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Summary of Rivero v. Rivero, 124 Nev. Adv. Op. No. 84

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***Rivero v. Rivero*,¹ 125 Nev. Adv. Op. No. 34 (August 27, 2009)**

**FAMILY LAW – DIVORCE: CHILD SUPPORT, CHILD CUSTODY,
ATTORNEY’S FEES**

Summary

Petition for rehearing of *Rivero v. Rivero* and appeal from a district court post-divorce decree order modifying a joint child custody award. Rehearing denied, opinion withdrawn, affirmed in part, reversed in part, and remanded.

Disposition/Outcome

The Supreme Court of Nevada withdrew its October 30, 2008 opinion for *Rivero v. Rivero*² and ruled that the district court abused its discretion when it determined, without making specific findings of fact, that the parties had joint physical custody and when it modified the custody arrangement set forth in the divorce decree. In addition, the Court concluded that the district court abused its discretion in denying Ms. Rivero’s motion to modify child support because it did not set forth specific findings of fact to justify deviating from the statutory child support formulas. The Court also concluded that the district court abused its discretion when it awarded Mr. Rivero attorney fees in relation to Ms. Rivero’s motion to disqualify the district court judge. The matter was reversed and remanded to the district court for further proceedings consistent with this opinion.

However, the Court concluded that the district court judge properly refused to recuse herself, and the chief judge properly denied Ms. Rivero’s motion for disqualification. The Court affirmed the district court’s orders regarding the recusal and disqualification.

Facts and Procedural History

Ms. Rivero filed a complaint for divorce, and the parties eventually reached a settlement. The district court entered a divorce decree incorporating the parties’ agreement. The parties agreed to joint physical custody of the child, with Ms. Rivero having physical custody five days each week and Mr. Rivero having physical custody for the remaining two days. The divorce decree also reflected the parties’ agreement that neither party was obligated to pay child support.

Less than two months after entry of the divorce decree, Ms. Rivero moved the court to modify the decree by awarding her child support. The district court dismissed her motion. Less than one year later, Ms. Rivero moved the district court for primary physical custody and child support. The district court held a custody hearing and denied Ms. Rivero’s motion for child support, found that the parties had joint physical custody, and ordered the parties to mediation to establish a more equal timeshare plan to reflect a joint physical custody arrangement.

¹ By James Conway

² 124 Nev. Adv. Op. No. 84, 195 P.3d 328 (2008).

After the mediation, but before the next district court hearing, Ms. Rivero served a subpoena on Mr. Rivero's employer for his employment records. The district court granted Mr. Rivero's motion to quash the subpoena, explaining that under the divorce decree, each party had joint physical custody, neither party owed child support, and the only pending issue was whether the parties could agree on a timeshare plan. Ms. Rivero then argued that the district court should reopen the child support issue and allow relevant discovery.

When the district court refused, Ms. Rivero requested that the district court judge recuse herself. The district court judge denied the request. Ms. Rivero then moved to disqualify the district court judge, alleging that the judge did not seriously consider the facts or the law because she was biased based on the parties' physical appearance. After considering Ms. Rivero's motion to disqualify the district court judge, supporting affidavits, and Mr. Rivero's opposition, the chief judge denied the motion. The chief judge concluded that Ms. Rivero's claims appeared to rely on "prior adverse rulings of the judge" and that "[r]ulings and actions of a judge during the course of official judicial proceedings do not establish legally cognizable grounds for disqualification." Thus, the chief judge found that Ms. Rivero's motion was without merit.

At a subsequent hearing, the district court granted Mr. Rivero's motion for attorney fees, noting that Ms. Rivero's disqualification motion was without merit. During the same hearing, the district court found that the decree's order for joint physical custody was inconsistent with the decree's timeshare arrangement because the decree's five-day, two-day timeshare did not constitute joint physical custody. In its order, the district court concluded that the parties intended joint physical custody and ordered an equal timeshare.

