

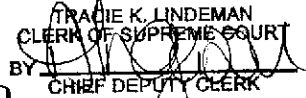
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

AMANDA MARIE UNDERWOOD,
Appellant,
vs.
JASON DANIEL UNDERWOOD,
Respondent.

No. 68950

FILED

APR 15 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is a fast track appeal from a district court order modifying the parties' timeshare arrangement. Eighth Judicial District Court, Family Court Division, Clark County; Lisa M. Brown, Judge.

Appellant Amanda Underwood appeals from a district court order modifying the parties' timeshare arrangement in favor of respondent Jason Underwood. Amanda argues the district court abused its discretion principally because it awarded Jason sufficient parenting time to qualify as joint primary physical custody under *Rivero v. Rivero*, 125 Nev. 410, 430, 216 P.3d 213, 227 (2009), which conflicted with the parties' agreement that Amanda have primary physical custody. In making her argument, however, Amanda argues the district court's order is problematic for several other reasons, including that it failed to set forth specific findings that modification was in the children's best interest. Because the district court's failure in this respect requires reversal and remand, we address only this contention.

Amanda and Jason divorced on October 8, 2012, pursuant to a stipulated divorce decree. In the decree, the parties agreed to a timeshare arrangement, which they labeled as primary physical custody. Amanda

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received primary physical custody of the children and Jason received parenting time¹ with the children (1) every other weekend throughout the year, beginning Friday afternoon and ending Monday morning; (2) every day after school during the school year until 5:30 p.m.; and (3) during the summer months, from 8:30 a.m. to 5:30 p.m., Monday through Friday, on an alternating weekly basis.

For three years, the parties followed the schedule set forth in the decree without any issues. Then, in January 2015, Amanda began restricting Jason's parenting time with the children. As a result, Jason filed a motion, requesting the court to order "make up visitation" and "to clarify the decree regarding [his] visitation." Amanda opposed the motion and countermoved to modify the parties' timeshare. In her countermotion, Amanda requested the court to eliminate Jason's parenting time with the children after school and during the summer, and to reduce his parenting time on the weekends.

The district court held an evidentiary hearing. After hearing testimony from Amanda and Jason, the district court modified the parties' timeshare arrangement by (1) consolidating Jason's after school parenting time from every day until 5:30 p.m. to every Monday and Wednesday until

¹See *Terabelian v. Klatt*, Docket No. 68442 (Order of Affirmance, Nev. Ct. App., March 17, 2016) ("In Nevada, the time awarded to a noncustodial parent has traditionally been referred to as "visitation," but in an effort to more accurately reflect the nature of this time, we use the more modern term "parenting time." (citing Cynthia R. Mabry, *Indissoluble Nonresidential Parenthood: Making It More Than Semantics When Parents Share Parenting Responsibilities*, 26 *BYU J. Pub. L.* 229, 231 (2012) (discussing the shift in usage of certain family law terms and explaining that "[p]arenting time, formerly called visitation, is the time awarded the non-residential parent after a divorce when the other parent is awarded custody")))).

7:00 p.m., (2) condensing Jason's summer parenting time from 8:30 a.m. to 5:30 p.m., Monday through Friday, on an alternating weekly basis, to one six-week block of time, and (3) removing the provision in the decree that required Jason to return the children to Amanda if he worked during his parenting time. The district court did not alter Jason's weekend schedule, maintaining that Jason would have the children every other weekend throughout the year from Friday afternoon to Monday morning. This appeal followed.

Amanda argues the district court abused its discretion in modifying the timeshare arrangement because the district court failed to set forth specific findings that the modification was in the best interest of the children under *Bluestein v. Bluestein*, 131 Nev. ___, 345 P.3d 1044 (2015). This court reviews child custody determinations, including decisions as to parenting time, for an abuse of discretion. See *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996).

In considering whether to modify a timeshare arrangement, the district court employs a two-step process. First, the district court must determine the type of physical custody arrangement the parties exercise in practice. *Rivero*, 125 Nev. at 430, 216 P.3d at 227. Second, the district court must apply the applicable test to determine whether modification is appropriate. See *id.* "A modification to a joint physical custody arrangement is appropriate if it is in the child's best interest." *Id.* "In contrast, a modification to a primary physical custody arrangement is appropriate when there is a substantial change in circumstances affecting the child and the modification serves the child's best interest." *Id.*

Under the first step, the district court must evaluate the actual timeshare the parties exercise, not the timeshare set forth in the decree. See *id.*; *Bluestein*, 131 Nev. at ___, 345 P.3d at 1047 (providing that "the terms upon which the parties agree will control until one or both

of the parties move the court to modify the custody arrangement”). To determine whether the parties’ timeshare constitutes joint or primary physical custody, the district court must calculate the time that each party has physical custody of the children over one calendar year. *Rivero*, 125 Nev. at 427, 216 P.3d at 225. In doing so, the district court should count the number of days each party has custody of the child. *Id.*

Here, the district court failed to determine whether the parties’ actual timeshare arrangement constituted joint or primary physical custody before it considered whether modification was appropriate. While the record shows that the district court inquired into the parties’ actual timeshare at the evidentiary hearing, the district court did not make any findings of fact as to whether the parties’ actual timeshare constituted joint or primary physical custody under Nevada law. Therefore, we conclude the district court abused its discretion in modifying the timeshare. *See id.* at 430, 216 P.3d at 227 (concluding the district court abused its discretion in modifying a joint physical custody arrangement because it did not make findings of fact supported by substantial evidence to support its determination that the custody arrangement was, in fact, joint physical custody).

Moreover, even assuming the district court determined the type of physical custody arrangement the parties exercised under Nevada law, the district court abused its discretion under the second step because it did not include specific findings of fact in its order demonstrating that the modification was in the children’s best interest. In modifying a timeshare arrangement, Nevada law “requires express findings as to the best interest of the child.” *Davis v. Ewalefo*, 131 Nev. ___, ___, 352 P.3d 1139, 1143 (2015). “Crucially, the decree or order must tie the child’s best interest, as informed by specific, relevant findings respecting the NRS


125.480(4) and any other relevant factors, to the custody determination made." *See id.* at ___, 352 P.3d at 1143.

Although the district court's statements and rulings at the evidentiary hearing demonstrate that it did consider the children's best interest, the district court's order does not set forth specific findings of fact demonstrating how modification serves the best interest of the children. Therefore, we also conclude the district court abused its discretion in modifying the parties' timeshare for this reason.

Accordingly, because the district court failed to make the requisite preliminary determination as to whether the parties actually shared joint or primary physical custody, and moreover, because the district court failed to set forth specific findings of fact in its order that modification was in the children's best interest, we reverse and remand this matter to the district court. On remand, the district court must determine the true nature of the parties' timeshare arrangement, by evaluating the arrangement the parties exercise in practice, and then apply the appropriate test for determining whether modification is appropriate and make express findings supporting its determination.

Therefore, we ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Lisa M. Brown, District Judge, Family Court Division
Steinberg Law Group
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Eighth District Court Clerk