IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DIANA BARBOZA,
Appellant,
vs.
HERIBERTO A. LOPEZ-REGALADO,
Respondent.

No. 79267-COA

ORDER OF REVERSAL AND REMAND

Diana Barboza appeals from a post-custody decree order in a family matter. Eighth Judicial District Court, Clark County; Rhonda Kay Forsberg, Judge.

The parties were never married, but have one minor child in common. When the child was born, he was given Diana's surname—Barboza. Respondent Heriberto Lopez-Regalado then filed a complaint for custody in December 2016. In January 2017, the parties entered a stipulation and order, stipulating that Heriberto was the natural father of the child, that the matter was moot as the parties had reconciled, and that a new birth certificate would be issued indicating Heriberto as the father and with the child's surname listed as Lopez. In February 2018, Heriberto filed a motion to modify custody and Diana opposed. Following a settlement conference, the parties entered a stipulated custody decree in September 2018, whereby they shared joint legal and joint physical custody of the child.

In April 2019, Diana filed a motion for name change, seeking to add her surname to the child's, such that the child's last name would be

hyphenated and would include both parents' surnames. In support of her motion, Diana asserted that she previously agreed that Heriberto's surname should be added to the child's, but did not understand that the order would remove her surname from the child's, and that it was in the child's best interest to include both parents' names. Heriberto opposed, asserting that the stipulation was clear and that it was a binding contract that could not be changed absent a finding of unconscionability, illegality, or violation of public policy pursuant to *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009). The district court denied Diana's motion. In its order, the court indicated that it was concerned that the parties stipulated to the child's name over two years prior and summarily denied the motion. This appeal followed.

On appeal, Diana challenges the district court's denial of her motion for a name change, asserting that the district court erred in failing to consider the child's best interest and incorrectly applied *Rivero*. Heriberto contends the district court correctly denied the motion without considering the best interest factors because the parties previously stipulated to change the child's surname to Lopez, the stipulation is a binding contract pursuant to *Rivero*, and Diana failed to bring her concern regarding the child's name change until two years after the stipulation was entered. This court reviews a child custody decision for an abuse of discretion. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007). But whether a district court used the proper standard of proof is a legal question we review de novo. *Petit v. Adrianzen*, 133 Nev. 91, 92, 392 P.3d

630, 631 (2017) (citing *Matter of Halverson*, 123 Nev. 493, 509, 169 P.3d 1161, 1172 (2007)).

Neither parent has a greater right to have their child bear his or her surname, and the only relevant factor in determining a child's surname is the best interest of the child. *Magiera v. Luera*, 106 Nev. 775, 777, 802 P.2d 6, 7 (1990); *see also Petit*, 133 Nev. at 94, 392 P.3d at 632. Typically, the party seeking to change a child's name bears the burden to prove the name change is in the child's best interest. *Magiera*, 106 Nev. at 777, 802 P.2d at 7-8. However, when parents come before the court regarding an initial naming dispute, having never previously agreed on the child's surname, the parties are on equal footing and neither party bears the burden of proof. *Petit*, 133 Nev. at 94, 392 P.3d at 632-33.

Here, the district court stated that this case was more like that presented in *Magiera*, but concluded that it could not grant Diana's name change request because the parties previously stipulated to change the child's birth certificate to reflect Heriberto's surname. But the court's conclusion in this regard does not comport with the controlling Nevada caselaw governing name change requests. Regardless of whether the parents have previously agreed to the child's surname—a fact that Diana disputes here as she asserts she did not agree to remove her surname from the child's—the district court can consider a request to change the child's name. *Magiera*, 106 Nev. at 777, 802 P.2d at 7-8; *Petit*, 133 Nev. at 93, 392 P.3d at 631-32. If the parents have previously agreed to the child's surname, then the party seeking to change the child's name bears the burden of proof, rather than neither party having a burden of proof if there

has been no prior agreement as to the child's name. *Magiera*, 106 Nev. at 777, 802 P.2d at 7-8; *Petit*, 133 Nev. at 93, 392 P.3d at 632-33. And in either scenario, when deciding whether to change a child's name, the sole consideration is the best interest of the child. *Magiera*, 106 Nev. at 777, 802 P.2d at 7; *Petit*, 133 Nev. at 94, 392 P.3d at 632.

Although we note that the district court indicated on the record that it had continuing jurisdiction to deal with issues involving the child's best interest, the court ultimately concluded that the parties determined the name change was in the best interest of the child at the time they entered into the 2017 stipulation, and that the time to determine the child's best interest was then and between the parties, not at the time of the hearing on Diana's motion. Thus, based on the record before us, the district court misapplied the correct standard of law in deciding Diana's motion and we necessarily must reverse and remand the matter to the district court. *See Petit*, 133 Nev. at 92, 392 P.3d at 631.

To the extent the district court relied on *Rivero* for the proposition that the court will enforce a custody agreement that is not unconscionable, illegal, or in violation of public policy, as Heriberto argued, such that the court could not consider Diana's motion due to the stipulation, that was likewise an incorrect application of the law. While *Rivero* does state that parents are free to contract regarding child custody, once the parties come before the court on a motion to modify the custody agreement, the district court must apply Nevada law. *Rivero*, 125 Nev. at 429, 216 P.3d at 227 ("[P]arties are free to agree to child custody arrangements and those agreements are enforceable if they are not unconscionable, illegal, or in

violation of public policy. However, when modifying child custody, the district courts must apply Nevada child custody law, including NRS Chapter 125C and caselaw."). Thus, *Rivero* does not preclude the district court from considering Diana's motion to change the child's surname.

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[1]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Rhonda Kay Forsberg, District Judge
Fine Carman Price
Fuller Law Practice, PC
Eighth District Court Clerk

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[1]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.