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Romano v. Romano, 138 Nev. Adv. Op. 1 (Jan. 13, 2022)

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FAMILY LAW: THE TEST FOR JOINT OR PRIMARY PHYSICAL CUSTODY
ARRANGEMENTS

Summary

Caselaw surrounding the circumstances under which a district court may modify the joint physical custody of minor children and a parent’s child-support obligations has been inconsistent in Nevada. In *Rivero*,² for example, the Court relied on two tests to evaluate motions to modify a physical custody arrangement. Initially, *Traux* held that the test to modify *joint* physical custody arrangements was different from the test to modify *primary* physical custody.³ The initial test was based on NRS 125.510(2), which provided that a court may modify a joint physical custody arrangement when the movant can show that it is in the child’s best interest to do so. Thus, the Court initially concluded that a party does not need to show a change in the parent’s circumstances to modify a joint physical custody arrangement.⁴ Even when *Traux* was decided, the child’s best interest was the sole factor in determining physical custody, regardless of whether a party sought joint or primary custody.

However, the Court later observed that when a judge makes a decision on child custody, it should not be modified if the circumstances that were present when the decision was made remains in effect.⁵ As such, the Court modified the physical custody arrangement test. The Court held that requiring the movant to show a substantial change in circumstances affecting a child’s welfare “serves the important purpose of guaranteeing stability unless circumstances have changed to such an extent that a modification is appropriate.”⁶ Accordingly, a court may modify a joint or primary physical custody arrangement only 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.”⁷

Background

In 2019, appellant Aaron Romano and respondent Tracy Romano divorced. The parties agreed to create a timeshare regarding the physical custody of their seven children. According to the timeshare, Aaron would hold custody of the oldest three children for approximately 90 percent of the time. Tracy, on the other hand, would hold custody of the four younger children for approximately 95 percent of the time. The timeshare did not meet the at-least-40-percent-physical-custody standard for joint physical custody; regardless, the parties agreed to joint physical custody.

¹ By Brandon Rusk.

² *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009).

³ *Truax v. Truax*, 110 Nev. 437, 874 P.2d 10 (1994) (*emphasis added*).

⁴ *Murphy v. Murphy*, 84 Nev. 710, 711, 447 P.2d 664, 665 (1968), *overruled by* *Ellis v. Carucci*, 123 Nev. 145, 150, 161 P.3d 239, 242.

⁵ *Mosley v. Figliuzzi*, 113 Nev. 51, 58, 930 P.2d 1110, 1115 (1997).

⁶ *Ellis*, 123 Nev. at 151, 161 P.3d at 243.

⁷ *Id.* at 150, 161 P.3d at 242.

After the parties resolved custody, they stipulated to a Marital Settlement Agreement (MSA). The MSA provided that Aaron owed Tracy \$1,138 per month per child. The MSA also provided that the prevailing party in litigation concerning the terms and conditions of the MSA, or its breach, is entitled to attorney fees and costs.

Roughly eight months after stipulating to the MSA, Aaron filed a “Motion to Confirm De Facto Physical Custody Arrangement of Children.” He requested that the court modify the custody order to reflect his status as having primary physical custody of the three oldest children and Tracy’s status as having primary physical custody of the four youngest children. He also requested that the court modify the child-support obligations based on the actual physical custody timeshare and Tracy’s monthly income increase.

Tracy opposed Aaron’s motion, arguing that their settlement did not warrant a modification. Specifically, Tracy argued that there were no changed circumstances and that the settlement reflected what Tracy and Aaron contemplated and stipulated to in court. As to her income, Tracy argued that there was no change in circumstances because her income was part of the parties’ global settlement agreement, which Aaron knew of at the time they agreed on child support.

The district court concluded that there was no change in circumstances warranting the modification in custody and that Tracy’s income had not changed. The court denied Aaron’s motion and awarded Tracy attorney fees and costs pursuant to the MSA and NRS 18.010(2)(b). Aaron appealed from both of the district court’s orders.

Discussion

The district court did not abuse its discretion when it denied Aaron’s motion to modify custody

The Court held that a court may modify a joint or primary physical custody arrangement only 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.”⁸ Applying this analysis, the Court discerned no abuse of discretion in the district court’s holding that there was no change in circumstances warranting a modification of the child-custody arrangement. Aaron did not allege or show a substantial change in circumstances affecting the welfare of the children since the arrangement was agreed upon.

However, Aaron argues that *Rivero* requires the district court to rely on the stipulated custody order to determine whether it qualifies as joint custody before it may reject a motion to modify based on a lack of changed circumstances. The Court held that Aaron’s argument is premised on the existence of two separate tests used to evaluate a motion to modify physical custody. Thus, the Court overrules *Rivero*’s holding to the extent that a district court must first determine the type of physical custody arrangement before considering whether to modify it. As such, the Court held that the district court did not abuse its discretion in denying Aaron’s motion based on his failure to show a substantial change in circumstances without having first determined if the parties were exercising primary or joint physical custody.

⁸ *Id.*

The district court did not abuse its discretion when it denied Aaron's motion to modify his child-support obligation

Aaron argues that the district court abused its discretion by denying his motion to modify his child-support obligations based on Tracy's income increase. Aaron further argues that the district court should have reviewed the child-support order based on changed circumstances concerning Tracy's income. However, the Court held that Tracy's income and Aaron's child-support obligation were both resolved in the MSA. Thus, Tracy's income at the time the parties resolved the child support was \$6,018.67, and her income had not changed since then. As such, the district court did not abuse its discretion when it concluded Tracy's income did not constitute a change in circumstances to justify modifying Aaron's support obligation.

Aaron next relies on NAC Chapter 425 and 425.170(3) to argue that a change in the law made after entry of a support obligation amounts to a changed circumstance, justifying a modification of that obligation. However, the Court held that, while *Rivero and Burton* provide that a district court may modify a support order when there is a legal change in circumstances, the promulgated regulation sets out a minor exception to the rule.⁹ Further, the regulation is not invalid because it does not violate the constitution, conflict with existing statutory provisions, or is otherwise arbitrary and capricious. As such, NAC 425.170(3) does not exceed the scope of the Administrator of the Division of Welfare and Support Services, and the district court did not abuse its discretion in concluding that there was no change in circumstances justifying a modification of Aaron's child-support obligations.

Conclusion

The Court held that a district court may modify a joint physical custody arrangement only when (1) there has been a substantial change in circumstances affecting the welfare of the child and (2) the modification would serve the child's best interest. The Court held that the district court did not abuse its discretion when it concluded that no substantial change in circumstances occurred that would affect the welfare of the children. As such, the Court affirmed the district court's order denying Aaron's motion to modify his child-support obligation.

⁹ See NEV. REV. STAT. § 425.170(3) (2020).