IN THE SUPREME COURT OF THE STATE OF NEVADA

SHAWN WIKER,
Appellant/Cross-Respondent,
vs.
CATHERINE WIKER, N/K/A CATHERINE PETERS,
Respondent/Cross-Appellant.

No. 41226

FILED

MAR 18 2005

CLERK OF SUPREME COURT

DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal and cross-appeal from a district court order concerning child custody, visitation, and child support. Eighth Judicial District Court, Family Court Division, Clark County; Cynthia Dianne Steel, Judge.

Appellant/cross-respondent Shawn Wiker and respondent/cross-appellant Catherine Peters were married in 1995 and divorced in 1999. Under the divorce decree, Wiker retained primary custody of their two minor children and Peters was entitled to visitation. Peters was obligated to pay the statutory minimum child support of $200.00 per month. In 2003, Wiker moved for an increase in child support and modification of the visitation arrangements. Peters, in turn, counter-moved for a change in custody, make-up visitation, an order prohibiting contact between the children and their paternal grandmother Ann Strauss, and preliminary attorney fees, among other things. Following a hearing, the district court entered an order denying both parties' motions. Wiker and Peters now appeal.

In denying Wiker's request for a change in child support, the district court reasoned that insufficient time had elapsed since the last change. Wiker argues that the district court erred because the law does

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not require the passage of some minimum amount of time before child support is reviewed, particularly if there are changed circumstances. Wiker contends that there are changed circumstances here, namely an increase in Peters' gross monthly income, her remarriage, her job stability, and the children's changed needs. Peters argues that the district court did not err because Wiker presented no proof of changed circumstances. He only made unsupported allegations.

"This court reviews a district court child support order for abuse of discretion."[1] A child support order must, upon the request of a parent, be reviewed by the court at least every three years to determine whether the order should be modified or adjusted.[2] A child support order may also be reviewed at any time on the basis of changed circumstances.[3]

The district court must apply the formula in NRS 125B.070 to any request filed after July 1, 1987, to change the amount of the required support of children.[4] A noncustodial parent's monthly child support obligation for two children is set at twenty-five percent of the parent's

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[1]Edgington v. Edgington, 119 Nev. 577, 588, 80 P.3d 1282, 1290 (2003).

[2]NRS 125B.145(1).

[3]NRS 125B.145(4).

[4]NRS 125B.080(1)(b); see also Rodgers v. Rodgers, 110 Nev. 1370, 1374, 887 P.2d 269, 271-72 (1994) (holding that the district court is required to apply the statutory support schedule when a parent requests a change in the amount of the required child support); Hoover v. Hoover, 106 Nev. 388, 389, 793 P.2d 1329, 1330 (1990).

gross monthly income.[5] The minimum amount of support is $100.00 per month per child,[6] or $200.00 in this case.

"[A]pplication of the formula must be the rule, and deviation from the formula for the benefit of the secondary custodian must be the exception."[7] Deviations from the formula must be justified by specific findings of fact, which should also include the amount of support that would have been established under the statutory formula.[8] "A child support award can be modified in accordance with the statutory formula, regardless of a finding of changed circumstances."[9]

First, we conclude that the passage of time from a previous change in child support is an inadequate reason for the district court to deny a change.[10] The statute does not suggest that some minimum amount of time must pass before a party may request a review. NRS 125B.145(1) states that a review must take place at least once every three

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[5]NRS 125B.070(1)(b)(2).

[6]NRS 125B.080(4).

[7]Barbagallo v. Barbagallo, 105 Nev. 546, 552, 779 P.2d 532, 536 (1989).

[8]NRS 125B.080(6).

[9]Scott v. Scott, 107 Nev. 837, 840, 822 P.2d 654, 656 (1991); see also Parkinson v. Parkinson, 106 Nev. 481, 483 n.1, 796 P.2d 229, 231 n.1 (1990).

[10]Technically, there has been no previous change in child support, since even before the valid divorce decree was issued in 2000, Peters' child support obligation was set at $200.00 per month. We presume that the district court meant to say that insufficient time had passed since the last review of Peters' child support obligation, which was in June 2001.

years, but makes no mention of how much time must pass before another review may be requested. Furthermore, a review based on changed circumstances may take place "at any time" per NRS 125B.145(4). Here, Wiker's motion for increased child support is based on changed circumstances. Thus, we conclude that the district court's reasoning that insufficient time had passed since the last change in, or review of, child support is incorrect.

