

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSHUA LUKE SWALINKAVICH,
Appellant,
vs.
KRYSTAL LEIGH SWALINKAVICH,
Respondent.

No. 77860-COA

FILED

JUN 05 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Joshua Swalinkavich appeals from a post-divorce decree district court order modifying the physical custody arrangement of the parties' minor child and approving the child's relocation to Virginia. Eighth Judicial District Court, Family Court Division, Clark County; Cheryl B. Moss, Judge.

Joshua Swalinkavich and Krystal Swalinkavich were married in Virginia, and their daughter was born in Florida in June 2013.¹ In 2014, they lived in Las Vegas, before Krystal and the child returned to Virginia in 2015. The parties divorced in October 2016, after Joshua and Krystal reached an agreement at trial to settle all issues. The divorce decree provided that the parties would have joint legal custody and joint physical custody on a rotating three-month parenting time schedule. The decree indicated the parties' plan that the child would be residing in Las Vegas by August 2, 2018, so that the child could commence kindergarten there, unless the parties agreed otherwise or a court order stating differently was issued. The decree further provided that if Krystal did not relocate to Las Vegas,

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

Joshua would have primary physical custody of the child, with Krystal having reasonable and frequent parenting time.

Upon Krystal's decision not to relocate back to Nevada, both parties filed competing motions for primary physical custody, with Krystal also seeking to relocate with their daughter to Virginia. The matter was set for an evidentiary hearing, and after a full day of testimony in July 2018, the district court found that the best interest of the child favored relocating to Virginia with Krystal.

Joshua appeals, arguing that (1) the district court abused its discretion when it determined the parties shared joint physical custody for the purposes of applying the legal standard for relocation and modification of custody, (2) the district court erred in finding it was in the daughter's best interest for Krystal to have primary physical custody, (3) Krystal could not have supported her request for modification because she could not show a substantial change in circumstances, and (4) the district court's findings regarding the relocation factors were erroneous and not supported by substantial evidence, and therefore, it erred in granting Krystal's relocation request. We disagree.

This court reviews a district court's decision regarding child custody and relocation for an abuse of discretion. *See Flynn v. Flynn*, 120 Nev. 436, 440, 92 P.3d 1224, 1227 (2004). However, this court conducts a de novo review of the district court's conclusions of law. *Id.*; *see also Schwartz v. Schwartz*, 107 Nev. 378, 812 P.2d 1268 (1991).

The district court did not abuse its discretion by concluding that the parties shared joint physical custody for the purposes of determining modification and relocation

Joshua first argues that the district court abused its discretion when it determined the parties shared joint physical custody for the purpose

of applying the custody modification standards and the relocation statutes. Joshua argues that the plain language of the decree, which he contends granted him primary physical custody upon Krystal deciding not to relocate, is controlling. As a result, the court should have adhered to the language of the decree and granted Joshua primary physical custody of their daughter and denied relocation. Krystal argues the plain language of the decree gave the parties joint physical custody of their daughter. We agree with Krystal.

NRS 125C.007(1) states that, “[I]n every instance of a petition for permission to relocate with a child that is filed pursuant to NRS 125C.006 (primary physical custody) or 125C.0065 (joint physical custody), the relocating parent must demonstrate to the court that [the elements in the statute are met].” Thus, by its plain language, NRS 125C.007 applies when the moving party has joint or primary physical custody prior to the relocation request.

Here, at the time the motions to modify were filed, and for relocation, the parties were actually exercising joint physical custody with a three-month rotating parenting time schedule, per the decree. The district court modified custody and granted relocation before the child was expected to begin school in Las Vegas in August 2018, so Joshua never became the primary custodian. This possibility was envisioned in the decree: “IT IS FURTHER ORDERED that the Parties have agreed [that the minor child] . . . will be residing in Las Vegas by August 2, 2018, unless otherwise agreed upon by [the] Parties or upon order of the Court.”

Even so, Joshua claims that the stipulated-to decree, giving him primary custody so that the child could begin kindergarten in Las Vegas, is a contract and, therefore, the parties’ intent must be upheld under

Mizrachi.² Krystal argues that, even if the decree was analyzed in the context of a contract, it contained a condition precedent that had to occur before Joshua received primary physical custody.