The district court found that Ms. Rivero did not have de facto primary physical custody. Therefore, the court determined that an evidentiary hearing was unnecessary because it was not changing primary custody to joint custody, but was modifying a joint physical custody arrangement. Ms. Rivero appealed, challenging the district court's order denying her motion for child support, the order denying her motion to disqualify the district court judge, and the order modifying the custody timeshare and awarding Mr. Rivero attorney fees.

Discussion

Legal Custody

The Court stated that legal custody involves having basic legal responsibility for a child and making major decisions regarding the child, including the child's health, education, and religious upbringing.³ The Court continued by noting that sole legal custody vests this right with one parent, while joint legal custody vests this right with both parents. Joint legal custody can exist regardless of the physical custody arrangements of the parties.⁴

³ Mack v. Ashlock, 112 Nev. 1062, 1067, 921 P.2d 1258, 1262 (1996).

⁴ NEV. REV. STAT. § 125.490(2); Mack, 112 Nev. at 1067, 921 P.2d at 1262 (Shearing, J. concurring).

Physical Custody

The Court held that physical custody involves the time that a child physically spends in the care of a parent. Parents can share joint physical custody, or one parent may have primary physical custody while the other parent may have visitation rights.⁵

A. Defining Joint Physical Custody

The Court stated the need for it to clarify Nevada's definition of joint physical custody pursuant to Nevada statutes and case law and create parameters to clarify which timeshare arrangements qualify as joint physical custody. The Court began by stating that "[i]n determining custody of a minor child . . . the sole consideration of the court is the best interest of the child."⁶ The Court held that the Nevada State Legislature created a presumption that joint legal and joint physical custody are in the best interest of the child if the parents so agree.⁷ Since NRS Chapter 125 does not contain a definition of joint physical custody, the Court looked to the legislative history regarding NRS 125.490 in order to gauge the Legislature's understanding of its meaning. Joint physical custody is "[a]warding custody of the minor child or children to both parents and providing that physical custody shall be shared by the parents in such a way to ensure the child or children of frequent associations and a continuing relationship with both parents."⁸

1. The timeshare required for joint physical custody

The Court noted that "while joint custody must approximate an equal timeshare, given the variations inherent in child rearing, such as school schedules, sports, vacations, and parents' work schedules, to name a few, an exactly equal timeshare is not always possible." As a result, the Court held that there must be some flexibility in the timeshare requirement. The Court noted that the legislature was silent regarding how far removed from 50/50 a timeshare may be and still constitute joint physical custody. The Court ultimately held that in order to approximate an equal timeshare but allow for necessary flexibility, each parent must have physical custody of the child at least 40 percent of the time to constitute joint physical custody. The Court continued by noting that the Legislature is free to alter the timeshare required for joint physical custody, but that the Court is adopting the aforementioned guidelines to provide needed clarity for the district courts.

2. Calculating the timeshare

The Court held that the method for calculating the timeshare for joint physical custody should be based on the time during which a parent has physical custody of a child over one calendar year. Each parent must have physical custody of the child at least 40 percent of the

⁵ See *Ellis v. Carucci*, 123 Nev. 145, 147, 161 P.3d 239, 240 (2007) (describing the mother as having primary physical custody and the father as having liberal visitation); *Barbagallo v. Barbagallo*, 105 Nev. 546, 549, 779 P.2d 532, 534 (1989) (discussing primary and secondary custodians); CAL. FAM. CODE §§ 3004, 3007 (Westlaw current through 2004) (defining joint and sole physical custody).

⁶ NEV. REV. STAT. § 125.480(1).

⁷ NEV. REV. STAT. § 125.490(1).

⁸ Hearing on S.B. 188 before the Assembly Judiciary Comm., 61st Leg. (Nev., Apr. 2, 1981).

time which is 146 days per year. A district court should look to the number of days during which a party provided supervision of the child, the child resided with party, and during which the party made the day-to-day decisions regarding the child, and not focus on, for example, the exact number of hours the child was in the care of the parent, whether the child was sleeping, or whether the child was in the care of a third-party caregiver or spent time with a relative or friend during the period of time in question.

