

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHANE H. CHRISTIAN,  
Appellant,  
vs.  
RESSEL CHRISTIAN, N/K/A RESSEL  
YU,  
Respondent.

No. 42774 **FILED**

NOV 16 2005

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

ORDER VACATING JUDGMENT AND REMANDING

This is an appeal from a district court order granting Respondent permission to relocate outside of Nevada with her two children. Second Judicial District Court, Family Court Division, Washoe County; Deborah Schumacher, Judge.

Shane Christian's (Shane) and Ressel Yu's (Ressel) divorce settlement included a child custody agreement, which provided for joint legal and physical custody of their two minor children as long as Shane and Ressel lived in northern Nevada. Ressel now seeks, under NRS 125C.200, to relocate to Valencia, California.

The district court determined that because Ressel has physical custody of the children during the week, while Shane has physical custody on weekends, Ressel was the de facto physical custodian and has been for the past three years. The district court then analyzed and granted Ressel's request to relocate as that of a primary physical custodian under NRS 125C.200. We will not disturb the district court's findings on appeal absent a clear abuse of discretion.<sup>1</sup> However, the district court's legal

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<sup>1</sup>See Flynn v. Flynn, 120 Nev. 436, 440, 92 P.3d 1224, 1227 (2004) (citing Culbertson v. Culbertson, 91 Nev. 230, 233, 533 P.2d 768, 770 (1975)).

conclusions are reviewed de novo and without deference to the findings of the lower court.<sup>2</sup>

Since the district court's decision, we have provided guidance in Potter v. Potter<sup>3</sup> regarding situations when one parent in a joint physical custody arrangement desires to move outside of Nevada with the minor children. In Potter, as in this case, one parent in a joint physical custody arrangement desired to move out of Nevada and petitioned for relocation under NRS 125C.200. However, as written, NRS 125C.200 only applies to a parent with primary physical custody. Therefore, a parent with joint physical custody must first file a motion for change of custody under NRS 125.510(2). The district court then determines, under NRS 125.510(2) and Truax v. Truax,<sup>4</sup> "whether the best interests of the child[ren] are better served" by living with the moving parent outside of Nevada or by remaining in Nevada with the nonmoving parent.<sup>5</sup>

In contrast to the children's best interest standard, the district court below applied a de facto custody standard to determine whether joint physical custody should be changed. The de facto custody standard

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<sup>2</sup>Blaich v. Blaich, 114 Nev. 1446, 1447-48, 971 P.2d 822, 823 (1998) (citing SIIS v. United Exposition Services Co., 109 Nev. 28, 30, 846 P.2d 294, 295 (1993)).

<sup>3</sup>121 Nev. \_\_\_, \_\_\_ P.3d \_\_\_ (Adv. Op. No. 60, September 22, 2005).

4110 Nev. 437, 874 P.2d 10 (1994).

<sup>5</sup>Potter, 121 Nev. at \_\_\_, \_\_\_ P.3d at \_\_\_, Adv. Op. No. 60, at 2. Shane argues that the standard in Murphy v. Murphy, 84 Nev. 710, 447 P.2d 664 (1968), should apply. However, as we held in Truax, 110 Nev. at 439, 874 P.2d at 11, Murphy only applies to modify a primary custody agreement.

applied by the district court focuses on the parents' actual, physical custody of the children. Thus, regardless of the divorce custody arrangement, if a parent actually has primary physical custody, that parent is deemed the de facto primary physical custodian. This standard ignores the best interests of the children and is, therefore, an incorrect standard.

The children's best interests standard focuses instead on whether the children will be better off in the new location. When considering whether a change in physical custody is in the children's best interests, the district court can consider

whether the moving parent will be relocating outside of Nevada with the child[ren] if he or she obtains primary custody. The district court may also consider, among other factors, the locales of the parents and whether one parent had de facto primary custody of the child[ren] prior to the motion. The moving party has the burden of establishing that it is in the child[ren]'s best interest to reside outside of Nevada with the moving parent as the primary physical custodian.<sup>6</sup>

Once the district court determines that it is in the children's best interests to have the joint physical custody arrangement altered to a primary physical custody arrangement, then the parent with primary physical custody may petition for relocation under NRS 125C.200.

A petition for relocation under NRS 125C.200 is controlled by Schwartz v. Schwartz<sup>7</sup> and its progeny. The custodial parent must first

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<sup>6</sup>Potter, 121 Nev. at \_\_\_, \_\_\_ P.3d at \_\_\_, Adv. Op. No. 60, at 7-8.

<sup>7</sup>107 Nev. 378, 812 P.2d 1268 (1991).

demonstrate “a sensible, good faith reason for the move”<sup>8</sup> and that a reasonable alternative visitation schedule is possible.<sup>9</sup> Then, the noncustodial parent has the burden to show that the move is not in the children’s best interests.<sup>10</sup> In determining whether the move is in the children’s best interests, the district court should apply the non-inclusive Schwartz factors:

- (1) whether the move will likely improve the quality of life for the child and the parent,
- (2) whether the custodial parent's motives are to frustrate visitation with 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.<sup>11</sup>

If the district court determines that the child’s best interests are served by relocation, then it should grant the petition for relocation.

In this case, the district court did not determine whether the children’s best interests were served by a change in physical custody when it determined that Ressel was the de facto physical custodian.

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<sup>8</sup>Blaich, 114 Nev. at 1452, 971 P.2d at 826 (1998) (quoting Jones v. Jones, 110 Nev. 1253, 1266, 885 P.2d 563, 572 (1994)).


<sup>9</sup>Flynn, 120 Nev. at 442, 92 P.3d at 1228.

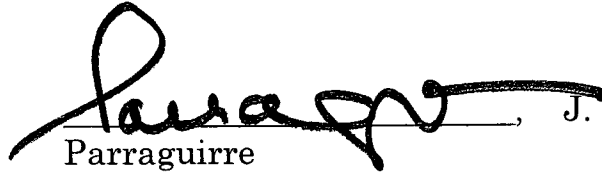
<sup>10</sup>Id.

<sup>11</sup>Id. at 441, 92 P.3d at 1227 (citing Schwartz, 107 Nev. at 383, 812 P.2d at 1271).

Accordingly, we ORDER the judgment of the district court VACATED AND REMAND this matter to the district court for proceedings consistent with this order.

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. Deborah Schumacher, District Judge, Family Court Division  
Rodney E. Sumpter  
Jonathan H. King  
Washoe District Court Clerk