Second, we conclude that the district court erred in failing to apply the statutory formula upon Wiker's request to modify Peters' child support obligation. The statutory scheme and the case law mandate such an application of the formula, but the district court appears to have summarily denied Wiker's motion and maintained Peters' obligation at the statutory minimum of $100.00 per month per child without applying the formula. Even if the amount of Peters' child support obligation deviates from the amount suggested by the statutory formula, that amount must still be analyzed in the order pursuant to NRS 125B.080(6). While the district court stated that it considered all documentation, there is no evidence in the record on appeal that it applied the statutory formula either at the hearing or in its order.

Therefore, regarding child support, we conclude that the district court abused its discretion. We reverse that portion of the district court's order pertaining to child support, and we remand with instructions to conduct an evidentiary hearing and to apply the applicable statutory child support formula.[11]

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[11]In so doing, the district court should note that Peters' community interest in her new husband's income is a factor to be considered. See Rodgers, 110 Nev. at 1376, 887 P.2d at 273.

In her cross-appeal, Peters argues that the district court erred in failing to conduct an evidentiary hearing on the issue of child custody, thereby depriving her of due process. She also argues that the district court erred in failing to award her custody of the children.

"[A] district court has the discretion to deny a motion to modify custody without holding a hearing unless the moving party demonstrates 'adequate cause' for holding a hearing."[12] "'Adequate cause' requires something more than allegations which, if proven, might permit inferences sufficient to establish grounds for a custody change."[13] "'Adequate cause' arises where the moving party presents a prima facie case for modification. To constitute a prima facie case, it must be shown that: (1) the facts alleged in the affidavits are relevant to the grounds for modification; and (2) the evidence is not merely cumulative or impeaching."[14]

"This court will not disturb the district court's child custody determination absent a clear abuse of discretion."[15] "A change of primary physical custody is warranted only when: (1) the parent's circumstances have been materially altered, and (2) the child's welfare would be substantially enhanced by the change."[16] "Stability is one of the primary objectives behind the changed circumstances requirement, and children's

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[12]Rooney v. Rooney, 109 Nev. 540, 542, 853 P.2d 123, 124 (1993).

[13]Id. at 543, 853 P.2d at 125 (citation omitted).

[14]Id.

[15]Martin v. Martin, 120 Nev. ___, 90 P.3d 981, 983 (2004) (citing Sims v. Sims, 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993)).

[16]Id. (citation omitted).

stability should not be disturbed simply because the noncustodial parent has been remarried."[17]

NRS 125.480 provides, in relevant part:

> 1. In determining custody of a minor child in an action brought under this chapter, the sole consideration of the court is the best interest of the child . . . .
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> . . . .
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> 3. The court shall award custody in the following order of preference unless in a particular case the best interest of the child requires otherwise:
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> (a) To both parents jointly . . . or to either parent . . . . When awarding custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent.

In Rooney v. Rooney, a former wife moved for a change of custody based on changed circumstances, alleging that: (1) her former husband had stated that he no longer wanted custody of their child, although he later changed his mind; (2) her former husband and his parents harassed her and obstructed her visitation rights; (3) she had terminated her relationship with her fiancé with whom she had planned to move to California; and (4) she could provide an extended family for the child.[18] After analyzing the parties' moving and opposition papers, the

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[17]Id. at ___, 90 P.3d at 983-84 (citing Castle v. Simmons, 120 Nev. 98, 86 P.3d 1042, 1047 (2004)).

[18]Rooney, 109 Nev. at 541, 853 P.2d at 124.

district court, without a hearing, denied the wife's motion, noting that this would protect the best interests of the child at the time.[19] We affirmed.[20]

Here, we conclude that Peters failed to establish adequate cause for a hearing in her affidavit and points and authorities, and the district court properly exercised its discretion in denying Peters' motion without holding a hearing. Though Peters alleges that Wiker and Strauss are interfering with Peters' relationship with the children, as well as her visitation rights, the presence of interference of the latter sort, if true, did not convince this court in Rooney. Furthermore, the record on appeal does not suggest that Wiker and Strauss are attempting to destroy Peters' relationship with the children.

Peters points out that she is now married, lives in a four-bedroom house, has job stability, as well as a minivan, all of which are factors suggesting a stable environment in which to raise children. However, under Martin v. Martin, Peters' remarriage alone is not enough to establish changed circumstances. Also, it is not clear whether Peters' material stability would substantially enhance the children's welfare above that which Wiker is currently providing. The district court could have reasonably concluded that the advantages of custodial continuity outweighed any disadvantages and the children's best interests would be served by maintaining the status quo.

We conclude that Peters has not established a prima facie case for modification of child custody that would constitute adequate cause to

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[19]Id. at 542, 853 P.2d at 124.

[20]Id. at 543, 853 P.2d at 125.

warrant a hearing. Therefore, the district court did not err either in failing to conduct a hearing or in denying a change of custody.

