IN THE SUPREME COURT OF THE STATE OF NEVADA

CYNTHIA KONICKE, F/K/A CYNTHIA GLOMB, Appellant/Cross-Respondent, vs. ANDREW GLOMB, Respondent/Cross-Appellant.	No. 39956
ANDREW GLOMB, Appellant, vs. CYNTHIA KONICKE, F/K/A CYNTHIA GLOMB, Respondent.	No. 39957

FILED

JUL 0 1 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal and cross-appeal from two post-decree district court orders. Eighth Judicial District Court, Family Court Division, Clark County; Steven E. Jones, Judge.

In February 2001, the district court granted appellant/cross-respondent Cynthia Konicke, f/k/a Cynthia Glomb, permission to relocate temporarily, pending an evidentiary hearing on permanent relocation, to Washington State with the parties' two minor children. Subsequently, the district court granted Cynthia permission to relocate permanently. It also awarded respondent/cross-appellant Andrew Glomb attorney fees in an amount equal to three years of child support payments and permitted Andrew to abate his child support for three years in satisfaction of the attorney fees award. The district court also assessed to Cynthia Andrew's travel costs for visiting the children and denied Cynthia's motion to prevent Andrew from traveling internationally with the minor children. The district court subsequently eliminated Andrew's requirement to post a

bond prior to traveling internationally with the children and slightly altered his visitation schedule.

Cynthia argues on appeal that the district court abused its discretion by (1) eliminating Andrew's obligation to pay child support over the next three years in lieu of ordering Cynthia to pay Andrew's attorney fees, (2) removing the condition for Andrew to post a bond while traveling internationally with the children, and (3) ordering Cynthia to pay all the children's travel costs for visitation.

Andrew cross-appeals, contending that the district court erred in (1) violating Andrew's due process rights when the court permitted Cynthia to relocate temporarily to Washington prior to an evidentiary hearing, (2) granting Cynthia's motion to relocate permanently after Cynthia created new evidence to support her relocation, (3) its application of good faith and sensible reasons for relocation under current law, (4) ignoring Cynthia's bad faith and perjury, and (5) reducing Andrew's timeshare and failing to grant him primary custody of the children.[1]

For the reasons discussed below, we affirm all aspects of the district court order.

DISCUSSION

Standard of review

As an introductory matter, we presume that the district court properly exercised its discretion in determining the best interests of the children.[2] "Matters of custody and support of minor children of parties to

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[1]Although Andrew argues that the district court erred, the appropriate standard of review is abuse of discretion.

[2]Trent v. Trent, 111 Nev. 309, 314, 890 P.2d 1309, 1312 (1995); Culbertson v. Culbertson, 91 Nev. 230, 233, 533 P.2d 768, 770 (1975).

a divorce action rest in the sound discretion of the trial court, the exercise of which will not be disturbed on appeal unless clearly abused."[3] Therefore, in reviewing the issues raised by the parties in the instant case, we review the district court's decisions for an abuse of discretion.

Cynthia's relocation to Washington

Andrew argues on appeal that the district court erred in allowing Cynthia to relocate because Cynthia allegedly never evidenced a good faith reason to move.[4] We disagree.

In Hayes v. Gallacher, we stated that the district court must first determine that the custodial parent wishing to leave Nevada has demonstrated good faith reasons for relocating.[5] In November 2001, the district court heard three days of testimony and argument related to Cynthia's permanent relocation, and properly placed the burden on Cynthia to demonstrate her good faith reasons for relocation. The district court stated that "there's a number of factors that [Cynthia] has to establish. If she does it, then she gets to move. If she doesn't, then she doesn't."

In her motion seeking temporary relocation, Cynthia told the district court that she needed to relocate to Washington to (1) help care for her dying father, (2) undergo shoulder surgery, and (3) obtain her teaching credentials from Central Washington University. At the time of the hearing on permanent relocation, Andrew presented substantial evidence

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[3]Culbertson, 91 Nev. at 233, 533 P.2d at 770.

