

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES RODRIGUEZ,
Appellant,
vs.
MICHELLE MCKENNA,
Respondent.

No. 39628

FILED

MAR 04 2004

ORDER OF AFFIRMANCE

JANETIE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is a proper person appeal from a district court order changing child custody and an order refusing to rule on a motion to disqualify district court judge.

Child custody matters rest in the sound discretion of the district court.¹ Any order for joint custody may be modified by the district court upon its own motion if the child's best interest requires the modification.² In its decision to modify a joint custody arrangement, the district court must state the reasons for the modification.³ "It is presumed that a trial court has properly exercised its discretion in determining a child's best interest."⁴ Here, the district court determined that the child's best interest was served by awarding respondent sole legal and physical custody because the child is thriving ever since appellant's contact with the child has been restrained. We conclude that the district

¹Wallace v. Wallace, 112 Nev. 1015, 922 P.2d 541 (1996).

²NRS 125.510(2); see also Traux v. Traux, 110 Nev. 437, 874 P.2d 10 (1994) (concluding that only the child's best interest need be considered by the district court in situations involving joint physical custody).

³NRS 125.510(2).

⁴Wallace, 112 Nev. at 1019, 922 P.2d at 543.

court did not abuse its discretion when it awarded respondent sole legal and physical custody of the child.⁵

As for the May 23 order declining to rule on appellant's motion to disqualify Judge Lueck, under NRS 1.235(1), a party who seeks to disqualify a judge for bias or prejudice must file an affidavit specifying the basis for disqualification not less than twenty days before the date set for trial or hearing of the case, or not less than three days before the date set for a pretrial hearing. Thus, a challenge for prejudice or bias, like a peremptory challenge, generally must be initiated before adversarial proceedings commence. A party may not wait to see how the judge will rule, then use a disqualification affidavit to overturn an adverse ruling and obtain a new ruling by a new judge.⁶

Here, the record establishes that on April 8, 2002, a hearing was held on appellant's motion to change child custody. The minutes further reveal that the district court made an oral ruling during the hearing that respondent would have sole legal and physical custody of the child. It was not until May 1, 2002, however, that the district court signed a written order changing child custody. The order was filed in the district court on May 2, 2002.


On April 30, 2002, appellant filed an affidavit for the disqualification of Judge Lueck. Since appellant filed his disqualification affidavit before the district court's written order concerning the child

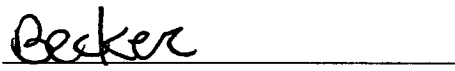
⁵To the extent that appellant seeks to challenge the portion of the district court's May 2, 2002 order which extended the protective order entered against him, that matter appears moot since the protective order expired December 19, 2002.

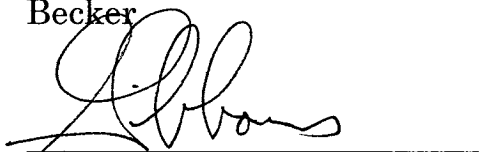
⁶Valladares v. District Court, 112 Nev. 79, 910 P.2d 256 (1996).

custody arrangement was entered, the district court should have ruled on appellant's affidavit for disqualification before rendering a decision as to custody. Even so, because appellant's disqualification affidavit was untimely filed under NRS 1.235, the district court's failure to rule first on his request for disqualification was harmless error.⁷ Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁸

 _____, C.J.
Shearing

 _____, J.
Becker

 _____, J.
Gibbons

cc: Hon. Robert W. Lueck, District Judge, Family Court Division
Shelley Lubritz
Charles Rodriguez
Clark County Clerk

⁷See Jacobson v. Manfredi, 100 Nev. 226, 679 P.2d 251 (1984) (affirming a district court order granting a motion to strike an untimely disqualification motion).

⁸Although appellant and respondent were not granted permission to file documents in proper person, see NRAP 46(b), we have considered all proper person documents received in this matter. We deny appellant's March 6, 2003 motion for appointment of counsel.

We note that although appellant initially failed to pay the filing fee mandated by NRS 2.250, the record indicates that on May 23, 2002, the district court granted appellant's motion to proceed on appeal in forma pauperis. Accordingly, the filing fee is waived. See NRAP 24(a).