IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BECKY FISHBEIN, N/K/A BECKY HARDT-HARDING,
Appellant,
vs.
CHAD FISHBEIN,
Respondent.

No. 66215



*ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING*

This is an appeal from a district court order denying appellant's motion to relocate to Canada and granting respondent's motion to change custody. First Judicial District Court, Carson City; James E. Wilson, Judge.[1]

Appellant Becky Hardt-Harding and respondent Chad Fishbein separated in July 2011. The parties have two daughters, C.F. and M.F., who at the time of the separation were 4 and 2 and are now 8 and 6, respectively. Evidence shows C.F. was sexually abused around the time of the separation, and M.F. was sexually abused thereafter. However, the investigation was poorly handled and the evidence badly tainted, leaving no clear and convincing evidence implicating a perpetrator.

[1]Chief Judge Michael P. Gibbons is disqualified from this case and took no part in the decision.

Chad and Becky's relationship during the separation and divorce proceedings was highly acrimonious. Upon divorcing, Chad and Becky agreed to share joint legal custody, with Becky having primary physical custody. Chad, who was pursuing a professional license at the time, lived in Texas but thereafter moved to Ohio to further his career. He moved back to northern Nevada in early 2013. Thereafter, the district court increased Chad's visitation time on a temporary basis but declined to then enter an order making the change permanent. Chad and Becky's relationship has not improved, and they continue to engage in contentious behavior, sometimes to such an extent that the girls' needs are unmet.

Both Chad and Becky remarried. Becky married Paul, who is a citizen of Canada. Paul is employed in Canada and makes nearly $80,000 a year, although he was temporarily in the United States on paternity leave at the time Becky filed her motion, living in northern Nevada with Becky and their newborn son. Chad, a manager for a rehabilitation center, makes approximately $110,000 a year. He married Camille, and they live in Minden, Nevada.

C.F. and M.F. spend time with both parents, and the families are each active in their respective church congregations. Living in Carson City also affords the girls opportunities to see extended family. Becky's family lives nearby and in northern Utah. Chad's parents live several hours away, in California, although he has a sister who lives approximately two hours away and whom Chad visits with some regularity. The girls also have established relationships with a court appointed special advocate, a court appointed guardian ad litem, and a counselor, although the girls have yet to trust these professionals enough

to be completely open with them. The girls are established at their respective schools and appear to be doing well.

In April 2013, Chad filed a Motion to Change Custody, requesting joint physical custody of the girls. In August of that same year, Becky filed a Motion to Request Change in Residence and Visitation Schedule, asking the court to allow her to move the girls to Canada, arguing Paul's salary would allow her to stay at home with the girls. Becky also apparently[2] requested, in the alternative, that she be allowed to move to Salt Lake City, Utah. Both parties opposed the other's motion. In June 2014, the district court granted Chad's motion and denied Becky's.

Becky appeals, advancing three arguments. First, she argues the district court abused its discretion by failing to allow her to relocate to Salt Lake City. Second, she contends the district court abused its discretion by denying her petition to relocate to Canada. Third, she asserts the district court abused its discretion in modifying custody to grant Chad joint physical custody of the girls. We disagree.

We consider Becky's first two arguments in tandem, as the district court applied the same reasoning to each.[3] We review a district

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[2]It is unclear from the briefs and records whether Becky made this request as part of her motion to relocate or whether she raised it at some other juncture.

[3]The parties failed to include, in any appendix to this court, either their motions or their oppositions and replies to those motions, or any transcript of the arguments on those motions. Accordingly, we are unable to review the legal arguments made to the district court. We are nevertheless concerned regarding the limited evidence in the record supporting certain of the district court's findings and conclusions, and note that additional information could have shed light on those concerns. But, as Becky, the appellant, had a duty to provide an adequate record and

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court's decision denying a motion to relocate for abuse of discretion. *Flynn v. Flynn*, 120 Nev. 436, 440, 92 P.3d 1224, 1227 (2004). While we may not agree with a court's decision, we will not substitute our judgment for that of the district court. *See id.* ("we will uphold the district court's determination if it is supported by substantial evidence").

As Becky had primary physical custody when the motions were filed, we proceed under NRS 125C.200 and *Schwartz v. Schwartz*, 107 Nev. 378, 812 P.2d 1268 (1991). *See, e.g., id.* at 440-41, 92 P.3d at 1227. We review the district court's application of the law, including the *Schwartz* factors, de novo. *Id.* at 440, 92 P.3d at 1227.

NRS 125C.200 requires a custodial parent who intends to relocate with the children to attempt to obtain written consent from the noncustodial parent, and, if the noncustodial parent refuses, then to petition the court for permission. Under *Schwartz*, a court considering a petition for relocation must first determine whether there is a good faith, sensible reason for relocating. *Id.* at 441, 92 P.3d at 1227. If such is the case, the court then determines whether the additional *Schwartz* factors favor the move, focusing on the availability of adequate alternative visitation. *Id.*; *McGuinness v. McGuinness*, 114 Nev. 1431, 1437, 970 P.2d

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failed to do so, we necessarily presume the missing portions of the record support the district court's decision. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007).

