IN THE SUPREME COURT OF THE STATE OF NEVADA

BENJAMIN BOONE CHILDS, SR.,
Appellant,
vs.
MARENDA TUEYSHONE CHILDS,
Respondent.

No. 56878

FILED

JUN 09 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court divorce decree concerning child custody. Eighth Judicial District Court, Family Court Division, Clark County; Bryce C. Duckworth, Judge.

Having considered appellant's fast track statement and the record on appeal, we conclude that the district court abused its discretion in characterizing the parties' custody and visitation schedule as a joint physical custody arrangement. Wallace v. Wallace, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996) (providing that a district court's child custody decision, including that of visitation, will not be overturned absent an abuse of discretion); Rivero v. Rivero, 125 Nev. ___, ___, 216 P.3d 213, 224 (2009) (defining joint physical custody); Gepford v. Gepford, 116 Nev. 1033, 1036, 13 P.3d 47, 49 (2000) (explaining that a district court's factual findings will be upheld if supported by substantial evidence in the record).

In Rivero, this court held that "in joint physical custody arrangements, the timeshare must be approximately 50/50." 125 Nev. at ___, 216 P.3d at 224. But to allow for flexibility, this court established a minimum timeshare requirement that would satisfy the definition of joint physical custody—a 40 percent timeshare arrangement. Id. In other words, "[i]f a parent does not have physical custody of the child at least 40

percent of the time, then the arrangement is one of primary physical custody with visitation." Id.

To determine whether the parties' custody arrangement constitutes joint physical custody, the district court should calculate the parties' timeshare over a calendar year. Id. at ___, 216 P.3d at 225. This district court specifically held that a 40-percent custody arrangement means that that parent has physical custody of the child 146 days per year. Id. In calculating this time, the district court should consider the "time during which a party has physical custody of the child," which includes "the number of days during which a party provided supervision of the child, the child resided with the party, and during which the party made the day-to-day decisions regarding the child." Id. As recognized by the district court below, it "should not focus on . . . the exact number of hours the child was in the care of the parent." Id.

Here, in its oral ruling following an evidentiary hearing, the district court recognized that the proposed custody and visitation schedule adopted by the court did not provide respondent with at least 146 days of custody of the parties' minor children. Indeed, the district court found that it was unnecessary to adjust the proposed schedule to provide respondent with 146 custody days, as the arrangement gave respondent a significant portion of custody time. Based on its finding that respondent had a significant amount of custody time, the district court determined that under Rivero, the custody arrangement constituted joint physical custody. We disagree.

Under Rivero, this court has defined joint physical custody as each parent having the child a minimum of 40 percent of the time over a calendar year. Id. This court also specifically stated that 40-percent

physical custody equates to a minimum of 146-custody-days per year. Id. Thus, here, although the district court acknowledged that respondent's timeshare did not equal 146 days, it nevertheless refused to adjust the custody arrangement to ensure that respondent's physical custody time satisfied the Rivero requirement. Consequently, we conclude that the district court abused its discretion in awarding the parties joint physical custody when it acknowledged that the physical custody arrangement did not provide respondent with the requisite minimum physical custody timeshare.

Also, we conclude that the district court's decision to award the parties joint physical custody based on the custody arrangement ordered is not supported by substantial evidence in the record. For example, it is unclear whether the custody arrangement properly constitutes joint physical custody because the record is void of any information concerning the actual dates that the holiday exchanges take place, as such information is based on the children's school schedules that were not made a part of the district court record. In a post-divorce decree order from August 4, 2010, the district court stated that in determining respondent's custody time it "counted the Fridays as a day allocated to [respondent] and possibly on at least a portion of the Mondays when [respondent] has the children." The district court also, however, defined a weekend as beginning on a Friday. Thus, it is unclear whether all Fridays were counted toward respondent's physical custody timeshare or just those Fridays that constituted her weekends. Additionally, the custody schedule ordered by the court alternated the holidays between the parties based on even and odd-numbered years. Thus, arguably, depending on whether the year is even- or odd-numbered, one parent could satisfy the 146-days

requirement in one year, but not in the next, which would leave that parent short of the 146 days required to maintain joint physical custody.

We conclude that the district court abused its discretion in characterizing the custody arrangement as one of joint physical custody because it did not abide by the minimum 146 days of physical custody required under Rivero and substantial evidence does not support the district court's finding that the custody arrangement satisfies the Rivero standard. Accordingly, we reverse the portion of the district court's divorce decree regarding joint physical custody and remand this issue to the district court for it to make specific findings to support its joint physical custody award, or to enter an order awarding appellant primary physical custody if it finds that the custody arrangement does not provide respondent with the minimum days of physical custody required under Rivero.

It is so ORDERED.[1]

Cherry, J.
Cherry

Gibbons, J.
Gibbons

Pickering, J.
Pickering

cc: Hon. Bryce C. Duckworth, District Judge, Family Court Division
Robert W. Lueck, Esq.
Marenda Childs
Eighth District Court Clerk

[1]In light of this order, we deny as moot appellant's May 5, 2011, motion.