

IN THE SUPREME COURT OF THE STATE OF NEVADA

LISA M. EORIO,

Appellant,

v.

JOEL E. EORIO,

Respondent.

Electronically Filed
Nov 09 2021 08:36 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court No.: 83132

CHILD CUSTODY FAST TRACK RESPONSE

1. Name of Party filing this fast response:

Joel E. Eorio

2. Name, law firm, address, and telephone number of attorney submitting this fast track response:

Emily McFarling, Esq.
Nevada Bar Number 8567
McFarling Law Group
6230 W. Desert Inn Road
Las Vegas, NV 89146
(702) 565-4335

3. Proceedings raising same issues. If you are aware of any other appeal or original proceeding presently pending before this court, which raise the same legal issue(s) you intend to raise in this appeal, list the case name(s) and docket number(s) of those proceedings:

None.

4. Procedural history. Briefly describe the procedural history of the case:

Joel adds the following to the procedural history in Appellant's Fast Track Statement:

In her Pretrial Memorandum, Lisa indicated her intention to relocation to New Mexico if Joel was granted primary custody and given permission to relocate. 1 JA000189.

At trial, the court heard testimony from Joel's father, Michael Eorio ("Michael"). 3 JA000442. Lisa did not have any witnesses at trial. *Id.*

The court made express findings regarding Joel's sensible good faith reasons to relocate. 3 JA000642-654.

The court made express findings regarding all best interest factors and specified which ones apply in this case. 3 JA000654-661.

The court made express findings regarding best interest factors: which parent is more likely to allow frequent associations and a continuing relationship, conflict level and the parties' ability to cooperate with each other. 3 JA000655-657.

The court made express findings regarding the NRS 125C.007(2)(c), children and the relocating parent will benefit from an actual advantage as a result of the relocation. 3 JA000661.

The court considered the parties' dynamic during the marriage in which Joel primarily handled responsibilities with respect to the children because mom was working, but that did not mean Mom was an absentee parent. 3 JA000660.

The court also considered the parties' post separation lives when it acknowledged their shared [custody] arrangement. 3 JA000660.

The Court found that the parties were married in Las Cruces, New Mexico and neither party has deep rooted ties to Las Vegas, Nevada. 3 JA000395.

The Court made express findings regarding the likelihood to improve the quality of life for the children and the relocating parent as well as to Dad's housing and living conditions. 3 JA000661-663.

The Court further found the children are not at harm in the presence of either parent and the Court looked at both parents as two good parents. 3 JA000642, 3 JA000396.

The Court further found that Dad does have a good faith reason(s) to move which is/are financial stability including living rent free in his parent's home and family ties. 3 JA000396.

The Court further found that Dad's motives are honorable in requesting the relocation and there is no pattern of non-compliance with visitation thus far, so the court finds that it is not worried about compliance with future orders. 3 JA000396.

The Court further found there will be an opportunity to foster and preserve the maternal bond after the relocation as evidenced in the Parenting Agreement the parties formulated at Family Mediation Center.¹ 3 JA000397.

The Court ordered that Defendant [Lisa] shall have until May 28, 2021, to designate her intentions to relocate to New Mexico to live closer to the children or not to relocate to determine how to allocate the summer timeshare. 3 JA000398.

The Court further ordered that Joel shall be awarded primary physical of the children if Mom does not relocate to Mexico. *Id.* Otherwise, the parties shall be awarded Joint Physical Custody. *Id.*

The Court further ordered that the Parenting Agreement based on the approval of the relocation will be adopted only if Mom designates her intent to remain in Las Vegas, Nevada. 3 JA000399.

5. Statement of facts. Briefly set forth the facts material to the issues on appeal:

In addition to the facts stated in Appellant's Fast Track Statement, Joel adds the following:

///

///

¹ The parties formulated two parenting plans in mediation through Family Mediation Center (FMC), with one being contingent upon the Court granting Plaintiff's relocation. 3 JA000397.

a) Ties to New Mexico & family bond

All children were born in and resided in New Mexico until August 2019. 3 JA000448; 2 JA000395.