[4]The proper standard of review is abuse of discretion.

[5]115 Nev. 1, 5, 972 P.2d 1138, 1140 (1999).

that Cynthia's father was not dying, she had not had shoulder surgery and she had not attempted to obtain her teaching credentials.

Cynthia's dying father

During the November 2001 evidentiary hearing, Cynthia testified that her father had diabetes, back problems, and fibromyalgia. Cynthia's father had blood sugar problems when she moved to Washington in March 2001. He was disoriented, could not control his bladder, and had prostate cancer. Cynthia helped care for her father by monitoring his food and medication intake. She believed, at the time of the temporary relocation, that her father was terminally ill and did not know how much longer he would live.

Cynthia also testified that her mother told her that her father was dying and that the doctors did not know what was wrong with her father at that time. Since the temporary relocation, evidence demonstrated that Cynthia's father was in remission and the district court found that his condition was not terminal. The district court concluded that whether or not the father was terminally ill was not a controlling factor because the evidence supported that he was seriously ill at the time of the temporary relocation request.

Shoulder surgery

At the November 2001 evidentiary hearing, Cynthia testified that in the past, she had problems with her shoulder joint. When Cynthia worked at the Bellagio Hotel and Casino as a cocktail waitress, she would hold a tray with ten to sixteen drinks on it using her left hand. Cynthia took medications for the pain, and a doctor suggested that she have surgery to alleviate the pain. Cynthia took extensive time off work because of her shoulder problems.

Cynthia testified that she never did have shoulder surgery because she would have a permanent scar and the doctor would not guarantee that surgery would cure her problem. Cynthia testified that her shoulder pain improved because she was no longer lifting trays as a waitress. Even though Cynthia did not undergo the shoulder surgery, we conclude that the district court could have reasonably found that Cynthia's circumstances for having surgery changed and that she acted in good faith at the time of the request for temporary relocation.

Cynthia's education

Cynthia testified that she could attend Central Washington University to further her education. After moving to Washington, Cynthia discovered that the master's program she wanted to enter was offered only every other year and the program would not start until Fall 2002. Cynthia also stated that she did not immediately enroll in classes because she was unsure if she would be able to stay in Washington. Cynthia further testified that after obtaining a master's degree, she would be able to procure employment in Washington. On cross-examination, Cynthia testified that she would enroll in school in September 2002.

When the court questioned Cynthia as to why she had not enrolled in the prerequisite course, Cynthia testified that she had been under a lot of stress with her father, the court battle, and her new job. Cynthia further declared that with everything going on in her life, she did not have the time to pursue her education. Cynthia had asked the district court's permission to relocate based in part on her testimony that she would pursue her education; however, Cynthia failed to take any courses. Cynthia apologized to the court for not having enrolled in school and

stated that she wanted to pursue her education, but was unable to do so for various reasons.

Although the district court expressed concern over the change in circumstances since the request for temporary relocation pending a hearing was granted, it concluded that Cynthia had made the request in good faith and not for the purpose of frustrating Andrew's relationship with the children. The district court then concluded, based upon evidence presented by Cynthia regarding her current status and reasons for remaining in Washington permanently, including better living and job opportunities, that Cynthia had a good faith reason for remaining in Washington. Because substantial evidence supports this conclusion, the district court did not abuse its discretion.

Having concluded that Cynthia had a good faith reason for the permanent relocation, the district court then considered whether the move was in the best interests of the children. We have stated that "the polestar for judicial decision is the best interests of the child."[6]

Under Schwartz v. Schwartz, the district court must determine whether the custodial parent demonstrated that an actual advantage will be realized by both the parent and the children by moving to the new location.[7] Once the custodial parent has met this burden, the district court must then consider the following five factors: (1) whether the move will likely improve the quality of life for the children and parent; (2) whether the custodial parent's motives are to frustrate visitation with

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[6]Schwartz v. Schwartz, 107 Nev. 378, 382, 812 P.2d 1268, 1270-71 (1991).

