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## Lewis v. Lewis, 132 Nev. Adv. Op. 46 (June 30, 2016)

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CONSTITUTIONAL LAW; CRIMINAL LAW; FAMILY LAW

**Summary**

A contempt order that does not contain a purge clause is criminal in nature, therefore the Sixth Amendment right to counsel applies.

**Background**

Wesley Lewis (Appellant) and Maria Lewis (Respondent) divorced in 2011. The divorce decree awarded joint physical custody of their one minor child, and imposed child support obligations upon Appellant.

In 2013, Respondent filed a motion to hold Appellant in contempt for lack of child support payment. The district court held Appellant in contempt, ordered payment of arrearages, and stayed a jail sentence contingent upon making all future payments.

In 2014, Respondent filed a motion to modify custody and enforce the 2013 order. Appellant represented himself for the hearing. The district court awarded Respondent primary physical custody, adopted the findings of the 2013 order, and held Appellant in contempt. A jail sentence was again stayed on the condition that Respondent “follow the Orders of the Court.”

Respondent appealed, arguing that the Sixth Amendment provides him a right to counsel before holding him in criminal contempt, and that the district court abused its discretion in modifying child custody.

**Discussion**

*Respondent’s Sixth Amendment right to counsel was violated by the district court’s contempt order*

A contempt order in Nevada is civil in nature if the intent is to compel compliance with a court directive, rather than to punish.<sup>2</sup> However, the United States Supreme Court also identified that a contempt order must contain a purge clause to be civil in nature.<sup>3</sup> Here, the intent of the contempt order appeared to compel rather than punish, but it failed to contain a purge clause, whereby Respondent could eliminate the sentence by complying with the terms. Despite the possibility that compliance could have, in effect, purged Respondent’s sentence, the order made no such specific statement, and was therefore criminal in nature.

*The district court abused its discretion in its order modifying child custody*

Modification of joint physical custody is necessary if it is in the child’s best interest.<sup>4</sup> Here, the district court based modification solely on Respondent’s conduct; custody modification

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<sup>1</sup> By Paul George

<sup>2</sup> *Rodriguez v. Eight Jud. Dist. Ct.*, 120 Nev. 798, 804-05, 102 P.3d 41, 45-46 (2004).

<sup>3</sup> *Hicks v. Feiock*, 485 U.S. 624, 640 (1988).

<sup>4</sup> *Rivero v. Rivero*, 125 Nev. 410, 430, 216 P.3d 213, 227 (2009).

is not to be used to punish parental misconduct.<sup>5</sup> Though the written order stated modification was in the child's best interest, there was no evidence of such consideration in the record. Oral pronouncements during the hearing speak only toward Respondent's failure to comply with child support terms. While such failure could correspond to the child's best interest factors outlined in NRS 125.480(4), the district court did not adequately set forth specific findings as to each factor. It is unclear from the record whether NRS 125.480(4) factors were considered at all. Child custody modification was, therefore, an abuse of discretion.

### **Conclusion**

For a contempt order to be civil in nature, its intent must be to compel compliance with a court directive and not to punish, and it must contain a purge order that states compliance with the order will eliminate the sentence. Child custody modification must be based upon the child's best interest. Orders modifying custody must set forth specific findings based on the best-interest-of-the-child factors outlined in NRS 125.480(4).

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<sup>5</sup> Sims v. Sims, 109 Nev. 1146, 1149, 865 P.2d 328, 330 (1993).