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Harrison v. Harrison, 132 Nev. Adv. Op. 56 (Jul. 28, 2016)

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FAMILY LAW: LIMITATIONS ON DISTRICT COURT DISCRETION IN CHILD
CUSTODY CASES

Summary

The Court held that a district court's written order concerning the custody of two minor children did not violate public policy when its stipulations provided (1) that it was within the discretion of each minor child, after reaching the age of 14, to decide how much time to spend with either of their divorced parents as long as the original arrangement for joint physical custody remained intact, and (2) that a "parent coordinator" would be appointed to resolve disputes and whose role could be defined by a written district court order. Three justices dissented that the first provision encroaches on the district court's jurisdiction and that the second provision inappropriately delegates the district court's responsibility.

Background

After Kirk and Vivian Harrison divorced in 2011, they entered into written stipulations that the district court adopted as an order. These stipulations concerned the arrangements for joint legal and physical custody of their two minor children. One of the stipulations provided that each child could, after reaching the age of 14, exercise discretion as to the time spent with each parent. A second stipulation allowed for a "parenting coordinator" to be appointed with authority to resolve disputes to an extent that would be determined separately. The district court could define the coordinator's role by written order if the parties to the case disagreed. The Harrisons did not at first appoint a coordinator or determine between themselves what the coordinator's role would be in resolving disputes.

When the Harrisons' oldest daughter turned 14, she informed her father that she wished to live full-time with her mother. Vivian Harrison argued that under the district court's order the child's exercise of discretion is a binding order that both parents must honor while Kirk Harrison argued that the exercise of discretion is merely a request that the parents are free to disregard. Over Kirk's objections, Vivian moved for a parenting coordinator to be appointed with a proposal outlining the coordinator's role in settling the dispute. The district court's ultimate order appointed a coordinator with the defined role of making recommendations as to ancillary matters such as scheduling that would be subject to court review. Kirk Harrison filed a motion with the district court to amend the initial order on the grounds that (1) the discretion provision was either void as a matter of public policy or should be construed as the expression of a non-binding request, and (2) that the provision allowing for a parent coordinator is void for lack of a meeting of the minds.

The district court denied Kirk's motion and he now appeals.

¹ By Douglas H. Smith

Discussion

As the Supreme Court will not disturb a district court's custody determinations absent a clear abuse of discretion, the stipulations in question will be void only if they violate public policy.²

Teenage discretion provision

Kirk Harrison argues that district court must amend its initial custody order on the grounds that the discretion provision was either void as a matter of public policy or should be construed as the expression of a non-binding request. The plain language of the provision indicates that the parties did not intend for the children to have absolute authority to decide their custody schedules, but that the children should feel more at ease making occasional adjustments to their weekly schedules so as to spend additional time with each parent or at each home.

Modification by invalidation

When parents agree to joint physical custody, there is a presumption that such custody is in the child's best interests.³ The question here is thus whether the discretion provision preserves the agreement to joint physical custody. The court held that, because the provision extends only limited discretion, the agreement is not endangered. The order does not confer absolute power upon the children to decide their own custody. They simply have more flexibility in arranging their weekly schedules than they would have before age 14. Any serious threats to the physical custody arrangements may be referred to the parenting coordinator and the district court for review. Moreover, parents have the right to confer this kind of limited discretion as part of their fundamental liberty interest in their children that can generally be limited only when it opposes the fundamental rights of the children themselves.⁴ The Harrisons initially agreed that both joint physical custody and the discretion provision were in their children's best interest, and Kirk Harrison did not object to the provision until his daughter indicated her wishes a year later. As such, and considering the limited extent of discretion, the provision does not endanger the joint physical custody agreement or by extension the children's best interests. The provision is therefore not void as a matter of public policy.

Modification by rewriting

Kirk argues in the alternative that the discretion provision should be construed as a non-binding request. Based upon the plain meaning of the existing language, such a construction would effectively require additional terms to be inserted into the order without Vivian Harrison's consent, which the court will not do.⁵

² Ellis v. Carucci, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007); *see also* Miller v. A & R Joint Venture, 97 Nev. 580, 582, 636 P.2d 277, 278 (1981).

³ Nev. Rev. Stat. §§ 125.510(1)(b) (2015).

⁴ Kirkpatrick v. Eighth Judicial District Court, 119 Nev. 66, 71, 64 P.3d 1056, 1059 (2003).

⁵ *See* Reno Club, Inc. v. Young Inv. Co., 64 Nev. 312, 313, 182 P.2d 1011, 1016 (1947) (Creating a new contract for the parties that they did not themselves intend is beyond the court's power).