[7]Id. at 382, 812 P.2d at 1271.

the noncustodial parent; (3) whether the custodial parent will comply with visitation orders; (4) whether the noncustodial parent's opposition is honorable; and (5) whether there will be an adequate alternative visitation schedule available to preserve the parental relationship.[8]

Additionally, the district court may permit a custodial parent to relocate if the district court determines the move will likely improve the lifestyle of the custodial parent and the children.[9] This court listed additional factors that the district court may consider in determining whether a party's lifestyle will improve as a result of the move. They are

> (1) whether positive family care and support, including that of the extended family, will be enhanced; (2) whether housing and environmental living conditions will be improved; (3) whether educational advantages for the children will result; (4) whether the custodial parent's employment and income will improve; (5) whether special needs of a child, medical or otherwise, will be better served; and (6) whether, in the child's opinion, circumstances and relationships will be improved.[10]

In its November 19, 2001, decision, the district court also stated that it considered the Schwartz factors in its determination. We now turn to a discussion of those factors.[11]

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[8]Id. at 383, 812 P.2d at 1271.

[9]Id.

[10]Id.

[11]Two Schwartz factors, (1) whether the custodial parent will comply with visitation orders and (2) whether the noncustodial parent's opposition was honorable, were not disputed by either party. We therefore conclude

continued on next page . . .

Quality of life

During the evidentiary hearing, Cynthia testified regarding the activities, environment, recreation, and schooling available to her and the children in Washington. Cynthia testified that Wedge Mountain, Alpine Lakes, and the Enchantments provided hiking opportunities. Cynthia also offered brochures of the Washington area where her parents reside and stated that the Columbia River and Confluence Park were only five minutes away. The district court admitted brochures of the Washington area where Cynthia's parents reside. These brochures showed some recreational opportunities available there. Both children were involved in the community soccer teams. The children could also be involved with skiing at Mission Ridge, located twenty minutes away. Cynthia also testified about the Chelan Street Workshop winter art program that is available for the children.

Living conditions

Cynthia and the children live in the basement of her parents' home. Cynthia testified that the house is located on approximately one and one-quarter acres. The basement has its own entrance, and there are three bedrooms with a living room and a bathroom. In 2001, Cynthia's daughters, aged eight and six, were attending school and had made friends in the neighborhood. Cynthia paid no rent or utilities in Washington, her expenses were reduced because Cynthia and her children shared the food with her parents, and there was no day care expense.

. . . continued

that these issues are not properly before this court and we will not discuss them.

Schooling

Cynthia regularly volunteered with her children's classes on Wednesday afternoons and believed that the children had an advantage in Washington because of extensive music and academic programs. She also testified that there was a stronger parent-teacher organization in Wenatchee compared to Las Vegas.

Employment

While in Las Vegas, Cynthia worked as a cocktail waitress. In Washington, Cynthia was able to gain employment with KOHO radio station. Cynthia's new job allowed her to help her children with homework and put them to bed at night.

Based upon the evidence, we conclude that the district court could reasonably determine that Cynthia's and her children's lives would be substantially improved by moving to Washington. Therefore, the district court did not abuse its discretion in finding that relocating to Washington would improve their lifestyle.

Frustrate visitation

During the November 2001 evidentiary hearing, Cynthia was asked, "Is it your intention to relocate to Wenatchee for the purpose of frustrating the children's father's visitation with the children?" Cynthia answered, "No, it is not." Cynthia then testified that she had done everything in her ability to obey court orders regarding visitation.

The district court found that while Cynthia would not "be disappointed in the least if her relocation resulted in Andrew not being able to maintain a relationship with his children, the Court does not find that this is the motivating factor behind her request to relocate." Based on the totality of the evidence, including Cynthia's testimony, we conclude

that substantial evidence supports the district court's finding that Cynthia was not attempting to frustrate Andrew's visitation.

