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Jefferson Cummings

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Roe v. Roe [State of Nevada], 139 Nev. Adv. Op. 21 (Jul. 27, 2023)¹

The court of appeals defines sole physical custody and clarifies when it is appropriate, as well as when a court can delegate decisions over custodial modifications, when attorney fees can be awarded in a child custody case, and when reassignment of a case is appropriate.

Summary

In a child custody case, the court of appeals clarified Nevada law by (1) defining “sole physical custody” as “a custodial arrangement where the child resides with only one parent and the noncustodial parent’s parenting time is restricted to no significant in-person parenting time” and outlining the considerations required for entering an order for sole physical custody; (2) directing district courts to retain substantive decision-making authority over custodial modifications and parenting time allocations; (3) reiterating that, in family law cases, being a prevailing party alone is not a sufficient basis for an award of attorney fees under NRS 18.010; and (4) clarifying when reassignment of a case to a different judge on remand is appropriate because of the requisite fairness demanded in ongoing child custody proceedings.

Background

Appellant Maggie Cox and respondent Jason J. Roe were divorced for approximately seven years when Maggie filed a motion in 2020 to modify physical custody of their child, H.R. At the time, the parties shared joint legal and physical custody, but in her motion, Maggie argued H.R.’s behavior towards her was negatively impacted by Jason’s influence and requested primary physical custody, orders for therapy, and an assessment of the likely cause of H.R.’s change in demeanor. Jason opposed the motion and filed a countermotion for primary physical custody. The district court granted the motion for therapy, granted the request for a brief focused assessment, and set a hearing date on the parties' motions to modify custody.

Prior to the hearing, H.R. was taken into custody for battery against Maggie on two separate occasions and Jason filed an emergency motion for temporary sole legal and physical custody of H.R. The district court granted the motion, finding “something wrong with the parent who cannot manage an 11-year-old.” The district court supported this conclusion by finding that Maggie “is obviously not able to parent her son” and “it is not safe when you have the police call out to your home as somebody might get shot, and it is not safe.” The district court ordered Maggie's contact with H.R. immediately restricted to just six hours of parenting time weekly and reunification therapy sessions conducted by Dr. Sunshine Collins and appointed a guardian ad litem and parenting coordinator. The parenting coordinator recommended all contact between Maggie and H.R. be paused until the district court resolve the issues between the parents, noted that Maggie could not pay for Dr. Collins’ sessions, and recommended Jason pay part of the reunification services and that he should be included in the session.

Jason filed an objection to the parenting coordinator’s recommendation, and the district court granted it, ordering Maggie to “have [no contact]” with H.R. “outside of the therapeutic services” with Dr. Collins. Maggie withdrew her motion and instead requested the district court maintain joint legal and physical custody. The district court held an evidentiary hearing and orally modified its no-contact order and allowed Maggie to send cards, text, and call H.R. The district court maintained joint legal custody but granted Jason what it called primary physical custody, finding a substantial change of circumstances in the severe deterioration of H.R. and

¹ By Jefferson Cummings.

Maggie's relationship and H.R.'s age and wishes. The district court also considered H.R.'s best interest and found that H.R. wanted to live with Jason, Jason had relatively superior mental health, and the relationship between H.R. and Jason was comparatively less fraught. The district court ordered Maggie to attend individual therapy with Dr. Collins and Dr. Collins was given authority to determine when Maggie's parenting time could be expanded to include in-person contact with H.R. Finally, the district court ordered Maggie to pay over \$11,000 in attorney fees to Jason because he was the prevailing party. Maggie appealed.

Discussion

The district court's decision to modify physical custody is supported by substantial evidence

Maggie argued that the district court: (1) did not have substantial evidence to modify child custody, improperly considered child testimony when determining what was in H.R.'s best interest, and abused its discretion in finding there was a substantial change of circumstances since the 2017 order; (2) demonstrated actual bias against her; (3) violated her parental rights; and (4) abused its discretion in awarding Jason attorney fees and costs. Jason argued that the district court's order is supported by substantial evidence, Maggie's fundamental parental rights are not properly at issue as she can reconnect with H.R. as soon as she does the work prescribed by Dr. Collins, and he is entitled to attorney fees and costs as the prevailing party.

