

10-30-2008

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

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*Nevada Law Journal*

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### Recommended Citation

Demaree, Lindsay, "Summary of Rivero v. Rivero, 124 Nev. Adv. Op. No. 84 " (2008). *Nevada Supreme Court Summaries*. Paper 397.  
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*Rivero v. Rivero, 124 Nev. Adv. Op. No. 84 (Oct. 30, 2008)*\*

**FAMILY LAW—CHILD CUSTODY**

**Summary**

Appeal from a district court post-divorce decree order modifying a joint child custody award.

**Disposition/Outcome**

Affirmed in part, reversed in part, and remanded. The court reversed and remanded the district court's determinations that the parties had joint physical custody and Ms. Rivero was not entitled to child support. The court affirmed the Judge Miley's refusal to recuse, the district court's denial of Ms. Rivero's motion to disqualify Judge Miley, and the district court's award of Mr. Rivero's attorney's fees.

**Factual and Procedural History**

Appellant Michelle Rivero had divorced respondent Elvis Rivero. Their divorce decree granted "joint physical custody" for their minor child and no child support obligations for either party. Ms. Rivero had custody five days a week and Mr. Rivero had custody two days a week. Approximately one year after district court entered the divorce decree, Ms. Rivero moved to modify child custody and support, alleging that Mr. Rivero did not spend time with the child and that she had de facto primary custody.

In response to Ms. Rivero's motion, the district court heard arguments from the parties' counsel and testimony from the parties. Although the parties presented conflicting testimony, the district court did not require an evidentiary hearing. The district court concluded that the divorce decree did not reflect the actual time share agreement. The court denied Ms. Rivero's motion for child support, found that the parties had joint physical custody, and ordered family mediation to establish a timeshare plan, the decree's only remaining issue.

Following the hearing, Ms. Rivero argued that the court should reopen and allow discovery for the child support issue. The court refused. In response, Ms. Rivero requested that Judge Miley, the presiding judge, recuse herself. Judge Miley refused and Ms. Rivero moved to disqualify Judge Miley. Mr. Rivero opposed the motion and moved for attorneys fees.

Chief Judge Hardcastle considered Ms. Rivero's motion and an affidavit provided by Judge Miley. Chief Judge Hardcastle found Ms. Rivero's claim to be without merit. As a result, the court denied Ms. Rivero's motion without a hearing or a reply.

At a later hearing, the district court addressed the issues of attorney's fees and the custody timeshare arrangement. The court granted fees to Mr. Rivero for defending a frivolous motion. The court also denied Ms. Rivero's request for an evidentiary hearing because the hearing would produce only self-serving testimony and it was unnecessary since the court was not changing the custody award, but only modifying joint physical custody. Furthermore,

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\* Written by Lindsay Demaree.

because the parties failed to reach an agreement in mediation, the court determined that the parties actually intended an equal timeshare and, while joint physical custody does not require an equal split, the current five-day, two-day split was too unequal to comprise joint physical custody. As a result, the district court ordered an equal timeshare.

Ms. Rivero appealed the district court's order denying her motion for child support, the order denying her motion to disqualify Judge Miley, and the order awarding Mr. Rivero's attorney's fees and modifying the custody timeshare arrangement.

## **Discussion**

### **Joint Physical Custody**

The court noted that district courts, the bar, and litigants needed a precise definition of joint physical custody to make informed custody decisions. In response, the court chose to adopt the Missouri definition of joint physical custody as recommended in an amicus curiae brief submitted by the Family Law Section.<sup>1</sup> While Nevada did not have any statutory or case law expressly defining the term joint physical custody, previous Nevada case law implied that joint physical custody did not require an equal timeshare.<sup>2</sup> Similarly, the Missouri definition does not require an equal timeshare. It emphasizes "significant, but not necessarily equal" timeshare, providing the courts and the parties flexibility. This definition also helps the courts to clarify what the parties mean when they use the term "joint physical custody" because it requires the courts to consider whether the parents' time with the child is significant, frequent, continuous and meaningful.

### **Custody Modification**

The court reviewed the district court's custody decision for an abuse of discretion and questions of law de novo. Although the courts have broad discretion in child custody matters, the court's factual findings must be supported by substantial evidence. Substantial evidence is evidence that a reasonable person may accept as adequate to sustain a judgment.

The court stressed the importance of a district court's findings of fact in child custody determinations. A district court's sole concern in child custody matters is the best interest of the child, but the test for modifying a custody arrangement differs depending on whether a party is seeking to modify joint physical custody or primary physical custody. Consequently, the determination of whether the parties had joint physical custody dictates the appropriate test for modification.

The court noted that, in this case, the district court failed to provide any findings of fact to support its determination that the Riveros' custody arrangement was actually joint physical custody. The district court relied solely on its conclusion that the parties shared custody on an equal time basis. Additionally, the district court modified the timeshare arrangement without providing specific findings of fact that the modification was in the child's best interest. Thus, the

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<sup>1</sup> "'Joint physical custody' means an order awarding each of the parents significant, but not necessarily equal, periods of time during which a child resides with or is under the care and supervision of each of the parents. Joint physical custody shall be shared by the parents in such a way as to assure the child of frequent, continuing and meaningful contact with both parents." Mo. Ann. Stat. § 452.375(1)(3) (West 2003).

