IN THE SUPREME COURT OF THE STATE OF NEVADA

MELISSA V. STEARNS,
Appellant,
vs.
MICHAEL J. STEARNS,
Respondent.

No. 41479

FILED

APR 25 2005

JANETTE M BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying an NRCP 60(b) motion to set aside a divorce decree, denying appellant's motion to relocate with the children and to modify the child custody arrangement, and granting respondent's motion to modify the child custody arrangement. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

With regard to appellant's NRCP 60(b) motion to set aside the divorce decree, appellant contends that the six-month period began to run when the notice of entry was filed. Under the version of NRCP 60(b)(1) in effect when the appellant filed her motion, however, a motion made due to mistake, inadvertence, surprise, or excusable neglect had to be brought "not more than six months after the judgment, order, or proceeding was

entered or taken."[1] The district court correctly concluded that appellant's motion was untimely as it was filed outside this six-month parameter under NRCP 60(b).

As for the custody issues, the district court has broad discretionary power in determining questions of child custody, and this court will not disturb the district court's determinations absent a clear abuse of discretion.[2] When resolving custody issues involving joint physical custody, the district court only has to consider the child's best interests.[3] Additionally, "[i]t is presumed that a trial court has properly exercised its discretion in determining a child's best interest[s]."[4]

Here, in awarding respondent primary physical custody, the court stated that it was modifying "the decree in the best interest of the children." Moreover, the district court determined that since the parties shared physical custody, the Schwartz v. Schwartz[5] factors did not apply.

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[1]NRCP 60(b) was amended January 1, 2005, and currently provides that the six-month period in which to file a motion to set aside a judgment or order begins to run from "the date that written notice of entry of the judgment or order was served."

[2]See Wallace v. Wallace, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996).

[3]Truax v. Truax, 110 Nev. 437, 874 P.2d 10 (1994) (concluding that only the child's best interest need be considered by the district court in situations involving joint physical custody).

[4]Wallace, 112 Nev. at 1019, 922 P.2d at 543.

[5]107 Nev. 378, 383, 812 P.2d 1268, 1271 (1991) (providing that the district court must consider: (1) how likely the move will improve the moving parent's and children's quality of life; (2) whether the moving

continued on next page . . .

Even so, the court stated that the appellant did not offer sufficient reasons to move with the children to Pennsylvania. And the district court expressed concern regarding the maternal grandparents.

Appellant contends that she was the de facto primary physical custodian and thus the district court should have applied the Murphy v. Murphy[6] test to determine if changed circumstances warranted a change in custody. Appellant further asserts that the court failed to make express findings as to the children's best interests. The Murphy test only applies when one parent has primary physical custody.[7] Thus, the district court properly relied on the best interest test when it awarded respondent primary physical custody of the children.[8] Additionally, we presume that

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. . . *continued*
parent's motives are honorable; (3) whether the custodial parent will comply with the court's visitation orders; (4) whether the noncustodial parent's motives for resisting the move are honorable; and (5) whether, if the move is approved, the noncustodial parent will have a realistic opportunity to exercise visitation such that the parent's relationship with the children will be adequately fostered).

[6]84 Nev. 710, 711, 447 P.2d 664, 665 (1968) (providing that the district court can consider changing custody if the circumstances of the parents have been materially altered, and the child's welfare would be substantially enhanced by the change).

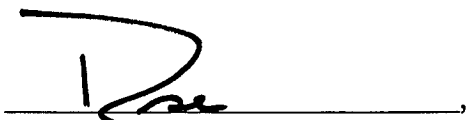
[7]See Truax, 110 Nev. 437, 874 P.2d 10.

[8]Id. Since we affirm the district court's order as to custody, we need not address appellant's additional contentions regarding her motion to relocate with the children.

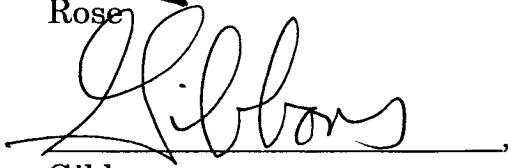
the district court properly exercised its discretion in determining the children's best interests.[9]

Since the district court did not abuse discretion when it denied appellant's NRCP 60(b) motion, and when it granted respondent's motion to change the child custody arrangement, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Rose



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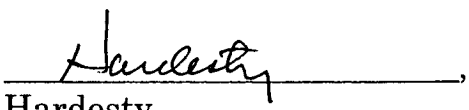
Gibbons



_____, J.
Hardesty

cc: Hon. Robert W. Lane, District Judge
Thomas F. Christensen, Settlement Judge
Cuthbert E.A. Mack
Minicozzi & Associates, Ltd.
Nye County Clerk

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[9]Wallace, 112 Nev. at 1019, 922 P.2d at 543.