IN THE SUPREME COURT OF THE STATE OF NEVADA

GREG ELLIOT PELKOLA,

Appellant

v.

HEIDI MARIE PELKOLA.

Respondent

S.C. Docket No. 80763
D-13-488682-D

RESPONDENT PETITION FOR REHEARING EN BANC

Respondent, HEIDI MARIE PELKOLA ("Heidi") by and through her attorneys, Radford J. Smith, Esq. and Kimberly A. Stutzman, Esq. of Radford J. Smith, Chartered, and pursuant to NRAP 40 and NRAP 40A, respectfully requests that this court reconsider its *Opinion,* filed May 27, 2021, and reverse its decision in the manner identified in the Points and Authorities below. This Petition is based upon the Points and Authorities below, on all pleadings on file herein, and is made in good faith and not to delay justice.

Dated this 28 June 2021.

RADFORD J. SMITH, CHARTERED

/s/ Radford J. Smith

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I.

POINTS AND AUTHORITIES

NRAP 40(c) states in relevant part:

> (2) The court may consider rehearings in the following circumstances:
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> (A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or
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> (B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.

Furthermore, NRAP 40A(a) states in relevant part:

> **Grounds for En Banc Reconsideration.** En banc reconsideration of a decision of a panel of the Supreme Court is not favored and ordinarily will not be ordered except when (1) reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals, or (2) the proceeding involves a substantial precedential, constitutional or public policy issue. The court considers a decision of a panel of the court resolving a claim of error in a criminal case, including a claim for postconviction relief, to be final for purposes of exhaustion of state remedies in subsequent federal proceedings. En banc reconsideration is available only under the limited circumstances set forth in Rule 40A(a). Petitions for en banc reconsideration in criminal cases filed on the pretext of exhausting state remedies may result in the imposition of sanctions under Rule 40A(g).

Here, rehearing is appropriate. As discussed below, Respondent, Heidi Pelkola, submits that the Court overlooked the relevant case law and legislative history of NRS 125C.006 and its predecessor statutes. Furthermore, en banc reconsideration is appropriate. For example, en banc rehearing is necessary to secure and maintain the uniformity of decisions interpreting NRS 125C.006 consistent with NRS 125A.350 and NRS 125C.200 as well as

relevant and applicable case law. This case also involves substantial precedent and public policy regarding relocations and the best interests of the children.

II.

THE COURT INTERPRETED THE NRS 125C.006(1) IN A WAY INCONSISTENT WITH ITS PLAIN LANGUAGE, DIFFERENT FROM THE COURT'S PRIOR INTERPRETATION OF THE SAME LANGUAGE, AND CONTRARY TO THE LEGISLATIVE HISTORY OF THE STATUTE

In June 2014, Respondent, Heidi Pelkola was granted the right to move from the State of Nevada to Arizona with the parties' three minor children. 1RA00030. In June 2018, Appellant filed an action for change of custody of the children, and the matter was set for an evidentiary hearing that was continued multiple times. 1RA 13-27. The hearing was finally set for November 20, 2019. In the time pending the hearing, Heidi became engaged to a man that lived in Ohio. On October 1, 2019, Heidi filed a motion seeking to address her desire to move to the State of Ohio from Arizona, and she was prepared to address those issues as part of her presentation of evidence at the November 20, 2019 hearing. 4AA00389-463.

On November 20, 2019, the date of the evidentiary hearing, Appellant's lawyer arrived late and blithely advised the district court, Judge David S. Gibson, Jr., that Appellant was vacating the motion to modify custody that he had brought against Heidi (in 2018). Though Appellant, by vacating his motion was agreeing that it was in the best interest that the children should remain in Heidi's primary care, he argued that she should not be able to move to from Arizona to Ohio with the children.

Appellant's Opposition to Heidi's motion to relocate was based upon his argument that NRS 125C.006(1) required Heidi to meet the requirements of NRS 125C.006(1) because she was intending to move from Arizona to another state, Ohio.

NRS 125C.006(1) reads:

> If primary physical custody has been established pursuant to an order, judgment or decree of a court and the custodial parent intends to relocate his or her residence to a place outside of this State or to a place within this State the is at such a distance that would substantially impair the ability of the other parent to maintain a meaningful relationship with the child, and the custodial parent desires to take the child with him or her, the custodial parent.

