IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JASON L. PROFFITT,
Appellant,
vs.
CANDACE JEAN PROFFITT,
Respondent.

No. 63763

FILED

DEC 07 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court post-divorce decree order granting a motion to relocate with the parties' minor children. Third Judicial District Court, Lyon County; Leon Aberasturi, Judge.

On April 16, 2012, the district court clerk filed a divorce decree resolving the case between respondent Candace Proffitt and appellant Jason Proffitt. The parties have two minor children from their marriage. A parenting plan was established within the divorce decree wherein the parties were awarded joint legal custody and Candace was awarded primary physical custody subject to Jason's parenting schedule. Jason's schedule was defined as three weekends one month and two weekends the next month for an alternating 3/2 monthly schedule throughout the year. The months Jason parented for two weekends he also had parenting time on the Mondays of the weeks where there was no parenting time (off-weeks).

Additionally, the parenting plan defined the holiday schedule, which superseded the regular 3/2 monthly schedule. Candace would have weekend parenting every Mother's Day and Jason on every Father's Day. Thanksgiving, Memorial Day, Labor Day, 4th of July, Nevada Day and spring break would alternate in even/odd years. Each parent received one week during winter break and had parenting rights on their respective

birthdays. Jason was awarded six consecutive weeks during the summer break as well.

The decree contained provisions that the court could reconsider the appropriateness of the custody and visitation schedule to review the possibility of increasing Jason's parenting time. The parties agreed that Jason would not have to show a change in circumstances from the time the Decree was entered to the date he filed his motion. The court held an evidentiary hearing regarding the modification on June 8, 2012, and issued an order denying modification concluding that it was in the children's best interest for Candace to retain primary physical custody primarily based on three concerns: (1) Jason's erratic behavior; (2) uncertainty regarding Jason's income; and (3) continued communication problems between the parties.

Jason subsequently filed two motions in the second half of 2012 to modify custody or visitation. He acknowledged in both motions that Candace had primary physical custody. Jason sought adjustments to his parenting time schedule but did not seek joint physical custody. The court resolved these motions by the end of 2012.

Candace filed a motion to relocate with the children to the state of Washington on April 23, 2013. According to Candace, she had been terminated from her employment and could not find suitable employment above minimum wage in northern Nevada. Her new husband was unable to find any work above minimum wage in northern Nevada and had already relocated to Washington where he had obtained employment as a pipe-fitter making $18.00/hour. Candace stated that she and her new husband both had family in Washington. Additionally, Candace argued that the children would benefit from a better school

system, especially her new husband's autistic son, and lower crime rates if they relocated to Washington.

Jason opposed the motion arguing Candace's move to Washington would impair his relationship with the children, as well as the relationship between these two children and his son from a previous marriage. Jason neither filed a motion to award him custody, or for joint physical custody, nor did he seek a declaration from the court that the actual exercise of time in the existing schedule constituted de facto joint custody.

At the hearing on June 25, 2013, Candace reiterated her reasons for seeking to relocate, and offered an alternative parenting plan wherein Jason would no longer have the 3/2 monthly weekend parenting time, but would still have substantial time. Neither party would exercise Mother's Day or Father's Day weekend visitation. The parties would alternate spring break, Thanksgiving, and winter break (consisting of two weeks, rather than splitting weeks). Additionally, Jason would retain six consecutive weeks during the summer. The noncustodial parent would have parenting rights over the weekend if the noncustodial parent visited the area where the other parent was located as well as five weekday nights (not to occur more than one time over every eight weeks). Cell phones would also be provided to the children and Jason could call at least five days a week.

Jason testified at the hearing that Candace's move to Washington with the children would severely limit his parenting time. As proof, Jason submitted a six-month calendar (January through June 2013) representing the amount of time exercised under the parenting plan and claiming that it was nearly equal to Candace's time. He also argued

Candace's proffered motivation for relocating was a false pretense. According to him, Candace and her husband only wanted to relocate to get away from their ex-spouses. Finally, Jason claimed his disabling back injury and need for additional surgeries would limit his ability to exercise his parenting rights if the children were so far away. Jason did not propose an alternative parenting schedule.

The district court applied NRS 125C.200 and the *Schwartz*[1] factors and granted Candace's motion to relocate. Specifically, the court ordered that Candace would continue as the primary custodian and Jason would have visitation rights. Further, the district court order reflects that Candace had demonstrated a good-faith reason for relocating to Washington based on her and her husband's employment opportunities and the additional family support she would receive from their families, and the move was not intended to frustrate or impair Jason's visitation rights. The court also found that the children would receive an educational advantage compared to their opportunities in Lyon County. Finally, the court adopted the parenting schedule proposed by Candace and granted her motion.

