IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SHERRY ANN DUMDEI, F/K/A SHERRY ANN RITCHEY,
Appellant,
vs.
CHAD AARON RITCHEY,
Respondent.

No. 68302

ORDER VACATING IN PART, REVERSING IN PART, AND REMANDING

This is a fast track appeal from a district court order modifying custody and child support. Eighth Judicial District Court, Family Court Division, Clark County; Lisa M. Brown, Judge.

Appellant Sherry Dumdei asserts three assignments of error on appeal, each stemming from the district court's modification of the parties' joint physical custody agreement to designate respondent Chad Ritchey as the primary physical custodian. First, Dumdei argues the district court erred in modifying the parties' custody agreement because she did not receive notice that the district court would consider the issue of custody at the hearing. Second, she contends the district court abused its discretion in modifying custody because it did not hold an evidentiary hearing, identify the applicable legal standard, or make findings of fact to support modification. Lastly, Dumdei argues the district court abused its discretion in awarding child support. We agree with Dumdei on her second and third contentions and therefore vacate, reverse, and remand.

Dumdei and Ritchey were divorced on October 22, 2008. The divorce decree awarded Dumdei primary physical custody over the parties' three children and ordered Ritchey to pay $404.00 per month for child support. About six years later, Ritchey filed a motion to modify custody, requesting the district court to award him primary physical custody. In his motion, he argued that his home provided a more stable and nurturing environment for the children during the school year.

The Honorable Gayle Nathan presided over the hearing on the motion on October 14, 2014. At the outset, Judge Nathan indicated a reluctance to change the custodial designation if a modification to the timeshare arrangement would resolve the issue. Judge Nathan thus proposed a timeshare arrangement which provided for a five-day, two-day split, with Ritchey having the children five days a week during the school year, and Dumdei having the children five days a week during the summer recess. In setting forth the timeshare, Judge Nathan stated that the arrangement results in joint physical custody over the course of one year. Ritchey then reminded Judge Nathan that Dumdei currently had primary physical custody under the decree, but explained that the parties' shared de facto joint physical custody. Dumdei stipulated that she and Ritchey had shared de facto joint physical custody for the past three years. As a result, Judge Nathan stated she would modify the decree to reflect joint physical custody.

The order, entered on November 7, 2014, stated "that pursuant to the stipulation of the parties, they have been sharing joint physical custody over the past three (3) years; therefore, the Decree will be modified to reflect that the parties share joint physical custody of the

minor children." The order also set forth the new timeshare arrangement, which provided for a five-day, two-day split, alternating with the summer and school schedule. Additionally, the order awarded Dumdei parenting time with the children every Wednesday until 7:00 p.m. during the school year, and Ritchey overnight parenting time with the children every Wednesday during the summer recess. The order further awarded Ritchey parenting time every fifth weekend, with four additional floating weekends per year. In setting forth the timeshare, the order stated: "Over the course of the year, this results in a joint physical custody arrangement."

On March 12, 2015, Ritchey filed a motion to resolve the remaining financial and parenting time issues. In his motion, Ritchey requested, among other things, that the court specify the time for Friday exchanges and his overnight Wednesday parenting time, confirm the holiday schedule, clarify the number of floating weekends per year, and award him two Sundays each month during the school year to take the children to church. Ritchey did not seek to change the joint physical custody designation. Dumdei filed an opposition and a countermotion to modify the timeshare and obtain an order for child support, among other requests. Ritchey filed a reply and responded to Dumdei's request for child support. In his reply, he argued that he "clearly has primary physical custody of the minor children no matter what label is attached to the timeshare" because he has the children 70 percent of the year and thus "any argument that [he] should pay child support to [Dumdei] during the school year is without merit."

The district court held a hearing on the motions on April 16, 2015. The Honorable Lisa Brown presided over the hearing. With respect to the timeshare arrangement, the parties agreed that the district court's November 2014 order was confusing and needed clarification. As to the issue of child support, Ritchey argued, as he did in his reply, that "there would be no reason for him to pay child support" because he has primary physical custody per the November order. Dumdei responded that the November order clearly established joint physical custody and thus, if the district court modified child support, it should do so in accordance with the joint physical custody agreement.

Since Ritchey's counsel prepared the November order, the district court asked him to explain the paragraph about the parties' sharing joint physical custody. Ritchey's counsel described the parties' stipulation as only referring to the parties' prior de facto arrangement, not as an agreement to share joint physical custody in the future. He argued that because the court awarded him parenting time 70 percent of the year, the court "unknowingly" awarded him primary physical custody. Dumdei responded that she had not done the calculations with regard to the actual timeshare, but that the district court's order intended for the parties to share joint physical custody going forward. To resolve the confusion, the district court stated it would watch the video recording from the hearing before Judge Nathan before making a decision about custody and child support. The district court continued the hearing until April 20, 2015.