Adequate alternative visitation schedule

The district court found that a "reasonable alternative visitation" schedule was available to Andrew. The district court granted Andrew Thanksgiving holiday breaks on even-numbered years. During odd-numbered years, Andrew was granted the Veteran's Day holiday. Additionally, the court equally divided the Christmas holiday breaks; granted Andrew three-day weekends in January, February, March, May, and October; and awarded Andrew the entire spring break. Finally, the district court granted Andrew the entire summer vacation commencing two weeks after school is dismissed and concluding two weeks before schools begins.

The district court stated that "based upon the times the children can spend with their father, coupled with the ease of travel and minimal expense . . . the Court finds that such an arrangement is available." The district court's finding of a reasonable alternative visitation schedule is strikingly similar to the one upheld in Schwartz.[12] The district court did not abuse its discretion in permitting Cynthia to relocate to Washington.

Andrew's due process rights

Andrew contends that the district court violated his due process rights by allowing Cynthia to relocate temporarily. We disagree.

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[12]Schwartz v. Schwartz, 107 Nev. 378, 384, 812 P.2d 1268, 1272 (1991).

Procedural due process consists of having reasonable notice and an opportunity to be heard.[13] "Although Nevada is a notice pleading jurisdiction, a party must be given reasonable advance notice of an issue to be raised and an opportunity to respond."[14]

In the instant case, Andrew had notice of Cynthia's motion to relocate to Washington. Andrew requested oral argument and filed an opposition to the relocation motion. Andrew states in his brief that he, or his attorney, was present at the in-chambers meeting regarding Cynthia's temporary relocation to Washington. Because Andrew knew of the relocation motion, opposed the relocation, and attended the in-chambers hearing on the temporary relocation, Andrew's due process rights were not violated.

Temporary relocation

Andrew contends that the district court failed to use the Schwartz factors when it permitted Cynthia to relocate temporarily to Washington. We conclude that this issue is moot.

A writ of mandamus is proper to challenge temporary district court orders.[15] In the case at bar, the district court found that "the criteria that needs to be determined in the relocation issues appear to be satisfied." Citing to Schwartz and other cases, the district court temporarily granted Cynthia permission to relocate. The properly sought

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[13]Las Vegas Downtown Redev. Agency v. Pappas, 119 Nev. ___, ___, 76 P.3d 1, 15 (2003).

[14]Anastassatos v. Anastassatos, 112 Nev. 317, 320, 913 P.2d 652, 653 (1996).

[15]In re Temporary Custody of Five Minors, 105 Nev. 441, 443, 777 P.2d 901, 902 (1989).

remedy for a temporary order is a writ of mandamus; however, Andrew did not seek writ relief. Andrew conducted discovery and appealed from the permanent relocation order. Because the temporary relocation order has now been superceded by the permanent relocation order, this argument is moot. Even if this issue was not moot, the district court's decision to allow Cynthia to relocate temporarily to Washington was reasonable because Cynthia believed her father was dying. Accordingly, we will not address this issue further.

Child custody

Andrew argues that the district court erred in failing to grant his request for primary physical custody.[16] We disagree.

This court has held that "[m]atters of custody and support of minor children of parties to a divorce action rest in the sound discretion of the trial court, the exercise of which will not be disturbed on appeal unless clearly abused."[17] Additionally, the district court should determine the issue of child custody based on the welfare of the child and when the parents' circumstances have been materially altered.[18]

In the instant case, the district court determined that custody was at issue during the October 2, 2001, hearing. However, the district court did not see fit to change the custody award to Andrew. Additionally, Andrew has failed to submit additional arguments in his brief as to why the district court abused its discretion in not giving him sole custody.

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[16]The appropriate standard of review is abuse of discretion.