Maggie first argued the testimony given at the hearing by the guardian ad litem that recounted H.R.'s wish to live with Jason. was both inadmissible hearsay and unrecorded child testimony under *Gordon v. Geiger*.² The Court found this argument failed for three reasons. First, Maggie did not address the effect of similar testimony given by Jason, H.R.'s stepmother, and Dr. Collins, so she did not show how the admission of the guardian ad litem's testimony affected her substantial rights. Second, the Court noted the *Gordon*'s holding was limited and declined to extend it to require guardians ad litem to record a child's interview when the purpose is to protect the best interest of the child rather than to garner testimony.³ Finally, the Court noted a hearsay exception likely applies.⁴

Maggie also argued Jason did not meet his burden to show substantial change in circumstances affecting H.R.'s welfare and that the district court did not have sufficient evidence that modification was in H.R.'s best interest. The district court found the severely deteriorating relationship between H.R. and Maggie, H.R.'s age, and H.R.'s wishes constituted a substantial change in circumstances. The court of appeals held the district court's findings were supported by substantial evidence, noting, among other things, that Maggie herself acknowledged the deteriorating relationship between her and H.R. in her motion to modify (the motion that initiated the instant matter).⁵

The district court's allocation of parenting time is contrary to Nevada law and policy

Maggie argued the district court's order effectively undermined her relationship with H.R. to the point of near termination of her parental rights. Jason contended Maggie's fundamental parental rights were not properly at issue because she could follow the district court's order and

² 133 Nev. 542, 547, 402 P.3d 671, 675 (2017).

³ See NRS 159A.0455; see generally NRCP 16.215(a), (f).

⁴ See NRS 51.105(1).

⁵ See *Romano v. Romano*, 138 Nev. 1, 9, 501 P.3d 980, 986 (2022) (concluding that to modify custody a movant must show "there has been a substantial change in circumstances affecting the welfare of the child" and "the modification would serve the child's best interest").

be reunited with H.R. as soon as Dr. Collins is satisfied with her progress. The Court noted three significant legal errors in the district court's order: (1) the order unduly infringed upon Maggie's parental rights and effectively awarded sole physical custody to Jason without a sufficient legal basis or findings; (2) the district court improperly delegated its substantive authority to Dr. Collins; and (3) the order incorporated by reference an oral modification that did not include any findings or information as to how Maggie's parenting time was to be controlled, so the order was facially unenforceable.

Sole physical custody

The Court noted no definition for sole legal custody existed and defined it as “where the child resides with only one parent and the noncustodial parent's parenting time is restricted to no significant in-person parenting time.”⁶ The Court then explained that, while a sole physical custody order does not terminate a parent's rights, the severe restriction on parenting rights requires more findings and procedure than a joint or primary physical custody order.⁷ In requiring sufficient cause for a sole physical custody order, the Court noted Nevada's policy of supporting “frequent associations and a continuing relationship” between parent and child after the parents' relationship with each other has ended.⁸ The Court then explained sole physical custody may only be entered if the noncustodial parent is found to be unfit for the child to reside with or if there are specific findings and an adequate explanation as to why physical custody is not in the best interest of the child; additionally, the findings must be in writing, separate from, and in addition to the best interest findings under NRS 125C.0035(4). After making either of the findings, a district court must order the least restrictive arrangement possible that is within a child's best interest—if a less restrictive arrangement is available, or proposed and rejected, the district court must provide an explanation of how the interest of the child is served.

Here, the Court found the order awarding “primary physical custody” to Jason was properly categorized as a sole custody order because Maggie's parenting time was inequitably restricted (i.e. she was limited solely to cards, texts, and calls). The Court held the district court erred by: (1) failing to consider a less restrictive arrangement; (2) failing to adequately explain why the greater restriction was necessary; (3) failing to make findings how true primary physical custody was not in H.R.'s best interest; and (4) implementing an almost unachievable plan with no ending, review, or even status check date. The Court reversed the effective award of sole physical custody and remanded for reconsideration consistent with the opinion.

Delegation of substantive decision-making authority

The district court ordered Dr. Collins to determine when Maggie and H.R. were ready to have any modification to the parenting time schedule. Maggie argued she could not satisfy the district court's order because she could not afford to see Dr. Collins twice a month for an indefinite time. The Court noted, in child custody cases, district courts must have the ultimate decision-making authority, and cannot delegate substantive issues or the power to modify the underlying custody arrangement.⁹ The Court, therefore, held the district court here abused its

⁶ See NRS 125C.0035.

⁷ See NRS 128.005(2)(a) (providing that the public policy of Nevada is to preserve and strengthen family life; thus, “[s]everance of the parent-child relationship is a matter of such importance” that it requires “judicial determination”); cf. NRS 128.105 (outlining specific findings a district court must make before terminating parental rights); NRS 128.160-.190 (providing the procedure for seeking a restoration of parental rights).

⁸ NRS 125C.001(1).

⁹ *Bautista v. Picone*, 134 Nev. 334, 337, 419 P.3d 157, 159 (2018); see generally *Romano v. Romano*, 138 Nev. 1, 9, 501 P.3d 980, 986 (2022).

discretion “by tethering any post-order increase of Maggie’s parenting time to Dr. Collins’s discretion.”

