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Summary of Bluestein v. Bluestein, 131 Nev. Adv. Op. 14 (Mar. 26, 2015)

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FAMILY LAW: CHILD CUSTODY

Summary

The Court held a district court has the authority to review and modify a custodial agreement once either party makes a modification request. When modifying a custodial agreement, however, the district court must primarily look for the child's best interest.

Background

Ellen and Michael Bluestein were married for 13 years, had one child together, and divorced in 2004. In their stipulated divorce decree, Michael would have the child from 5 p.m. on Thursday to 9:30 a.m. on Sunday, Ellen would have the child for the remainder of the time, and the parties would alternate holidays. The stipulation did not cover child support or explicitly stated if there was primary or joint physical custody.

In 2011, Michael began receiving public assistance and the Nevada Department of Health and Human Services sought a reimbursement from Ellen for a portion of Michael's state aid as her child support obligation. Ellen objected and requested that the court designate her as the child's primary physical custodian. Ellen argued that under the custodial agreement Michael only had the child 38 percent of the time instead of the 40 percent in accordance with *Rivero*.² Under *Rivero*, parents have joint custody when they have the child 40 percent of the time per week.

The district court entered an order concluding that Ellen had primary physical custody of the child because Michael only had the child 38.393 percent of the time. Michael motioned for reconsideration, and the district court held an evidentiary hearing. The evidentiary hearing dealt with the responsibilities of both parties regarding the child on Thursdays. The court designated Ellen as the child's primary physical custodian because Ellen had the child over 60 percent of the time. The court did not state whether it took into account the child's best interest. Michael appealed and challenged the designation of Ellen as the child's primary physical custodian.

Discussion

Modifying custody agreements

Public policy encourages parents to enter into private custody agreements for co-parenting.³ These agreements are generally enforceable until one or both of the parties move the court to modify the custody agreement. However, once the parties move the court to modify an existing custody agreement, the court must use Nevada law. Michael argues that since Ellen did not request a change in the timeshare, then the district court lacked authority to modify the custody agreement.

¹ By Ashleigh Wise.

² *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009).

³ *St. Mary v. Damon*, 129 Nev. ___, ___, 309 P.3d 1027, 1035–36 (2013); *Rennels v. Rennels*, 127 Nev. ___, ___, 257 P.3d 396, 399 (2011).

The parties' agreement to share joint physical custody controlled until Ellen asked the court to designate her as the primary physical custodian. Ellen did not request a modification to the timeshare, but she did request a modification to the physical custodial agreement. The district court has the authority to review timeshare arrangements and determine whether the parties shared joint physical custody under Nevada law. Since the district court has proper authority, it could modify the agreement accordingly.

Child's best interest is paramount when modifying custody

Whenever an issue of custody modification is brought before the court, the court must consider whether such modification is in the child's best interest.⁴ Here the district court used the 40 percent test in *Rivero* instead of considering the child's best interest. In *Rivero*, the parties agreed to joint physical custody but created a timeshare agreement where the mother had the child for five days each week. The parties filed motions to either modify the timeshare agreement or the physical custody. The district court determined that the parties intended a joint physical custody arrangement and ordered a modification to the timeshare.

On appeal, the Supreme Court set parameters for the purpose of clarifying which timeshare arrangements qualified as joint physical custody. The Court held it is in the child's best interest to have frequent associations and a continuing relationship with each parent and to encourage parents to share the rights and responsibilities of child rearing.⁵ The child's best interest is paramount in custody matters. Further, there is a presumption that joint physical custody is in the best interests of a child. The 40-percent custody threshold serves as a baseline to achieve these aims.

Here, The Court held that the district court looked solely to the 40-percent guideline in modifying the custody agreement and did not consider the child's best interest. Further, the Court held the 40-percent guideline in *Rivero* should not be so rigidly applied that it would preclude joint physical custody when the court has broad discretion in using the child's best interest for custodial designations. Moreover, the child's best interest is especially important when one parent has the child for almost 40 percent of the time and the timeshare allows the child to have frequent associations with each parent. Finally, the Court held it is important to look for the child's best interest when one parent requests a modification solely to decrease child support obligation.

Conclusion

The district court abused its discretion by not looking towards the child's best interest when modifying the parties' custodial agreement to designate Ellen as primary physical custodian. The Court reversed and remanded for further proceedings consistent with this opinion.

⁴ NEV. REV. STAT. 125.510(2).

⁵ *Rivero*, 125 Nev. 410, 423.