i. Relocation

(1) Statutes and Court Rules

NRS 125C.200 provides that once custody has been established and the custodial parent intends to move his residence to a place outside Nevada and to take the child with him, he or she must, as soon as possible and before the planned move, attempt to obtain the written consent of the non-custodial parent. If the non-custodial parent refuses to consent, the custodial parent may petition the court for permission to move the child. NRS 125C.200. Furthermore, the failure of a parent to comply with this statute may be considered as a factor if a change of custody is requested by the non-custodial parent. NRS 125C.200.

In reviewing the cases discussed below, the practitioner should remember that the Nevada Legislature amended the statute in 1999 to delete references to a parent having joint custody.

(2) Cases

The Nevada Supreme Court first interpreted NRS 125C.200 (formerly NRS 125A.350) in *Schwartz v. Schwartz*, 107 Nev. 378, 812 P.2d 1268 (1991). In *Schwartz*, the Nevada Supreme Court held that in deciding whether to grant permission to move, the district courts in Nevada are supposed to balance the interest of the custodial parent's freedom of movement against the best interests of the child and the competing interest of the non-custodial parent.

In order to assist courts in balancing these competing concerns, the Nevada Supreme Court set forth a multi-part test in *Schwartz* for determining when permission for a parent to remove a child from the State should be granted. First, the party seeking to move must demonstrate that an actual advantage will be realized by both the child and the custodial parent as a result of the move. If the threshold requirement is met, the court must then examine the following additional factors and their impact on family members. These factors include: (1) the extent to which the move is likely to improve the quality of life for both the child and the custodial parent; (2) whether the custodial parent's motives are honorable, and not designed to frustrate or defeat the visitation rights of the non-custodial parent; (3) whether the custodial parent is willing to comply with any substitute visitation orders issued by the court in the event that permission to move is granted; (4) whether the noncustodial parent's motives in opposing the move are honorable; and (5) whether, if the move 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. *Id.* at 383.

Since the *Schwartz* decision in 1991, the Nevada Supreme Court has decided a multitude of cases in an effort to clarify and in some ways modify the *Schwartz* test. For example, in *Jones v. Jones*, 110 Nev. 1253, 885 P.2d 563 (1994), the Nevada Supreme Court clarified the *Schwartz* test by ruling that a custodial parent seeking to relocate does not have to necessarily prove a significant economic or other tangible benefit to meet the threshold showing of "actual advantage" to the child and the parent. As long as the custodial parent can demonstrate a sensible, good faith reason for the move, the district court should evaluate the other factors

enumerated in the balancing test, focusing on the possibility of reasonable alternative visitation, and if reasonable alternative visitation is possible, the burden shifts to the non-custodial parent to show concrete, material reasons why the move is inimical to the child's best interests. *Id.* at 1266.

In *Trent v. Trent*, 111 Nev. 309, 890 P.2d 1309 (1995), the Court found it disturbing that despite its decision in *Schwartz*, "many district courts are using NRS 125A.350 (former version of NRS 125C.200) as a means to chain custodial parents, most often women, to the state of Nevada." The Court stated that the move statute 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." *Id.* at 315. The Court warned trial courts against using the move statute as a means "to prevent the custodial parent from freely pursuing a life outside of Nevada when reasonable alternative visitation is possible." *Id.*

Since *Trent*, the Nevada Supreme Court has issued a steady stream of cases re-emphasizing the duty of district courts to permit moves by the custodial parent once a sensible, good faith reason for the move has been demonstrated.

In *Gandee v. Gandee*, 111 Nev. 754, 895 P.2d 1285 (1995), the Supreme Court addressed two consolidated move cases and held that an out-of-state move was improperly denied where the father had a greater family support system in Oregon, housing would improve, and his improved financial position and expanded career opportunities would benefit the children, letting him save for the children's college and provide better medical care for the handicapped child, where education was testified to as comparable, both parties' motives were conceded to be honorable, and the father had been accommodating regarding visitation, and agreed to lessen support to provide a transportation offset. In the consolidated case, *Montelione v. Montelione*, the Court again determined that a move had been improperly denied where the mother with primary custody sought to move to Denver, Colorado to live with her new husband who had been transferred there from Reno, and the move offered a great house in a wonderful neighborhood, two step-brothers, and the chance for the mother to be a full-time homemaker. *Id.* at 762-63.

