and had a bad temper; that Tiffany called G.S. names; that Tiffany often left G.S. and V.H. home alone; and that Martin used to prepare G.S. and V.H.'s meals and got them ready for school. Martin also mentioned a video that Tiffany had sent him on his birthday—months after the domestic violence incident—in which Tiffany can be heard instructing V.H. to make disparaging statements about Martin. Martin stated this video tended to show Tiffany's manipulative character and the harmful way she treats her children.

In opposition, Tiffany argued that Martin was conspiring with James to get revenge on Tiffany for ending their relationship, and that any aggressive acts she took towards Martin during the October incident were done in self-defense after Martin physically restrained her. Additionally, Tiffany adamantly denied telling G.S. to conceal the domestic violence incident from James. As to former babysitter Shannon's comments, Tiffany contended that Shannon rarely babysat the children and had a close relationship with Martin. In response to G.S.'s alleged malnourishment, Tiffany argued that genetics were responsible for G.S.'s small stature, and that G.S.'s pediatrician said she was "thriving."

In reply, James referenced a conversation he recorded with Tiffany in April 2022, in which Tiffany implied she instructed G.S. to conceal the domestic violence incident from James. Regarding G.S.'s physical health, James contended that G.S.'s growth charts demonstrated that her weight had steadily dropped during a two-year period, while her height had not. Moreover, James contended that the pediatrician who wrote the letter stating that G.S. was thriving was not G.S.'s primary physician, and that her primary physician had concerns about G.S.'s growth and nutrition.

The district court held a hearing on James' motion in May 2022 and concluded that James had alleged sufficient changes in circumstance to warrant an evidentiary hearing. The court also expressed that it wanted G.S. interviewed, presumably pursuant to NRS 16.215(d)(1)(B)(ii), and James requested that the interview be conducted with a "PhD level" professional. James provided a list of experts to Tiffany, and Tiffany stated she had no preference. James' counsel suggested the parties use Dr. Stephanie Holland because her office was conveniently located, and the court agreed to "sign a referral for Dr. Holland as the mutually agreed upon interviewer." Pending the evidentiary hearing, which was scheduled for October 2022, the court also changed the physical custody arrangement from week on/week off to a joint "4/3" split, with James to have four days of physical custody each week. Lastly, the district court set an in-chambers return date for September 2022 and stated that it would distribute Dr. Holland's report in advance.

In August 2022, the parties stipulated to a continuance due to the child interview's timing and possible settlement. In mid-September 2022, the parties stipulated to an additional continuance because Dr. Holland needed more time to complete the child interview and report. The

district court ordered that the time originally set for the September 2022 return date be moved to November 9, 2022, and that Dr. Holland's expert report was due on or before November 2, 2022.[2] Based on these continuances, the parties also stipulated that the evidentiary hearing be continued to March 2023, and that the discovery cutoff date be continued to February 17, 2023.

Tiffany filed her final list of witnesses, which included Dr. Holland, on February 24, 2023. Dr. Holland's testimony was anticipated to include, "the parties' interactions, timeshare, and historical events regarding care of minor child." In his pretrial memo, James noted "the issue of [Tiffany's] late disclosed witnesses," and alleged that he "lodg[ed] an objection upon service of the untimely disclosed witnesses." But the untimely witness disclosure issue was not resolved before the evidentiary hearing.

On the first day of the evidentiary hearing, James called Martin; Shannon; and Dr. John Lepore, G.S.'s primary pediatrician. James also testified on his own behalf. Martin testified on direct examination that Tiffany often slept until mid-afternoon because she typically worked nights; that he was the primary caregiver for G.S. and V.H. while Tiffany was asleep; and that Tiffany had been violent towards him on multiple occasions.

On cross examination, Martin admitted to violating the protective orders; acknowledged his felony conviction; recounted his role in the domestic violence incident; and stated that Tiffany had occasionally helped him get the children ready for school. The district court questioned Martin about why, on the day of the domestic violence incident, he changed his clothes and cleaned the blood off of his face before the police arrived, and

[2]This order references specific dates when relevant.

Martin responded that he did not want Tiffany to get arrested. The district court also probed Martin's relationship with V.H. and wanted to know the details behind the disparaging video Tiffany had sent Martin on his birthday.

During her direct examination, Shannon testified that she had been G.S. and V.H.'s caregiver for approximately two years, and that, during that time, Tiffany rarely cooked for the children and had only snack food available. Shannon expressed that Tiffany's house was in constant disarray, and V.H. had called her on two occasions because she was hungry. Additionally, Shannon testified to her status as a social worker and noted her experience working with abused and neglected children. On cross examination, Shannon acknowledged that she is a mandatory reporter of child abuse and neglect and conceded that, while she was concerned for G.S. and V.H., she did not report Tiffany to CPS.