The parties are employed in economic areas that exist in Las Cruces, New Mexico and Las Vegas, Nevada, such as food or auto parts. 3 JA000662.

At trial the court considered family connections from both sides of the family. 3 JA000661.

Also, at trial Lisa testified that she, as well as Joel and the children had strong bonds to New Mexico prior to 2019. 3 JA000450.

Lisa admitted that Joel's parents have a "very, very" strong bond with the children and supervised them when Lisa and Joel were unable to do so. 3 JA000450-451. She also admitted that the children love their grandparents and if they stayed in Las Vegas, their bond would not be the same. 3 JA000466, 480-481.

The court heard testimony from Joel's father regarding a plethora of activities that he and his wife did with the children in New Mexico. 3 JA000502. The record does not show that Lisa had an issue with these activities. 3 JA000502.

Joel has a brother, niece, and nephew in New Mexico, and all the cousins love to hang out with each other periodically. 3 JA000451.

Lisa's father lived in New Mexico and he was only 25 minutes away from the children whereas he would be thousands of miles away if they stayed in Las Vegas. 3 JA000484-486.

The court heard testimony from Lisa that she has called her sister "psycho" at some point and her sister was diagnosed with bipolar disorder for which she takes medication. 3 JA000454.

However, Lisa has another sister who lives in New Mexico 45 minutes from Joel's parents, and while she is not as involved in the children's lives as Joel's family, Lisa testified her sister does have a relationship with the children. 3 JA000486.

The court acknowledged some concerns with Joel's parents but cautioned both parties to stop any relative from either side of the family from disparaging the other parent in the children's presence. 3 JA000658-659.

b) Lisa's employment

Lisa had five jobs since she has been in Las Vegas, no savings and has taken jobs where she earns less. 3 JA000461-462, 466. Lisa's mother does not help her at all finally and her sister does not work. 3 JA000469. Lisa's sister does not have a driver's license. 3 JA000455-456.

///

///

c) Living condition

The court heard testimony from Michael regarding the children's living situation at his home. 3 JA000505.

Yes, Joel can live rent free with his parents as long as needed, but even if he was not, rent is cheaper in New Mexico. 3 JA000511.

Michael testified he would help Joel start up a business if needed. 3 JA000511-512.

d) reasons to relocate

Joel informed the court he wants to move back to New Mexico because it is a lot safer for the children, they are happier there and he believes they can thrive a lot there. 3 JA000528. He also wants to move back to New Mexico to have financial security and stability. 3 JA000537-538. Moreover, the court heard testimony from Joel regarding his request to move being to improve the children's lives. 3 JA000539.

Joel has leaned on his parents for support. 3 JA000534.

Relocating to New Mexico, living rent free at his parents' house and having them care for the children when he is at work, would enable him to save money to get his own place. 3 JA000544-545. While in Las Vegas, Joel was only renting a room. 3 JA000553.

Lisa admitted that when the parties and the children resided with Joel's parents it helped them financially when Joel's mother provided childcare. 3 JA0000594.

Lisa did not present evidence as to the magnet school Harley had been accepted to and how it supersedes the school she would attend in New Mexico. 3 JA000442. She also did not present evidence of the children's activities. *Id.*

6. Issues on appeal. State concisely the principal issue(s) in this appeal:

A. Did the court abuse its discretion when it concluded that Joel had met his burden of proving that the children's best interests would be served and their quality of life improved by relocating from Las Vegas into their paternal grandparent's house in Las Cruces, New Mexico?

7. Legal argument, including authorities:

A. THE COURT APPROPRIATELY GRANTED JOEL'S RELOCATION REQUEST TO NEW MEXICO BECAUSE HE MET HIS LEGAL BURDEN

The District Court did not abuse its discretion in granting Joel's motion to relocate the minor children because substantial evidence supported the decision. In any action for determining physical custody of a minor child, the sole consideration of the court is the best interest of the child.² Pursuant to NRS 125.007(1), when

² NRS 125C.0035

deciding whether to grant a petition for permission to relocate with a child, the relocating parent must demonstrate to the court that:

- (a) There 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) The best interests of the child are served by allowing the relocating parent to relocate with the child; and
- (c) The child and the relocating parent will benefit from an actual advantage as a result of the relocation.