In *Gandee*, the Court noted that denial of a proposed move simply based on resulting disruption of weekly visitation places an "unfair burden" on the custodial parent. The Court reiterated its position in *Jones* that the custodial parent is the one who has to "arrange his or her day-to-day life in a manner consistent with the burdens of raising the child." *Id.* at 761. The Court opined that: "The sad reality is that often when parents divorce, one parent may at some point lose the continuing physical contact, i.e., daily time spent with his or her children, that he or she enjoyed while still married." *Id.*

The Nevada Supreme Court concluded in *Gandee* that "we construe [the move statute] to mean the following: once the custodial parent has made a threshold showing of a good faith reason for the move, i.e., a reason that is not designed to frustrate visitation of the non-custodial parent, then the court must consider the *Schwartz* factors. Recognizing that the visitation that the non-custodial parent has been enjoying will necessarily be disrupted as a result of the custodial parent's intended move, the courts must focus particularly on the possibility of alternative and

reasonable visitation schedules." *Id.* at 763.

In *Cook v. Cook*, 111 Nev. 822, 898 P.2d 702 (1995), the Court reiterated the *Schwartz* test, as interpreted in *Jones*, and reiterated the *Trent* language that NRS 125A.350 is not to be used to "chain custodial parents, most often women, to the state of Nevada." In *Cook*, the very close relationship between father and daughter alone was found to be an insufficient basis to deny the move motion. The Court determined that the mother met the threshold, and that the secondary *Schwartz* factors favored the mother as well. *Id.* at 828.

In *McGuinness v. McGuinness*, 114 Nev. 1431, 970 P.2d 1074 (1998) the Nevada Supreme Court first applied the relocation standards to a case involving joint physical custody. The Court again emphasized the importance of alternate visitation arrangements, reasoning that physical separation does not necessarily preclude a parent from maintaining significant and substantial involvement in a child's life, and noting alternate methods of maintaining a meaningful relationship, including telephone calls, e-mail messages, letters, and frequent visitation. *Id.* at 1436. The Court went on to reverse the lower court's denial of permission to move, finding that the district court failed to consider the possibility of reasonable, alternative visitation and focused on the fact that a move would render the current joint physical custody arrangement impossible. *Id.* at 1437.

In *Halbrook v. Halbrook*, 114 Nev. 1437, 971 P.2d 1262 (1998), a case similar to that of *McGuiness*, the Supreme Court found that the District Court erred in finding that the mother had failed to present a sensible, good faith reason for her move and in finding that the mother had failed to file her motion in good faith. In reversing and remanding for a re-evaluation of the mother's motion to relocate, the Court found that the District Court improperly weighted the fact that the father would no longer have weekly contact with his daughter, and failed to seriously consider the possibility of alternative visitation. *Id.* at 1458.

In *Mason v. Mason*, 115 Nev. 12, 975 P.2d 340 (1999), the trial court denied the mother's relocation request after addressing all factors set out in *Schwartz*. The lower court found that the mother had not passed the *Schwartz* threshold of establishing a good-faith basis for the move based upon her long and documented history of actions taken in frustration of father's visitation and parental bonding with his son. The lower court also analyzed the five *Schwartz* factors, and found that the mother's frustration of the father's parental relationship would continue from long distance thus rendering inadequate any alternate visitation arrangement established if relocation was granted.

On appeal, the Nevada Supreme Court affirmed the decision of the lower court, concluding that frustration of the non-moving parent's parental relationship may be part of the calculus of the final *Schwartz* factor, that being whether, assuming all of the other factors have been considered, reasonable alternate visitation is available. In a footnote, the Court opined that an intent to frustrate might or might not prevent a finding that the threshold good faith reason for a move had been satisfied, since there might well be independent grounds establishing the threshold showing, but that in any event, such intent to frustrate was relevant to the fifth factor as well.