Dr. Lepore testified during his direct examination that he had been G.S.'s primary pediatrician since 2018, and that G.S.'s bone x-rays demonstrated delayed growth. He also testified that, in February 2022, G.S.'s weight was in the seventh percentile, while it was in the fourth percentile at the time of the evidentiary hearing in March 2023. On cross examination, Dr. Lepore acknowledged that James and Tiffany are both small in stature, and that G.S. is technically "on track" growth-wise. He stated that, while G.S. was not malnourished, he had concerns she was not eating properly. Dr. Lepore also noted his status as a mandatory reporter and stated that he never filed a CPS report.

James' testimony on direct examination primarily centered on G.S.'s schooling and physical health. He testified that Tiffany often brought G.S. to school late, had issues picking G.S. up, and would let G.S. miss school whenever G.S. told Tiffany she felt sick. Regarding G.S.'s physical health,

James testified that, when G.S. arrives at his house from Tiffany's, she is ravenous, and that since the slight alteration in custody from week on/week off to the joint 4/3 custodial arrangement, G.S.'s weight has increased from the third to the fourth percentile. He cited his ability to consistently prepare G.S. three meals a day as the cause.

Tiffany began James' cross examination towards the end of the hearing's first day. James admitted to having recorded the February 2022 conversation with G.S., despite being a licensed attorney who knew that he was not permitted to discuss court issues with a minor child. However, he testified that he was prompted to start recording after G.S. came to him, of her own volition, saying that she was unhappy with the current custodial arrangement. The February 2022 recording was admitted as an exhibit, and Tiffany played pertinent excerpts supporting that James used derogatory language when speaking about Tiffany and may have manipulated G.S. with leading questions. Regarding G.S.'s growth, James acknowledged that, while G.S. had gained weight since the custody alteration, the increase was modest.

Tiffany then attempted to question James about Dr. Holland's child interview report. After stating that he had reviewed Dr. Holland's report with his attorney, James objected to further questioning because the report was not in evidence. In response, Tiffany stated that the district court had received the report before the hearing, to which James replied that it was not authenticated and could not be moved into evidence "unless [Tiffany] [had Dr.] Holland coming tomorrow." Tiffany stated that she planned to call Dr. Holland the following morning, to which James replied, "Okay. Then it can be moved into evidence at that time."

With Dr. Holland's impending testimony in mind, Tiffany requested to pause the proceedings, hear the parties out of order, and "insert

[Dr. Holland] before [James] . . . first thing [the following] morning." James responded that he had no issue taking people out of order. The district court concluded the proceedings by saying, "[O]kay, we're going to take Holland out of order, and then you're going to pick up with [James'] cross . . . perfect." When asked if there were any other housekeeping matters, both parties said, "[No]."

The following morning, however, James changed course and objected to Dr. Holland's testimony and report. Specifically, James argued that Tiffany was required to disclose her witnesses at least 21 days prior to the February 17 discovery cutoff pursuant to the stipulated order, and that Dr. Holland did not send her report to the district court until November 8, which was six days past the November 2 deadline. According to James, had he timely known that Dr. Holland was set to testify, he would have taken her deposition because he had issues with her report.

In response, Tiffany argued that James chose Dr. Holland as the expert, had full notice of Dr. Holland's presence and participation in the case, and had spoken with Dr. Holland on at least one occasion. Moreover, Tiffany contended that James took G.S. to the appointments with Dr. Holland, and Dr. Holland's status as a witness was not a surprise, given that James had received Dr. Holland's report from the district court's chambers months in advance. To that end, Tiffany averred that Dr. Holland testifying would not amount to trial by ambush, which is what the discovery rules were intended to prevent. Finally, Tiffany argued that the parties "stipulated" to Dr. Holland testifying when they agreed to the child interview pursuant to the court order, and that it was "not atypical" for an evaluator's report to be submitted late. However, Tiffany made no formal offer of proof as to either Dr. Holland's expected testimony, or the report's contents, at this time.

The district court concluded that Dr. Holland would not be permitted to testify, and that, in the absence of a stipulation, her report was also inadmissible.[3] In its reasoning, the court stated that Dr. Holland "was only stipulated to do . . . a child interview," and that "just because a [child interview] is done doesn't mean the report's going to come in, and doesn't mean that the interviewer is going to be automatically [included] as a witness." The court concluded that the parties were bound by the September 2022 stipulation and order in which they agreed that Dr. Holland's report was due on or before November 2, and that expert witness disclosures were due no later than January 27—21 days before the stipulated close of discovery on February 17. Ultimately, the district court determined that James was prejudiced by Tiffany's failure to timely disclose Dr. Holland as a witness because he was unable to depose her.

Dr. Holland being excluded, Tiffany then resumed her cross examination of James and focused the majority of her questions on G.S.'s ability to communicate with Tiffany while she was in James' care. According to James, G.S. had two cell phones—one to use at Tiffany's house and one to use at his. James has apparently never given Tiffany the number to the cell phone he gave G.S. and will allow G.S. to speak to Tiffany only on his cell phone.