B. Defining primary physical custody

The Court stated that a parent has primary physical custody when he or she has physical custody of the child subject to the district court's power to award the other parent visitation rights.⁹ The focus of primary physical custody is the child's residence. The party with primary physical custody is the party that has the primary responsibility for maintaining a home for the child and providing for the child's basic needs.¹⁰ The Court noted that this focus on residency is consistent with NRS 125C.010, which requires that a court, when ordering visitation, specify the "habitual residence" of the child. As a result, the determination of who has primary physical custody revolves around where the child resides.

The Court continued by noting that primary physical custody arrangements may encompass a wide array of circumstances. As discussed above, if a parent has physical custody less than 40 percent of the time, then that parent has visitation rights and the other parent has primary physical custody. In addition, a primary physical custody arrangement could also encompass a situation where one party has primary physical custody and the other party has limited or no visitation.¹¹

III. Custody Modification

The Court then addressed whether the district court abused its discretion in determining that the parties had joint physical custody when the Riveros' divorce decree described a 5 days/2 days custodial timeshare but labeled the arrangement as joint physical custody. The Court stated that district courts have broad discretion in child custody matters, but substantial evidence must support the court's findings.¹² Substantial evidence "is evidence that a reasonable person may accept as adequate to sustain a judgment."¹³

As for this matter, the Court concluded that the district court properly disregarded the parties' definition of joint physical custody because the district court must apply Nevada's physical custody definition—not the parties' definition. In addition, the Court held that the district court abused its discretion by not making specific findings of fact to support its decision

⁹ See, e.g., *Ellis*, 123 Nev. at 147, 161 P.3d at 240.

¹⁰ See *Barbagallo*, 105 Nev. at 549, 779 P.2d at 534 (discussing primary custodians and custodial parents in the context of child support); Tenn. Code Ann. § 36-6-402(4) (2005) (defining "primary residential parent" as the parent with whom the child resides for more than 50 percent of the time)

¹¹ See *Metz v. Metz*, 120 Nev. 786, 788-89, 101 P.3d 779, 781 (describing a primary physical custody situation where the nonprimary physical custodian had visitation every other weekend).

¹² *Ellis*, 123 Nev. at 149, 161 P.3d at 241-42.

¹³ *Id.* at 149, 161 P.3d at 242.

that the custody arrangement constituted joint physical custody and that modification of the divorce decree was in the best interest of the child.

A. Custody agreements

As for custody agreements, the Court concluded that the terms of the parties' custody agreement will control except when the parties move the court to modify the custody arrangement and that in custody modification cases, the court must use the terms and definitions provided under Nevada law, including NRS chapter 125C and caselaw. In this case, the Court concluded that Ms. Rivero moved the district court to modify the decree. Therefore, the district court properly disregarded the parties' definition of joint physical custody.

B. The district court's determination that the parties' custody arrangement was joint physical custody and its modification of the custody arrangement

The Court stated that when considering whether to modify a physical custody agreement, the district court must first determine what type of physical custody arrangement exists because different tests apply depending on the district court's determination. A modification to a joint physical custody arrangement is appropriate if it is in the child's best interest.¹⁴ In contrast, a modification to a primary physical custody arrangement is appropriate when there is a substantial change in the circumstances affecting the child and the modification serves the child's best interest.¹⁵

The Court held that the district court properly found that the 5 days/2 days timeshare included in the parties' divorce decree did not constitute joint physical custody. However, the district court found that in actuality the parties shared custody on approximately equal time basis, and thus effectively had joint legal custody. However, the Court ruled that the district court did not make findings of fact supported by substantial evidence to support its determination that the custody arrangement was, in fact, joint physical custody.¹⁶ Therefore, the Court determined, the decision was an abuse of discretion. The Court held that, on remand, the district court must evaluate the true nature of the custodial arrangement, pursuant to the definition of joint physical custody described above, by evaluating the arrangement the parties are exercising in practice, regardless of any contrary language in the divorce decree. The district court must then apply the appropriate test for determining whether to modify the custody arrangement and make express findings supporting its determination.