On April 20, after reviewing the video, Judge Brown explained that the timeshare arrangement gives Ritchey primary physical custody. Specifically, Judge Brown stated:

> In reviewing the video, Judge Nathan did start off saying that this was going to be a joint custody arrangement. And then she decided to set the visitation schedule out on the record. She—but she was mistaken in the fact that the actual custody arrangement that she ordered really gives [Ritchey] primary custody, physical primary custody. So at this point in time I don't have a basis to change the timeshare that's already been ordered, but I think under the Nevada case law I have to correct the record because in reality the timeshare that she ordered gives [Ritchey] primary custody.

The district court entered its order on May 27, 2015. The order included Judge Brown's findings and awarded Ritchey primary physical custody of the parties' children. Additionally, the district court ordered Dumdei to pay $300.00 per month in child support, retroactive to October 14, 2014. This appeal followed.

Dumdei received notice that the district court would consider the issue of custody at the hearing

Dumdei argues that the district court erred in modifying the parties' joint physical custody agreement because she did not receive notice that the district court would consider modifying custody at the hearing. Ritchey responds that the district court's decision to "correctly label" the parties' timeshare arrangement did not constitute a modification.

"[C]hild custody decisions implicate due process rights because parents have a fundamental liberty interest in the care, custody, and control of their children." *Blanco v. Blanco*, 129 Nev. ___, ___, 311 P.3d 1170, 1175 (2013). Before a district court makes a child custody determination, "notice and an opportunity to be heard . . . must be given to

all persons entitled to notice pursuant to the law of this state . . . ." NRS 125A.345(1). "Although Nevada is a notice pleading jurisdiction, a party must be given reasonable advance notice of an issue to be raised and an opportunity to respond." *Anastassatos v. Anastassatos*, 112 Nev. 317, 320, 913 P.2d 652, 653 (1996).

Although neither party filed a motion to modify the parties' custody designation, we conclude Dumdei and Ritchey put the issue of custody before the district court by filing motions to modify the timeshare arrangement in the November order. In order to determine whether a custody modification is appropriate, *Rivero* requires the district court to make the preliminary determination of what type of physical custody arrangement the parties have under Nevada law. *Rivero v. Rivero*, 125 Nev. 410, 430, 216 P.3d 226, 227 (2009). In requesting the district court to modify the timeshare arrangement in the November order, the parties put the true nature of their agreement before the district court. *See id.* at 429, 216 P.3d at 226 (concluding that "the terms of the parties' custody agreement will control except when the parties move the court to modify the custody arrangement."). Therefore, we conclude Dumdei had notice that the district court would consider a modification to the parties' joint physical custody designation when she moved to modify the parties' timeshare.

Moreover, Dumdei should have known the district court would consider the issue of custody because Ritchey expressly argued that the November order grants him primary physical custody in his reply to Dumdei's request for child support. Therefore, we conclude Ritchey's pleadings provided Dumdei with reasonable notice that the district court

would consider the issue of custody. *Cf. Anastassatos*, 112 Nev. at 320, 913 P.2d at 653 (concluding a mother did not receive reasonable advance notice that the district court would consider the issue of child support abatement where the father did not raise the issue in his pleadings).

Therefore, in light of the parties' respective motions to modify the timeshare arrangement and Ritchey's argument in his reply that the November order gave him primary physical custody based on the timeshare, we conclude Dumdei received reasonable notice that the hearing might involve a change in custody.

The district court abused its discretion in modifying custody

Dumdei argues that the district court abused its discretion when it modified custody because it did not hold an evidentiary hearing, identify the applicable legal standard, or make findings of fact to support a modification. Ritchey argues that the district court did not modify custody because the district court did not modify the parties' timeshare arrangement.

This court reviews child custody decisions for an abuse of discretion. *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). In reviewing child custody determinations, this court will not set aside the district court's factual findings if they are supported by substantial evidence, which is evidence that a reasonable person may accept as adequate to sustain a judgment. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007).

In *Rivero*, the Nevada Supreme Court set forth parameters for determining whether a timeshare arrangement qualifies as joint physical custody. 125 Nev. at 423, 216 P.3d at 222. There, the court provided that

"[e]ach parent must have physical custody of the child at least 40 percent of the time, which is 146 days per year" to constitute joint physical custody. *Id.* at 427, 216 P.3d at 225. "If 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.* at 426, 216 P.3d at 224.

