

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANK TOPPO,
Appellant,
vs.
SHAINA MARIE TOPPO,
Respondent.

No. 50929

FILED

NOV 04 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order allowing respondent to move to Oregon with one of the parties' two minor children.¹ Eighth Judicial District Court, Family Court Division, Clark County; T. Arthur Ritchie Jr., Judge.

The parties divorced in May 2004, at which time they were awarded joint legal custody of their two minor children, with respondent having primary physical custody of both children and appellant having visitation. In August 2006, the parties stipulated that, on a "temporary trial" basis, the older child would reside with appellant in Pahrump, Nevada, and the younger child would continue residing with respondent in Las Vegas, Nevada. The parties also agreed that the children would spend weekends together, alternating between the parents. In August 2007, appellant filed a motion requesting that the custody arrangement be made permanent. Respondent opposed the motion and, approximately one

¹The order also changed primary physical custody of the other minor child from respondent to appellant, but appellant is not challenging that portion of the order.

month later, petitioned the district court to relocate to Oregon with the children. Appellant opposed the relocation petition. Subsequently, respondent withdrew her opposition to appellant's motion to change the physical custody arrangement as to the older child, and she modified her relocation request to apply only to the younger child.

In seeking permission to relocate to Oregon with the younger child, respondent contended that the move would improve her quality of life, by allowing her to live with her new husband who recently accepted a job in Oregon. Respondent asserted that the child had been in her primary physical custody since the divorce and that living together with her new husband in Oregon would provide an emotionally and financially stable environment for her and the child.

After a hearing on the parties' motions, the district court granted respondent's relocation request and appellant's motion to modify custody, awarding primary physical custody of the older child to appellant and allowing respondent to relocate to Oregon with the younger child, with the parties having visitation with the children during holidays and school breaks. This appeal followed.

On appeal, appellant argues that the district court's decision regarding the relocation request is not supported by substantial evidence, as there was no evidence demonstrating that the child's quality of life would be improved if the move to Oregon was allowed. According to appellant, the district court failed to consider the best interests of both children and how the move would affect the children's relationship with each other. Appellant characterizes respondent's relocation as "abandoning" the older child in order to move to Oregon with her new husband.

Child custody matters rest in the district court's sound discretion,² and this court will not disturb the district court's custody decisions absent a clear abuse of that discretion.³ This court nevertheless must be satisfied that the district court's determination was made for appropriate reasons.⁴ We will not set aside the district court's factual findings in a custody matter if they are supported by substantial evidence.⁵

When a parent who is the minor child's primary physical custodian wishes to relocate with the child out of state and the noncustodial parent does not consent, the custodial parent may petition the district court for permission to move with the child.⁶ In reviewing a petition to relocate, the district court first must determine whether the custodial parent wishing to leave Nevada demonstrated that she had a "sensible, good faith reason to move."⁷ If the petitioning parent so demonstrates, the district court next must weigh the factors outlined in Schwartz v. Schwartz, namely whether (1) the move likely will improve the moving parent and child's quality of life; (2) the moving parent's motives are honorable; (3) the custodial parent will comply with the court's

²Wallace v. Wallace, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996).

³Sims v. Sims, 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993).

⁴Id.

⁵Ellis v. Carucci, 123 Nev. ___, 161 P.3d 239 (2007).

⁶NRS 125C.200.

⁷Davis v. Davis, 114 Nev. 1461, 1466, 970 P.2d 1084, 1087 (1998) (quoting Trent v. Trent, 111 Nev. 309, 315, 890 P.2d 1309, 1313 (1995)).

visitation orders; (4) the noncustodial parent's motives for resisting the move are honorable; and (5) the noncustodial parent will have a realistic opportunity to exercise visitation, if the move is approved, so that the parent's relationship with the child will be adequately fostered.⁸

Here, the district court found that respondent's request to relocate with the minor child was sensible and made in good faith, as she recently had remarried and her new husband accepted an employment opportunity in Oregon, where his additional family members, including children from his first marriage, reside. The court concluded that respondent and the child would benefit from the move, since respondent would be able to live with her new husband, and the child, who had thrived in respondent's custody, would be able to continue residing with her. Although the district court recognized that the children would be separated by a greater physical distance, it also found that each child had been doing well living in separate homes and that it would be more traumatic for the younger child to be separated from respondent than from his brother. In particular, the district court noted that the children had been living in separate homes for over one year and that both had benefited in some ways from the separation, since appellant was able to provide the older child with direct attention and substantial resources to address his special needs, and respondent therefore was able to spend more time with the younger child.

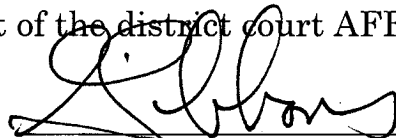
In rendering its decision, the court thus determined that respondent was not requesting to move in order to interfere with

⁸107 Nev. 378, 383, 812 P.2d 1268, 1271 (1991).

appellant's relationship with the child and that the child's interests would be advanced by remaining in respondent's primary custody. The court also found that respondent demonstrated that she would comply with visitation orders and that, while appellant's motives were also honorable, he would have a realistic opportunity to preserve the parent-child relationship with an alternate visitation schedule, which would allow him to maintain his relationship with the child and would allow the children to maintain their relationship with each other.

Thus, in granting respondent's motion to relocate, the district court properly considered the relevant factors, including the child's best interest and the factors outlined in Schwartz. Accordingly, we conclude that the district court acted within its discretion in granting respondent's motion, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. T. Arthur Ritchie Jr., District Judge, Family Court Division
Robert E. Gaston, Settlement Judge
Thomas J. Fitzpatrick
Mark A. Jenkin
Jolley Urga Wirth Woodbury & Standish
Eighth District Court Clerk