Upon reviewing the language of NRS 125C.006(1), the district court granted Heidi's motion to relocate. The district court found that the language of NRS 125C.006(1) addressed relocation to a place outside of Nevada, and relocation inside Nevada, but did not address relocation from a place outside of Nevada to another place outside of Nevada.

Appellant appealed the decision to grant Heidi's motion to relocate from Arizona to Ohio. He contended upon appeal that NRS 125C.006 applied, but Appellant agreed to waive an evidentiary hearing. 4AA00714. In its May 27, 2021 decision (hereinafter, "Decision"), this Court reversed the district court's order." It did so by finding that the language "intends to relocate his or her residence to a place outside of this State," addresses a relocation from a place outside the State to another place outside the State. Specifically, the Decision reads: "In this appeal, we consider whether that provision applies only to relocation from Nevada to a place outside of Nevada, or also from a place outside of Nevada to another place outside of Nevada. We conclude that it applies to both." Even though the litigants had differing

views of the effect of the same language, the Court found that it would not address any ambiguity in the language of the statute. Instead, it found that the plain language of the statute applied to relocations to a place outside of Nevada from another place outside of Nevada. That interpretation is contrary to fundamental law relating to the interpretation of statutes.

> Statutory interpretation is a question of law subject to de novo review. When the language of a statute is clear and unambiguous, its apparent intent must be given effect. However, "when a statute is ambiguous, the legislature's intent is the controlling factor in statutory interpretation." In such instances, this court may look to the legislative history to ascertain the Legislature's intent.

Potter v. Potter, 121 Nev. 613, 19 P.3d 1246 (2005).

The operative language of this Court's Decision is its interpretation of the meaning of the phrase "to a place outside of this state" found in NRS 125C.006(1). The language "outside of this state" is contained in every version of Nevada's "anti-removal" statute, including the first version added to the Nevada Revised Statutes in 1987. As addressed below, the Nevada Supreme Court repeatedly interpreted that phrase as referring to a move from *within* Nevada to *outside* of Nevada. The Court's interpretation in its Decision in this case is the first time any court has found that the language "to a place outside of this state" would encompass moves from outside Nevada to another place outside of Nevada. The differences in the litigants and this Court's own interpretations of the statute should have led to find that the operative language it addressed was ambiguous, or at the very least should be interpreted with a view of the legislative history of the statute.

A. The History of Nevada's the Anti-Removal Statute

The first statute requiring a parent to seek written permission to relocate with a child from Nevada to another state was NRS 125A.350 added to Nevada Revised Statutes in 1987. That statute read:

> If custody has been established and the custodial parent or a parent having joint custody intends to move his residence ***to a place outside of this state*** and to take the child with him, he must, as soon as possible and before the planned move, attempt to obtain the written consent of the other parent to move the child from the state. If the noncustodial parent or other parent having joint custody refuses to give that consent, the parent planning the move shall, before he leaves the state with the child, petition the court for permission to move the child. The failure of a parent to comply with the provisions of this section may be considered as a factor if a change of custody is requested by the noncustodial parent or other parent having joint custody.

[Emphasis supplied]

NRS 125A.350 was first addressed in a decision of the Nevada Supreme Court in *Schwartz v. Schwartz,* 107 Nev. 378, 812 P.2d 1268 (1991). In that decision, the Court specifically stated its understanding that the language "to a place outside of this state" meant a move from Nevada to another state. The *Schwartz* court referred to NRS 125A.350 as Nevada's "anti-removal" statute. *Schwartz v. Schwartz*, 107 Nev. 378, 812 P.2d 1268, 1270 (1991). In its decision, it revealed its interpretation of the anti-removal statute when it framed the issue on appeal: "Removal of minor children *from Nevada* by the custodial parent is a separate and distinct issue from the custody of the children." *Id.* [emphasis added]. That analysis allowed the *Schwartz* court to judicially add a layer of factors that a

party must meet beyond the "sole consideration" of the best interest of the child where the request was a "removal of minor children from Nevada."[1]