For her case-in-chief, Tiffany testified on her own behalf. On direct examination, Tiffany recounted the domestic violence incident and noted that, on the day of the incident, James contacted Martin's mother before contacting her. Tiffany and James met to discuss the incident in April 2022, during which time Tiffany showed James the video of Martin on top of

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[3]James declined to stipulate to the report's admission, and Dr. Holland's report is not included in the record on appeal.

her. After watching the video, James apparently conveyed to Tiffany that he did not believe she acted in self-defense.

With respect to G.S.'s physical health, Tiffany testified that she was similar in size to G.S. when she was G.S.'s age, and that genetics—not malnourishment—were responsible for G.S.'s low body weight percentile. Tiffany also averred that James first raised the issue of G.S.'s nutrition and physical health approximately a week before their April 2022 meeting and implied that James was not concerned with G.S.'s growth and nutrition until right before he filed his motion to modify physical custody.

In terms of communication, Tiffany testified that she purchased G.S. a phone when she was around eight years old, so that G.S. could easily communicate with James during Tiffany's parenting time. James purchased G.S. a separate cell phone to use at his house when G.S. was ten. Tiffany stated that she has always allowed G.S. to contact James whenever G.S. asks and often prompts G.S. to call James at her own behest. In contrast, Tiffany declared that James requires her to text him when she wants G.S. to call, and that G.S. often does not return her calls in a timely manner due to James' interference. Tiffany also recalled hearing James in the background during her phone calls with G.S. telling G.S. to "wrap it up." Tiffany contended that the cell phone issues were indicative of James' refusal to effectively coparent.

On cross examination, Tiffany acknowledged that, within the admitted exhibits, there was no evidence to support that James was ever uncooperative on custodial adjustments. She also recounted her intentional violation of the June 2013 stipulation and order, in which she left G.S. in her sister's care with her nephew present.

After Tiffany's cross examination, the district court extensively questioned Tiffany. At the outset, the court asked what Tiffany had done to

address the concerns G.S. raised in the February 2022 recorded conversation. In response, Tiffany implied that she had not taken any remedial actions because she had listened to the recording only recently. The court also questioned Tiffany about the video she sent Martin on his birthday, and Tiffany acknowledged that she knew the video was wrong and regretted sending it. In response to questions about her job and working hours, Tiffany explained that she is a massage therapist for poker players and provides her services in poker rooms and on casino floors. On recross examination, Tiffany stated that she mainly works nights because her income would be "substantially less" if she worked during the day.

In his closing, James contended that the most disturbing element of Tiffany's testimony was that she has not made any changes to address G.S.'s stated concerns in the recorded conversation. He also argued that Tiffany treated G.S. like the adult in their parent/child relationship and expected G.S. to take care of herself. James also noted that Tiffany did not deny Martin's allegations of verbal and physical abuse, nor did she deny that G.S. was underweight for her age. Finally, James argued that G.S.'s life did not need to be as unstable as it currently was in the joint arrangement.

Tiffany responded in her closing that, while G.S. may be underweight, she was not malnourished, and that nothing G.S. said in the recorded conversation could be trusted because it was all the result of James' manipulation and leading questions. Tiffany also underscored James' refusal to coparent with Tiffany at G.S.'s expense and highlighted that none of the mandatory reporters who testified ever contacted CPS out of concern for G.S.'s well-being. She concluded by stating that "[James] does one thing one way," and she "does it [different]," but those differences do not warrant a change in custody because "[o]ne's not empirically worse [than the other]."

The district court granted James' motion and awarded him primary physical custody with Tiffany to have scheduled phone calls and teleconferences with G.S. during James' parenting time. Further, pursuant to the new arrangement, Tiffany would have approximately 48 hours during the week with G.S. and six hours with G.S. every other Sunday.

In its findings, the district court listed the NRS 125C.0035(4) best-interest factors and analyzed each in turn. The court explicitly found that five factors favored James, no factors favored Tiffany, and the remaining factors were either not applicable or neutral. Specifically, the district court found that factor (a), child's preference, was not applicable because the court would not accept the improperly obtained February 2022 recording as evidence of G.S.'s custodial preference. It also found that factors (b), (f), and (l) were not applicable.[4]

Of the applicable best interest factors, the district court found that factor (c), parental interference, was neutral because it had little evidence of either parent interfering. It found factor (d), conflict between the parents, to favor James because Tiffany attempted to conceal the domestic violence incident. The court found that factor (e), ability to cooperate, favored James because, while both parties were responsible for the "not healthy situation regarding the phones," Tiffany gave G.S. a cell phone before James did. Regarding factor (g), needs of the child, the court determined that this factor favored James because he was better able to provide G.S. with consistent meals and prioritized her school attendance. The court found

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[4]Factor (b) refers to "[a]ny nomination of a guardian for the child by a parent"; factor (f) refers to "[t]he mental and physical health of the parents"; and factor (l) refers to "[w]hether either parent or any other person seeking physical custody has committed any act of abduction against the child or any other child." NRS 125C.0035(4)(b), (f), (l).

factor (h), nature of the relationship with each parent, to favor James. In its reasoning, the court stated that, while it did not condone James' recorded conversation with G.S. because it violated EDCR 5.304, it was obligated to consider the recording's contents under *Abid v. Abid*, 133 Nev. 770, 406 P.3d 476 (2017). With *Abid* in mind, the district court found that the recording demonstrated that James was better able to meet G.S.'s needs.