Parenting coordinator provision

Kirk claims that the parenting coordinator provision is against his children's best interests and that the court may not delegate its authority. The court disagrees.

Defining a parenting coordinator

Parenting coordinators are generally neutral third-party intermediaries who assist in resolving conflicts over custody and visitation between divorced or separated parents.⁶

Best interests of the children

Kirk Harrison argues that the provision for a parenting coordinator is against his children's best interests because it increases third-party intrusion into their lives. The court disagrees. In light of this case's contentious history, the parenting coordinator can provide an outlet for resolving conflict over non-substantive issues and thus minimize the effect of persistent conflict upon the children.⁷ A coordinator also allows for disputes to be resolved without the need for formal proceedings.⁸ Therefore, the court holds that the district court did not abuse its discretion by allowing the coordinator provision to remain in the order.

Delegation of judicial authority

The district court did not improperly delegate its decision-making power to a third party. Both parents initially consented to the role of a parenting coordinator. The coordinator's powers are limited to resolving non-substantive issues such as scheduling and don't affect the underlying custody arrangement. Moreover, any recommendations the coordinator made would be subject to court review. As such, the Supreme Court holds that appointing and defining the responsibilities of a parenting coordinator does not compromise judicial integrity. Contrary to the dissent's assertion, judicial review is unnecessary when both parties agree or when a disagreeing party fails to raise an objection. When someone actually knows that rights are going to be affected and wishes those rights to be preserved, requiring the person to act with due diligence does not offend due process.⁹

NRS 125.005

The dissent's objection that the majority improperly performed a legislative function expanding NRS 125.005(2) when it permitted the district court and the parties to give the parenting coordinator allegedly binding authority is incorrect. NRS 125.005 is a statute that empowers the court to appoint a referee in divorce and custody cases and issue recommendations to the district judge.¹⁰ It does not apply to Clark County based on its population size.¹¹ Even if

⁶ Bower v. Bournay-Bower, 15 N.E.3d 745, 748-749 (Mass. 2014).

⁷ *Id.* at 752.

⁸ *Id.*

⁹ SFR Invs. Pool 1, LLC v. U.S. Bank, 130 Nev. Adv. Op. 75, 334 P.3d 408, 418 (2014) (quoting *In re Medaglia*, 52 F.3d 451, 455 (2nd Circuit 1995).

¹⁰ NEV. REV. STAT. §§ 125.005(2) (2016).

¹¹ NEV. REV. STAT. §§ 125.005(6) (2016).

the statute did apply, however, the grant of authority to the parenting coordinator is the same as that which is given to a referee in that both are subject to district court review and are not actually binding. In fact, the scope of the parenting coordinator's powers is more limited than that available to a referee, who can examine parties and witnesses under oath and rule on the admissibility of evidence.¹² Subject to these limits, recognizing the district court's and the parties' authority to empower a parenting coordinator is not an improper expansion of the statute.

Conclusion

The provisions for teenage discretion and a parenting coordinator are legally permissible. The district court's decision to deny Kirk Harrison's motion is upheld.

Dissent

The teenage discretion provision encroaches on the district court's jurisdiction and the parenting coordinator provision inappropriately delegates that court's responsibility.

"Teenage discretion" provision

The district court has original jurisdiction in all cases that the law excludes from justices' courts and determines the physical custody of children.¹³ The sum of power rests with the district court, and granting discretion intrudes on that power. In addition, it gives the child's wishes undue weight when there are many factors behind a custody decision.¹⁴

Parenting coordinator provision

Under the majority's reasoning, the parenting coordinator has binding authority to make decisions when both parties agree or neither party files an objection. Yet by statute a referee in custody cases can only make recommendations that are subject to a district court's review.¹⁵ Ultimate power in child custody cases rests with the judge.¹⁶ The district court's order therefore represents an improper delegation of power.

Conclusion

For the foregoing reasons, the dissent believes that the district court should have modified its custody order regarding teenage discretion and the parenting coordinator.

¹² Nev. Rev. Stat. §§ 125.005(3) (2016).

¹³ NEV. CONST. ART. 6 § 6(1); NEV. REV. STAT. §§ 125C.0025(1)(2016).

¹⁴ See NEV. REV. STAT. §§ 125C.0035(4)(2016).

¹⁵ NEV. REV. STAT. §§ 125.005(2)(2016)

¹⁶ *Cosner v. Cosner*, 78 Nev. 242, 245, 371 P.2d 278, 279 (1962).