

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEBORAH M. JARRETT,
Appellant,
vs.
JASON J. JARRETT,
Respondent.

No. 41018

FILED

SEP 03 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a motion to relocate with the minor children to California. Second Judicial District Court, Family Court Division, Washoe County; Scott Jordan, Judge.

In this appeal, we consider whether the district court, having found that relocation would result in an actual advantage to the parent and minor children, abused its discretion by denying appellant Deborah Jarrett's motions for relocation and change of custody. We conclude that the district court did not abuse its discretion because substantial evidence supports its conclusion that the advantages associated with relocation were insufficient to overcome the presumption that continued joint custody is in the children's best interests under NRS 125.490(1), and reasonable visitation designed to preserve respondent Jason Jarrett's relationship with the children was not available. We therefore affirm the judgment of the district court.

FACTS AND PROCEDURAL HISTORY

Deborah and Jason were divorced in 2001. They agreed to share joint custody of their two minor children, ages three and four. In

2002, Deborah filed a petition for relocation.¹ Deborah desired to move with the children from Reno, Nevada, to Cottonwood, California. Cottonwood is approximately a three-hour drive from Reno.

The district court conducted an evidentiary hearing on the motion above. Deborah testified that she planned to live with her mother in Cottonwood, who agreed to pay for Deborah's housing costs. Deborah planned to open a day spa in Cottonwood with her mother and sister, and Deborah's mother agreed to finance the costs of the operation. However, Deborah's mother also testified that she would be willing to provide the same financing for a day spa located in Reno. Deborah testified that one of her motivations for the move was to be closer to her extended family, most of whom reside in the Cottonwood area.

Several witnesses testified that Deborah is the better parent and spends more time with the children. However, on cross-examination, witnesses also indicated that they had no problems with Jason and would welcome him into their home if he were visiting the children upon their relocation to California. The parties presented conflicting testimony on the amount of time that Jason spends with the children. Deborah claimed Jason was erratic in his visits with the children and that they spent more time with Jason's girlfriend. Jason claimed that Deborah was just as erratic and that her boyfriend cared for the children. Evidence demonstrated that Deborah and Jason had not significantly changed their

¹Deborah also moved for a change of custody based on circumstances unrelated to the relocation.

lifestyles since the divorce and that many of the cross-complaints about their conduct existed before the divorce.

Witnesses also testified, in vague terms, that Jason had drinking and gambling problems, but could not state with specificity how these alleged problems were affecting the children's lives or Jason's parenting skills. Moreover, the district court heard testimony that Deborah had recently been convicted of driving while under the influence of alcohol.

Evidence was presented that the children were encouraged to call Deborah's boyfriend "Daddy," fostering the notion that this individual would become the children's father. Deborah and her witnesses stressed in their testimony that the boyfriend had better parenting skills than Jason. Finally, the district court heard general evidence that schools were better in Cottonwood than in Reno and that the crime rate was lower. Jason presented contrary evidence through deposition references and cross-examination of Deborah's witnesses.²

After hearing arguments from both sides, the district court found that Deborah had a good-faith reason for requesting permission to relocate and that a move could present advantages to her and the

²Jason moved for a directed verdict at the close of Deborah's evidence. The district court concluded that Deborah's evidence was insufficient to overcome the presumption that continued joint custody was in the children's best interests, primarily because there was no reasonable alternative visitation plan presented. Because this was a bench trial, the district court was entitled to weigh Deborah's evidence and conclude that Deborah had failed to meet her burden of proof, alleviating any need for Jason to present additional evidence.

children, a closer relationship to Deborah's extended family, as well as family provided childcare. The district court then proceeded to analyze each of the Schwartz³ factors.

The district court found that the cross-allegations concerning drinking and gambling did not establish that either parent had a problem that showed he or she was an unfit or bad parent. Instead, the district court concluded that Jason's and Deborah's conduct was within the range of foolish actions often seen in twenty to thirty-year-old individuals. The district court found that the children were happy, well-adjusted, and thriving on the joint custody arrangement and were bonded to both parents.

