

IN THE SUPREME COURT OF THE STATE OF NEVADA

MATHEW BOELK,

No. 35842

Appellant,

vs.

CHRISTIE A. BOELK,

Respondent.

FILED

AUG 10 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the family court division of the district court awarding custody of the minor children to respondent and allowing respondent to relocate the children to Iowa.

Appellant asserts several claims of error with respect to the custody award: (1) the family court erred in not properly analyzing the best interest considerations set forth in NRS 125.480(1); (2) the court failed to maintain gender neutrality; (3) the court did not properly take into account the fact that the children had been living with appellant for eighteen months in a stable environment; (4) the court failed to account for the fact that respondent had engaged in domestic violence against one of the children; and (5) the court erred in failing to conduct a change of circumstances analysis, as required by Murphy v. Murphy.¹

The standard of review is clear abuse of discretion: "[D]ecisions as to child custody rest within the sound discretion of the district court and will not be disturbed absent a clear abuse of that discretion."² "In determining custody of a minor child in an action brought under this

¹84 Nev. 710, 447 P.2d 664 (1968).

²Davis v. Davis, 114 Nev. 1461, 1465, 970 P.2d 1084, 1087 (1998).

chapter, the sole consideration of the court is the best interest of the child."³ Pivotal evidence regarding the children's best interest was that respondent was the children's sole care provider for the entire marriage, up to 1998, and would have remained so had appellant not improperly invoked the jurisdiction of the family court when he sought the temporary custody order in 1998. Because nothing in the record indicates that the family court departed from the best interest standard or clearly abused its discretion in applying that standard, we affirm the custody order.

In so holding, we reject all of appellant's contentions regarding the custody order. Appellant's arguments regarding the family court's purported failure to take into account certain evidence favorable to him are, in effect, a request for this court to improperly substitute its judgment for that of the family court regarding the conflicting evidence of which parent had provided and would provide the best environment for the children.⁴ Appellant's gender neutral argument is unsupported by the record: the family court gave considerable weight to the six years that respondent cared for the children, not simply because she was their mother, but expressly because she had cared for them while appellant was an absentee father with an alcohol abuse problem. Appellant's argument that the change of circumstances standard of Murphy should have been applied also lacks merit. Because the custody order in the divorce decree

³NRS 125.480(1).

⁴See Wolff v. Wolff, 112 Nev. 1355, 1359, 929 P.2d 916, 919 (1996) (citing Winn v. Winn, 86 Nev. 18, 20, 467 P.2d 601, 602 (1970)) ("This court's rationale for not substituting its own judgment for that of the district court, absent an abuse of discretion, is that the district court has a better opportunity to observe parties and evaluate the situation.").

had previously been declared void, the present proceeding constituted an initial custody determination and not a change in custody. Therefore, Murphy and its progeny are inapplicable.

Appellant also contends that the district court abused its discretion in granting respondent permission to relocate the minor children to Iowa. Appellant discusses at length the factors outlined in Schwartz v. Schwartz,⁵ and how certain evidence at trial would have supported denial of respondent's request to relocate.

Schwartz and its progeny outline the necessary factors which must be considered when a custodial parent requests permission to remove minor children from the state.⁶ Based on the record, we conclude that the family court fully and properly considered these factors. The family court expressly cited Schwartz, both in its oral ruling from the bench and in the written custody order, stating in the written order that the decision to grant respondent's relocation request was "made pursuant to the factors set forth above in

⁵107 Nev. 378, 812 P.2d 1268 (1991).

⁶See Davis v. Davis, 114 Nev. 1461, 1466, 970 P.2d 1084, 1087 (1998) (citations omitted) (requiring a two-part threshold showing: that the move will be an actual advantage for both the moving parent and the children, and that the moving parent has a sensible, good faith reason for moving -- meaning that the reason is "not designed to frustrate the visitation rights of the noncustodial parent"; once this threshold showing is made, the trial court must also consider five other factors: (1) how likely the move will improve the moving parent and children's quality of life; (2) whether the moving parent's motives are honorable; (3) whether the custodial parent will comply with the court's visitation orders; (4) whether the non-moving parent's motives for resisting the move are honorable; and (5) whether, if the move is approved, the non-moving parent will have a realistic opportunity to exercise visitation such that the non-moving parent's relationship with the children will be adequately fostered; in considering these additional factors, the family court should place particular emphasis "on the availability of adequate, alternate visitation.")

Schwartz . . . and its progeny." Furthermore, the family court specifically discussed some of these factors in concluding that: respondent's desire to remove the children to Iowa was made in good faith; there were actual advantages to the minor children living in Iowa, including support from extended family; and appellant would have opportunities for reasonable visitation if the move was approved. Although appellant presented conflicting evidence, the record contains substantial evidence supporting the family court's conclusion that the Schwartz factors were met. Accordingly, we conclude that the district court did not abuse its discretion in granting respondent permission to relocate the children to Iowa.

Having reviewed all of appellant's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

Young J.
Young

Leavitt J.
Leavitt

Becker J.
Becker

cc: Hon. Gerald W. Hardcastle, District Judge,
Family Court Division
Brian J. Steinberg
Christie A. Boelk
Clark County Clerk