When a motion is filed to modify an order or decree containing a parenting agreement, “the court must use the terms and definitions provided under Nevada law, and the parties’ definitions no longer control.” *Bluestein v. Bluestein*, 131 Nev. 106, 111, 345 P.3d 1044, 1047 (2015) (quoting *Rivero v. Rivero*, 125 Nev. 410, 429, 216 P.3d 213, 227 (2009)).

Here, the terms of the decree were clear and there was no need for clarification. Moreover, both Joshua and Krystal filed motions to modify the decree, and once the district court concluded that modification was warranted, the terms of the agreement expressed in the decree no longer controlled, and the district court was required to apply NRS 125C.0035 and 125C.007, rather than the decree of divorce, to ascertain what was in the best interest of the child and whether relocation was proper.

In sum, the district court correctly determined the parties shared joint physical custody, which is subject to modification if the child’s best interest so requires, and under the plain language of NRS 125C.007, this custody designation at the time of relocation did not affect the analysis because it was joint. Thus, the district court did not abuse its discretion and Joshua’s arguments do not warrant relief.

²*Mizrachi v. Mizrachi*, 132 Nev. 666, 677, 385 P.3d 982, 989 (Ct. App. 2016) (“[A]s in contract interpretation cases a court that is called upon to clarify the meaning of a disputed term in an agreement-based decree must consider the intent of the parties in entering into the agreement.” (internal citation omitted)).

The district court did not abuse its discretion in granting Krystal's motion to relocate

Next, Joshua argues that the district court erred by finding that Krystal satisfied the threshold elements of NRS 125C.007(1). Specifically, Joshua contends that the best interest test in NRS 125C.007(1)(b) was not met because the decree, which the parties both previously agreed to, shows that the best interest of the child is to remain in Nevada with Joshua. Further, Joshua argues that the district court erred when it determined that the child would receive an actual advantage by relocating to Virginia as required under NRS 125C.007(1)(c).

NRS 125C.007(1) sets forth three elements that the relocating parent must demonstrate to the district court to relocate with a child: (a) “[t]here exists a sensible good-faith reason for the move, and the move is not intended to deprive the non-relocating parent of his or her parenting time,” (b) “[t]he best interests of the child are served by allowing the relocating parent to relocate with the child,” and (c) “[t]he child and the relocating parent will benefit from an actual advantage as a result of the relocation.” If a relocating parent meets the threshold requirements of NRS 125C.007(1), the district court *must* then weigh the factors in subsection (2) and determine the impact of each factor on the child, the relocating parent and the non-relocating parent, including, without limitation, the extent to which the compelling interests of the child, the relocating parent and the non-relocating parent are accommodated.

Here, the district court found that each of these three threshold elements were satisfied. First, there was a good faith reason for the move because Krystal has family living in Virginia. Second, the child will experience an actual advantage due to maintaining a relationship with half-siblings and have increased support from her maternal grandparents.

Further, in the district court's analysis under NRS 125C.0035(4), which also applies to the best interest in the relocation statute, *see* NRS 125C.007(1)(b) and (3), it concluded that the best interest of the child was satisfied by allowing relocation.

Specifically, the district court referenced an instance where Joshua prohibited Krystal from seeing their daughter and a past instance of child discipline and alleged domestic abuse as factors that weighed against Joshua. The district court described one specific instance—captured on a video recording—wherein Joshua hit and yelled at their daughter, leaving her crying and hysterical. Finally, the district court included its belief that Nevada schools are low in national rankings and Virginia schools are high, which created an actual advantage for relocation.³ Thus, we conclude that substantial evidence supported the district court's decision.⁴ Therefore, the district court did not abuse its discretion in determining that the threshold factors for granting relocation were met.

³In *Mizrachi*, 132 Nev. at 678, 385 P.3d at 990, we noted that the district court should rely on the evidence presented by the parties to reach its decision and not conduct independent research to support its conclusion. Nevertheless, there was substantial evidence to support the district court's conclusion even without this information. *See also infra*, note 5.