IV. Child support

The Court held that the district court abused its discretion in denying Ms. Rivero's motion for child support because it did not make specific findings of fact supported by substantial evidence.

¹⁴ NEV. REV. STAT. § 125.510(2).

¹⁵ *Ellis*, 123 Nev. at 150, 161 P.3d at 242.

¹⁶ *Id.* at 149, 161 P.3d at 241-42.

A. Modifying a child support order requires a change in circumstances

The Court found that an ambiguity has arisen in Nevada case law regarding when the district court has the authority to modify a child support order. The Court held that the district court only has authority to modify a child support order upon finding that there has been a change in circumstances since the entry of the order and the modification is in the best interest of the child.

The requirement of changed circumstances in child support cases prevents parties “[from filing] immediate, repetitive, serial motions until the right circumstances or the right judge allows them to achieve a different result, based on essentially the same facts.”¹⁷ Therefore, a court cannot modify a child support order if the predicate facts upon which the court issued the order are substantially unchanged.¹⁸ Also, the modification must be in the best interest of the child.¹⁹

Under NRS 125B.145(1), the district court must review the support order if three years have passed since its entry. The district court must then consider the best interests of the child and determine whether it is appropriate to modify the order.²⁰ The Court stated that “modification is appropriate if there has been a factual or legal change in circumstances since the district court entered the support order.” Upon a finding of such a change, the district court can then modify the order consistent with NRS 125B.070 and 125B.080.²¹ Therefore, although a party need not show changed circumstances for the district court to review a support order after three years, changed circumstances are still required for the district court to modify the order.

The Court also retreated from *Scott v. Scott*²² and *Parkinson v. Parkinson*²³ for the proposition that a court can modify a child support order according to the statutory formula without a finding of changed circumstances.

B. Calculating child support in cases of primary physical custody

The Court held that where one party has primary physical custody and the other has visitation rights, *Barbagallo v. Barbagallo*,²⁴ controls. Under the current version of NRS 125B.080, the focus on the financial circumstances of the parties is reflected in several factors, including: the relative income of both parents, the cost of health care and child care, “[a]ny public assistance paid to support the child,” “expenses related to the mother’s pregnancy and confinement,” visitation transportation costs in some circumstances, and “[a]ny other necessary expenses for the benefit of the child.”²⁵ All of the other statutory factors, such as the amount of

¹⁷ *Ellis*, 123 Nev. at 151, 161 P.3d at 243 (internal quotations omitted).

¹⁸ *Mosley v. Figliuzzi*, 113 Nev. 51, 58-59, 930 P.2d 1110, 1114-15 (1997) (discussing custody orders).

¹⁹ NEV. REV. STAT. § 125B.145(2)(b).

²⁰ NEV. REV. STAT. § 125B.145(2)(b).

²¹ *Id.*

²² 107 Nev. 837, 822 P.2d 654, (1991).

²³ 106 Nev. 481, 796 P.2d 229 (1990).

²⁴ 105 Nev. 546, 779 P.2d 532 (1989).

²⁵ NEV. REV. STAT. § 125B.080(9).

time a parent spends with a child, are of lesser weight.²⁶ The Court also held that this approach remains unchanged by the adoption of the new definition of joint physical custody because it only applies to situations in which one party has primary physical custody and the other has visitation rights.

C. Calculating child support in cases of joint physical custody

In cases where the parties have joint physical custody, the *Wright v. Osburn*²⁷ formula determines which parent should receive child support. The Court held that *Wright* now overrules the *Barbagallo* application of the statutory child support formulas in joint physical custody cases.

