IN THE SUPREME COURT OF THE STATE OF NEVADA

KELLY WOOD,
Appellant,
vs.
SHANNON E. WOOD,
Respondent.

No. 53777

FILED

MAY 26 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order modifying custody of a minor child, granting a motion to relocate with the minor child, and awarding additional monies to respondent from the refinance of the marital residence. Eighth Judicial District Court, Family Court Division, Clark County; Steven E. Jones, Judge.

Appellant Kelly Wood and respondent Shannon Wood married in 1998 and divorced in 2007. They have one child. In 2007, they entered into a settlement agreement that divided their marital assets and provided for shared joint physical and legal custody of the child.

In 2008, Shannon filed a motion for primary custody and permission to relocate with the child to Texas. Shannon also sought $16,401.91 from Kelly. She argued that this amount was due under the parties' settlement agreement in order to fully compensate her for her half of the equity realized from the appraisal of the parties' marital home. Kelly opposed the motion in its entirety. An evidentiary hearing was scheduled for September 2008. In August 2008, during an initial hearing on Shannon's motion, Kelly agreed to allow the child to relocate to Texas with Shannon, pending the evidentiary hearing, on the condition that Kelly not be prejudiced by the relocation. Ultimately, the evidentiary hearing was continued until February 2009. Following the evidentiary

hearing, the district court awarded Shannon primary physical custody of the child, imposed a school-based visitation schedule, and ordered Kelly to pay $300 per month in child support. It also entered a judgment of $16,401.91 in favor of Shannon, determining that this was due to her under the distribution set forth by the parties' settlement agreement.

For the reasons set forth below, we reverse and remand the district court's custody determination and reverse the district court's judgment awarding Shannon additional monies for the parties' marital residence. As the parties are familiar with the facts of this case, we do not recount them further except as necessary for our disposition.

The district court applied the incorrect legal standard when it awarded Shannon primary physical custody

Kelly asserts that the district court erred when it awarded Shannon primary physical custody of the child because it applied the relocation factors from Schwartz v. Schwartz, 107 Nev. 378, 812 P.2d 1268 (1991), rather than the best interest of the child standard as required by Potter v. Potter, 121 Nev. 613, 119 P.3d 1246 (2005). He contends that although the district court referenced Potter and the best interest of the child standard, it actually applied the Schwartz factors.[1] We agree.

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[1]Kelly also argues that the district court's custody determination should be reversed because: (1) it failed to make requisite specific findings of fact regarding the child's best interest, (2) it allowed Shannon to temporarily relocate with the child six months before the evidentiary hearing to determine custody of the child, and (3) his right to a fair hearing was prejudiced by the district court order allowing Shannon to temporarily relocate with the child six months before the evidentiary hearing was held. In light of our disposition, we need not address these arguments.

Standard of review

We review de novo whether the district court applied the correct legal standard in deciding a motion for primary custody for purposes of relocation. Potter, 121 Nev. at 618, 119 P.3d at 1249-50; see also Staccato v. Valley Hospital, 123 Nev. 526, 530 & n.4, 170 P.3d 503, 505-06 & n.4 (2007) (noting that our "plenary review is implicated" when considering a purely legal question such as whether the district court applied the proper legal standard).

Correct legal standard

NRS 125.510(2) states that "[a]ny order for joint custody may be modified or terminated by the court . . . if it is shown that the best interest of the child requires the modification or termination." NRS 125.480(1) provides that in determining custody, "the sole consideration of the court is the best interest of the child." (Emphasis added.) NRS 125.480(4) sets forth a list of non-exhaustive factors which the court "shall consider" in determining the best interest of the child.

In Potter, we held that the district court must apply NRS 125.510(2) and utilize the best interest of the child standard when considering a joint physical custodian's motion for primary custody and relocation outside of Nevada. 121 Nev. at 618, 119 P.3d at 1249. The parents in Potter shared joint legal and physical custody of their minor child. Id. at 615, 119 P.3d at 1247. After several years under this arrangement, the mother received an employment offer in California for a position at a higher salary than she received in a similar position in Las Vegas. Id. She then filed a petition for relocation under Nevada's relocation statute. Id. The father opposed the motion, arguing that the relocation statute did not apply to joint physical custody arrangements. Id. at 615, 119 P.3d at 1248. He argued that the mother could not file a

relocation motion unless she first successfully moved for primary custody. Id.

