IN THE COURT OF APPEALS OF THE STATE OF NEVADA

STEPHEN NEWELL,
Appellant,
vs.
KATIE NEWELL,
Respondent.

No. 70593

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

Stephen Newell appeals from findings of fact, conclusions of law, and decree of divorce. Second Judicial District Court, Family Court Division, Washoe County; David Humke, Judge.

Stephen Newell and respondent Katie Newell were married in Georgia and relocated with their two minor children to Nevada. Prior to the marriage, the parties executed a prenuptial agreement. After Stephen filed for divorce, Katie received permission to temporarily relocate with the children to California. Following a trial, the district court divided the community property, awarded Katie sole physical custody of the minor children, and permitted Katie and the children to remain in California.[1] On appeal, Stephen argues that the district court abused its discretion by: (1) granting Katie's request to permanently relocate with the children, (2) invalidating the parties' prenuptial agreement, (3) ordering an unequal

[1]We do not recount the facts further except as necessary to our disposition.

17-901185

disposition of community property,[2] and (4) denying his motion for a new trial. Because the district court abused its discretion in granting Katie's request to permanently relocate to California and in awarding an unequal distribution of property, we reverse the district court's conclusions with respect to these issues and remand for further proceedings. We affirm the district court's decision in all other respects.

The district court abused its discretion by granting Katie's relocation request without evaluating all Schwartz factors

Stephen argues the district court abused its discretion by granting Katie's relocation request without considering the necessary *Schwartz* factors. We review a district court's decision granting a motion to relocate for abuse of discretion. *See Flynn v. Flynn*, 120 Nev. 436, 440,

---

[2]Stephen also argues that the district court exhibited bias against him by deciding the issue of child custody before hearing evidence thereon. As Stephen failed to raise this challenge during the proceedings below, we review for plain error, *see Parodi v. Washoe Med. Ctr., Inc.*, 111 Nev. 365, 368, 892 P.2d 588, 590 (1995), and conclude that there was no such error. *See Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998) (holding that a judge's remarks are indicative of prejudice only if "they show that the judge has closed his or her mind to the presentation of all the evidence"). Accordingly, we do not order that this case be reassigned to a new district judge upon remand.

Further, Stephen argues the district court abused its discretion by determining that his guilty plea to conspiracy to commit battery against his son constitutes clear and convincing evidence of domestic violence for the purposes of NRS 125.180(5)'s custody presumption. We conclude that substantial evidence supports the district court's decision as the guilty plea agreement required Stephen to admit that he conspired to place the child in a situation where he could suffer unjustifiable physical pain and/or mental suffering in that he put a sock in the child's mouth and then duct taped the child's mouth shut. *See Flynn v Flynn*, 120 Nev. 436, 440, 92 P.3d 1224, 1227 (2004). We affirm the district court's supervised parenting time decision on the same basis.

92 P.3d 1224, 1227 (2004). As Katie had sole physical custody based upon an interim order, her relocation request was subject to former NRS 125C.200[3] and the factors articulated in *Schwartz v. Schwartz*, 107 Nev. 378, 812 P.2d 1268 (1991). *See Flynn*, 120 Nev. at 440-41, 92 P.3d at 1227 (outlining the relocation methodology where parent with primary physical custody desires to relocate); *McGuinness v. McGuinness*, 114 Nev. 1431, 1435, 970 P.2d 1074, 1077 (1998) (holding that the relocation statute applies to situations where custody has been established by interim order).

We review the district court's application of the *Schwartz* factors de novo. *Flynn*, 120 Nev. at 44, 92 P.3d at 1227. If the custodial parent demonstrates a good faith reason for relocation and that an actual advantage to both the custodial parent and child will result, the district court must then determine whether the five *Schwartz* factors favor the move while focusing on the availability of adequate alternative visitation. *See Jones v. Jones*, 110 Nev. 1253, 1265-66, 885 P.2d 563, 571-72 (1994).

Here, the district court failed to expressly consider any of the *Schwartz* factors, including whether reasonable alternative visitation was available. Thus, we reverse the district court's order to the extent it permits relocation and remand the issue for further consideration.[4]

---

[3]The Nevada Legislature altered portions of NRS Chapter 125C in 2015, *see* 2015 Nev. Stat., ch. 445, §§ 2-16, at 2581-90, and NRS 125C.006 has been substituted in revision for former NRS 125C.200. As the district court applied former NRS 125C.200, and there were no substantive changes that affect this appeal, we cite former NRS 125C.200.

[4]As the district court already conducted a trial that addressed the issues of child custody and relocation, the district court may in its discretion determine what type of proceeding is necessary to evaluate the *Schwartz* factors.