Under *Wright*, child support in joint physical custody arrangements is calculated based on the parents' gross incomes.²⁸ Each parent is obligated to pay a percentage of their income, according to the number of children, as determined by NRS 125B.070(1)(b). The difference between the two support amounts is calculated, and the higher-income parent is obligated to pay the lower-income parent the difference.²⁹ The district court may adjust the resulting amount of child support using the NRS 125B.080(9) factors.³⁰ The Court held that the purposes of the *Wright* formula are to adjust child support to equalize the child's standard of living between parents and to provide a formula for consistent decisions in similar cases.³¹

The Court noted that the *Wright* formula also remains unchanged by the new definition of joint physical custody. The Court held that in a joint physical custody situation, if a party seeks a reduction in child support based on the amount of time spent with the child, the party must prove that payment of the full statutory amount of child support is unfair or unjust, given that party's substantial contributions to the child's support.³²

D. The district court's denial of Ms. Rivero's motion for child support

The Court held that, in denying Ms. Rivero child support, the district court relied on the divorce decree, in which the parties agreed that neither would receive child support. The Court concluded that the district court erred by not making specific findings of fact regarding whether Ms. Rivero was entitled to receive child support under NRS Chapter 125B and explaining any deviations from the statutory formulas. The Court reversed the district court's denial of Ms. Rivero's motion for child support. On remand, the Court held that the district court may only modify the divorce decree upon finding a change in circumstances since the entry of the decree, and must calculate child support pursuant to either *Barbagallo* or *Wright*, as appropriate.

²⁶ *Barbagallo*, 105 Nev. at 551, 779 P.2d at 536.

²⁷ 114 Nev. 1367, 1368-69, 970 P.2d 1071, 1072 (1998).

²⁸ *Id.* at 1368-69, 970 P.2d at 1072.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Barbagallo*, 105 Nev. at 552, 779 P.2d at 536.

V. Ms. Rivero's motions for recusal and disqualification

Ms. Rivero asserted that the district court abused its discretion when the district court judge refused to recuse herself and when the chief judge denied Ms. Rivero's motion to disqualify the judge. According to Ms. Rivero, the district court abused its discretion in not allowing her to file a reply to Mr. Rivero's opposition to the motion to disqualify and by not permitting her to argue the merits at a hearing. The Court stated that to disqualify a judge based on personal bias, the moving party must allege bias that "'stem[s] from an extrajudicial source and result[s] in an opinion on the merits on some basis other than what the judge learned from his participation in the case.'"³³ In addition, "where the challenge fails to allege legally cognizable grounds supporting a reasonable inference of bias or prejudice," a court should summarily dismiss a motion to disqualify a judge.³⁴

The Court held that Ms. Rivero has not established legally cognizable grounds for disqualification.³⁵ As a result, the Court concluded that the district court judge did not abuse her discretion when she refused to recuse herself and that the chief judge properly denied Ms. Rivero's motion to disqualify the district court judge without considering a reply from Ms. Rivero or holding a hearing on the motion because Ms. Rivero did not establish legally cognizable grounds for an inference of bias.

VI. The district court's award of attorney fees to Mr. Rivero

In addition to denying Ms. Rivero's disqualification motion, the district court awarded Mr. Rivero attorney fees arising from defending against the motion. Ms. Rivero argued that the district court abused its discretion when it awarded Mr. Rivero attorney fees because Ms. Rivero had a reasonable basis to move for the district court judge's disqualification. Ms. Rivero also contended that NRS 1.230, which prohibits punishment for contempt if a party alleges that a judge should be disqualified, prohibits an award of attorney fees under NRS 18.010 and sanctions under EDCR 7.60 and NRCP 11. The Court held that the contempt prohibition of NRS 1.230(4) prohibits attorney fees as a sanction for filing a frivolous motion to disqualify a judge. However, the Court did conclude that the district court abused its discretion in awarding attorney fees because substantial evidence did not support the sanction.

A. Contempt prohibition of NRS 1.230(4)

Under NRS 1.230(4), "[a] judge or court shall not punish for contempt any person who proceeds under the provisions of this chapter for a change of judge in a case." The Court found that the district court did not state the basis for the attorney fees sanction but found that Ms. Rivero's motion to disqualify was meritless and that it appeared that the district court sanctioned Ms. Rivero to compensate Mr. Rivero for having to defend a frivolous motion, which is explicitly allowed under NRS 18.010(2)(b). The Court determined that the contempt prohibition

³³ In re Petition to Recall Dunleavy, 104 Nev. 784, 790, 769 P.2d 1271, 1275 (1988) (quoting United States v. Beneke, 449 F.2d 1259, 1260-61 (8th Cir. 1971)).