In *Hayes v. Gallacher*, 115 Nev. 1, 972 P.2d 1138 (1999), the mother – who had been awarded primary physical custody of the minor children – married a USAF officer who was about to be transferred to Japan. Based upon the military transfer of her husband, the mother petitioned the court for permission to relocate to Japan. The children's father opposed the request and also counter-moved for change of custody in the event she did move.

The district court, without an evidentiary hearing, denied the mother's motion and granted father's motion to change custody if the mother decided to move. The lower court found that both parties' motives were honorable, but that it was in the children's best interest to remain in Las Vegas. The trial court reasoned that the mother had not "justified" the move under the standard of *Schwartz* as there were unresolved concerns about life in Japan, the inability of the children to speak the local language, contact with extended family would be lost, medical facilities were not believed adequate, housing and environmental conditions were unknown, and the mother's overall financial condition would be diminished. The court also found that round trip travel for the children would cost $6,000, and that such a move would by itself meet the test set out in *Murphy v. Murphy*, 84 Nev. 710, 447 P.2d 608 (1974) justifying a change in custody.

The Nevada Supreme Court reversed. The Court began by reviewing the *Schwartz* line of authorities interpreting Nevada's move statute, and acknowledged the impossibility of not causing at least one parent to be negatively impacted by whatever decision is made in a relocation case. The Court then proceeded to announce a new rule to apply "where relocation of the primary custodian would substantially obliterate the possibility of a traditional alternative visitation," adopting Section 2.20 of the American Law Institute's Principles of the Law of Family Dissolution (Tentative Draft No. 3, Mar. 20, 1998), which provides that if a move makes it impractical to maintain the same proportion of residential responsibilities, the move should be granted anyway if it is made because of one of a number of listed reasons (including to be with a new spouse), and there is no reasonable closer alternative. The Court concluded that since the move here significantly impaired the father's abilities to exercise the responsibilities set out in the prior plan, it warranted a re-examination of custody based on the best interest of the children, taking into account all relevant factors, including the effects of the relocation. *Id*. at 5.

The Court went on to note the absence of an evidentiary hearing, unrefuted evidence in the record regarding the quality of life at a military base in Japan, and the district court's failure to address NRS 125.480(4) (which requires consideration of domestic violence allegations), and reversed and remanded the case for consideration of the relevant evidence. The Court went on to criticize the order below (that would grant a change of custody upon relocation) as designed to punish the primary custodian for relocating, which is strictly prohibited by *Sims v. Sims*, 109 Nev. 1146, 865 P.2d 328 (1993). The Court held it particularly unacceptable to force the mother to choose between her husband and her children, and stated that such conditional orders should only be made when the best interest of the child are served by such a change, taking into consideration all factors, not just a proposed move. Even if a move is for "an illegitimate reason" or to "an unreasonable location," the move with the child should be allowed if that parent can show that the relocation would be better for the child than a change of custody would be. *Id.* at 5.

(3) Discussion

Undoubtedly, relocation cases present some of the most difficult legal and factual challenges a family law practitioner faces. Courts today are struggling with the difficult task of having to balance the custodial parent's freedom of movement against the needs of the child and the non-custodial parent's desire to maintain frequent and continuing contacts with the child.

In cases where there is a clear primary physical custodian seeking permission to relocate, the cases of *Jones* and *Trent* are most instructive. In those situations, the proposed moves have virtually always been approved barring any unusual circumstances. The "method of analysis" set forth in *Jones* and *Trent* is much different than a strict application of the best interest standard. In fact, the Nevada Supreme Court has made it quite clear that a strict application of the best interest standard would unfairly restrict the freedom of the primary custodian, and therefore, the Nevada Supreme Court has attempted to level the playing field through its long line of cases dating back to *Schwartz*.

On the other hand, in joint or shared physical custody removal cases, the Supreme Court's decisions in *McGuiness* and *Halbrook* are controlling. Those cases are less instructive as to outcome, and should be used only as a basis for arriving at a "method of analysis" for addressing future cases. Finally, in those joint physical custody cases where the non-moving parent responds with a motion for primary physical custody, the law in Nevada remains somewhat unclear – although the *Hayes* case does attempt to address this issue.