Jason filed an appeal of the district court's order and a request for a stay with the Nevada Supreme Court. Thereafter, Jason filed an ex-parte emergency motion seeking temporary custody of the children. The district court denied the motion concluding it lacked jurisdiction to reconsider or modify the custody award while the appeal on the relocation motion was pending. Then the Nevada Supreme Court entered an order

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[1]*Schwartz v. Schwartz*, 107 Nev. 378, 812 P.2d 1268 (1991).

denying Jason's motion to stay the district court's order granting the motion to relocate.

Then Candace filed an ex-parte emergency motion regarding children concerning modification of visitation in district court. The Nevada Supreme Court directed the district court to determine whether it would be inclined to reverse its previous decision to approve Candace's relocation to Washington and whether the district court should address the parenting issues based upon the relocation. In her motion, Candace alleged, and represented to the court, that Jason had been placed in jail in Baker County, Oregon. She further alleged that Jason did not have sufficient income or housing to properly care for the children during any parenting time in Nevada. Finally, she alleged Jason had a new address and may now live in Utah.

Jason argued that Candace moved to the Seattle area, rather than Portland, Oregon, that Candace was frustrating his ability to see his children and alienating Jason and his son from the other two children, and alleged bias by the court. Based on the parties' arguments, the district court declined to revise the relocation order and summarily found it was in the children's best interest to grant Candace's motion requiring all visitation to take place near the children's new residence until the matter could be heard by the court. We address Jason's appeal of the district court's order granting Candace's motion to relocate which is the only issue before this court.

Jason argues that the district court erred in finding Candace had primary physical custody of the children and therefore applied the wrong legal standard in analyzing her motion to relocate. Alternatively, if the district court applied the correct legal standard, Jason claims it

abused its discretion in finding Candace's reasons to relocate were made in good faith, and in finding it was in the children's best interest to relocate.

Jason first argues that the district court erred by relying solely on the divorce decree to determine that Candace had primary physical custody. Jason acknowledges that the divorce decree granted Candace primary physical custody and that the district court denied custody modification at the June 8, 2012, hearing. Jason also acknowledged, in his two subsequent motions that the decree awarded Candace primary custody, and he did not seek to change the status. Jason maintains, however, that he had joint physical custody based upon the actual time share, and the court should have relied on his evidence of a six-month calendar he prepared as proof[2] and Candace's statement that the parties "will continue to share joint custody of [the minors]"[3] when describing her proposed visitation schedule. Jason, however, failed to urge this argument in his written pleadings, or at the evidentiary hearing, and raises it for the first time on appeal; therefore, we deem this argument

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[2]Although Jason's calendar might support his assertion, we note that *Rivero v. Rivero* directs the district courts to consider a one-year calendar, rather than a six-month calendar. 125 Nev. 410, 427, 216 P.3d 213, 225 (2009) ("The district court should calculate the time during which a party has physical custody of a child over one calendar year. . . . Calculating the timeshare over a one-year period allows the court to consider weekly arrangements as well as any deviations from those arrangements such as emergencies, holidays, and summer vacation.").

[3]We note the phrase "joint custody" in this context appears to describe joint *legal* custody because it is referring to the future if the relocation motion was granted; joint physical custody would not be possible yet joint legal custody would continue.

waived.[4] *See Old Aztec Mine, Inc., v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

Jason next argues that the district court abused its discretion by inadequately analyzing Candace's motion to relocate. We review a district court order granting a motion to relocate for abuse of discretion. *Trent v. Trent*, 111 Nev. 309, 314, 890 P.2d 1309, 1312 (1995). When a custodial parent seeks to relocate outside of Nevada with the child, the parent must seek written consent from the noncustodial parent.[5] NRS 125C.200. If the noncustodial parent refuses to give consent, as is the case here, the custodial parent must then petition the court to relocate. *Id.*

The court should first consider whether the custodial parent meets the threshold burden of demonstrating an actual advantage will be realized by both the custodial parent and the children based on good-faith reasons for leaving Nevada. *Flynn v. Flynn*, 120 Nev. 436, 440-41, 92 P.3d 1224, 1227 (2004). A good-faith reason is one that is "not designed to frustrate the visitation rights of the non-custodial parent." *Jones v. Jones*, 110 Nev. 1253, 1261, 885 P.2d 563, 569 (1994). Once the custodial parent

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[4]Jason used the calendar and argued parenting time in the context of reasonable alternative visitation, not as a motion to modify custody. *See generally Bluestein v. Bluestein*, 131 Nev. ___, ___, 345 P.3d 1044, 1048 (2015).