⁴We note that the district court did not make explicit findings under NRS 125C.007(2). Joshua did not challenge the lack of findings under NRS 125C.007(2), and therefore, he has waived this argument on appeal. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that “[i]ssues not raised in an appellant's opening brief are deemed waived”). We also note that, despite the lack of findings under NRS 125C.007(2), the record supports the district court's conclusion that relocation in favor of Krystal was proper, but we caution the district court to apply the full relocation statute in the future.

The district court did not abuse its discretion by awarding primary physical custody to Krystal

Joshua next argues that the district court abused its discretion by awarding primary physical custody to Krystal because the factors listed in NRS 125C.0035(4) did not weigh in her favor, as the district court found. Under NRS 125C.0035(1), “[i]n any action for determining physical custody of a minor child, the sole consideration of the court is the best interest of the child.” NRS 125C.0035(4) provides twelve factors to consider when ascertaining the best interest of the child.

Here, the parties presented conflicting evidence regarding these factors. It is not within the appellate court’s purview to reweigh conflicting evidence or witness credibility. *Ellis v. Carucci*, 123 Nev. 145, 152, 161 P.3d 239, 244 (2007). Because the district court’s findings came from weighing conflicting evidence and assessing witnesses’ credibility—and because there was substantial evidence in the record to support its findings—we conclude that the district court did not abuse its discretion while making its findings regarding the child’s best interest.⁵

⁵Joshua argues that the district court should not have considered the prior instance of domestic abuse in the custody and relocation order because it was res judicata as it was already considered—in the form of an expert custody evaluation report—when adopting the parties’ custody agreement in the decree of divorce. He cites to *Nance v. Ferraro*, 134 Nev. 152, 159, 418 P.3d 679, 685 (Ct. App. 2018), for his argument that parties are not free to relitigate previously decided matters. As a threshold observation, the doctrine of res judicata (also known as claim preclusion) applies to the resolution of the merits of a legal claim, while the question of whether domestic violence occurred relates to whether a particular fact or event occurred. Beyond that, we note that the decree of divorce, which constituted the stipulated custody agreement, never references the prior instance of domestic violence, and the district court made no findings as to domestic violence, see NRS 125C.0035(4)(k), nor did it apply or reject any

Joshua also cites to *Ellis*, 123 Nev. at 150, 161 P.3d at 242, to argue that modification of primary physical custody is warranted only when there has been a substantial change in circumstances affecting the welfare of the child. While this may be the applicable standard for modification of primary physical custody, it is not the standard governing modification of joint physical custody. *Id.* Furthermore, due to the implementation of Nevada's relocation statute, it is no longer necessary to consider a substantial change in circumstances under NRS 125C.007. The argument presented by Joshua is misplaced, as the district court is not required by NRS 125C.007 to determine that a substantial change in circumstance affecting the welfare of the child existed. *See* NRS 125C.0065(1)(b) (“[The relocating parent shall] petition the court for primary physical custody for the purpose of relocating.”).

The district court did not identify any substantial change in circumstances, nor was it required to. Instead, as discussed above, the district court performed a proper analysis to determine physical custody of

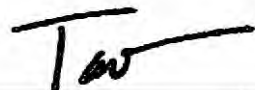
presumptions regarding domestic violence, NRS 125C.0035(5). Thus, it is doubtful that *res judicata* barred the district court from considering the domestic violence in the relocation order. Further, the district court is required to consider the history of child abuse under NRS 125C.0035(4)(j) to determine the child's best interest, which the court needed to determine here. Finally, even if there was any error, it was not shown to be prejudicial because the court only gave the evidence “slight weight” and it had other information and made findings justifying the change of custody and relocation. *Cf.* NRCP 61. For these reasons, the district court's consideration of the act of alleged child abuse or domestic violence in the custody and relocation order does not warrant relief.

the minor child as required under NRS 125C.0035(4), along with determining that relocation was proper, and there is substantial evidence in the record to support the district court's decision.

Accordingly, we

ORDER the judgment of the district court AFFIRMED


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Cheryl B. Moss, District Judge, Family Court Division
Black & LoBello
The Grigsby Law Group
Eighth District Court Clerk