In considering the mother's motion, "[t]he district court treated the petition as [a] relocation petition." Id. at 616, 119 P.3d at 1248. The district court did not address the father's argument that the mother needed to first have primary physical custody before filing a relocation petition. Id. Instead, the district court analyzed the motion under the Schwartz factors.[2] Id. The district court then awarded the mother primary physical custody and granted her permission to live with the child in California. Id.

On appeal, we reversed the district court, concluding:

> When a parent with joint physical custody of a child wishes to relocate outside of Nevada with the child, the parent must move for primary physical custody for the purposes of relocating. The district court must consider the motion for primary custody under the best interest of the

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[2]Under Schwartz, in considering a custodial parent's petition to relocate, the court must first consider the threshold inquiry of whether an "actual advantage will be realized by both the children and the custodial parent in moving." 107 Nev. at 382, 812 P.2d at 1271. If the threshold issue is satisfied, the district court next must balance five additional factors: (1) the extent the move will improve the children and custodial parent's quality of life; (2) "whether the custodial parent's motives are honorable, and not designed to frustrate" the non-custodial parent's visitation rights; (3) whether "the custodial parent will comply with . . . substitute visitation orders issued by the court" if the relocation is allowed; (4) whether the noncustodial parent's motives in resisting the relocation are honorable; and (5) "whether, if removal is allowed, there will be a realistic opportunity" for a visitation schedule that will preserve the relationship between the child and the noncustodial parent. Id. at 382-83, 812 P.2d at 1271.

> child standard established for joint custody situations in NRS 125.510 and Truax v. Truax, [110 Nev. 437, 874 P.2d 10 (1994)]. . . .
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> . . . The moving party has the burden of establishing that it is in the child's best interest to reside outside of Nevada with the moving parent as the primary physical custodian. The issue is whether it is in the best interest of the child to live with parent A in a different state or parent B in Nevada.

Id. at 618, 119 P.3d at 1249-50 (footnotes omitted).

Here, because Shannon and Kelly shared joint physical custody, Shannon's motion for purposes of relocating is governed by Potter. The district court order correctly identified Potter as the controlling standard. But, peculiarly, the district court proceeded to analyze the custody issue under the Schwartz factors. It then summarily determined, without mentioning the factors from NRS 125.480(4), that it was in the child's best interest to reside in Texas with Shannon as her primary physical custodian.

The problem with the district court's order is that its analysis makes it difficult to determine whether it proceeded under the best interest of the child standard as required by Potter or under the Schwartz factors. Part of this difficulty arises from the district court's failure to set forth and analyze the various factors from NRS 125.480(4) for determining the best interest of the child. For example, the district court order did not analyze or make any findings about the level of conflict between Shannon and Kelly; their mental and physical health; the child's physical, developmental, and emotional needs; and the nature of the child's relationship with Shannon and Kelly. See NRS 125.480(4)(d), (f)-(h). Instead, the court analyzed the Schwartz factors, noting that Shannon's

move provided many financial benefits to Shannon and the child, that Shannon's motion was made in good faith and not brought to frustrate Kelly's contact with the child, that Kelly opposed the motion in good faith, and that there is reasonable alternative visitation that would maintain Kelly's relationship with the child. 107 Nev. at 383, 812 P.2d at 1271. In sum, the district court made the same error that the district court made in Potter—it treated Shannon's motion as a relocation motion, rather than a motion for custody.

The factors that the district court utilized are unique to Schwartz and largely foreign to the best interest of the child standard. See Schwartz, 107 Nev. at 382, 812 P.2d at 1270 ("Removal of minor children from Nevada by the custodial parent is a separate and distinct issue from the custody of the children."). The Schwartz inquiry differs significantly from the best interest of the child inquiry in that it focuses largely on the parents. See id. at 382, 812 P.2d at 1271. The focus of the Schwartz factors makes sense in the context of relocation situations where one parent has primary physical custody and the other parent has visitation, because custody, and therefore the best interest of the child, has already been determined. See Stout v. Stout, 560 N.W.2d 903, 917 (N.D. 1997) ("[I]n a motion to relocate, the primary physical custody decision has already been made, and custody is not the issue."). But in relocation situations involving parents with joint physical custody, which necessarily require a change to the parents' joint custody arrangement before the relocation is allowed, applying the Schwartz factors improperly shifts the focus away from the best interest of the child and onto the relocating parent. See NRS 125.480(1) ("In determining custody of a minor child[,] . . . the sole consideration of the court is the best interest of

the child." (emphasis added)). Under Potter, the district court may consider the requested relocation as a relevant factor in its analysis of the child's best interest, but the district court must not allow its consideration of the proposed relocation to shift its focus away from the best interest of the child, as it did here. 121 Nev. at 618, 119 P.3d at 1250 (noting that "among other factors, the locales of the parents" is a relevant consideration for the district court (emphasis added)).