The district court found factor (i), ability to maintain sibling relationships, to be neutral, and factor (j), history of neglect and abuse, to favor James. In its reasoning on factor (j), the court found that Tiffany had exposed G.S. to domestic violence, which amounted to neglect; had involved G.S. in adult issues; and treated G.S. like an adult and not a child. The district court found factor (k), engaging in acts of domestic violence, to be neutral, as James' evidence did not conclusively support that Tiffany attacked Martin.

Finally, in the NRS 125C.0035(4) "other things" provision, the district court impliedly found in James' favor when it (1) expressed its concern that Tiffany had intentionally violated the June 2013 stipulation and order when she left G.S. in her sister's care while her nephew was present and (2) noted that Tiffany had demonstrated "a level of immaturity and actual cruelty" towards V.H. in the disparaging video she sent to Martin.

Tiffany filed a motion for new trial and to alter and amend the findings and judgment in June 2023. In her motion, she argued that a new trial was necessary based on the district court's exclusion of Dr. Holland's testimony and report. To that end, Tiffany contended that both parties were on notice that Dr. Holland planned to testify and had met with Dr. Holland during the child interview process. Tiffany and James also received Dr.

Holland's report, via the court, in early November 2022, and neither party filed a motion in limine seeking to prevent the report's admission.

Tiffany also argued that, on the first day of the evidentiary hearing, James took no issue with Dr. Holland testifying and agreed to hearing the witnesses out of order specifically so that Dr. Holland's report could be properly authenticated and admitted before resuming his cross examination. Notably, Tiffany stated she had reason to believe that Dr. Holland's report was critical of James' conduct and would likely have impacted the district court's best interest analysis and custody determination. In support of this assertion, Tiffany included transcribed excerpts from the February 2022 recording, which she argued demonstrated that James manipulated G.S.

With respect to amending the findings, Tiffany stated that the district court's findings on NRS 125C.0035(4)'s factors (c), (d), (e), (h), (i), and (j) were not supported by substantial evidence. Namely, the court found factor (c) to be neutral when Tiffany was the parent more willing to nurture the non-custodial parent relationship; factor (d) to favor James when James often sent nasty messages to Tiffany, and no evidence supported that Tiffany told G.S. to hide the domestic violence incident from James; factor (e) to favor James, despite the fact that *both* parties gave G.S. a phone; factor (h) to favor James based on the February 2022 recording when Dr. Holland's testimony and report would have been critical of that recording; factor (i) to be neutral without adequate explanation; and factor (j) to favor James when it had no evidence of abuse or neglect.

In opposition, James argued that a new trial was not warranted because Dr. Holland's testimony and report would not have changed the hearing's outcome, and the district court's best-interest analysis and decision

to modify custody were supported by substantial evidence. James reiterated that Tiffany had ample notice of the discovery cutoff date, and that she failed to timely disclose Dr. Holland as a witness. With respect to amending the findings, James acknowledged that, while he may not always have acted perfectly, "his focus was [always] on protecting his daughter and her best interests." Thus, he argued that all of the district court's findings were supported by substantial evidence.

In reply, Tiffany contended that Dr. Holland's testimony about the February 2022 recorded conversation would likely have altered the trial's outcome, as well as the district court's best interest analysis. In short, without Dr. Holland's testimony and report, the district court was able to consider only the recording's contents "without any inquiry into what such a recording demonstrate[d] in terms of . . . [G.S.'s] best interests."

The district court issued a post-trial order denying Tiffany's motion for new trial and amending its findings in September 2023. Procedurally, the court reiterated that the "orders were clear about . . . deadlines," and that James would have been prejudiced had the court permitted Dr. Holland's testimony and report. Substantively, the district court determined that Dr. Holland's report and testimony would have been relevant only to G.S.'s custodial preferences, and that G.S.'s custodial preferences were not determinative to its custody decision.

As to amending the findings, the district court added additional details to factors (c) and (k) but found that those factors similarly did not alter its custody determination. Namely, regarding factor (c), parental interference, the court amended its finding that this factor favored James to instead find the factor neutral because "some of [James'] . . . comments on the recording were not supportive of [G.S.'s] relationship with [Tiffany] and

should not have been said." The district court found factor (k), engaging in acts of domestic violence, to be non-applicable instead of neutral.