Specificity of final order

Maggie contends that the lack of specificity in the district court's orders harmed her relationship with H.R., specifically noting the district court's final order incorporating by reference only its oral modification of “the no contact order of Dr. Collins.” The Court noted an order awarding parenting time must “[d]efine that right with sufficient particularity to ensure that the rights of the parties can be properly enforced and that the best interest of the child is achieved,” and not use terms that are “susceptible to different interpretations by the parties.”¹⁰ Additionally, a court’s oral pronouncement from the bench is ineffective.¹¹

The Court reasoned the details of the district court’s oral modification were never reduced to writing and the final order did little to outline the scope or enforceability of the order, so the final order was ineffective. The Court remanded the issue, instructing the district court to enter an interim order that satisfies the requisite level of specificity and that is consistent with goal of achieving “frequent associations and a continuing relationship.”¹²

On remand, this case must be reassigned to a different district court judge

Maggie argued that the district court displayed bias against her by: (1) ignoring the evidence in the record about who was responsible for H.R.'s arrests; (2) ignoring H.R.'s personal therapist’s recommendation that H.R. would benefit from physical time with Maggie; (3) questioning her excessively and rebuking her; and (4) predetermining the outcome before the close of the evidentiary hearing. Jason responds that the district court was not biased because it was Dr. Collins who recommended the ultimate outcome—no contact—and the parenting coordinator also recommended that contact be paused.

The Court considered (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.¹³ The Court listed “nonexhaustive” examples of “expressed views and findings that are either erroneous or based on evidence predating the [previous] order.” One such example the Court cited was the district court finding “that Maggie ‘obviously [cannot] parent [H.R.]’ and ‘[t]here is something wrong . . . with the parent who cannot manages an 11-year-old.” The Court, accordingly, remanded the case to be reassigned to a different judge because of the district court’s “strong negative opinions of Maggie” and extrajudicial opinions made on the record.

The award of attorney fees and costs must be vacated

The district court awarded Jason attorney fees and costs under NRS 18.010 and NRS 125C.250, and later cited EDCR 7.60(b)(3) as a legal basis for its conclusions of law but did not cite NRS 125C.250. The Court noted the district court’s analysis focused on NRS 18.010. The

¹⁰ NRS 125C.010(1)(a), (2).

¹¹ *Nalder v. Eighth Judicial Dist. Court*, 136 Nev. 200, 208, 462 P.3d 677, 685 (2020) (quoting *Millen v. Eighth Judicial Dist. Court*, 122 Nev. 1245, 1251, 148 P.3d 694, 698 (2006)).

¹² See NRS 125C.001(1).

¹³ *Smith v. Mulvaney*, 827 F.2d 558, 562-63 (9th Cir. 1987).

Court first explained NRS 18.010(2)(a) is limited to civil actions where the party recovers a monetary judgment and cannot be used in a custodial action.¹⁴ The Court then noted “NRS 18.010(2)(b), however, permits the district court to award attorney fees to a prevailing party ‘when the court finds that the claim, counterclaim[,] . . . or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party.’” However, the Court found the district court failed to make findings that Maggie’s claims or defenses were unreasonable or meant to harass, so the award of attorney’s fees was unsupportable under NRS 18.010(2)(b). The Court also noted NRS 18.120 was also unsupportable due to lack of findings.

The Court, similarly, found the district court failed to make any findings under NRS 125C.250 or make a sufficient determination of the reasonableness of ordering Maggie to pay Jason over \$11,000 in attorney’s fees, as the evidence indicated Maggie is largely unable to afford the payments. Finally, the Court held the district court could not properly sanction Maggie under EDCR 7.60(b)(3) without notice and an opportunity to be heard, nor would it be proper without first finding Maggie unreasonably and vexatiously multiplied the cost of litigation without just cause.

The Court vacated the fees and costs because “the district court’s findings did not support an award of attorney fees and costs under NRS 18.010(2)(b), NRS 18.020(1)–(5), NRS 125C.250, or EDCR 7.60(b)(3).”

Conclusion

The court of appeals clarified Nevada defining “sole physical custody” as “a custodial arrangement where the child resides with only one parent and the noncustodial parent’s parenting time is restricted to no significant in-person parenting time” and remanded the district court’s effective award of sole physical custody—specifically, the district court erred by: (1) failing to consider a less restrictive parenting time arrangement; (2) failing to adequately explain why the greater restriction was necessary; (3) failing to make findings how true primary physical custody was not in H.R.’s best interest; and (4) implementing an almost unachievable plan with no ending, review, or even status check date. The Court also found the district court erred by failing to retain substantive decision-making authority over custodial modifications and parenting time allocations. The Court further vacated the award of attorney fees under NRS 18.010(2)(b), NRS 18.020(1)–(5), NRS 125C.250, or EDCR 7.60(b)(3). Finally, the Court required the case to be reassigned to a different judge on remand due to the district court’s “strong negative opinions of Maggie” and extrajudicial opinions made on the record.

¹⁴ In re Execution Search Warrants for: 12067 Oakland Hills, Las Vegas, Nev. 89141, 134 Nev. 799, 799, 435 P.3d 672, 674 (Ct. App. 2018).