[5]We note that after this case was heard by the district court, NRS 125C.200 was amended to include relocation within the state if the distance would substantially impair the ability of the non-custodial parent to maintain a meaningful relationship with the children. 2015 Nev. Stat., ch. 445 §16, at 2589.

meets the threshold burden, the court then evaluates the "factors enumerated in *Schwartz*, focusing on whether reasonable, alternative, visitation is possible. If reasonable alternative visitation is possible, the burden shifts to the noncustodial parent to show that the move is not in the best interests of the children." *Blaich v. Blaich*, 114 Nev. 1446, 1452, 971 P.2d 822, 826 (1998) (internal quotation marks omitted).

As applied in this case, Jason claims that the district court abused its discretion by relying solely on Candace's testimony to find she met the threshold burden of demonstrating good-faith and did not verify the reasons Candace offered. The district court found Candace's testimony credible; we will not reweigh that determination. *See Castle v. Simmons*, 120 Nev. 98, 103, 86 P.3d 1042, 1046 (2004) (stating credibility determinations rest "within the trier of fact's sound discretion").

Based on the district court's credibility determination, we conclude there is substantial evidence to support the district court's findings that Candace demonstrated good-faith reasons for the relocation. *Gepford v. Gepford*, 116 Nev. 1033, 1036, 13 P.3d 47, 49 (2000) (stating a district court's factual findings will not be set aside if they are supported by substantial evidence); *see also Cook v. Cook*, 111 Nev. 822, 828, 898 P.2d 702, 706 (1995) (concluding that seeking a higher salary and higher standard of living is a good-faith reason to relocate).

Jason next argues that the district court failed to analyze whether the alternative visitation schedule was reasonable.[6] Jason maintains that due to his back surgeries, allowing the children to relocate

[6]Although Jason does not challenge any of the other *Schwartz* factors, we note that the district court adequately addressed the remaining factors.

would make visitation more difficult. Jason did not provide an alternative schedule to the one Candace proposed. A reasonable alternative visitation schedule is "one that will provide an adequate basis for preserving and fostering a child's relationship with the noncustodial parent if the removal is allowed." *Schwartz*, 107 Nev. at 385 n.5, 812 P.2d at 1272 n.5.

After reviewing the record, we recognize that the district court did not make explicit findings regarding the proposed parenting plan. Thus, we could reverse the order of the district court on the basis that it failed to analyze this factor. *See id.* (requiring the district court to weigh the visitation schedule in its relocation analysis). Nevertheless, we conclude that by analyzing the *Schwartz* factors and then adopting Candace's proposed visitation schedule, the district court implicitly found it was reasonable. *See Gorden v. Gorden*, 93 Nev. 494, 496, 569 P.2d 397, 398 (1977) ("[I]n the absence of express findings, [we] will imply findings where the evidence clearly supports the judgment.").

Although Jason's parenting time was reduced, this is not a determinative factor. *See Schwartz*, 107 Nev. at 384, 812 P.2d at 1272. Further, the schedule maintains the six-week summer visitation period and alternating holiday schedule. And if Jason is able to travel to the area where the children reside, he can exercise some additional weekend parenting time. The schedule also facilitates telephonic communication between Jason and the children with telephone calls five days a week.

Further, the district court found that economic and educational advantages, as well as the increased family support, were substantial. These substantial advantages should not be sacrificed solely to maintain regular parenting time with the noncustodial parent. *See*

Schwartz, 107 Nev. at 383, 812 P.2d at 1272-73. Thus, Jason failed to prove it was not in the best interest of the children to grant the relocation.

We observe that relocation by one parent can significantly change the relationship between the parent left behind and the children. Nevertheless, the law as written by the Legislature and interpreted by the Nevada Supreme Court, allows relocation and the parenting schedule here does not demonstrate an irrevocable alteration will occur in the relationship, nor does it present an unmanageable schedule that would preclude Jason from fostering and preserving his relationship with the children. *Cf. Davis v. Davis*, 114 Nev. 1461, 1467-68, 970 P.2d 1084, 1088 (1998) (concluding the proposed eight-week summer visitation was not reasonable because short weekend trips and the noncustodial parent's job requiring four twenty-four hour consecutive work days greatly reduced the overall time allotted).

We therefore conclude the district court applied the correct legal standard and did not abuse its discretion in granting Candace's motion to relocate.

Accordingly, we ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

cc: Hon. Leon Aberasturi, District Judge
Holland & Hart LLP/Las Vegas
Candace Jean Proffitt
Third District Court Clerk