³⁴ *Id.* at 789, 769 P.2d at 1274.

³⁵ *Id.*

of NRS 1.230(4) did not apply. The Court concluded that the district court abused its discretion in awarding attorney fees to Mr. Rivero.

B. Attorney fees sanction for filing a frivolous motion

The Court stated that it will review a district court's award of attorney fees for an abuse of discretion.³⁶ The district court may award attorney fees as a sanction under NRS 18.010(2)(b), NRCP 11, and EDCR 7.60(b) if it concludes that a party brought a frivolous claim. The district court must determine if there was any credible evidence or reasonable basis for the claim at the time of filing.³⁷

The Court held that the district court did not explain in its order the basis for awarding Mr. Rivero attorney fees and only noted in its summary order that Ms. Rivero's motion to disqualify the district court judge was without merit. The Court concluded that the district court abused its discretion in sanctioning Ms. Rivero with attorney fees for her motion to disqualify. The Court reversed and remanded the district court's order granting an award of attorney fees to Mr. Rivero to the district court for further proceedings consistent with this opinion.

Conclusion

The Supreme Court of Nevada withdrew its October 30, 2008 opinion for *Rivero v. Rivero* and ruled that the district court abused its discretion when it determined, without making specific findings of fact, that the parties had joint physical custody and when it modified the custody arrangement set forth in the divorce decree. The Court concluded that the district court abused its discretion in denying Ms. Rivero's motion to modify child support because it did not set forth specific findings of fact to justify deviating from the statutory child support formulas. The Court also concluded that the district court abused its discretion when it awarded Mr. Rivero attorney fees in relation to Ms. Rivero's motion to disqualify the district court judge. The matter was reversed and remanded to the district court for further proceedings consistent with this opinion.

However, the Court also concluded that the district court judge properly refused to recuse herself, and the chief judge properly denied Ms. Rivero's motion for disqualification. The Court affirmed the district court's orders regarding the recusal and disqualification.

³⁶ *Miller v. Wilfong*, 121 Nev. 619, 622, 119 P.3d 727, 729 (2005).

³⁷ *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1095, 901 P.2d 684, 687-88 (1995) (discussing NRS 18.010(2)(b)).

Concurring/Dissenting Opinions³⁸

PICKERING, J., concurring in part and dissenting in part:

I. The formulaic approach is inconsistent with Nevada law

Court-mandated formulas in general, and specifically the majority's 40% joint physical custody formula, are better left to legislative determination. The formulaic approach taken in this case is inconsistent with the Nevada legislature's chosen approach. The legislature considered a formulaic approach in 1987 but rejected such in favor of the multifaceted approach to determining support codified in NRS § 125B.080. Based on the legislature approach, the Court has held that judicially concocted formulas in joint custody cases are "inappropriate."³⁹ The majority's formula, when tied, as intended, to eligibility for a child support offset under *Wright v. Osburn*,⁴⁰ is indeed of the type judicially created standard that was to be avoided.

A. The family court's interpretation of its decree was sound

1. The stipulated decree was not irreconcilably inconsistent with joint physical custody

In interpreting parties' stipulated divorce decrees, the Court has historically deferred to a trial court's interpretations of its own decrees.⁴¹ In this case, both family court judges recognized tension between the stipulated joint physical custody provision and its original residential timeshare provision. In resolving such, the judges enforced the parties' overarching agreement and apparent intent to share joint legal and physical custody as evidenced by the elasticity of the original timeshare provision.⁴²

The family court judges' interpretation of the stipulated divorce decree comports with the NRS § 125.490 presumption that "joint custody would be in the best interest of a minor child if the parents have agreed to an award of joint custody." Because the parents agreed to joint custody and the family court judge found that the child's best interest would be served by the timeshare agreement, remanding for further findings regarding custody is unnecessary.