Moreover, if a parent satisfies the provisions set forth above, the court must then weigh the following factors and the impact of each 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:

- (a) The extent to which the relocation is likely to improve the quality of life for the child and the relocating parent;
- (b) Whether the motives of the relocating parent are honorable and not designed to frustrate or defeat any visitation rights accorded to the non-relocating parent;
- (c) Whether the relocating parent will comply with any substitute visitation orders issued by the court if permission to relocate is granted;
- (d) Whether the motives of the non-relocating parent are honorable in resisting the petition for permission to relocate or to what extent any opposition to the petition for permission to relocate is intended to secure a financial advantage in the form of ongoing support obligations or otherwise;
- (e) Whether there will be a realistic opportunity for the non-relocating parent to maintain a visitation schedule that will adequately foster and preserve the parental relationship between the child and the non-relocating parent if permission to relocate is granted; and

(f) Any other factor necessary to assist the court in determining whether to grant permission to relocate.³

The parent who wishes to relocate with a child has the burden of proving that relocating with the child is in the child's best interest.⁴

Here, the district court appropriately granted Joel's request to relocate the children to Las Cruces, New Mexico because he satisfied the two prongs set forth above and the relocation is in the children's best interest. As such, the District Court's decision to grant the relocation should be affirmed.

1. Relocating the Minor Children to Las Cruces, New Mexico is in their Best Interest as they will Benefit Significantly from Financial Security and will be Returning to their Lifelong Home.

Substantial evidence supported the District Court's finding that relocation would be in the children's best interest and as such, there was no abuse of discretion in granting the request to relocate the minor children. To determine the best interest of the child, the Court must analyze the specific "best interest" factors, among other things.⁵

The following factors are relevant for the Court's consideration.

- (a) The wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his or her physical custody.
- (b) Any nomination by a parent or a guardian for the child.

³ NRS 125C.007(2).

⁴ NRS 125C.007(3)

⁵ NRS 125C.0035(4).

- (c) Which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent.
- (d) The level of conflict between the parents.
- (e) The ability of the parents to cooperate to meet the needs of the child.
- (f) The mental and physical health of the parents.
- (g) The physical, developmental and emotional needs of the child.
- (h) The nature of the relationship of the child with each parent.
- (i) The ability of the child to maintain a relationship with any sibling.
- (j) Any history of parental abuse or neglect of the child or a sibling of the child.
- (k) Whether either parent or any other person seeking custody has engaged in an act of domestic violence against the child, a parent of the child or any other person residing with the child.
- (l) Whether either parent or any other person seeking custody has committed any act of abduction against the child or any other child.

i. The court made express findings regarding the best interest factors.

Nevada law requires express findings as to the best interest of the child in custody matters.⁶ In *Davis*, the court denied the father’s request for visitation in Uganda and Rwanda and in support of its decision, the district court only stated that the world is a dangerous place.⁷ On appeal, the court reasoned that “the world is a dangerous place” is not enough and reversed and remanded the matter.⁸

Here, unlike in the *Davis* case, where the court’s findings were reduced to “the world is dangerous”, the court made express findings regarding all best interest factors. While Lisa stated the Decree only contains 50 words regarding the best

⁶ *Davis v. Ewalefo*, 352 P.3D 1139, 1143, Nev. 450-451 (2015).

⁷ *Id.* at 1142, 450.

⁸ *Id.* at 1145, 455.

interest findings, the record shows at least 7 pages stating findings regarding best interest factors.⁹

Moreover, the court specified the factors that are applicable in this case, which were not the fact that one parent spent more time with the children during the marriage.¹⁰ Additionally, the court considered the parties' post separation lives when it acknowledged the parties' recent shared custody arrangement, Joel's housing condition in Las Vegas, and the family bond between the children and both paternal and maternal families. It should also be noted that Lisa admitted many of the factors are inapplicable or neutral.¹¹

Lisa alleged that the district court did not address the factor regarding which parent is more likely to allow the children to have frequent associations and a continuing relationship with the noncustodial parent or the ability of the parents to cooperate to meet the needs of the child. However, that could not be farther from the truth, as the court addressed them in detail at trial.¹²

Therefore, because *Davis* is not analogous to the present case, Lisa's argument that the district court violated Nevada law is not persuasive and should not be considered.