[17]Culbertson v. Culbertson, 91 Nev. 230, 233, 533 P.2d 768, 770 (1975).

[18]Murphy v. Murphy, 84 Nev. 710, 711, 447 P.2d 664, 665 (1968).

Cynthia and her attorney advised the district court that the Las Vegas Municipal Court convicted Andrew of domestic violence on March 18, 1997. Andrew's domestic violence conviction raised a rebuttable presumption that it is not in the children's best interests that Andrew be awarded sole custody.[19] Based on the record, we conclude that the district court did not abuse its discretion in denying Andrew primary custody of the children.

Reduction of Andrew's visitation

Andrew argues that the district court erred in reducing his visitation.[20] We disagree.

As mentioned above, one of the Schwartz factors the district court uses in determining relocation is whether there is an adequate alternative visitation schedule available.[21] "A reduction in visitation privileges is not necessarily determinative."[22] In Schwartz, the father relocated to Pennsylvania from Nevada.[23] The district court in Schwartz determined that the noncustodial parent could appropriately preserve her relationship with the children through extended summer visitation instead of weekend visits.[24] We reiterated the district court's conclusion, stating that "an expanded visitation period during the summer may serve

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[19]NRS 125C.230.

[20]Abuse of discretion is the appropriate standard of review.

[21]Schwartz, 107 Nev. at 383, 812 P.2d at 1271.

[22]Id. at 384-85, 812 P.2d at 1272.

[23]Id. at 381, 812 P.2d at 1270.

[24]Id. at 385, 812 P.2d at 1272.

as an effective substitute for weekend visits that can provide a realistic opportunity to nurture and renew the mother-child bond."[25]

In the instant case, the district court provided adequate alternative visitation to Andrew. In the November 19, 2001, decision, the district court granted Andrew visitation during three-day weekends in January, February, March, May, and October. The district court also awarded Andrew visitation during the entire spring break and the entire summer vacation, commencing two weeks after school is dismissed and concluding two weeks before school begins. The district court also ordered visitation for Andrew on alternating Thanksgiving holiday breaks on even-numbered years and Veteran's Day holidays on odd-numbered years. Cynthia and Andrew split the Christmas holiday breaks. The district court found "that this sufficiently allows reasonable and alternative visitation to the schedule that [Andrew] previously enjoyed."

The district court also ordered Cynthia to schedule and pay for the visitation. After more disputes between the parties, on April 3, 2002, the district court modified the visitation schedule. The court determined that it was not in the best interests of the children to undergo monthly travel. The court changed the date of summer visitation with Andrew to start the day after school is dismissed and to conclude two weeks before school begins. The district court eliminated Andrew's three-day weekend visitations to minimize the hardship on the children. However, the district court did allow Andrew to visit the children in Washington during one weekend per month if he provides thirty days written notice to Cynthia.

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[25]Id.

The district court granted Andrew the entire summer vacation, holidays, and optional visits during the school year. Therefore, the district court did not abuse its discretion because it provided an adequate alternative visitation schedule pursuant to the Schwartz standard.

International travel

Cynthia argues that Andrew should not be allowed to travel internationally with the children because he previously violated other district court orders. We disagree.

The district court "may order [a] parent to post a bond if the court determines that the parent poses an imminent risk of wrongfully removing or concealing the child outside the country."[26] The Legislature used the word "may" instead of "must" or "shall" to indicate that it is discretionary. The district court originally required Andrew to post a $75,000.00 bond to ensure his return from Poland, check in with the United States consulate within forty-eight hours of arrival, provide Cynthia with phone numbers for contact, and provide Cynthia with a written itinerary. In February 2001, the district court lowered the bond amount to $37,500.00. Later, the district court completely removed the bond requirement. The other requirements were not eliminated.

