IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FLORENTINA SANTOS GARCIA,
Appellant,
vs.
HUGO ANGEL DORADO ROSALES,
Respondent.

No. 85962-COA

FILED

JAN 22 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Florentina Santos Garcia appeals from a district court order granting a petition for return of minor children pursuant to the Hague Convention on the Civil Aspects of International Child Abduction and denying her request for attorney fees and costs. First Judicial District Court, Carson City; James Todd Russell, Judge.

Florentina and respondent Hugo Angel Dorado Rosales were never married but had two minor children: A.B.D.S. (born in Nevada in September 2007) and A.G.S.G. (born in Mexico in October 2009).[1] In 2009, the parties' relationship ended, and Florentina moved to Mexico with A.B.D.S., gave birth to A.G.S.G., and raised both minor children in Mexico from 2009 to 2019. When the children came to Nevada to visit Hugo and other family, Hugo retained them in Nevada beyond the time of their scheduled visits.

Hugo then filed a complaint for sole legal and primary physical custody of the minor children in Nevada. Florentina, in turn, petitioned for the return of the minor children pursuant to the Hague Convention in the

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

24-02317

same court as the pending custody case.[2] Specifically, Florentina sought to have the minor children returned to Mexico, arguing that Hugo had wrongfully retained the minor children in the United States. She also noted that the Hague Convention contains a presumption in favor of awarding attorney fees, court costs, and travel expenses to a prevailing petitioner.

After a hearing, the district court granted Florentina's petition, finding that Hugo had wrongfully retained the minor children in Nevada in violation of the Hague Convention. The court denied her request for fees and costs, however, stating that it believed that both parties' positions were reasonable. This appeal followed.

On appeal, Florentina only challenges the denial of attorney fees and costs. She argues that reversal is warranted because 22 U.S.C. § 9007(b)(3) mandates an award of attorney fees and costs to a prevailing petitioner, unless the respondent establishes that such an order would be clearly inappropriate. She asserts that Hugo's conduct prolonged the litigation, causing her to incur extensive attorney fees and costs. Hugo responds that Florentina waived the issue by not filing a written motion for attorney fees and costs, as required by NRCP 54(d), and because she did not submit evidence supporting her request. He further asserts that Florentina cannot demonstrate that the fees and costs were necessarily incurred.

This court reviews the decision to grant or deny attorney fees or costs for an abuse of discretion. *Gunderson v. D.R. Horton, Inc.*, 130 Nev.

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[2]The Hague Convention, implemented in the United States by the International Child Abduction Remedies Act, provides that a child wrongfully removed from their country of habitual residence ordinarily must be returned to that country. 22 U.S.C. §§ 9001-9011. Federal and state courts have concurrent original jurisdiction over Hague petitions. *See* 22 U.S.C. § 9003(a).

67, 80, 319 P.3d 606, 615 (2014). A district court abuses its discretion when it applies an incorrect legal standard. *In re Halverson*, 123 Nev. 493, 510, 169 P.3d 1161, 1173 (2007). Additionally, statutory construction presents a question of law that the appellate court reviews de novo. *Leven v. Frey*, 123 Nev. 399, 402, 168 P.3d 712, 714 (2007). "[W]hen a statute's language is plain and its meaning clear, [we generally] apply that plain language." *Id.* at 403, 168 P.3d at 715. And we are cognizant that the Supremacy Clause of the United States Constitution provides that federal law is the supreme law of the land. U.S. Const. art. VI, § 2; *Nanopierce Techs., Inc. v. Depository Tr. & Clearing Corp.*, 123 Nev. 362, 370, 168 P.3d 73, 79 (2007). The doctrine of federal preemption thus provides that federal law shall apply and preempt state law where Congress intended to preempt state law. *Nanopierce Techs.*, 123 Nev. at 370, 168 P.3d at 79.

As pertinent here, 22 U.S.C. § 9007(b)(3) provides that

> [a]ny court ordering the return of a child pursuant to an action brought under section 9003 of this title shall[3] order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.

22 U.S.C. § 9007(b)(3) is a "mandatory obligation to impose necessary expenses, unless the respondent establishes that to do so would be clearly inappropriate." *Noergaard v. Noergaard*, 271 Cal. Rptr. 3d 905, 915 (Ct. App. 2020), *as modified on denial of reh'g* (Nov. 24, 2020). As such,

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[3]When construing statutes, the word "shall" is presumptively mandatory. *State v. Am. Bankers Ins. Co.*, 106 Nev. 880, 882, 802 P.2d 1276, 1278 (1990).