⁹ 3 JA000654-661.

¹⁰ 3 JA000655.

¹¹ Appellant's Br. 18.

¹² 3 JA000655-657.

2. Joel Proved the Children Would Benefit from an Actual Advantage by Relocating to New Mexico Because He Proved the Children have a Strong Bond with their Paternal Grandparents and will have Financial Security when Relocating.

Because substantial evidence supported the District Court's finding of an actual advantage to the children from relocation, the District Court did not abuse its discretion in granting the relocation. In the first prong in the relocation analysis, the relocating parent must prove the child and the relocating parent will benefit from an actual advantage as a result of the relocation.¹³

Here, the district court was presented with a divorce case with two parties and who resided in New Mexico since marriage and 3 children who resided there since birth. Having only resided in Las Vegas, Nevada, since August 2019 and with only less than a year in Nevada, Joel initiated divorce proceedings with a request for primary physical custody and relocation of the children to their lifelong home, Las Cruces, New Mexico.

While it is true that just because someone lived someplace for a long time does not mean it would be an "actual advantage" to return there, here there are valid reasons to conclude there is an actual advantage.

¹³ NRS 125C.007(1)(c).

First, the children would benefit significantly from financial security in the form of family support. Despite Lisa being financially stable now, the children would still gain an actual advantage by relocating.

The court heard testimony from Michael regarding the children's living situation at his home. Moreover, Joel can live rent free with his parents as long as needed, but even if he was not, the court heard testimony that rent is cheaper in New Mexico. Also, Michael testified he would help Joel start up a business if needed.

Relocating to New Mexico would allow Joel's parents to provide care for the children when he is at work, which would enable Joel to save money to get his own place. While in Las Vegas, Joel was only able to rent a room, which is not a suitable environment for the children.

The court should consider that Lisa admitted that when the parties and the children resided with Joel's parents it helped them financially when Joel's mother provided child care.

In contrast, Lisa's mother does not help her at all finally and her sister does not work and Lisa's sister does not even have a driver's license.

Second, the children have a stronger bond with Joel's family in New Mexico. At trial the court considered family connections from both sides of the family. Lisa admitted that Joel's parents have a "very, very" strong bond with the children and supervised them when Lisa and Joel were unable to do so. She also admitted that the

children love their grandparents and if they stayed in Las Vegas, their bond would not be the same.

The court heard testimony from Joel's father regarding a plethora of activities that he and his wife did with the children in New Mexico. The record does not show that Lisa had an issue with these activities.

Joel has a brother, niece, and nephew in New Mexico, and all the cousins love to hang out with each other periodically.

In contrast, Lisa has her mother and a sister in Las Vegas who sometimes watch the children. They did not testify at trial, so the record does not show specific activities they have done or how they spend quality time with the children.

Lisa has another sister who lives in New Mexico 45 minutes from Joel's parents but is not as involved in the children's lives as Joel's family.

All this creates an actual advantage not only for Joel but for the children to relocate to Las Cruces, NM. As such, the District Court's decision to grant the relocation should be affirmed.

3. The Court had Sufficient Facts to Conclude the Children's Relocation to New Mexico is Likely to Improve their Quality of Life.

Because substantial evidence supported the District Court's finding that relocation would likely improve the children's quality of life, the District Court did not abuse its discretion in granting the relocation. Once a relocating parent satisfies the requirements in the first prong of the analysis, the Court must weigh various

factors, including the extent to which the relocation is likely to improve the quality of life for the child and the relocating parent.¹⁴ *Schwartz v. Schwartz* is not controlling here as those factors have been codified in Nevada law.