In a series of decisions that followed *Schwartz,* the Court repeatedly held that the language of NRS 125A.350 statute addressed moves from Nevada to another state. *See, Trent v. Trent,* 111 Nev. 309, 890 P.2d 1309 (1995)(holding that in considering a motion for permission to move a minor child *from Nevada*, the district court must first determine "whether the custodial parent has demonstrated that an actual advantage will be realized by both the children and the custodial parent)(emphasis added); *Jones v. Jones*, 110 Nev. 1253, 885 P.2d 563 (1994)(holding that the Court first interpreted Nevada "anti-removal" statute in *Schwartz*); *Gandee v. Gandee*, 111 Nev. 754, 895 P.2d 1285 (1995)(citing to *Trent*, *Jones,* and *Schwartz*, as the cases which construed that a custodial parent wishing to remove the child from the state must make a threshold showing of "a sensible, good faith reason for the move.") *See also Cook v. Cook*, 111 Nev. 822, 898 P.2d 702 (1995); *McGuinness v. McGuinness,* 114 Nev. 1431, 970 P.2d 1074 (1998); *Halbrook v. Halbrook,* 114 Nev. 1437, 971 P.2d 1262 (1998); *Mason v. Mason*, 115 Nev. 12, 975 P.2d 340 (1999); *Hayes v. Gallacher,* 115 Nev. 1, 972 P.2d 1138 (1999).

In *Trent v. Trent*, 111 Nev. 309, 890 P.2d 1309 (1995) this court emphasized that NRS 125A.350 was intended to address moves outside of Nevada.

[1] NRS 125.480 previously read: 1. In determining custody of a minor child in an action brought under this chapter, the sole consideration of the court is the best interest of the child. If it appears to the court that joint custody would be in the best interest of the child, the court may grant custody to the parties jointly.

> We find it disturbing that despite our decision in *Schwartz,* many district courts are using NRS 125A.350 as a means to chain custodial parents, most often women, to the state of Nevada. NRS 125A.350 is primarily a notice statute intended to prevent one parent from in effect "stealing" the children away from the other parent by moving them away to another state and attempting to sever contact. Given the legislative purpose behind NRS 125A.350, it should not be used to prevent the custodial parent from freely pursuing a life outside of Nevada when reasonable alternative visitation is possible.

Id. at Nev. 309, 315, 890 P.2d 1309, 1313 (1995). Nowhere in any of the decisions entered by the Court was any focus on moves once the

The language "outside of this state" was never deleted from Nevada's "anti-removal" statute. In 1999, the Nevada Legislature amended the statute and recodified it as NRS 125C.200. The amended language did not change the language of the statute addressed in *Schwartz* and in issue in this case. NRS 125C.200 read:

> If custody has been established and the custodial parent intends to move his or her residence ***to a place outside of this State*** and to take the child with him or her, the custodial parent must, as soon as possible and before the planned move, attempt to obtain the written consent of the noncustodial parent to move the child from this State. If the noncustodial parent refuses to give that consent, the custodial parent shall, before leaving this State with the child, petition the court for permission to move the child. The failure of a parent to comply with the provisions of this section may be considered as a factor if a change of custody is requested by the noncustodial parent.

All of the cases interpreting the language of NRS 125C.200 that followed found that the statute addressed moves from within Nevada to outside of Nevada. *See Gepford v. Gepford, 116 Nev. 1033, 13 P.3d 47 (2000); Reel v. Harrison,* 118 Nev. 881, 60 P.3d 480 (2002); *Flynn v. Flynn,* 120 Nev. 436, 441, 92 P.3d 1224, 1227 (2004).

In *Potter v. Potter*, 121 Nev. 613, 19 P.3d 1246 (2005), the court reviewed the language of NRS 125C.200 and found, correctly, that the change in the language of the anti-removal statute that removed "a parent having joint custody" reference in NRS 125A.350 rendered NRS 125C.200 not applicable to joint custodians, and that the standard for determining relocation moves brought by joint physical custodians was whether it was in the best interest of the child to relocate to the location outside of Nevada, or to remain in Nevada with the custodial parent. *Id.* at 618, 119 P.3d at 1249.

In 2014, the Court addressed the application of NRS 125C.200 to non-married couples in *Druckman v. Ruscitti*, 130 Nev. 468, 474, 327 P.3d 511, 515 (2014). In that decision the court held that the *Schwartz* factors applied in cases between unmarried parents where a parent moved from Nevada to another state. While the *Druckman* decision did not change the long-standing interpretation of the "removal statute," its language applying the *Schwartz* factors to unmarried parents and a joint custodians led to the third iteration of the statute.