<sup>2</sup> *Barbagallo v. Barbagallo*, 105 Nev. 546, 548, 779 P.2d 532, 534 (1989).

court held that the district court abused its discretion by ruling that the custodial arrangement was joint physical custody and that an equal time share was in the child's best interest because it failed to provide specific findings of fact that were supported by substantial evidence. According to the court, the district court must first consider the true nature of the custody arrangement under the newly adopted Missouri definition and make specific findings of facts. Then, the district court may apply the appropriate test for custody modification.

### Child Support

The court found that the district court abused its discretion by denying Ms. Rivero's motion for child support. Under NRS Chapter 125B, a custodial parent may be entitled to child support despite contrary terms of the divorce decree.<sup>3</sup> Here, the court held that the district court should have determined whether Ms. Rivero was entitled to child support under NRS Chapter 125B. If the district court then decided to depart from the amount of child support provided by the appropriate formula, it must provide what the child support would have been under the formula and specific findings of fact to support its decision.

In reviewing the issue of child support, the court noted that Nevada had yet to establish a formula to determine child support in situations where the parties has joint physical custody and unequal timeshare. In cases of primary physical custody and unequal timeshare, a court applies a statutory formula, along with any necessary deviations.<sup>4</sup> In cases of joint physical custody and equal timeshare, a court calculates child support according to the *Wright* formula.<sup>5</sup> Here, the court expanded on the *Wright* formula by modifying the formula to account for differences in both income and timeshare between the parents.<sup>6</sup> The court noted that this modified formula furthered the child's best interest by equalizing the parents' standard of living and thus courts should be cautious about reducing the amounts of child custody.

### Motion for Recusal and Motion for Disqualification

The court reviewed the Judge Miley's decision not to recuse herself for abuse of discretion. The court pointed out that the burden of proof required to disqualify a judge rests with the moving party, and Ms. Rivero failed to support her allegation of Judge Miley's bias with evidence in the record. The court found that neither Judge Miley nor Chief Judge Hardcastle

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<sup>3</sup> See *Atkins v. Atkins*, 50 Nev. 333, 336-37, 259 P. 288, 288-89 (1927).

<sup>4</sup> Nev. Rev. Stat. 125B.070; Nev. Rev. Stat. 125B.080.

<sup>5</sup> *Wright v. Osburn*, 114 Nev. 1367, 1368-69, 970 P.2d 1071, 1072 (1998). Under the *Wright* formula, the court first takes the difference between the child support payments required from each parent pursuant to Nev. Rev. Stat. 125B.070(1)(b). The court may then apply various statutory factors under Nev. Rev. Stat. 125B.080(9) to adjust this difference. The higher-income parent is required to pay the resulting amount to the lower income parent.

<sup>6</sup> The seven steps of the newly adopted modified *Wright* formula are as follows:

1. Apply the original *Wright* formula.
2. Determine the percentage of time each parent spends with the child.
3. Determine the differences between the amounts of time in Step 2.
4. Multiply each parent's calculated child support by the time difference.
5. Subtract this adjusted child support amount from the parent who has the child most of the time and add the adjusted child support amount to the parent who has the child less of the time.
6. Subtract the smaller number from the larger, and the parent that owes the greater amount pays this difference to the other parent.
7. Apply any applicable statutory caps.

abused their discretion by refusing to recuse and denying Ms. Rivero's motion to disqualify without allowing Ms. Rivero a hearing or a reply on the issue.

In addition, the court also reviewed the district court's decision to grant Mr. Rivero's attorneys fees for defending Ms. Rivero's motion to disqualify for an abuse of discretion. Ms. Rivero argued that the attorney's fees sanction for her motion to disqualify is prohibited by Nev. Rev. Stat. 1.230. The court disagreed and found that attorney's fees were granted appropriately.

The court reasoned that, although Nev. Rev. Stat. 1.230 prohibits punishment for contempt, attorney's fees sanctions are not similar enough to contempt to bar these sanctions on parties who bring frivolous motions to disqualify a judge.<sup>7</sup> Punishment for contempt either preserves the rights of a party or preserves the authority of the court. In contrast, attorney's fees sanctions promote efficient administration of justice and compensate a party who must pay to defend a frivolous motion. Here, the attorney's fees compensated Mr. Rivero for fees spent defending Ms. Rivero's frivolous motion to disqualify Judge Miley. Thus, the district court acted within its discretion because the fees were not punishment for contempt prohibited by Nev. Rev. Stat. 1.230.

## **Conclusion**

Nevada has adopted the Missouri definition of joint physical custody. This definition requires the courts to consider whether the parents' time with the child is significant, frequent, continuous and meaningful, without requiring an equal timeshare. By clarifying what the term joint physical custody means, this explicit definition will allow parties to make informed custody decisions.

Also, Nevada courts will now apply the modified *Wright* formula to determine the amount of child support in cases of joint physical custody and unequal timeshare. This formula accounts for differences in both the custodial parents' incomes and the amount of time each parent spends with the child. By equalizing the parents' standard of living, this formula seeks to promote the best interest of the child.

Finally, an attorney's fees sanction is not punishment for contempt under Nev. Rev. Stat. 1.230. Punishment for contempt seeks to preserve the rights of a party or preserve the authority of the court. An attorney's fee sanction, on the other hand, merely compensates a party for the cost of defending against frivolous motions.

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<sup>7</sup>Nev. Rev. Stat. 18.010(2)(b), Nev. R. Civ. P. 11, and EDCR 7.60(b) allow the district court to award attorney's fees as a sanction on parties that bring a frivolous claim.