Reviewing the housing, environmental, and living condition elements embodied in the quality-of-life factor of Schwartz, the district court determined that very little weight should be given to the allegation that Cottonwood was a better community than Reno. The district court concluded, based upon the evidence, that the children and Deborah would have approximately the same quality of life in either community. Similarly, the district court found that Deborah's employment opportunities would not be significantly enhanced by the relocation given her mother's willingness to invest in Deborah's business opportunities regardless of whether Deborah moved to Cottonwood.

Next, the district court found that Jason was not opposing the move to be "stubborn and selfish," but out of a genuine desire to preserve the relationship with his children that had arisen from the joint custody

³Schwartz v. Schwartz, 107 Nev. 378, 812 P.2d 1268 (1991).

arrangement. In contrast, the district court concluded that Deborah was not making Jason's relationship with the children a priority in her life. Although the district court found that Deborah was acting in good faith and not for the purpose of frustrating Jason's visitation, it concluded that her pleadings, testimony, and conduct in promoting her boyfriend as a "better father" than Jason indicated that she viewed Jason's relationship with the children as unimportant. This was further demonstrated by her proposed visitation schedule that offered Jason alternate weekends with the children, despite knowing that Jason has worked weekends for the last seven years. Moreover, the district court noted that the children would not be able to spend significant time with Jason on his weekdays off once they started school. Although Deborah indicated a willingness to give Jason visitation on major holidays and summer vacations, the district court concluded that such an arrangement would substantially alter the children's relationship with their father, and that alteration was not in the children's best interests.

Ultimately, the district court entered an order denying Deborah's motion for permission to relocate, concluding that Deborah had failed to overcome the statutory presumption that continued joint custody is in the children's best interests.

On appeal, Deborah contends that the district court abused its discretion by denying her motion to relocate with the minor children. Deborah argues that relocating to California would significantly enhance her life and the children's.⁴ Jason argues that if the children were to

⁴Deborah also asserts that the district court erred in: (1) denying her motion to change custody, (2) finding the couple's 2001 tax return was
continued on next page . . .

move, he would be precluded from spending any meaningful time with them on a weekly basis, since he works weekends, when the children have their main free time.

DISCUSSION

The decision whether to grant permission to relocate rests “within the sound discretion of the district court and will not be disturbed absent a clear abuse of that discretion.”⁵ “Rulings supported by substantial evidence will not be disturbed on appeal.”⁶ Substantial evidence is that which a sensible person may accept as adequate to sustain a judgment.⁷ Under NRS 125C.200, if a parent desires to relocate with a minor child out of the state, the parent must attempt to obtain written consent from the other parent before moving. If consent is not obtained, the parent wishing to relocate must petition the district court for permission to relocate with the children.

When parents have agreed to a joint custody arrangement, there is a presumption that continued joint custody is in the children’s

... continued

unadjudicated property in which Jason had a one-half interest, and (3) granting Jason’s motion for a directed verdict. We have considered these arguments and find them to be without merit.

⁵Davis v. Davis, 114 Nev. 1461, 1465, 970 P.2d 1084, 1087 (1998).

⁶Shydler v. Shydler, 114 Nev. 192, 196, 954 P.2d 37, 39 (1998) (citation omitted).

⁷See Schmanski v. Schmanski, 115 Nev. 247, 251, 984 P.2d 752, 755 (1999).

best interests.⁸ The party seeking to overcome this presumption has the burden of proving that joint custody is no longer in the children's best interests.⁹

In Schwartz and its progeny, this court established guidelines for determining whether a district court should permit a parent to relocate out of the state with the minor children.¹⁰ The paramount judicial concern is the children's best interest.¹¹

However, before considering the Schwartz factors, a court must first determine whether the request to move is being made in good faith and for the children's benefit, not just for the moving parent's benefit. We have said that the parent who wishes to relocate must demonstrate "that an actual advantage will be realized by both the children and the custodial parent in moving to a location so far removed from the current residence that weekly visitation by the noncustodial parent is virtually precluded."¹² The advantage need not be a substantial one, but it must be based on a sincere and genuine desire of the custodial parent to move and a sensible, good-faith reason for the move, meaning a

⁸NRS 125.490.