NRS 125C.006(1) arose from legislation proposed and passed in the 2015 Nevada Legislature. The primary author and proponent of that was a lawyer named Keith Pickard.[2] The Parental Rights Protection Act of 2015, known in as "AB 263," began as a response to the decision of this Court in *Druckman*. The legislation evolved into a bill that incorporated

[2] Mr. Pickard was then a private attorney, but he has since held a seat in the Nevada Assembly and is now a State Senator.

judicial decisions that had reinterpreted (some would argue judicially modified) the language of various family law statutes addressing the custody of minor children in Nevada. During the legislative sessions for AB 263, Mr. Pickard testified as to the intent of that portion of the bill addressing and modifying NRS 125C.200, and the *Druckman* decision interpreting it.

> There are inequities, but as we look at the decision in *Druckman v. Ruscitti*, 130 Nev., Advance Opinion 50 (Exhibit J), we have created an atmosphere in which a parent who is not married and wants to relocate simply relocates without permission of the other parent or the court. In NRS 125C.200, it is not appropriate for couples that are married to go without permission of the court. One of the other things that this legislation tries to resolve is the fact that you can go from Reno to Truckee, California, which would not be a monumental impediment for maintaining your relationship with your child. If you are married, you need court permission to do that, and if you are not married, you do not. However, say you are a resident of Las Vegas, and you want to relocate to Winnemucca, you do not need permission from anybody. You just get up and move.
>
> One of the other things that we tried to do in section 13 is to limit that by distance. There is some discussion as to whether 100 miles is appropriate. It is not an entirely arbitrary number. . . . I am not going to say that I advocate what this is trying to do like with the *Druckman* loophole. I am not. We, as officers of the court, should be doing justice and should be stepping up in trying to do what is in the best interest of the child. Certainly, there are inconsistencies that foster inequities.

See Minutes of the Meeting of the Assembly Committee on Judiciary dated March 26, 2015, page 20-21.

During the testimony, there was no reference to any change in the interpretation of "relocate to a place outside of this State." The amendment focused on a modification of the statute to require the application of NRS 125C.200 and the *Schwartz* factors, codified in

AB263 to unmarried parents, and to intrastate-moves. In the final product, NRS 125C.200 was reformed, at least for married individuals, to NRS 125C.006(1). This version of the anti-removal statute contained the same operative language as the other prior to versions relating to moves from Nevada to outside of Nevada ("parent intends to relocate his or her residence to a place outside of this State") but added language to distinguish between removing a child from Nevada to moving a child from one location to another location within Nevada that would substantially impair the ability of the other parent to maintain a meaningful relationship with the child."

The present statutory language distinguishes between moves to a location outside of Nevada and moves to a location within Nevada. Nothing in the legislative history suggests that the author of the language ever contemplated an application of the "anti-removal" statute to anything but moves from Nevada to outside its boundaries. To interpret the language differently would be to impose a meaning to the words "to relocate outside of the state" that is contrary to the legislative history of the "removal statute" in any of its three versions, is contrary to this court's interpretation of the language "to relocate outside of this state" in the statute and ignores the context of that language in relation to the other language in the statute.

B. The Plain Language of the Statute Supports the Interpretation that it only Applies to Relocations or Removal of Children from Nevada

Even if the Court were to ignore the decisional and legislative history of the current statute, the plain language of the statute supports the district courts decision that NRS

125C.006 does not apply to moves that start outside the state of Nevada. The statement that is interpreted in the current case is: "the custodial parent intends to relocate his or her residence to a place outside of this State." The operative word that is refashioned in this Court's present Decision in its interpretation of NRS 125C.006 is the word "outside." The Court does not redefine "relocate" (a verb defined by the Oxford English Dictionary as "move to a new place and establish one's home or business there") or "this state" as meaning Nevada. Instead, the Court interprets the word "outside" to mean any place not in Nevada, rather than relocate outside of Nevada. In the statutory language, the word "outside" is a preposition. A preposition is defined in the Oxford English Dictionary as, "A word governing, and usually preceding, a noun or pronoun and expressing a relation to another word or element in the clause." The word "outside" is defined as "[s]ituated or moving beyond the boundaries or confines of." Here, "outside" governs to the words it precedes "this State" and relates to the word "relocate" in the phrase. In other words, the act that invokes the statutory requirements of approval is the act of relocating "beyond the boundaries or confines" of Nevada, not a move outside the boundaries or confines of any other state.