The Nevada Supreme Court later clarified that regardless of *Rivero's* 40 percent guideline, "the child's best interest is paramount" in custody matters. *Bluestein v. Bluestein*, 131 Nev. ___, ___, 345 P.3d 1044, 1048 (2015). Although *Rivero* provided parameters for determining what constitutes joint physical custody, the court explained that "the guideline should not be so rigidly applied that it would preclude joint physical custody when the court has determined in the exercise of its broad discretion that such a custodial designation is in the child's best interest." *Id.* at ___, 345 P.3d at 1048. Thus, under *Bluestein*, even if one parent has physical custody of the child less than 40 percent of the time, the district court may still exercise its discretion to award joint physical custody if it finds the arrangement is in the child's best interest. *Id.*

Here, the district court did not consider evidence of the actual time share nor whether modification of the parties' custody designation was in the children's best interest. In modifying the designation, the district court relied solely on the timeshare arrangement the parties agreed to at the October hearing and which the district court set forth in the November order. I AA 208. Therefore, because the district court did not consider or set forth specific findings as to whether the modification was in the children's best interest, we conclude the district court abused

its discretion in modifying the physical custody arrangement.[1] *See Davis v. Ewalefo*, 131 Nev. ___, ___, 352 P.3d 1139, 1143 (2015) (providing that Nevada law "requires express findings as to the best interest of the child in custody and visitation matters").

The district court abused its discretion in awarding child support

Dumdei argues that the district court abused its discretion in awarding Ritchey child support because the district court should have established child support pursuant to *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998) and *Wesley v. Foster*, 119 Nev. 110, 65 P.3d 251 (2003) because the parties' stipulated to joint physical custody. Further, Dumdei argues that Nevada law prohibits retroactive modification of child support. Ritchey responds that because the district court's labeling of the timeshare is correct and he has primary physical custody, the award of the statutory minimum amount of child support is consistent with Nevada law. This court reviews a district court's decision regarding child support

---

[1]We recognize that *Bluestein* preceded the April hearings by only three weeks, and thus the district court might not have been aware of the Nevada Supreme Court's opinion. We note, however, that the district court even abused its discretion under *Rivero* because it based its decision on the timeshare arrangement in the November order and not on the actual number of days each party had physical custody of the children. *See Rivero*, 125 Nev. at 430, 216 P.3d at 227 (concluding the district court abused its discretion when it determined that the parties had a joint physical custody arrangement because it "did not make any findings supported by substantial evidence to support its determination that the custody arrangement was in, fact, joint physical custody"). Although neither party argued that the November order did not reflect their actual practice, both parties agreed that the timeshare arrangement in the November order was confusing and needed clarification.

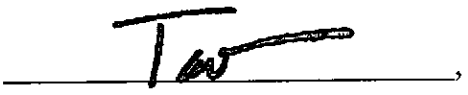
for an abuse of discretion. *See Rivero*, 125 Nev. at 438, 216 P.3d at 232. "The district court only has authority to modify a child support order upon finding that there has been a change in circumstances since the entry of the order and the modification is in the best interest of the child." *Id.* at 430, 216 P.3d at 228.

While a modification to a custody arrangement from joint to primary physical custody constitutes a change in circumstances, since we conclude the district court abused its discretion in modifying the parties' physical custody designation, there is no evidence of a change in circumstances to warrant modification of the child support order. *See id.* at 432-33, 216 P.3d at 228-29. Further, even assuming the district court correctly determined that modification of the parties' custody designation was appropriate, the district court abused its discretion by not considering and setting forth specific findings as to whether modification of the child support order was in the children's best interest. *See Rivero*, 125 Nev. at 432-33, 216 P.3d at 228-29 (providing that the order modifying child support "must be supported by factual findings that a change in child support is in the child's best interest . . . ."). Therefore, we conclude the district court abused its discretion in awarding child support.

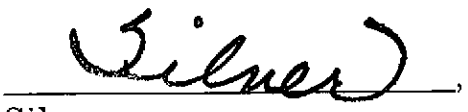
We therefore conclude the district court did not err in modifying the physical custody arrangement on the basis of a lack of notice. We conclude, however, that the district court abused its discretion in modifying physical custody because it failed to consider whether modification was in the children's best interest. Additionally, the district court abused its discretion in modifying child support because there may not have been a change in circumstances, and in any case, the district

court did not consider whether modification was in the children's best interest. Therefore, we VACATE the order of child support, order the judgment of the district court REVERSED AND REMAND this matter to the district court to determine the true nature of the parties' custody arrangement, by evaluating the arrangement the parties exercise in practice, and then apply the appropriate test for determining whether modification is appropriate and to make express findings supporting its determination, and then to order child support as appropriate.

_____, C.J.
Gibbons



_____, J.
Tao



_____, J.
Silver

cc: Hon. Lisa M. Brown, District Judge, Family Court Division
Robert E. Gaston, Settlement Judge
The Cooley Law Firm
Leavitt Law Firm
Eighth District Court Clerk