IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER FISHER,
Appellant,
vs.
ANGELICIA FISHER,
Respondent.

No. 50677

FILED

JUL 01 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order awarding primary physical custody of the parties' children to respondent and allowing respondent to move with the children to Oregon. Eighth Judicial District Court, Family Court Division, Clark County; Gerald W. Hardcastle, Judge.

The parties divorced in June 1999, and under the terms of the divorce decree, they shared joint legal and physical custody of their two minor children. In June 2007, appellant filed a motion to modify his child support obligation, explaining that he was earning significantly less money than he did when the support obligation was set. Respondent opposed the motion and filed a countermotion for, among other relief, change in custody and permission to relocate with the children to Oregon.

With regard to the countermotion to change custody, respondent maintained that appellant had engaged in acts of domestic violence against one of the children and other family members, had been charged with driving under the influence of alcohol, drank alcohol excessively, and sometimes disappeared for weeks at a time. Respondent also asserted that, although the parenting plan essentially called for a 50

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percent custody timeshare, during the previous year, the children had spent 80 to 100 percent of their time with her.

In seeking permission to relocate to Oregon with the children, respondent contended that the move would improve the children's quality of life, since respondent's extended family lived in Oregon and they would thus have a greater support system there, including child care and a home in which respondent and the children could stay at no charge until respondent found suitable employment and a permanent home. Respondent pointed out that, due to appellant's lack of financial support during the previous year, respondent was unable to meet her obligations and had to obtain a second job and live with a friend temporarily, where she shared a bedroom with the children. According to respondent, McMinnville, Oregon, where she wished to relocate with the children, had lower housing costs and better schools than Las Vegas in terms of attendance, quality teachers and after school programs, and no incidents of violence. Respondent asserted that her prospects for employment as an aesthetician were better in Oregon than they were in Las Vegas, where, she maintained, the market was saturated. She also proposed a revised visitation schedule and asserted that she had no intention of frustrating the children's relationship with appellant. The matter was set for an August 15, 2007, hearing.[1]

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[1]The matter originally was scheduled to be heard by Judge Cynthia Steele on July 10, 2007. In a July 11, 2007, order however, the matter was rescheduled to August 15, 2007. On appeal, appellant maintains that the matter was reassigned to Judge Gerald W. Hardcastle on the morning of the hearing, thus depriving him of his right to file a peremptory challenge against Judge Hardcastle, since such challenges must be made at least

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At the August 15 hearing, the district court granted appellant's motion to modify his child support obligation, reducing it from $1100 per month to $875 per month, based on his affidavit of financial condition. The remaining matters, including the motion to relocate, were set for a September 17, 2007, evidentiary hearing. On September 10, 2007, appellant moved to continue the hearing, arguing that additional discovery was needed and that one of his witnesses, a marriage and family therapist, was unavailable on September 17. Respondent opposed the motion, arguing that it was designed to delay and not brought in good faith. The district court denied the motion, concluding that the therapist's testimony was unnecessary and that a decision could be made based on the evidence and available witness testimony.

After the September 17 hearing, at which appellant and respondent testified and presented evidence, the district court indicated that it was inclined to grant respondent's countermotion for primary

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three days in advance of the hearing. The district court docket sheet, however, supports respondent's assertion that the matter was reassigned on July 25, three weeks before the August 15 hearing. Regardless, nothing in the record or appellant's fast track statement indicates that appellant ever attempted to exercise any peremptory challenge, even if only to preserve the issue for appeal. See SCR 48.1(4) (explaining that when a case is assigned to a judge after the time for filing a peremptory challenge has passed, the party wishing to file a peremptory challenge should do so within three days after being notified of the assignment, or before evidence is taken or any ruling made). Accordingly, because appellant did not present any peremptory challenge to the district court, we decline to address appellant's arguments regarding reassignment. See Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

physical custody and permission to relocate to Oregon with the children, contingent upon her providing a workable visitation schedule that would allow appellant to maintain his relationship with the children. Respondent later submitted a proposed visitation plan, which appellant opposed, arguing that it would be too costly and would not provide adequate time for him to spend with the children.