On appeal, Tiffany raises three issues. Specifically, she argues that (1) the district court abused its discretion when it excluded Dr. Holland's testimony and report; (2) the district court's best-interest findings and custody determination are not supported by substantial evidence; and (3) this case should be reassigned on remand because the district court judge demonstrated bias. We conclude that the district court abused its discretion when it excluded Dr. Holland's testimony and report, and that two of its best-interest findings are not supported by substantial evidence, but that reversal is not warranted because these errors are harmless and would not have changed the court's ultimate custody determination. Further, Tiffany has not demonstrated judicial bias.

The district court abused its discretion when it excluded Dr. Holland's testimony and report

Tiffany argues that the district court abused its discretion when it excluded Dr. Holland as a witness, and ordered that her expert report was inadmissible. To that end, she argues that James' participation in the child interview process, as well as his words and conduct accepting Dr. Holland's witness status both prior to and on the evidentiary hearing's first day, estopped him from raising the untimely disclosure objection he lodged moments before Dr. Holland was set to testify. Tiffany also argues that, by excluding Dr. Holland's testimony and report, the court failed in its obligation to act in G.S.'s best interest. James responds that the stipulated orders made the witness disclosure deadlines clear, and that Tiffany was on notice that the failure to timely disclose witnesses would result in their exclusion. Further, James contends there is no caselaw to support Tiffany's assertion that Dr. Holland was disclosed as a witness when the parties

stipulated to have her perform the child interview. He also argues that any errors are harmless.

We review a district court's decision to permit or exclude expert testimony for an abuse of discretion, *see Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008), and conclude that the district court abused its discretion when it excluded Dr. Holland's testimony and report. Not only was James estopped from objecting to Dr. Holland's testimony, but Nevada public policy also generally favors the admission of all evidence relating to the minor child's best interest.

James impermissibly delayed raising his objection

The Nevada Supreme Court has recognized that, "[i]f a party has constructive or actual knowledge of potentially disqualifying circumstances, but fails to object within a reasonable amount of time, then the objection is waived." *Venetian Casino Resort, LLC v. Eighth Jud. Dist. Ct.*, 118 Nev. 124, 130, 41 P.3d 327, 331 (2002). This holding reflects a long-settled principle of Nevada law that objecting "too late" waives the objection. *Iowa Mining Co. v. Bonanza Mining Co.*, 16 Nev. 64, 67, 70-71 (1881) (concluding that a defendant waived his ability to object to improper service after he affirmatively expressed a willingness to litigate the case on the merits and raised his objection mere days before trial); *see also Wagon Wheel Saloon & Gambling Hall, Inc. v. Mavrogan*, 78 Nev. 126, 129, 369 P.2d 688, 690 (1962) (concluding that an otherwise timely objection to an officer's testimony was untimely where "[t]he same evidence had previously been received without objection").

The equitable doctrine of laches reflects this principle and may be invoked when one party's delay prejudices the other party, "such that granting relief to the delaying party would be inequitable." *Besnilian v. Wilkinson*, 117 Nev. 519, 522, 25 P.3d 187, 189 (2001). Notably, laches is

"more than a mere delay"; to invoke laches, the party must show that the delay caused actual prejudice. *Carson City v. Price*, 113 Nev. 409, 412, 934 P.2d 1042, 1044 (1997). To that end, the party asserting laches must demonstrate that they have "become so changed" that they cannot be restored to their former state, and the doctrine's applicability depends on each case's particular facts. *Id.* (quoting *Home Savings v. Bigelow*, 105 Nev. 494, 496, 779 P.2d 85, 86 (1989)). To determine whether a challenge is barred by the doctrine of laches, this court considers "(1) whether the party inexcusably delayed bringing the challenge, (2) whether the party's inexcusable delay constitutes acquiescence to the condition the party is challenging, and (3) whether the inexcusable delay was prejudicial to others." *Miller v. Burk*, 124 Nev. 579, 598, 188 P.3d 1112, 1125 (2008).

Here, we conclude that James waived his ability to raise an objection to Dr. Holland's testimony because his objection was unjustifiably delayed and barred by the doctrine of laches. Namely, James' delay in raising his objection (1) was inexcusable, (2) indicated acquiescence to Dr. Holland's testimony and report, and (3) was prejudicial to both Tiffany and G.S.

Specifically, James had knowledge of the "potentially disqualifying circumstance" of Tiffany's untimely witness disclosure a month in advance of the evidentiary hearing. Yet, he did not file a motion in limine seeking to either prevent Dr. Holland's testimony or preclude her report's admission. On the evidentiary hearing's first day, instead of lodging his untimely disclosure objection, or referencing the objection he allegedly made upon service, James agreed that Tiffany could pause her cross examination of him specifically so Dr. Holland could testify out of order the following morning and authenticate her expert report. Such conduct conveyed acquiescence that Dr. Holland's report would be admitted as evidence and

used in his cross examination. As to prejudice, Tiffany argued that, upon information and belief, Dr. Holland's testimony would have been critical of both James' language in the recording and his choice to record the conversation itself. This testimony would have been relevant to the district court's best interest analysis, particularly because the court based its factor (h) findings about the nature of the parental relationships on G.S.'s statements in the recorded conversation.

