

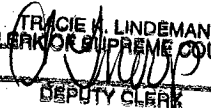
IN THE SUPREME COURT OF THE STATE OF NEVADA

MELANIE WEIGHT, A/K/A MELANIE
SWAFFORD,
Appellant,
vs.
IAN CHRISTOPHER WEIGHT,
Respondent.

No. 49314

FILED

OCT 10 2008

TRACIE H. LINDEMAN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order in a divorce and child custody proceeding. Eighth Judicial District Court, Family Court Division, Clark County; Terrance P. Marren, Judge.

Facts

Appellant filed a divorce complaint in August 2005. She later petitioned the district court for permission to relocate to Utah with the parties' children. In July 2006, the district court entered an order that denied appellant's relocation petition and provided that the parties would continue with the joint legal and physical custody arrangement that had been in place since their separation. In particular, the district court found that allowing appellant to relocate to Utah with the children would be extremely disruptive to respondent's relationship with the children and that the parties did not have the financial resources that would allow respondent to exercise reasonable visitation with the children if they were permitted to move. Pointing out that appellant was a qualified teacher who had not pursued employment opportunities in Las Vegas and that such jobs were not only available in Las Vegas, but also paid more than comparable positions in Utah, the district court also found that the move likely would not improve appellant's or the children's quality of life. Appellant later moved the district court, under NRCP 59(a), for a new trial on the child custody issues.

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On December 11, 2006, before resolving appellant's NRCP 59(a) motion, the district court entered a divorce decree, incorporating the July 2006 order as to the child custody arrangement. Appellant then filed a motion in the district court asking it to reconsider the child custody arrangement set forth under the divorce decree. After a hearing, the district court entered an order denying appellant's motion for reconsideration and denying her earlier NRCP 59(a) motion. Later, since the divorce proceedings had been bifurcated with regard to custody and property matters, the district court, on November 6, 2007, entered an order adopting the parties' stipulation to distribute property and debt. Thereafter, appellant timely appealed from the November 2007 order, challenging the custody and relocation decisions.

Discussion

On appeal, appellant argues that the district court abused its discretion by failing to properly apply the best interests of the children standard. In particular, appellant asserts that the district court did not correctly address the presumption against a joint physical custody award that applies when the evidence establishes that an act of domestic violence occurred.¹ She contends that, instead, the court made its own

¹Appellant, on page five of her fast track statement, asserts that the fast track appeal process does not provide her with a "meaningful opportunity to properly analyze the issues" presented in this appeal. She then requests that the "normal briefing process be ordered." Appellant, however, never filed a motion requesting extended briefing. See NRAP 3E(f)(2); NRAP 27(a). Instead, appellant filed a single-spaced fast track statement that appears to be in a font size smaller than ten characters per inch. Thus, not only did appellant fail to comply with NRAP 32(a) and (b)'s formatting requirements, she also, without leave of this court, expanded the length of her fast track statement beyond what is allowed under NRAP 3E(d)(1). Nevertheless, we have considered appellant's fast

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rule by concluding that the domestic violence here was an isolated incident, apparently provoked by appellant's infidelity. According to appellant, the court thus blamed her for causing the domestic violence. Regardless, she maintains that the court failed to make a proper assessment concerning the primary physical aggressor and failed to assess the evidence in accordance with the statutory definition of domestic violence. Appellant also argues that primary physical custody in her favor and permission to relocate out of state should have been granted because she has been the children's primary caregiver.

Child custody matters rest in the district court's sound discretion,² and this court will not disturb the district court's custody decisions absent a clear abuse of that discretion.³ This court nevertheless must be satisfied that the district court's determination was made for appropriate reasons.⁴ This court will not set aside the district court's factual findings in a custody matter if they are supported by substantial evidence.⁵

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track statement in resolving this appeal. To the extent that she is requesting full briefing, however, that request is denied. Appellant's counsel is cautioned that any further instances of noncompliance with this court's procedural rules will be grounds for sanctions. See Smith v. Emery, 109 Nev. 737, 743, 856 P.2d 1386, 1390 (1993) (imposing sanctions on appellate counsel for noncompliance with the Nevada Rules of Appellate Procedure).

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

³Sims v. Sims, 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993).

⁴Id.

⁵Ellis v. Carucci, 123 Nev. ___, 161 P.3d 239 (2007).

