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Summary of Flynn v. Flynn, 120 Nev. Adv. Op. No. 49

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Flynn v. Flynn, 120 Nev. Adv. Op. No. 49, 92 P.3d 1224 (2004)[1]

FAMILY LAW

Summary:

Terri Flynn appealed a denial from a post-divorce decree denying her permission to relocate with the parties' minor child to California for the purpose of Terri pursuing an associate's degree in theology.

Disposition/Outcome:

The district court's decision was upheld and the request for relocation denied.

Factual and Procedural History:

Terri and Tim Flynn were divorced in July 1997 and presently have an eleven-year old son. Both parents shared joint legal custody and Terri had Primary Physical Custody. In August 2002 she moved the district court for permission to relocate to California with her son in order to obtain an associate's degree in theology.

The district court denied the motion finding that such a move was not in the child's best interests. The court analyzed the motion in relation to the *Schwartz* factors[2] and found that Terri's rights were "only minimally affected by requiring her to complete the [Calvary Chapel Bible College] Associates [sic] in Theology degree here in Nevada." While acknowledging that Terri had a good faith reason to request the move, the court concluded that such a move was "not sensible" and would harm her son. Terri appealed.

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[1] By: Kirk Reynolds

[2] Schwartz v. Schwartz, 107 Nev. 378, 812 P.2d 1268 (1991) lists as factors for consideration in a relocation request:

> (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 non-custodial 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 non-custodian's motives are honorable in resisting the motion for permission to remove, or to what extent, if any, the opposition is intended to secure a financial advantage in the form of ongoing support obligations or otherwise; (5) whether, if removal is allowed, there will be a realistic opportunity for the non-custodial parent to maintain a visitation schedule that will adequately foster and preserve the parental relationship with the non-custodial parent.

The court also listed six sub-factors for deciding factor (1) "the extent to which the move is likely to improve the quality of life for both the children and the custodial parent." These are:

> (1) whether positive family care and support, including that of the extended family, will be enhanced; (2) whether housing and environmental living conditions will be improved; (3) whether educational advantages for the children will result; (4) whether the custodial parent's employment and income will improve; (5) whether special needs of a child, medical or otherwise, will be better served; and (6) whether, in the child's opinion, circumstances and relationships will be improved.

Discussion:

On appeal, Terri argued that the *Schwartz* factors do not apply to her situation because 1) she did not intend to change her domicile and 2) Tim is assured weekly contact with their son. The court was not compelled by either of these arguments.

As to the first argument, the court held that there is no basis for a distinction between the terms "residence" and "domicile." Terri argued that, although she and her son would live in California for two years, her intention was to return to Nevada once her schooling was complete. The court stated that Nevada's "anti-removal" statute NRS 125C.200[3] refers to parents who wish to change their "residence" and makes no mention of the term "domicile." Likewise, the *Schwartz* decision uses the term "residence" but not "domicile." Because Terri intended to change her residence for two years, the court reasoned that the *Schwartz* factors must apply.

Terri's second argument stated that the *Schwartz* factors do not apply if weekly contact is offered and possible. Terri argued that the statute merely requires that she demonstrate a good faith reason for moving and that, finding this, the *Schwartz* factors only apply if weekly visitation is precluded. The court rejected this, stating that a third step exists in the inquiry. Once the requesting parent makes such a showing, the burden then shifts to the non-moving parent to illustrate how the move is not in the best interests of the child. The district court is then left to determine the best interests of the child according to the *Schwartz* factors.

Terri argued that Tim did not meet his burden in showing how the move would not be in the best interests of the child and that the district court abused its discretion in denying the motion. The court, conducting a *de novo* review of the district court's findings, found that Tim did meet his burden. The court listed several factors considered by the court below including the child's entry into middle school and puberty during these two years as well as the fact that Terri could pursue the degree in Nevada while maintaining the same standard of living as that found in California. Finding this, the court rejected Terri's argument and affirmed the lower court's findings.

Lastly, Terri argued that a denial of the motion violated her First Amendment rights because the district court treated the motion differently due to her pursuit of religious beliefs. The court found nothing in the record to indicate an intent to deny the free exercise of religion and instead quoted Tim's attorney saying "this isn't a [sic] religious from our point of view…It's a question of what is best for [the minor child]. Christianity is not on trial."

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[3] NRS 125C.200 reads

> "If custody has been established and the custodial parent 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 noncustodial parent to move the child from this state. If the noncustodial parent refuses to give that consent, the custodial parent shall, before he leaves 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."

Conclusion:

The district court did not err or abuse its discretion in denying Terri's motion for relocation based on the *Schwartz* factors. These factors apply to all relocations outside the state of Nevada regardless of whether the relocation is for a fixed or indeterminate period of time.