At a subsequent hearing, the district court approved and adopted a modified version of the proposed visitation schedule and granted respondent's countermotion for a change in custody and for permission to relocate. In its order, the district court found that respondent was the more stable parent, who was better able to provide mental and emotional support for the children. The court noted that appellant had paid only $120 in child support during the previous nine months and that he had $10,571 in arrearages. The visitation schedule provided that appellant would have the children one weekend per month and all three-day weekends, eight weeks during the summer, and various holidays. It also provided that appellant would receive a $250 credit per visit toward his child support obligation, to be applied equally to arrearages and current child support, with a maximum monthly credit of $500 per month. Due to the financial hardship related to lack of child support payments over the last year,[2] and based on its findings that respondent could provide a stable environment for the children in Oregon and its findings concerning appellant's alcohol problems and issues with domestic violence, the district court concluded that it would be in the children's best interests to modify

[2]Between 1999 and 2006, appellant consistently paid between $1000 and $1100 per month in child support.

physical custody in respondent's favor and allow her to move to Oregon with the children.[3] This appeal followed.

On appeal, appellant argues that the district court abused its discretion by denying his motion for a continuance, so that he could conduct additional discovery and have his proposed witness present to testify.[4] As for the custody determination, appellant argues that the district court's decision is not supported by substantial evidence, as there was no evidence concerning the children's quality of life if allowed to move to Oregon. According to appellant, the district court thus failed to consider the children's best interest and instead improperly focused on respondent's interests. Appellant maintains that the court failed to consider how the move would affect the children and their relationship with appellant.

A motion for a continuance in order to conduct additional discovery is addressed to the trial court's sound discretion.[5] Similarly, the district court has broad discretion in determining child custody issues, and this court will not disturb the district court's custody determinations absent a clear abuse of discretion.[6] The district court may modify a joint

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[3]Applying the NRS 125B.070(1)(b) formula, the district court's order also again reduced appellant's child support obligation, to $792 per month.

[4]Appellant fails to cite any authority to support this assignment of error, as required under NRAP 3E(d)(1)(v).

[5]Southern Pac. Transp. Co. v. Fitzgerald, 94 Nev. 241, 577 P.2d 1234 (1978).

[6]See Wallace v. Wallace, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996) (noting that it is presumed that the district court properly exercised its discretion in determining the children's best interest).

physical custody order if it determines that such a change is in the children's best interest.[7] When a parent who shares joint physical custody of the children wishes to relocate outside of Nevada with the children, that parent must seek primary physical custody for the purposes of relocating.[8] The district court must consider the motion under the best interest of the children standard established for joint custody situations,[9] as set forth under NRS 125.510 and in Truax v. Truax.[10]

Here, with regard to the motion for a continuance, the district court determined that the therapist's testimony was unnecessary and that it could properly decide the matter without additional discovery. Having reviewed the record and considered the parties' arguments, we perceive no abuse of discretion in that determination.[11] As for the custody determination, although appellant argues that the district court failed to consider the children's best interest, the record reveals that the court made specific findings in accordance with NRS 125.510 and Truax, concluding that the change in custody and relocation would serve that

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[7]NRS 125.510(2); Potter v. Potter, 121 Nev. 613, 618-19, 119 P.3d 1246, 1250 (2005).

[8]Potter, 121 Nev. at 618, 119 P.3d at 1249.

[9]Id. (citing Truax v. Truax, 110 Nev. 437, 874 P.2d 10 (1994) (explaining that, when resolving custody issues in cases where the parents share joint physical custody, the district court's sole consideration is the children's best interest)).

[10]110 Nev. 437, 874 P.2d 10.

[11]See Hansen v. Universal Health Servs., 115 Nev. 24, 28, 974 P.2d 1158, 1161 (1999) (acknowledging the district court's discretion to simplify the issues and limit testimony).

interest. In particular, the court found that respondent was the more stable parent, that respondent was unable to maintain a suitable standard of living for the children in Las Vegas without regular support payments from appellant, which appellant concededly had failed to make during the past year, amassing significant arrearages, and that the children's quality of life would be improved if allowed to move to Oregon. Those findings are supported by substantial evidence.[12] Accordingly, we conclude that the district court acted within its discretion in granting respondent's countermotion, and we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

cc: Hon. Gerald W. Hardcastle, District Judge, Family Court Division
Kung & Wilson
Angelicia Fisher
Eighth District Court Clerk

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[12]Although appellant objected to the district court's findings of fact, conclusions of law, and decision, arguing that the written findings were not supported by the testimony and evidence and were contrary to the findings made during the hearing, our review of the record reveals otherwise.