The 1999 amendment to delete references to joint custody was apparently intended to eliminate any incentive by a joint physical custodian to gain primary custody by requesting a move and being held to only satisfying a "good faith" standard, instead of first establishing that the best interest of the child would be served by obtaining primary physical custody. While the cases do not yet make it clear, it would appear prudent practice in a joint physical custody context to seek primary physical custody prior to, or at least as an additional request in, a relocation motion.

Despite the strong tone of *Trent* and *McGuiness* (criticizing district courts for too often interpreting NRS 125C.200 as a means to prevent parents from freely pursuing a life outside of Nevada), not all moves have been permitted. *See*, *e.g.*, *Mason v. Mason*, 115 Nev. 12, 975 P.2d 340 (1999), and *Davis v. Davis*, 114 Nev. 1461, 970 P.2d 1084 (1998) (denying move in shared physical custody case where father's job as firefighter made extended visits difficult and distance from Florida to Las Vegas made short visits unmanageable, and trial court was therefore unable to fashion reasonable alternative visitation). As such, practitioners should be careful not to over-generalize the decisions discussed above. While many practitioners interpret the cases as establishing a strong preference of the court in favor of relocation, that is not necessarily true; the Court has indicated that

its intent was to establish a fair and efficient "method of analysis" to assist trial courts in resolving these very difficult cases. Each case is unique, and therefore warrants separate consideration.

At least some departments of the Eighth Judicial District Court have declared that they will apply the factors set out in the relocation decisions discussed above when hearing cases involving a proposed move by a custodial parent who already lives in another state, but wishes to move from that state to a third state (some have termed these "second-move" cases). The cases usually arise as either a motion by the out-of-state custodial parent to permit the relocation, or a motion by the Nevada non-custodial parent to change custody based on the custodial parent's already-completed relocation from state to state. While stressing that the statute, by its own terms, does not explicitly apply to such situations, the judges applying the relocation factors to such cases have indicated that the statute applies "by analogy," or as a framework for considering the overriding question of the child's best interest.[1]

(4) Local rules

There are no local rules specifically applicable to this section.

ii. The Hague Convention Regarding International Child Abduction

(1) Introduction, Purpose, and Framework of the Convention

A proceeding seeking the return of a child from one signatory country to another is governed by the "The Convention on the Civil Aspects of International Child Abduction, done at the Hague on 25 Oct. 1980" [commonly referred to as "the Hague Convention"], and its implementing legislation, the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§ 11601-11610. As a treaty entered into by the United States, this law is on par with the Constitution of the United States, and supersedes any conflicting statutes, cases, or rules.

The Hague Convention addressed the increasing problem of international child abduction in the context of international law while respecting rights of custody and visitation under national law. According to its Preamble, the Convention aims "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence." Hague Convention, Preamble, T.I.A.S. No. 11670 at 4.

The twin objectives of the Hague Convention are: (1) "to secure the prompt return of children wrongfully removed [ ] or retained"; and (2) "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." *Id.*, Art. 1; *see also In re Prevot*, 59 F.3d 556, 558 (6th Cir. 1995). One of the paramount purposes of the Hague Convention is to "restore the status quo and deter parents from crossing international borders in search of a more sympathetic court." *See Nunez-Escudero v. Tice-*

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[1] One district court judge, in reaching that conclusion, found persuasive the reasoning in the Illinois cases of *In re Marriage of Ballegeer*, 602 N.E.2d 852 (Ill. App. Ct. 1992) and *In re Marriage of Lange*, 717 N.E.2d 507 (Ill. App. Ct. 1999). Those two cases reached opposite results as to the cross-motions for custody and relocation before them, but both found the corresponding provisions of Illinois case law addressing relocations from that state to apply in such "second-move" situations.

Menley, 58 F.3d 374, 376 (8th Cir. 1995).

It can hardly be adequately stressed that the Convention does ***not*** give rise to custody proceedings; as explained in greater detail below, it is concerned with return of children to their countries of habitual residence, which is where any custody proceedings should be held.