The district court did not abuse its discretion by invalidating the spousal support provision in the parties' prenuptial agreement

Stephen argues the district court erred by concluding that Katie signed the prenuptial agreement under duress. Here, the prenuptial agreement was executed in Georgia and, thus, Georgia law governs. *See Braddock v. Braddock*, 91 Nev. 735, 738, 542 P.2d 1060, 1062 (1975). In determining whether a prenuptial agreement is valid, Georgia law requires courts to consider, in pertinent part, whether the agreement was the product of duress. *See Mallen v. Mallen*, 622 S.E.2d 812, 814 (Ga. 2005) (citing *Scherer v. Scherer*, 292 S.E.2d 662 (Ga. 1982)).

Georgia defines duress as "threats of bodily or other harm, or other means amounting to coercion, or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will," and requires that "[t]he threats . . . be sufficient to overcome the mind and will of a person of ordinary firmness." *See Hiers v. Estate of Hiers*, 628 S.E.2d 653, 657 (Ga. Ct. App. 2006) (defining duress for the purposes of the *Scherer* analysis).

Here, the district court determined that the lifetime spousal support provision in favor of Stephen was unenforceable because Katie did not sign the agreement freely and voluntarily. The district court found she credibly testified that she signed the agreement only because Stephen had previously committed acts of domestic violence against her, threatened to take the couple's son away from her, and was holding a pending criminal investigation over her head with threats to file charges against her if she did not sign the agreement. As this court does not reweigh the lower court's evaluation of witness credibility, we determine that the district court did not abuse its discretion by invalidating a provision in the

prenuptial agreement on the basis of duress.[5] *See Castle v. Simmons*, 120 Nev. 98, 103, 86 P.3d 1042, 1046 (2004).

The district court abused its discretion by ordering an unequal distribution of the community property

Stephen argues the district court abused its discretion by awarding Katie the entirety of a Thrift Savings Plan account. As Katie concedes that at least a portion of the account was acquired during the marriage, we conclude the district court abused its discretion by awarding her the entirety of the account without setting forth a compelling reason for an unequal distribution. *See Wolff v. Wolff*, 112 Nev. 1355, 1359, 929 P.2d 916, 918-19 (1996); NRS 125.150(1)(b). The district court awarded Katie the account after determining such a result was just and equitable. However, the just-and-equitable standard was replaced by NRS 125.150(1)(b) before this case began. *See Lofgren v. Lofgren*, 112 Nev. 1282, 1283, 926 P.2d 296, 297 (1996) (noting that NRS 125.150 now requires an equal division rather than an equitable division). On remand the district court must either identify the reasons for an unequal disposition or divide the community property equally.

The district court did not abuse its discretion by denying Stephen's motion for a new trial

"This court reviews a district court's decision to grant or deny a motion for a new trial for an abuse of discretion." *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 74, 319 P.3d 606, 611 (2014). NRCP 59(a)(1)

---

[5]As we conclude that the district court had sufficient evidence to find that Katie did not freely enter into the prenuptial agreement, we need not consider the challenge to the accuracy of any alternative findings that the spousal support provision was unenforceable.

states that a new trial may be granted due to an irregularity in the proceeding or an "abuse of discretion by which either party was prevented from having a fair trial."

The day before trial, Stephen's counsel filed a motion to withdraw as counsel, citing a breakdown in the attorney-client relationship. Stephen contends that the district court's denial of this motion constituted an abuse of discretion which prevented Stephen from receiving a fair trial. However, Stephen failed to demonstrate that he did not receive a fair trial.

First, the district court determined that Stephen's attorney was prepared for trial and properly represented Stephen's interest despite any disagreements between attorney and client. Second, while Stephen argues that his attorney failed to present beneficial evidence, he fails to demonstrate how he was prejudiced by this omission. Specifically, it is unclear whether the evidence cited by Stephen was admissible. Further, it is unlikely that this evidence, even if admitted, would have resulted in a different result as the district court determined Stephen had committed domestic violence and Child Protective Services substantiated an abuse allegation against Stephen. Additionally, Stephen acknowledged that he needed reconciliation services to restore his relationship with his children before he could realistically be a custodial parent.[6] Thus, we cannot

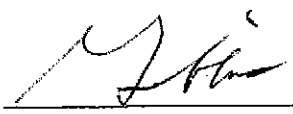
[6]Alternatively, this court could affirm the decision of the district court based upon Stephen's failure to challenge the district court's finding that the motion to withdraw was procedurally barred. Specifically, the district court concluded that the motion would violate WDCR 23(4) because the motion would have necessarily resulted in a continuance. Further, the district court found that the motion violated NRPC 1.16. On appeal, Stephen failed to challenge those findings.

conclude that the district court abused its discretion by denying Stephen's motion for a new trial.[7] Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART, REVERSED IN PART, and REMAND this matter for further proceedings consistent with this order.

_____, C.J.
Silver

_____, J.
Tao



_____, J.
Gibbons

cc: Hon. David Humke, District Judge, Family Court Division
Shawn B. Meador, Settlement Judge
Richard F. Cornell
Jaymie Mitchell Attorney at Law PC
Washoe District Court Clerk

[7]We have carefully considered all other arguments on appeal and conclude they are unpersuasive, not cogently argued, or not supported by relevant authority. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006).