Accordingly, we conclude that James waived his ability to raise his disclosure objection, because he raised the objection too late.

Public policy favors the admission of Dr. Holland's testimony and report

Independent from estoppel, we take this opportunity to consider Nevada public policy, which favors the admission of all evidence tending to support the district court's best-interest analysis.

For instance, the Nevada Supreme Court has held that protecting the interests of a nonlitigant child takes precedence over enforcing procedural rules, or even the law itself. *Abid v. Abid*, 133 Nev. 770, 772, 774 406 P.3d 476, 478, 479 (2017). In *Abid*, the court affirmed the district court's decision to permit an expert to consider an illegally obtained recorded conversation because it was "the type of evidence a psychologist would consider in forming an opinion as to the child's welfare." *Id.* at 772-73, 406 P.3d at 478-79. To that end, the court reasoned that "NRS 200.650's prohibition against 'disclos[ing]' the contents of illegal recordings cannot reasonably be read to prohibit a court-appointed expert from considering such evidence in a child custody case, wherein the '[c]hild's best interest is paramount.'" *Id.* at 773, 406 P.3d at 479 (quoting *Bluestein v. Bluestein*, 131 Nev. 106, 111, 345 P.3d 1044, 1048 (2015)). To hold otherwise, the court surmised, would amount to "sanctioning the child for the alleged crime of

[their] parent." *Id.* at 774, 406 P.3d at 479. In terms of balancing competing policy justifications, the court concluded by noting that "the potential deterrent effect of ignoring [the illegally obtained] evidence is outweighed by the State's 'overwhelming interest in promoting and protecting the best interests of its children.'" *Id.* at 774, 406 P.3d at 479-80 (quoting *Rogers v. Williams*, 633 A.2d 747, 749 (Del. Fam. Ct. 1993)).

In 2018, our decision in *Nance v. Ferraro* indicated that district courts may, when necessary, supersede standard procedure when considering evidence relevant to its custody modification analysis. 134 Nev. 152, 153, 418 P.3d 679, 681 (Ct. App. 2018). Specifically, in *Nance*, we held that the district court did not abuse its discretion when it considered domestic violence incidents that occurred before the last custody order was entered. *Id.* Although considering these incidents implicated prior caselaw generally mandating that courts may not consider events that took place before the last custody order, we stated that, when the child's best interest is at stake, "it may at times be necessary for the district court to review . . . evidence that underpinned its previous rulings." *Id.* at 156, 159, 418 P.3d at 683, 685. In other words, we clarified the child's best interest includes considering evidence that predated the most recent custody order when doing so is necessary to evaluate the child's current situation. *See id.*

Here, the district court's duty to determine G.S.'s best interest should have outweighed the potential deterrent effect of excluding Dr. Holland's testimony to protect James from trial by ambush. *See Abid*, 133 Nev. at 777, 406 P.3d 476 at 481 ("The court's duty to determine the best interests of a nonlitigant child must outweigh the policy interest in deterring illegal conduct between parent litigants."). This is particularly so, given that the risk of trial by ambush was minimal. James was involved in the child

interview process, initially acquiesced to Dr. Holland's testimony and report, and decided to object based on a procedural technicality at the last moment.

Additionally, the district court appointed Dr. Holland as a third-party outsourced provider, which NRCP 16.215(b)(3) defines as "any third party ordered by the court to interview or examine a child outside of the presence of the court for the purpose of eliciting information from the child *for the court*." (Emphasis added.) Thus, Dr. Holland's testimony and report were presumably intended for the court's consideration and would likely have been relevant to its best interest analysis and custody determination. *See* NRCP 16.215(a) ("[T]he court should find a balance between protecting the child, the statutory duty to consider the wishes of the child, and the probative value of the child's input . . . ."). In addition to elucidating how the recording may have been harmful to G.S., Dr. Holland's testimony and report would also have provided supplementary insight into G.S.'s custodial preference and relationships with James and Tiffany. By prohibiting Dr. Holland from testifying, the district court consequently hindered its own inquiry into G.S.'s best interest; in essence, the court improperly sanctioned G.S. for her mother's procedural misstep. *See Abid*, 133 Nev. at 774, 406 P.3d at 479.

Accordingly, we conclude that James' participation in the child interview process; initial acquiescence to Dr. Holland's testimony and report; and late objection on procedural, as opposed to evidentiary, grounds—coupled with Nevada's strong public policy favoring the consideration of all admissible evidence relating to the child's best interest—render the district court's decision to exclude Dr. Holland's testimony and report an abuse of discretion. However, as will be explained below, the error was harmless. Not only did Tiffany fail to include the report in the record for our review on

appeal, but substantial evidence also supports that James is better able to support G.S.'s physical, emotional, and developmental needs pursuant to the best interest factors. Thus, the district court's ultimate custody determination was appropriate and does not warrant reversal. *See Khoury v. Seastrand*, 132 Nev. 520, 539, 377 P.3d 81, 94 (2016) ("To be reversible, an error must be prejudicial and not harmless.").