Mr. Pickard current legislative efforts suggest that he has never interpreted the language of NRS 125C.006 as addressing moves that commence anywhere but Nevada. In the 2021 legislative session Mr. Pickard proposed a bill that specifically addressed moves by a parent who has previously moved in compliance with NRS 125C.006. The proposed

bill was Senate Bill 119. The language of the bill Mr. Pickard and two others sponsored would have modified the "removal statute" to state:

> 4. Except as otherwise provided in this subsection, a parent who has relocated with a child in compliance with the provisions of this section may subsequently relocate with the child without 18 obtaining additional written consent from the non-relocating parent or permission from the court after providing written notice to the non-relocating parent at least 30 days before relocating with the child. Additional written consent from the non-relocating parent or permission from the court in the manner set forth in this section is required to be obtained by the relocating parent before any subsequent relocation with the child if the non-relocating parent establishes that the subsequent relocation would deprive the non-relocating parent from continuing to: (a) Maintain regular contact with the child; or (b) Participate in major decisions relating to the child, including, without limitation, decisions related to the health, education and religious training of the child.

See, SB 119 and Minutes of the Assembly dated February 14, 2021 referring the bill to the Judiciary committee. Even though Bill was not brought to vote in the 2021 session, its language demonstrates that the author of the 2015 bill, Pickard, did not intend that the language in NRS 125C.006 address relocation after a party received an order granting relocation with the child to another State. If that was the intent of the 2015 bill that included NRS 125C006, he would have found no reason to address the issue of subsequent relocations in another bill.

The failure to recognize jurisdictional boundaries (moves from Nevada to outside Nevada) as the metric for the application of relocation factors would lead to absurd results. Such an order would require review of custody each time a party "relocates" even to a different residence within a short distance of the current residence if the party were in a

State other than Nevada, or a to any location in another State even if such a move did not affect the Nevada parent's visitation or contact with the child or children.

In other words, the current court's interpretation of the statute would result in even intrastate moves of a party that did not affect either visitation, the contact with the child, or the cost of travel to require a party to seek an evidentiary hearing so that requisite findings could be made regarding the move. *See Davis v. Ewalefo,* 131 Nev. 445, 451, 352 P.3d 1139, 1143 (2015)(The district court must issue specific findings for each of the NRS 125C.007(1) factors.)

In reality, the statute does not support that interpretation, nor was it ever envisioned by the author of the statute that it would be interpreted in that manner. Had the legislature wanted to address moves from a location out of Nevada to another, it could have done so specifically, but it did not. Any moves that affect the ability of the Nevada parent to remain in contact with the children could be addressed by the court using the best interest factors under NRS 125C.0035, including those moves that would constitute a material change in the circumstances affecting the welfare of the child by relocation to a place that would prevent the contact or visitation granted by the prior order. *See Ellis v. Carucci,* 123 Nev. 145, 161 P.3d 239 (2007). Placing yet another layer of litigation upon a custodial parent that has already shown that placing the child in his or her primary care outside of Nevada is in the child's best interest ignores the economic reality of that litigation, particularly for those parties that may be moving a second time to meet economic needs. The *Schwartz*

factors were developed in cases that addressed only moves outside of the residential state of the parents. They were not designed to address the factors more relevant to the non-custodial parent's continued contact and visitation with the child.

In our increasingly mobile society, the decision in this case may affect many cases each year and place burdens on custodial parents that were never addressed or contemplated by the authors of the statutes. If the legislature wants to take up the issue of moves that happen when one is already granted the right to live outside of the state of Nevada (and it appears that it is in that process), and host and participate in the debate, analysis, and testimony of attorneys in the field, experts, or any other interested constituents, or others, it should do so. This Court should not usurp that process by applying an interpretation of statutory language that never intended. Heidi respectfully requests that this court rehear this matter *en banc.*

RADFORD J. SMITH, CHARTERED
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Dated this 28 June 2021.

CERTIFICATE OF SERVICE

I certify that on the 28 June 2021, I served a copy of this Petition for Rehearing upon Melvin Grimes, Esq., counsel of record for Appellant via the Electronic Filing System of the Supreme Court of Nevada.

/s/ Kimberly A. Stutzman

_____

KIMBERLY STUTZMAN, ESQ.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of (a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this fast Respondent's Answering Brief (Amended) has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Font Size 14, in Times New Roman;

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP32(a)(7) because, excluding the parts of the petition/brief exempted by NRAP 32(a)(7)(C), it is either proportionally spaced, has a typeface of 14 points or more, and including the footnotes, contains 4,049 words.

3. I further certify that I have read the Respondent's Petition for Rehearing, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record be supported by appropriate references to page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules Appellate Procedure.

Dated this 28 June 2021.

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