IN THE SUPREME COURT OF THE STATE OF NEVADA

TRINA LEI SANTIAGO,
Appellant,
vs.
GREG MENDOZA,
Respondent.

No. 59167

FILED

OCT 09 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order establishing child custody and denying appellant's request to relocate with the minor child. Eighth Judicial District Court, Family Court Division, Clark County; Bryce C. Duckworth, Judge.

In the underlying proceedings, respondent Greg Mendoza filed a petition to establish paternity, child custody, visitation, and support concerning the parties' minor child. In response, appellant Trina Lei Santiago requested primary physical custody and sought to relocate from Nevada to Hawaii with the child.[1] After conducting an evidentiary hearing, the district court entered an order that awarded the parties joint physical custody and denied appellant's motion to relocate. This appeal followed.

On appeal, appellant first contends that the district court applied the wrong legal standard in denying her request to relocate. She

[1]The parties stipulated to respondent's paternity and to joint legal custody.

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argues that the district court should have applied the relocation statute, NRS 125C.200, and the relocation factors set forth in Schwartz v. Schwartz, 107 Nev. 378, 382-83, 812 P.2d 1268, 1271 (1991), rather than the best interest of the child standard under Potter v. Potter, 121 Nev. 613, 618, 119 P.3d 1246, 1249 (2005).

Whether the district court applied the correct standard in deciding the matter is a legal determination subject to de novo review. See Staccato v. Valley Hospital, 123 Nev. 526, 530, 170 P.3d 503, 505-06 (2007) (recognizing that de novo review is implicated when considering whether the district court applied the proper legal standard). For the reasons set forth below, we conclude that the district court applied the correct legal standard.

NRS 125C.200 allows a parent with primary physical custody to petition the district court for permission to move the child from this state. See Potter, 121 Nev. at 617-18, 119 P.3d at 1249. In Schwartz, this court set forth various factors that a court must consider when evaluating a request for relocation. 107 Nev. at 382-83, 812 P.2d at 1271-72. We held in Potter, however, that when parents share joint physical custody, a parent wishing to relocate outside of Nevada with the child is not eligible to petition for relocation under NRS 125C.200. 121 Nev. at 618, 119 P.3d at 1249. In such a case, the parent seeking relocation must move for primary physical custody of the child for the purpose of relocating, and the district court must apply the best interest of the child standard. Id.

Here, the district court determined that while Potter involved a joint physical custody arrangement, it was analogous to the situation in this case, where there had been no prior evidentiary proceedings determining what was in the child's best interest and establishing

custody. We agree. In the underlying case, no court had made a custody determination and considered what was in the child's best interest under NRS 125.480. Indeed, respondent initiated the proceeding with a petition to establish custody, and appellant subsequently made a request to relocate within that proceeding. We have stated that "[r]emoval of minor children from Nevada by the custodial parent is a separate and distinct issue from the custody of children." Schwartz, 107 Nev. at 382, 812 P.2d at 1270.

Appellant asserts that she had primary physical custody of the child as a matter of law under NRS 126.031(2)(a), and accordingly, as the child's primary custodian, she could request relocation under NRS 125C.200. NRS 126.031(2)(a) provides that the mother of a child born out of wedlock has primary physical custody if (1) the mother is not married to the father, and (2) no judgment or order determining paternity has been entered by a court or pursuant to an expedited process.

Respondent argues that the parties executed an affidavit of paternity upon the child's birth, thereby defeating appellant's argument of statutory custody under NRS 126.031(2)(a). NRS 126.053(1) provides that a voluntary acknowledgment of paternity signed by the parents has the same effect as a judgment or court order determining the existence of a parent and child relationship. Further, an "expedited process" includes a voluntary acknowledgment of paternity. NRS 126.161(6); see also NRS 126.031(4) (stating that "expedited process" has the meaning given in NRS 126.161).

The record before this court does not contain an affidavit of paternity. It is the parties' burden to create an adequate appellate record for review. See generally Carson Ready Mix v. First Nat'l Bk., 97 Nev.

474, 476, 635 P.2d 276, 277 (1981). Nevertheless, Paragraph IV of appellant's counterclaim filed in the district court contains the following acknowledgment:

> That paternity of the minor child is not at issue. Plaintiff's name is on the child's birth certificate, his last name is hyphenated and the parties filed an Affidavit of Paternity with the Office of Vital Statistics upon his birth. To Defendant's knowledge, the Affidavit of Paternity has not been revoked.

In his reply to the counterclaim, respondent admitted the allegation in Paragraph IV. Therefore, because it was undisputed that the parties executed an affidavit of paternity, we conclude that appellant's argument that she had primary physical custody under NRS 126.031(2)(a) lacks merit. Thus, as appellant was not the primary custodian, the district court properly applied the best-interest-of-the-child standard under Potter.

Appellant next contends that the district court abused its discretion in awarding the parties joint physical custody and denying her request to relocate. NRS 125.480 states that in determining child custody the sole consideration of the court is the best interest of the child, and sets forth a nonexhaustive list of factors that the court must consider in determining the child's best interest. Child custody matters rest in the district court's sound discretion, Wallace v. Wallace, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996), and this court will not disturb the district court's custody decision absent an abuse of that discretion. Sims v. Sims, 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993). In evaluating a district court's custody order, this court must be satisfied that the district court's decision was made for appropriate reasons and that the court's factual

determinations are supported by substantial evidence. Rico v. Rodriguez, 121 Nev. 695, 701, 120 P.3d 812, 816 (2005).

Having reviewed the record, we conclude that the district court did not misapply Potter, but rather made an appropriate determination of what custody arrangement would be in the child's best interest. The district court conducted an evidentiary hearing, considered testimony from the parties and other witnesses, and set forth specific findings under NRS 125.480(4) that it was in the child's best interest to award the parties joint physical custody and to deny appellant's request to relocate to Hawaii with the child. We conclude that the district court's findings are supported by substantial evidence in the record, and that the court did not abuse its discretion. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Saitta, J.
Saitta

Pickering, J.
Pickering

Hardesty, J.
Hardesty

cc: Hon. Bryce C. Duckworth, District Judge, Family Court Division
Carolyn Worrell, Settlement Judge
Pecos Law Group
Hanratty Law Group
Eighth District Court Clerk