Accordingly, we conclude that the district court erred by applying the Schwartz factors rather than the best interest of the child standard. We therefore reverse and remand this matter for the district court to conduct a best interest of the child analysis consistent with Potter.[3]

The district court erred when it entered a judgment awarding Shannon additional monies for the parties' marital residence

Kelly asserts that the district court erred when it entered a judgment of $16,401.91 in favor of Shannon because it miscalculated Shannon's interest in the marital home as the equity of half of the

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[3]Shannon contends that we must affirm the district court's order because it found that the relocation was in the child's best interest and evidence supported this finding. As we have previously explained, although the district court enjoys broad discretion in determining questions regarding child custody, we "must be satisfied that the court's determination was made for the appropriate reasons." Sims v. Sims, 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993); see also Maynard v. McNett, 710 N.W.2d 369, 372, 373, 376 (N.D. 2006) (where the district court found that relocation was in the child's best interest, reversal was nonetheless required because it used the wrong standard to analyze the issue). Thus, notwithstanding the district court's superficial finding that the relocation was in the child's best interest, we reverse the district court because we are not satisfied that its finding was made for the appropriate reasons.

appraised value of the home, rather than the equity of half of the refinanced value of the home. Kelly contends that the parties' settlement provided that Shannon's share would be the equity from half of the refinanced value of the property and it was error for the district court to alter the terms of the settlement. We agree.

Standard of review

"Because a settlement agreement is a contract, its construction and enforcement are governed by principles of contract law." May v. Anderson, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). The interpretation of a contract is a question of law reviewed de novo. Mack v. Estate of Mack, 125 Nev. 80, 95, 206 P.3d 98, 108 (2009). The district court does not have authority to alter the terms of a settlement agreement. See Travis v. Nelson, 102 Nev. 433, 434, 725 P.2d 570, 571 (1986).

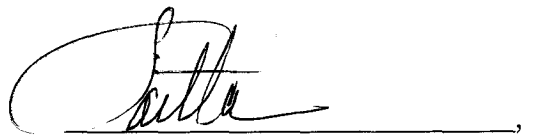
Interpretation of the terms of the settlement agreement

The settlement agreement does not provide that Shannon is entitled to half of the equity from the appraisal of the marital residence. Rather, by its express terms as incorporated into their divorce decree, Shannon is entitled to "50% of the equity from the refinance of [the] property." (Emphasis added.) The settlement between Shannon and Kelly is unambiguous. See Margrave v. Dermody Properties, 110 Nev. 824, 827, 878 P.2d 291, 293 (1994) ("A contract is ambiguous if it is reasonably susceptible to more than one interpretation.").

The total equity from the refinance of the residence was $60,000, of which Kelly paid Shannon $33,000, over half of the equity from the refinance of the property. This was all that Shannon was due under the terms of the parties' settlement agreement. Nonetheless, the district court determined that Shannon was entitled to a total of $50,000 for the

residence, representing half of the equity from its appraisal, and therefore it concluded that Kelly still owed Shannon approximately $16,000. In so doing, the district court essentially rewrote the parties' settlement agreement. The district court did not have authority to do so. See Travis, 102 Nev. at 434, 725 P.2d at 571. Thus, we conclude that the district court erred in entering a judgment of $16,401.91 for Shannon. Accordingly, we reverse the district court's judgment. For the foregoing reasons, we

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



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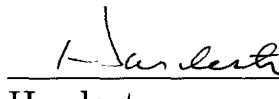

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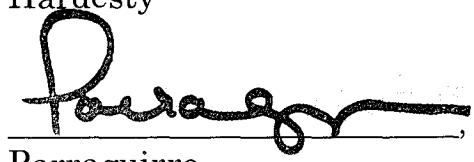

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cc: Hon. Steven E. Jones, District Judge, Family Court Division
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