Any error is harmless because the district court's ultimate custody determination is supported by substantial evidence

Regarding NRS 125C.0035(4)'s best-interest factors, Tiffany argues that the district court's findings on factors (a), child's wishes, (c), frequent associations, (d), level of conflict between parents, (e), ability to cooperate, and (j) parental history of abuse or neglect are not supported by substantial evidence. Her arguments mirror those she presented in her motion for new trial and to amend the findings and primarily center on the court's failure to consider that (1) the February 2022 recorded conversation was not in G.S.'s best interest, and (2) James has been an unwilling and inflexible coparent since their divorce. James responds that he demonstrated Tiffany's neglect and inability to provide a stable home environment during the evidentiary hearing, and that the district court's findings and custody determination are supported by substantial evidence. We conclude that the district court's findings on factors (e) and (h) are not supported by substantial evidence, but that the remaining factors and the court's ultimate custody determination are.

We review a district court's child custody determinations deferentially and will not disturb them absent a clear abuse of discretion. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (1999); *see also Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015) (explaining that district courts have broad discretion in making child custody

determinations). In reviewing a district court's child custody determinations, we focus on whether the district court "reached its conclusions for the appropriate [legal] reasons" and whether its factual findings were "supported by substantial evidence." *Ellis*, 123 Nev. at 149, 161 P.3d at 241-42; *see also Sims v. Sims*, 109 Nev. 1146, 1148, 865 P.3d 328, 330 (1993) (stating that this court "must be satisfied that the [district] court's determination was made for the appropriate reasons").

Here, we conclude that the district court's findings that factor (e), ability to cooperate, was neutral, and that factor (h), relationship with each parent, favored James are not supported by substantial evidence. As to factor (e), ability to cooperate, the court stated that the factor was neutral, while the record supports that it should have favored Tiffany. Specifically, James has historically been the more unwilling, argumentative, and inflexible coparent who has also hindered Tiffany's ability to communicate with G.S. Tiffany testified that, while she encourages G.S. to call James, James has not even provided Tiffany with the number to the cell phone G.S. uses at his house. G.S. is apparently allowed to call James whenever she wants during Tiffany's parenting time, while James requires Tiffany to notify him first before he will permit G.S. to call Tiffany. Finally, Tiffany testified to more than one occasion in which James was unwilling to make even slight logistical accommodations in emergency situations.

As to factor (h), relationship with each parent, the district court determined that this factor favored James based on G.S.'s statements in the recorded February 2022 conversation. Yet, because Dr. Holland's testimony and report were excluded, this finding is conclusory. *See Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015) (holding that deference is not owed to conclusory findings). While G.S.'s statements in the recording may

have supported that G.S. felt comfortable communicating with James and enjoyed living with him, without Dr. Holland's testimony and report, the court could not definitively say that the recording demonstrated that G.S. had a better relationship with James than with Tiffany. In the recording, James used derogatory language when speaking about Tiffany, and the recording itself may have been manipulative towards G.S. At minimum, the recording demonstrated that James was improperly willing to involve G.S. in "adult" matters. *See* EDCR 5.304. Dr. Holland's testimony was anticipated to include her analysis of the parties' interactions and relationships with G.S., as well as her opinion of the recorded conversation. For the district court to make the determination that G.S. had a better relationship with James based on a recording that may itself have been harmful to G.S. was an abuse of discretion because it was conclusory and not supported by substantial evidence.

Nonetheless, the district court's findings on the remaining NRS 125C.0035(4) factors were supported by substantial evidence, as was its ultimate order granting James' motion to modify his physical custody from joint to primary. To that end, of the applicable factors, the court found factor (d), conflict between the parents, to favor James based on Tiffany's attempts to conceal the domestic violence incident. While Tiffany may have had valid reasons to instruct G.S. to wait before discussing the incident with James, the court acted within its discretion when it determined that Tiffany's behavior significantly escalated the level of conflict between the parties. The district court also acted within its discretion when it found that factor (g), needs of the child, favored James, as James has been the parent to consistently get G.S. to school on time, provide G.S. with stable meals, and prioritize G.S.'s extracurricular activities.

The district court's findings that factor (i), ability to maintain sibling relationships, was neutral, and that factor (j), history of abuse and neglect, favored James are likewise supported by substantial evidence. Specifically, neither James nor Tiffany suggested that G.S.'s sibling relationships were in any way hindered by one another's conduct, G.S. had been exposed to domestic violence during Tiffany's parenting time, and Tiffany expected G.S. to take on an adult role during her parenting time.