As to Chad's argument that Becky failed to adequately raise her request to relocate to Salt Lake City, the record reveals some testimony regarding a move to Salt Lake City, and the judge specifically denied that "request" in his order. Thus, in light of the record provided on appeal, we assume this argument was sufficiently raised to the district court. *See id.*

1074, 1078 (1998). A court may not deny relocation "solely to maintain the existing visitation pattern, even if relocation entails a shift away from consistent day-to-day contact." *McGuinness*, 114 Nev. at 1437, 970 P.2d at 1078. If, however, the custodial parent shows a good faith reason for relocating, and the noncustodial parent has reasonable alternative visitation options, the motion should be granted unless the noncustodial parent shows, through concrete, material reasons, that the move is not in the children's best interests. *Flynn*, 120 Nev. at 442, 92 P.3d at 1228. In considering the district court's findings, we presume it "properly exercised its discretion in determining the best interests of the child." *Id.* at 440, 92 P.3d at 1226-27.

Here, the district court undertook this precise analysis required by Nevada law: it determined Becky had a good faith reason for the move, and that an alternate visitation schedule was possible, but concluded the move was not in the best interests of the children for a variety of reasons. Although true that the court determined consistent, ongoing, face-to-face contact with Chad was important, it did not deny the relocation solely or even primarily on that factor. Rather, that factor was one among many contributing to the court's decision that the girls' developmental and emotional need for stability and consistency would best be served by remaining in Carson City. Indeed, the court relied heavily on the importance of the girls' established relationships with nearby extended family, local church members, their court appointed special advocate and guardian ad litem, and particularly their counselor, in determining the move would be against the children's best interests. In light of this analysis, we cannot fault the district court's conclusion.

Next, we turn to whether the district court abused its discretion in modifying child custody. Becky asserts reversal of the joint custody determination is required because there was no substantial change in circumstances and the court incorrectly focused on Chad's change in circumstances rather than on whether Becky having primary care would jeopardize the welfare of the girls.

We review the district court's decision regarding custody for an abuse of discretion. *Culbertson v. Culbertson,* 91 Nev. 230, 233, 533 P.2d 768, 770 (1975). A court may modify a primary physical custody arrangement "only when (1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the child's best interest is served by the modification." *Ellis v. Carucci*, 123 Nev. 145, 150, 161 P.3d 239, 242 (2007). A "substantial change" may be one that affects a parent, the child, or the family unit as a whole. *Id.* at 151, 161 P.3d at 243. NRS 125.480(4) sets forth factors a court must consider in determining the best interests of a child. We presume the trial court, in determining the best interest of the child, properly exercised its discretion. *Flynn*, 120 Nev. at 440, 92 P.3d at 1226-27.

But, substantial evidence must support the district court's determination; that is, the evidence must be such that a reasonable person could deem it adequate to support the decision. *Rivero v. Rivero*, 125 Nev. 410, 428, 216 P.3d 213, 226 (2009). Critically, as regards the district court's analysis of the child's best interests under NRS 125.480(4), the order "must tie the child's best interest, as informed by specific, relevant findings" on the best interest factors, "to the custody determination made." *See Davis v. Ewalefo*, 131 Nev. ___, ___, 352 P.3d 1139, 1143 (2015) (explaining that determining a child's best interest "is not

achieved . . . simply by processing the case through the factors that NRS 125.480(4) identifies as potentially relevant to a child's best interest and announcing a ruling"). In the absence of such findings, we cannot conclude that the district court properly exercised its discretion in determining custody in this case. *See id.*

In its written order, the district court found there were facts supporting a substantial change in circumstances because Chad moved back to the area and the investigation into the abuse of C.F. and M.F. failed to yield clear and convincing evidence implicating Chad. This was not an abuse of discretion. When the divorce was finalized and Becky awarded primary physical custody of the children, Chad was living in Texas and would not live in Nevada for many months to come. Further, the investigation into sexual abuse allegations was proceeding, and at that time, investigators were considering that Chad may have been a possible suspect to the abuse. Chad's relocation to northern Nevada and his new proximity to the girls, as well as the investigation's conclusion that no clear and convincing evidence existed against Chad, significantly change the circumstances of this case. Nor was it improper for the court to consider Chad's circumstances rather than focusing on Becky's. *See Ellis*, 123 Nev. at 151, 161 P.3d at 243 (noting a substantial change may be one that affects either the parents, the child, or the family unit).

But, in determining whether the custody modification was in the children's best interests, the district court weighed the factors set forth in NRS 125.480(4) and summarily found they were all neutral, except for "the developmental and emotional needs of the children," which weighed in favor of granting joint physical custody. Critically, the district court did not make specific, relevant findings on the majority of the factors nor did

it tie those points to the children's best interests in this case. *See Davis*, 131 Nev. at ___, 352 P.3d at 1143. Rather, the court, without explanation, simply found the majority of factors to be neutral. Although the record is clear that the girls love their father and benefit from time spent with him, and Becky does not present any reason why joint custody is not in the girls' best interests, the district court's failure to make specific, relevant findings on each NRS 125.480(4) factor was an abuse of discretion that requires us to reverse and remand the district court's decision on joint custody. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

Tao, J.

Tao

Silver, J.

Silver

cc: Hon. James E. Wilson, District Judge
Shawn B. Meador, Settlement Judge
McFarling Law Group
Cassandra Jones
Chad Fishbein
Carson City Clerk