Domestic violence as a factor in determining children's best interests

In determining custody, the sole judicial consideration is the children's best interests.⁶ Under NRS 125.480(4)(k), the district court must, in determining the children's best interests, consider whether either parent has engaged in domestic violence. If, after an evidentiary hearing, the district court finds by clear and convincing evidence that either parent has engaged in one or more acts of domestic violence against the other parent, a rebuttable presumption arises that a joint custody arrangement is not in the best interests of the children.⁷

In this case, after an evidentiary hearing, the district court found that, although an incident of domestic violence occurred, the evidence and testimony revealed that it was isolated and that both parties shared responsibility for it. Although the court acknowledged that a domestic violence incident occurred, it determined that the parties equally were responsible and that it thus could not be considered a factor for or against either party in terms of awarding custody. Appellant asserts that the court blamed her for causing the incident, but the record does not support such an assertion. The district court pointed out that appellant's admission concerning an extramarital affair precipitated the incident and testimony from both appellant and respondent support that finding. The court's determination that both parties shared responsibility for the incident, however, is unrelated to that finding; instead, in making its determination, the court considered conflicting testimony and

⁶NRS 125.480(1).

⁷NRS 125.480(5).

evidence, including a police report and photographs, concerning who was the aggressor in the incident. It is not this court's role to reweigh evidence or testimony.⁸ After considering all of the evidence, the court then determined that, under NRS 125.480(1), continuing the joint physical custody arrangement that had been in place during the ten months that the parties had been separated was in the best interests of the children. We perceive no abuse of discretion in that determination.

Appellant's motion to relocate

After pointing out that permanent joint physical custody had not been ordered at the time when appellant filed her relocation motion and that the parties instead were operating under a temporary shared custody agreement, the district court determined that the rule set forth in Potter v. Potter⁹ did not directly apply. The district court therefore considered appellant's relocation petition under NRS 125C.200, analyzing the request in accordance with the factors set forth in Schwartz v. Schwartz.¹⁰ Applying the Schwartz factors, the court found that if the

⁸Ellis, 123 Nev. at ___, 161 P.3d at 244 (pointing out that it is not within the purview of an appellate court to weigh conflicting evidence or assess the credibility of the witnesses; instead, such evaluations are left to the district court).

⁹121 Nev. 613, 618, 119 P.3d 1246, 1249 (2005).

¹⁰107 Nev. 379, 383, 812 P.2d 1268, 1271 (1991) (providing that the district court must consider (1) whether the move will likely improve the moving parent and child's quality of life; (2) whether the moving 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 so that the parent's relationship with the child will be adequately fostered).

move was approved, respondent would not have a realistic opportunity to exercise visitation with the children in order to foster a quality relationship with them. The court also found that the move was not necessary for employment or financial reasons and that it likely would not improve appellant's or the children's quality of life. Finally, the court found that respondent's motives for resisting the move were honorable and that appellant's motives for moving were unclear. Thus, the court determined that appellant did not meet her burden of establishing a good faith, sensible reason for moving.¹¹ Accordingly, the district court denied appellant's motion to relocate and ordered the joint physical custody arrangement to remain in effect.

Although the district court concluded that Potter did not apply, we disagree. Under Potter, when a joint physical custody arrangement exists, or when custody has not been established, the parent seeking to relocate outside of Nevada with the children first must file a motion for primary physical custody of the children for the purposes of relocating.¹² In considering the motion, the district court must apply the best interests of the children standard.¹³ Nevertheless, upon reviewing the record and considering the parties' arguments, we conclude that the district court acted within its discretion by awarding joint physical custody and by denying appellant's motion to relocate with the children.

¹¹Jones v. Jones, 110 Nev. 1253, 1261, 885 P.2d 563, 569 (1994).

¹²121 Nev. at 618, 119 P.3d at 1249.

¹³Id. (citing Truax v. Truax, 110 Nev. 437, 874 P.2d 10 (1994) (explaining that, when resolving custody issues in cases when the parents have joint physical custody, the district court's sole consideration is the children's best interests)).

Although the district court denied appellant's motion to relocate based on NRS 125C.200, it also made findings supported by substantial evidence that continued joint physical custody was in the children's best interests. Thus, under Potter, it was appropriate for the district court to deny appellant's relocation motion, since relocation with the children is an option only when the parent wishing to relocate has primary physical custody.¹⁴ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁵

J. Hardesty, J.
Hardesty

J. Parraguirre, J.
Parraguirre

J. Douglas, J.
Douglas

¹⁴Id. at 618 & n.12, 119 P.3d at 1249 & n.12.

¹⁵Although, appellant, in her fast track statement, indicates that one of the issues on appeal is whether she should have been awarded primary physical custody because she was the children's primary caregiver during the marriage, she makes no legal argument to support her position on appeal. Regardless, the district court rejected appellant's argument that she should be the primary custodian of the children, concluding that the parties had shared physical custody equally since their separation and that the children were doing well under that arrangement. That finding is supported by substantial evidence, and we will not disturb the district court's decision on appeal.

cc: Chief Judge, Eighth Judicial District
Hon. Terrance P. Marren, Senior Judge, Family Court Division
Robert E. Gaston, Settlement Judge
Randall J. Roske
Donn W. Prokopius, Chtd.
Eighth District Court Clerk