Peters contends that Wiker interfered with the uninterrupted vacation period she was provided under the divorce decree and that the district court's failure to order a make-up period, or even address the issue, was an abuse of discretion. She requests compensatory visitation. Wiker argues that the district court was not required to grant Peters compensatory visitation.

NRS 125C.020 states:

> 1. In a dispute concerning the rights of a noncustodial parent to visit his child, the court may, if it finds that the noncustodial parent is being wrongfully deprived of his right to visit, enter a judgment ordering the custodial parent to permit additional visits to compensate for the visit of which he was deprived.

Here, Wiker explained that he purposefully interfered with Peters' vacation plans because they conflicted with one of the children's schooling, but Peters made no effort to alter her plans when given two months' advance notice. The district court could have reasonably determined that it was Peters' own refusal to reschedule the vacation, rather than Wiker's interference, that deprived Peters of her uninterrupted vacation time. Thus, we conclude that the district court did not abuse its discretion in refusing to award Peters compensatory visitation.

Peters also requests that this court direct the district court to prohibit contact between Strauss and the children. Peters alleges that Strauss' goal is to exclude Peters from the children's lives. Peters asserts that, because she is the joint legal custodian of the children, she has a constitutional right to decide with whom her children will associate or

reside, exclusive of Wiker, which justifies an order prohibiting contact between the children and Strauss.

Wiker argues that, because Strauss resides with him, Peters has no right to dictate with whom he can reside when he has the children. Wiker charges that in seeking a no-contact order barring Strauss from seeing her grandchildren, Peters is seeking to infringe upon his liberty interest and right to association.

"[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[21] "[T]here is a presumption that fit parents act in the best interests of their children."[22] "[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."[23]

In Moore v. City of East Cleveland, a plurality of the Supreme Court stated:

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Over the years millions of our citizens have grown up in just such an

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[21]Troxel v. Granville, 530 U.S. 57, 66 (2000) (plurality opinion).

[22]Id. at 68.

[23]Id. at 68-69.

> environment, and most, surely, have profited from it. Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family. Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home. Decisions concerning child rearing, which . . . have [been] recognized as entitled to constitutional protection, long have been shared with grandparents or other relatives who occupy the same household indeed who may take on major responsibility for the rearing of the children. Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life.
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> . . . .
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> Whether or not such a household is established because of personal tragedy, the choice of relatives in this degree of kinship to live together may not lightly be denied by the State.[24]

We conclude that Peters' arguments lack merit. Little, if anything, in the record supports Peters' assertions regarding Strauss. Furthermore, there is scant evidence indicating that Wiker is an unfit parent who is not adequately caring for the children or acting in their best

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[24]431 U.S. 494, 504-06 (1977) (plurality opinion) (holding that city ordinance under which it was a crime for a grandmother to live with her son and two grandsons, who were cousins, violated due process) (citations omitted).

interests. Therefore, we conclude that the district court did not err in declining to prohibit contact between Strauss and her grandchildren.

Finally, at the hearing, the district court stated that it would not award Peters preliminary attorney fees because the parties were already divorced. Peters argues that the district court erred because, under NRS 125.040, the court retains continuing jurisdiction over post-judgment motions relating to the support and custody of minor children. Wiker argues that the district court was acting within its discretion when it denied Peters' fees.

Even years after a divorce, the district court has power to grant allowances and suit money as part of its continuing jurisdiction where a party files appropriate post-judgment motions relating to support or custody of minor children.[25] An award of attorney fees in a divorce action is neither automatic nor compulsory, but is within the sound discretion of the trial court.[26]

We conclude that the district court was incorrect when it stated at the hearing that it would refuse to grant preliminary attorney fees because the parties were already divorced. Leeming v. Leeming provides otherwise. We therefore reverse that portion of the district court's order denying attorney fees and remand the matter of attorney fees to the district court for reconsideration in light of its child support calculations.

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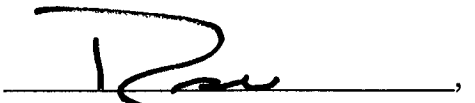
[25]See Leeming v. Leeming, 87 Nev. 530, 531-32, 490 P.2d 342, 343 (1971).

[26]Levy v. Levy, 96 Nev. 902, 905, 620 P.2d 860, 862 (1980).

In sum, we reverse those portions of the district court's order relating to child support and attorney fees and affirm the remainder of the order. We remand this matter to the district court for further proceedings consistent with this order.

It is so ORDERED.



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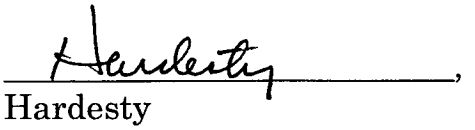

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cc: Hon. Cynthia Dianne Steel, District Judge, Family Court Division
Randall J. Roske
Kenneth L. Hall
Clark County Clerk