2. The mother did not establish a basis to modify child support

As to support, the decree generally specified the applicable statutory percentage and stipulated the parties' agreement to deviate downward as well as the basis for such deviation. The stipulation obliged Mr. Rivero to pay the child's health insurance and make monthly contributions of \$50 to an education fund to be controlled by Ms. Rivero.

Ms. Rivero's motions to modify support focused on the alleged inconsistency between the agreement for joint physical custody and the timeshare provision. However, the record on

³⁸ Summary of Pickering, J. opinion concurring in part and dissenting in part by Ian Houston.

³⁹ *Barbagallo v. Barbagallo*, 105 Nev. 546, 550 n.2, 779 P.2d 532, 535 n.2 (as amended by 786 P.2d 673 (1990)).

⁴⁰ 114 Nev. 1367, 970 P.2d 1071 (1998).

⁴¹ *Grenz v. Grenz*, 78 Nev. 394, 401, 374 P.2d 891, 895 (1962).

⁴² In addition to Mr. Rivero's specifically allotted time, the original timeshare provision allowed for such additional time "as agreed to by the Parties."

the first motion to modify reaffirmed the parties' agreement to share joint custody and the fact that the parties' incomes are similar. As discussed above, the stipulated decree, when read in conjunction with the NRS § 125.490 presumption, is not irreconcilably inconsistent with joint physical custody and, further, the second judge's modification of the residential timeshare agreement establishing a 4/3 timeshare falls within the majority's 40% rule. Because the joint custody agreement, as stipulated and as modified, does not implicate a basis for modifying support, there is no need to remand for further findings beyond those identified in the original decree supporting the downward deviation.

II. Adjusting a residential timeshare in a joint physical custody arrangement is appropriate when in the child's best interest

An agreement to share joint physical custody, interpreted in light of the child's best interest, should determine the appropriate residential timeshare, not the reverse. The majority's conclusion that Nevada case law presumes joint physical custody calls for a 50/50 timeshare is neither definitive nor supportive of automatically invalidating a presumptively valid agreement for joint custody merely because a residential timeshare arrangement results in one parent spending less than 40% of the year with the child.⁴³

The majority's bright-line 40% rule does not allow for inevitable changes in the lives of the child and parents and is susceptible to issues raised by other practical considerations.⁴⁴ Further, the type of record keeping required of the parents in order to make such formulaic determinations detracts from the true co-parenting goal of Nevada's custody statutes.

When the parties have agreed to joint physical custody, absent a showing that some other arrangement is in the child's best interest, courts should try to make the parents' agreement succeed. In doing so, however, courts should be advised that most disputes over the details of residential timeshare are best settled by the parents, not the courts.⁴⁵ If parents cannot agree on a suitable schedule, the family court should be held "to possess[] the broadest possible discretion in adjusting co-parenting residential agreements involved in joint physical custody."⁴⁶ The Court should afford the family court its due discretion and affirm.

III. Conclusion

The district court's order should be upheld as consistent with the statutory presumption favoring joint custody, especially applicable in cases wherein the parties have agreed upon joint custody. Before a joint custody agreement is modified, the moving party must show the child's best interest so requires. The district court properly adjusted the parties' timeshare agreement and declined to modify the agreed-upon support obligation. The majority properly affirmed the order denying disqualification of the family court judge.

⁴³ See *Mosley v. Figliuzzi*, 113 Nev. 51, 54, 930 P.2d 1110, 1112 (1997) (recognizing that a decree can validly establish joint physical custody even though the timeshare is not a 50/50 (or even 60/40) arrangement).

⁴⁴ Practical considerations discussed include: how to count hours the child spends with people besides either parent, or which parent to credit for time the child spends pursuing activities both parents support.

⁴⁵ *Enrique M. v. Angelina V.*, 18 Cal. Rptr. 3d 306, 314 (Ct. App. 2004).

⁴⁶ *In re Marriage of Birnbaum*, 260 Cal. Rptr. 210, 216 (Ct. App. 1989).