"the prevailing petitioner is presumptively entitled to necessary costs and the statute shifts the burden of proof onto a losing respondent to show why an award of necessary expenses would be 'clearly inappropriate.'" *Id.* at 915 (quoting 22 U.S.C. § 9007(b)(3)).

In considering whether an award is clearly inappropriate, courts have looked to various factors, such as the respondent's financial circumstances or whether the petitioner engaged in acts of violence against the respondent and the respondent's removal of the child from the country of habitual residence was related to that violence. *See, e.g., Rydder v. Rydder*, 49 F.3d 369, 373-74 (8th Cir.1995) (reducing an award to a "more equitable" amount in light of the respondent's financial circumstances); *Souratgar v. Lee Jen Fair*, 818 F.3d 72, 79 (2d Cir. 2016) (reducing the mandatory fee award where intimate partner violence prompted the respondent's removal of the child from their habitual country). At least one court has also considered whether a parent had a reasonable basis for believing they could remove the child. *See Ozaltin v. Ozaltin*, 708 F.3d 355, 375-76, 378 (2d Cir. 2013) (determining it would be inappropriate to award the successful petitioner all requested fees when the respondent had a reasonable belief her actions were consistent with another country's laws but remanding for the district court to determine in the first instance an appropriate award amount).

Here, the district court summarily denied Florentina's request for attorney fees and costs at the hearing without properly considering U.S.C. § 9007(b)(3)'s presumption in favor of such an award to a prevailing petitioner. The district court made no findings regarding 22 U.S.C. § 9007(b)(3)'s presumption that Florentina was entitled to an award of fees and costs or if Hugo had established that such an award was "clearly

inappropriate." Because the district court failed to properly analyze the appropriateness of a fees and costs award as contemplated by 22 U.S.C. § 9007(b)(3), it abused its discretion in denying Florentina attorney fees and costs. *See Gunderson*, 130 Nev. at 82, 319 P.3d at 616 (noting that the district court abuses its discretion when it "fail[s] to apply the full, applicable legal analysis").

Hugo asserts that Florentina waived the issue of attorney fees and costs by not filing a written motion pursuant to NRCP 54(d), but we are not persuaded by this argument. The plain language of 22 U.S.C. § 9007(b)(3) does not explicitly require a separate motion to be filed for a court to award fees and costs. *See Noergaard*, 271 Cal. Rptr. 3d at 915 ("[T]he only absolute prerequisite for an award of fees and costs to the prevailing party is an order for the return of the child." (Emphasis removed)). And NRCP 54(d)(2)(B) requires a claim for attorney fees to be made by motion "[u]nless a statute . . . provides otherwise." Additionally, the district court orally denied Florentina's request for attorney fees and costs at the hearing and in its written order making any further motion making the same request futile. *Cf. Soonhee Kim v. Ferdinand*, 287 F. Supp. 3d 607, 632 (E.D. La. 2018) (awarding attorney fees and costs to the prevailing petitioner contingent on the filing of an itemization of all costs requested within 21 days); *Cartes v. Phillips*, 240 F. Supp. 3d 669, 684 (S.D. Tex. 2017), *aff'd*, 865 F.3d 277 (5th Cir. 2017) (granting the petition for return of a child, determining that the petitioner was entitled to recovery necessary expenses incurred, and ordering the petitioner to submit a motion for fees within ten days). Therefore, on remand, the district court should give Florentina the opportunity to file a memorandum of fees and costs as it will need to determine the amount of attorney fees and costs that were necessarily

incurred by Florentina to prevail on her petition, before shifting the burden to Hugo to demonstrate that an award for fees and costs would be clearly inappropriate under federal law.[4]

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[5]

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. James Todd Russell, District Judge
Shawn B. Meador, Settlement Judge
Kyle E. Edgerton
Linda Nagy Daykin
Law Offices of Rajinder K. Rai-Nielsen, LLC
Carson City Clerk

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[4]We deny Hugo's January 4, 2024, Motion for Sanctions against Florentina's counsel for procedural errors made while pursuing this appeal. However, we caution Florentina's counsel to adhere to the Nevada Rules of Appellate Procedure in future filings; the failure to do so may lead to the imposition of sanctions.

[5]The appealed order also granted the return of the minor children pursuant to the Hague petition. As neither party challenges that decision, we do not address it herein. And insofar as the parties have raised arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.