Here, similarly to everything stated above, the children's quality of life would likely improve in Las Cruces, NM because they would benefit from financial security and continue enjoying strong family bonds. The court also found the parties have ties to New Mexico and not to Las Vegas. Additionally, the court considered that the parties are employed in economic areas that exist in Las Cruces, New Mexico and Las Vegas, Nevada, such as food or auto parts. As such, neither party is tied to Las Vegas for employment purposes.

In fact, on her Pretrial Memorandum, Lisa indicated her intention to relocation to New Mexico if Joel was granted primary custody and given permission to relocate. More importantly, the parties formulated a parenting agreement based upon the approval of the relocation. Had Lisa not believed the relocation would improve the children's quality of life, she would not have in advance contemplated returning to Las Cruces also or formulated a parenting plan contingent on the relocation.

Also, had she not had ties to Las Cruces, NM, she would not have contemplated returning. The record shows Lisa's father and one of her sisters remain in New Mexico and her mother at some point considered returning there too. The

¹⁴ NRS 125C.007(2)(a).

parties were married in New Mexico and resided there until August 2019 and the children lived there since birth, yet Lisa continues to pretend she does not have ties to New Mexico.

Based on the above, the court did not err in concluding that the children's quality of life would likely improve if they relocate to Las Cruces, New Mexico. As such, the District Court's decision to grant the relocation should be affirmed.

4. The Court did not award *de facto* physical custody to Joel's parents.

It is appellant's responsibility to present relevant authority and cogent argument, and issues not so presented need not be addressed.¹⁵

Here, Lisa accused the court of awarding *de facto* custody to Joel's parents when granting Joel's request for relocation. However, Lisa failed to cite proper legal authority regarding *de facto* custody and how that authority entitles Joel's parents to child custody. Alternatively, Lisa did not cite legal authority that would suggest that the district court's order would have the practical effect of placing Joel's parents in the role of primary physical custodians.

Should this Court consider the unsupported accusations, the Court should also consider that the district court acknowledged some concerns with Joel's parents but

¹⁵ *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (citing *Carson v. Sheriff*, 87 Nev. 357, 360-361, 487 P.2d 334, 336) (1971) and *Freeman v. Town of Lusk*, 717 P.2d 331 (Wyo. 1986)).

cautioned both parties to stop any relative from either side of the family from disparaging the other parent in the children's presence. The district court in no way, shape or form award custody to Joel's parents or not consider any potential "red flags."

Therefore, the court should disregard Lisa's argument regarding *de facto* custody.

Based on the above, the Court should affirm the district court's decision granting Joel's relocation request to Las Cruces, New Mexico.

VERIFICATION

1. I hereby certify that this fast track response complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this fast track statement has been prepared in a proportionally spaced typeface using Microsoft Word–Office 365 Business in font type Times New Roman size 14.

2. I further certify that this fast track response complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ Proportionately spaced, has a typeface of 14 points or more and contains 3,672 words; or

☐ Monospaced, has 10.5 or fewer characters per inch, and contains ____ words
or ____ lines of text; or

☐ Does not exceed 11 pages.

3. Finally, I recognize that under NRAP 3E I am responsible for timely filing a fast track response and that the Supreme Court of Nevada may impose sanctions for failing to timely file a fast track response, or failing to raise material issues or arguments in the fast track response. I therefore certify that the information provided in this fast track response is true and complete to the best of my knowledge, information, and belief.

DATED this 9th day of November, 2021.

MCFARLING LAW GROUP

/s/ Emily McFarling

Emily McFarling, Esq.
Nevada Bar Number 8567
6230 W. Desert Inn Road
Las Vegas, NV 89146
(702) 565-4335
Attorney for Respondent,
Joel E. Eorio

CERTIFICATE OF SERVICE

I, an employee of McFarling Law Group, hereby certify that on the 9th day of November, 2021, I served a true and correct copy of this Child Custody Fast Track Response as follows:

☒ via the Supreme Court's electronic filing and service system (eFlex):

Bruce I. Shapiro, Esq.
Bruce@pecoslawgroup.com

Shann D. Winesett, Esq.
Shann@pecoslawgroup.com

/s/ Alex Aguilar
Alex Aguilar