Finally, while the district court did not make an explicit finding, it acted within its discretion when it impliedly found in James' favor when it considered Tiffany's intentional violation of the June 2013 stipulation and order, as well as the video Tiffany sent to Martin. Pursuant to NRS 125C.0035(4), a district court, in its best-interest analysis, may consider "other" relevant factors. Here, we conclude that Tiffany's intentional violation of a stipulation and order meant to protect G.S. from a family member who had engaged in inappropriate behavior, as well as the manipulative video Tiffany forced V.H. to participate in, were both relevant and meaningful to the district court's ultimate custody determination.

Further, Tiffany bore the burden to include all necessary information for this court to review on appeal, and, while there is some information in the record regarding Dr. Holland's report and expected testimony, she did not include the report itself. *See Carson Ready Mix, Inc. v. First Nat. Bank of Nev.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) (noting that this court "cannot consider matters not properly appearing in the record on appeal," and that "[i]t is the responsibility of appellant to make an adequate appellate record"). Without Dr. Holland's actual report and an explicit offer of proof, our review is hampered. *Id.*

Accordingly, we conclude that, although the district court's findings on factors (e) and (h) are not supported by substantial evidence, its findings on the remaining factors are both supported and significant, particularly as to factor (g), needs of the child. The stability James provides G.S. in his home—as evidenced by his ability to (1) consistently prepare G.S. three meals a day, (2) get G.S. to school on time and prioritize her school attendance, and (3) maintain working hours that allow him to be awake during the morning—cannot be overstated. Thus, the court's ultimate custody determination is supported by substantial evidence, and Tiffany has not demonstrated otherwise. *See Roe v. Roe*, 139 Nev., Adv. Op. 21, 535 P.3d 274, 295 (Ct. App. 2023) (concluding that substantial evidence supported most of the district court's best-interest findings, which justified an affirmance of the primary physical custody decision, despite other significant errors). Therefore, the errors are harmless and do not provide a basis for reversal. *See Khoury*, 132 Nev. at 539, 377 P.3d at 94; *McClendon v. Collins*, 132 Nev. 327, 333, 372 P.3d 492, 495-96 (2016) (providing that reversal is warranted only where an error affects a party's substantial rights such that "a different result might reasonably have been reached" but for the error (internal quotation marks omitted)); *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.").

This case need not be reassigned to a new judge

Tiffany argues that the district court judge was biased, and that this case should be reassigned to a new judge on remand. Specifically, she argues that, because all of the judge's "erroneous findings and orders" were

in James' favor, the judge's partiality was implicated. James responds that judges are presumed impartial, and that a reasonable person would find that the judge acted impartially in this case. To that end, James notes that the judge held both parties responsible for the "unhealthy" phone situation, expressed "unequivocal" disapproval of James' recorded conversation with G.S, and excluded Dr. Holland based on Tiffany's untimely disclosure—not based on any partiality towards James.

Because we are affirming, the reassignment issue is moot. However, even if these parties were to appear before the district court again, reassignment to a new judge would not be required. We presume judges are unbiased, and Tiffany has shown no bias. *See Millen v. Eighth Jud. Dist. Ct.*, 122 Nev. 1245, 1254, 148 P.3d 694, 701 (2006). Specifically, because the judge's findings and conclusions in this case reflected opinions the judge formed during the evidentiary hearing—and were not purported to have originated from an extrajudicial source—Tiffany has not demonstrated a basis for reassignment. *See In re Petition to Recall Dunleavy*, 104 Nev. 784, 789-90, 769 P.2d 1271, 1275 (1988) ("The personal bias necessary to disqualify must 'stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.'" (quoting *United States v. Beneke*, 449 F.2d 1259, 1260-61 (8th Cir. 1971))).

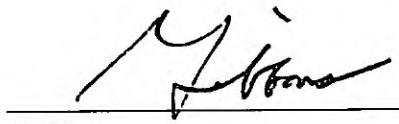
Additionally, regarding the judge's findings and conclusions, Tiffany has not established any "deep-seated favoritism or antagonism," or that the judge was unwilling to consider evidence that painted James in a negative light. *See Canarelli v. Eighth Jud. Dist. Ct.*, 138 Nev. 104, 105, 506 P.3d 334, 336 (2022); *see also Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998) (noting that, generally, a judge's remarks "made in

the context of a court proceeding are not considered indicative of improper bias or prejudice unless they show that the judge has closed his or her mind to the presentation of all the evidence").

Consequently, we conclude that reassignment to a new judge is not warranted.

Accordingly, we

ORDER the district court orders AFFIRMED.[5]



_____, C.J.
Gibbons



_____, J.
Bulla



_____, J.
Westbrook

cc: Hon. Dawn Throne, District Judge, Family Division
Israel Kunin, Settlement Judge
Pecos Law Group
Jones & LoBello
Eighth District Court Clerk

[5]Insofar as Tiffany 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.