⁹NRS 125.490(1); Mosley v. Figliuzzi, 113 Nev. 51, 930 P.2d 1110 (1997).

¹⁰107 Nev. at 382, 812 P.2d at 1271.

¹¹Id.

¹²Id.

reason that is not designed to frustrate the noncustodial parent's visitation rights.¹³

If the parent wishing to relocate makes this threshold showing, then the district court must consider the following factors:

(1) the extent to which the move is likely to improve the quality of life for both the children and the custodial parent; (2) whether the custodial parent's motives are honorable, and not designed to frustrate or defeat visitation rights accorded to the noncustodial parent; (3) whether, if permission to remove is granted, the custodial parent will comply with any substitute visitation orders issued by the court; (4) whether the noncustodian's motives are honorable in resisting the motion for permission to remove . . . ; [and] (5) whether, if removal is allowed, there will be a realistic opportunity for the noncustodial parent to maintain a visitation schedule that will adequately foster and preserve the parental relationship with the noncustodial parent.¹⁴

The district court determined that Deborah made the threshold showing that the move presents an actual advantage for both her and the children based on the presence of Deborah's extended family in Cottonwood and their willingness to assist with childcare. The district court also concluded that Deborah was acting in good faith and not for the

¹³Jones v. Jones, 110 Nev. 1253, 1261, 885 P.2d 563, 569 (1994).

¹⁴Schwartz, 107 Nev. at 383, 812 P.2d at 1271; see also Davis, 114 Nev. at 1466, 970 P.2d at 1087; Gandee v. Gandee, 111 Nev. 754, 757, 895 P.2d 1285, 1287 (1995); Trent v. Trent, 111 Nev. 309, 315, 890 P.2d 1309, 1312-13 (1995); Jones, 110 Nev. at 1261, 885 P.2d at 569.

purpose of frustrating Jason's visitation rights. The district court therefore turned to an analysis of the five factors from Schwartz.

First, the district court determined that the move was not likely to improve Deborah's and the children's quality of life, given that the living conditions and educational and work opportunities were relatively equal between Cottonwood and Reno. Second, the district court stated that, although it could not conclude that Deborah's intentions were dishonorable, Deborah was not making Jason's time with the children a priority. Third, the district court found that despite Deborah's lack of interest in promoting Jason's relationship with the children, there was no evidence that Deborah would not comply with visitation orders. Fourth, the district court declared that Jason's motives in resisting the move were honorable.

Finally, as to the fifth factor, the district court determined that the proposed visitation schedule would not adequately preserve and foster the type of relationship that Jason currently enjoys with the children. Jason has Mondays and Tuesdays off with his current employer. Jason would not be able to spend meaningful time with the children on his days off if they relocated to Cottonwood. Thus, relocation would mean a significant change in the children's weekly interaction with their father, and the district court determined that such a change was not in the children's best interests.

We conclude that the district court did not abuse its discretion by denying Deborah's petition to relocate with the minor children. In denying the motion, the district court adequately considered all of the Schwartz factors and the presumption in NRS 125.490(1) that joint custody should be maintained. Substantial evidence supports the district

court's factual findings. Accordingly, we affirm the district court's order denying the motion to relocate with the minor children.

Becker, J.
Becker

Agosti, J.
Agosti

Gibbons, J.
Gibbons

cc: Honorable Scott Jordan, District Judge
Lee T. Hotchkin, Jr.
Michael D. Merchant
Washoe County Clerk