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***Ellis v. Carucci*, 123 Nev. Adv. Op. No. 18, (June 28, 2007)¹**

FAMILY LAW – CUSTODY MODIFICATION

Summary

In December 2000, Appellant Melinda Ellis (“Melinda”) and Respondent Roderic Carucci (“Roderic”) divorced. The divorce decree named both parties as joint legal custodians over their daughter, Geena. Further, the decree named Melinda as primary physical custodian with Roderic having liberal visitation rights.

In 2004, after noticing a significant decline in Geena’s school performance, Roderic filed a motion with the district court requesting a custody modification. The district court considered the parties’ testimony and Geena’s elementary school teacher’s testimony. Further, the parties stipulated that a family evaluation would be conducted and a report submitted to the court. The evaluator recommended Geena receive equal support from both parents. The district court ordered custody modified, and named the parties joint physical custodians.

On appeal, the Nevada Supreme Court affirmed the district court’s ruling, and altered the test used to decide child custody modifications. The goal of the newly designed test is to further the court’s foremost concern in child custody cases; the best interest of the child.

Issue and Disposition

Issue

In the absence of a material alteration in the circumstances of the parents, can a district court modify a primary physical custody order?

Disposition

Yes. A court may modify a primary physical custody order when (1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the child’s best interest is served by the modification.

Commentary

State of the Law Before *Ellis*

Before *Ellis*, *Murphy v. Murphy*, 84 Nev. 710 (1968), governed whether circumstances existed warranting a modification to a primary physical custody order. Nevada courts

¹ By Krystallin Hernandez

adhered to *Murphy*'s two-prong test, which provides: a modification is "warranted only when: (1) the circumstances of the parents have been materially altered; and (2) the child's welfare would be substantially enhanced by the change." *Id.* at 711.

The *Murphy* test required the moving party to establish a change in either parent's circumstances warranting a court's reconsideration of a previous primary physical custody order. If the initial requirement was met, the party must then establish the modification would substantially enhance the child's welfare.

Other Jurisdictions

This change in the law reflects similar standards used by courts in several other jurisdictions: A court may modify a primary physical custody order when (1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the child's best interest is served by the modification. Both the Wyoming and North Carolina courts rely on the foregoing test mandated for Nevada by *Ellis*.²

The Court also considered other jurisdictions having similar "best interest" prongs, but varying in the change required to allow courts to modify the original order. Missouri and New York require "a substantial change in circumstances," but do not specify that the change must "affect the welfare of the child."³ Whereas, Oregon merely requires "a change in circumstances," and does not specify the change be "substantial."⁴ In contrast, South Dakota requires a "substantial change in circumstances" *and* a showing that "the welfare and best interests of the child require modification."⁵

Effect of *Ellis* on Current Law

Ellis maintains a "change in circumstances" requirement, while shifting the focus of the change to the child. *Murphy*'s threshold requirement mandated the parents must have experienced a change in circumstances since the primary physical custody order. The change in circumstances requirement is based on *res judicata*, and is used to limit a party's ability to seek a new order after the case has previously been adjudicated. In *Ellis*, the Court recognized that *Murphy* was decided prior to the Nevada legislature amending child custody laws to reflect the primary focus on "the best interest of the child." Consequently, the court removed the requirement for a change in the parents' circumstances, and added a requirement for a change in circumstances affecting the child's welfare. Thus, while maintaining a change in circumstances requirement, the new test moves the focus from the parents' circumstances to the child's.

² See *Selvey v. Selvey*, 102 P.3d 210, 214 (Wyo. 2004); *Evans v. Evans*, 530 S.E.2d 576, 578-79 (N.C. Ct. App. 2000).

³ See *Walker v. Walker*, 184 S.W.3d 629, 632 (Mo. Ct. App. 2006); *Pecore v. Pecore*, 824 N.Y.S.2d 690, 692 (App. Div. 2006).

⁴ See *Collins and Collins*, 51 P.3d 691, 693 (Or. Ct. App. 2002).

⁵ See *McKinnie v. McKinnie*, 472 N.W.2d 243, 244 (S.D. 1991).

Under *Ellis*, district courts have more flexibility to modify custody because the court may find the child's best interests, under NRS 125.480, are served by the modification without requiring a substantial enhancement to the child's welfare. The *Murphy* test's second prong required the modification to "substantially enhance" the child's welfare. However, the Court considered a modification may be in the child's best interest, even though such modification may not substantially enhance the child's welfare. The *Ellis* test's second prong allows the court to base its custody determination on any of the factors under NRS 125.480(4);⁶ the best interest of the child standard. Therefore, the Court modified the second prong to allow district courts more flexibility in making child custody modifications by ensuring the courts' focus remains on the primary goal of ensuring the best interest of the child.⁷

Unanswered Questions

Ellis changes the circumstances required for courts to consider a modification to primary physical custody, but fails to identify those circumstances which the court considers "circumstances affecting the welfare of the child."

In *Ellis*, the Court deemed the child's poor performance in school enough to establish an effect on the child's welfare. This raises the question of what other circumstances a court may consider affecting the child's welfare, rather than the more difficult standard, under *Murphy*, of showing the modification would substantially enhance the child's welfare. Would strained familial relationships with siblings or grandparents be enough? Would a deterioration of religious practices be enough? A change in health seems likely to meet this standard, but how significant must the change be?

Additionally, in *Ellis*, the mother argued the child's education was failing, due to the stress of the custody fight between her and the father. Could other side-effects of a custody battle be used to modify custody determinations? For example, how may resulting depression, mood swings, or episodes of acting out affect the custody order?

⁶ 4. NRS 125.480(4) provides: In determining the best interest of the child, the court shall consider and set forth its specific findings concerning, among other things:

(a) The wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his custody.

(b) Any nomination by a parent or a guardian for the child.

(c) Which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent.

(d) The level of conflict between the parents.

(e) The ability of the parents to cooperate to meet the needs of the child.

(f) The mental and physical health of the parents.

(g) The physical, developmental and emotional needs of the child.

(h) The nature of the relationship of the child with each parent.

(i) The ability of the child to maintain a relationship with any sibling.

(j) Any history of parental abuse or neglect of the child or a sibling of the child.

(k) Whether either parent or any other person seeking custody has engaged in an act of domestic violence against the child, a parent of the child or any other person residing with the child.

⁷ NRS 125.480(1) provides: In determining custody of a minor child in an action brought under this chapter, the sole consideration of the court is the best interest of the child.

Does this simply allow the court to re-evaluate the original custody order by considering what effects the order may have had on the child? Nonetheless, it is likely the Court left these questions open, in order to give the district courts a great amount of flexibility in making custody determinations.

Conclusion

In order to more closely adhere to the judiciary's primary goal of ensuring the best interest of the child, the Nevada Supreme Court modified the requirements for modification to a primary physical custody order. The new requirements shift the focus of change in circumstances from the parents to the child, and allow courts to modify custody when the modification is in the child's best interest, per NRS 125.480, rather than requiring a finding that the modification will substantially enhance the child's welfare.