Cynthia and Andrew have repeatedly argued over Andrew traveling to Poland with the children to visit Andrew's grandfather. During the November 2001 hearing, Cynthia testified that the children traveled through Slovakia during the last international trip; however, Andrew did not indicate this in the travel itinerary. Cynthia also testified

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[26]NRS 125.510(8)(b).

that the children visited Andrew's mother in New York when they were supposed to be in Poland.

Andrew effectively rebutted Cynthia's allegations that he attempted to obtain Polish citizenship for the children. Andrew testified that Cynthia disobeyed court orders and that she attempted to keep Andrew from going to Poland with the children. Andrew also testified that he never wrongfully withheld the children during his visitation periods.

There is evidence and testimony that would allow the district court to eliminate Andrew's bond requirement to travel to Poland with the children. Andrew testified that during his 2001 trip to Poland, the $37,500.00 bond posted one day late because the bank waited for the funds to clear. Andrew believed that it posted on time. Andrew was two days off on the travel itinerary he provided to Cynthia because his tickets were for departure on June 20 instead of June 22. Andrew did not inform Cynthia of the change because he was excited about the trip and ran out of time. After the Poland trip, Andrew returned the children to Cynthia and thought she would now trust him.

Based on this evidence and testimony, the district court eliminated Andrew's requirement to post a bond prior to traveling internationally with the children. The district court did not eliminate Andrew's requirement to check in with the United States Consulate when traveling internationally, but it did grant Andrew an additional day to check in. We conclude that there is sufficient evidence that the district court could believe that Andrew was not a risk to flee with the children to Poland. Therefore, the district court did not abuse its discretion.

Alleged child support abatement

Cynthia argues on appeal that the district court modified child support based on an attorney fees award instead of factors outlined in

NRS 125B.080(9). We disagree. Although the district court's order could have been more clearly written, the record reflects that the district court awarded Andrew attorney fees equal to the amount of three years of child support. Because this would have resulted in the parties simply exchanging payments, the district court then determined that Andrew would not make child support payments during the three-year period, thus satisfying the attorney fee award.

In divorce proceedings, an award of attorney fees is within the district court's sound discretion.[27] In the case at bar, Andrew spent a considerable amount of money to show that (1) Cynthia had not received shoulder surgery; (2) Cynthia had not enrolled in school to further her education; and (3) Cynthia's father was not terminally ill. The district court also outlined the specific reasons that it awarded fees. The order stated that "the Court was not impressed with [Cynthia's] representations and/or demeanor. Accordingly, the Court concludes that [Andrew] should be compensated for the fees that he had to incur." We conclude the district court did not abuse its discretion in awarding attorney fees and providing a practical method of resolving the offsetting payment issue.

Burden of visitation expenses

Cynthia contends that she should not have to bear all costs for the children's travel to Las Vegas to visit Andrew. We disagree.

The district court has discretion to determine matters of child custody and support.[28] NRS 125B.080(9)(i) allows district courts to take

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[27]Schwartz v. Schwartz, 107 Nev. 378, 386, 812 P.2d 1268, 1273 (1991).

[28]Culbertson v. Culbertson, 91 Nev. 230, 233, 533 P.2d 768, 770 (1975).

costs of transportation into consideration when adjusting child support. The Legislature specifically provided that a child's transportation costs for visitation are relevant when the custodial parent moves.[29] Therefore, district courts have discretion to allocate travel costs for the minor children.

After the evidentiary hearing, the district court ordered Cynthia to be responsible for the costs and scheduling of visitation. Cynthia failed to argue in her brief or reply brief how the district court abused its discretion to assign all visitation travel expense to her. Cynthia only claims that her bearing the visitation expenses is an abuse of discretion. We conclude that Cynthia's argument is without merit.

CONCLUSION

We conclude that the district court did not abuse its discretion in any aspect concerning Andrew's or Cynthia's appeal. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Becker, J.
Becker

Agosti, J.
Agosti

Gibbons, J.
Gibbons

[29]Wallace v. Wallace, 112 Nev. 1015, 1021, 922 P.2d 541, 544 (1996).

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