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**IN THE SUPREME COURT OF
THE STATE OF NEVADA**

CHRISTINA CALDERON STIPP,

Appellant/Cross-Respondent,

v.

MITCHELL DAVID STIPP

Respondent/Cross-Appellant.

SUPREME COURT CASE NO.: 57327

DISTRICT COURT CASE NO.: D-08-389203-Z

DEPT. NO.: M

EMERGENCY MOTION FOR CLARIFICATION

On March 24, 2013, the Nevada Supreme Court issued an order of reversal and remand ("Order of Reversal and Remand," Docket No. 13-15375) of the written decision of Judge Frank Sullivan of Department O, Eighth Judicial District, Clark County, State of Nevada, which was entered by the district court on November 4, 2010 (the "Appealed Order"). Subsequent to the Court's decision, the clerk of the Court issued a Remittitur ("Remittitur," Docket No. 13-17883) and the case was closed.

Respondent/Cross-Appellant, Mitchell Stipp, by and through his co-counsel, Radford J. Smith, Esq., of the firm of Radford J. Smith, Chartered, hereby submits this Emergency Motion For Clarification as set forth below.

DATED this 17th day of July, 2013.



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I.

POINTS AND AUTHORITIES

Respondent/Cross-Appellant filed his notice of cross-appeal on December 15, 2010 of the Appealed Order. The Appealed Order confirmed the parties as joint physical custodians of the children and granted Respondent/Cross-Appellant additional custodial time equal to nine (9) hours on the third Friday of each month. *See* Appealed Order at 17-19.

This Court reviews the district court's decision regarding custody (including changes in timeshare) for an abuse of discretion. *Rivero v. Rivero*, 216 P.3d 213, 226 (Nev. 2009) ("*Rivero II*") (citing *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996)). The district court has broad discretion in child custody matters, but substantial evidence must support the court's findings. *Id.*

1 (citing *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241-42 (2007)). Substantial evidence is
2 “evidence that a reasonable person may accept as adequate to sustain a judgment.” *Id.* (citing *Ellis*, 123
3 Nev. at 149).

4 When considering whether to modify a physical custody arrangement, the district court must first
5 determine what type of physical custody arrangement exists between the parties. *Id.* While providing a
6 precise number for the determination of physical custody (40 percent of the days of the year), *Rivero II*’s
7 nebulous criteria for determining what constitutes a “day” negates any certainty under the judicially
8 created formula.¹

10 Specifically, under *Rivero II*, the terms of a parties’ custody arrangement will control except
11 when the parties move the district court to modify the custody arrangement. *Id.* In that circumstance,
12 the district court must apply the definitions of custody as set forth in *Rivero II*. Essentially, the court
13 must review the parties’ custody arrangement under the “40% annually” standard that this Court
14 prescribed in that decision.

16 As this Court has pointed out in the Order of Reversal and Remand, Judge Sullivan found that
17 parties’ timeshare arrangement likely did not constitute joint physical custody as set forth in *Rivero II*.
18 He determined, without any findings analyzing his determination, that Respondent/Cross-Appellant had
19 a minimum of 131 days and a maximum of 143 days of physical custody per year, which he concluded
20

22 ¹ This Court stated in *Rivero II*:

24 In calculating the time during which a party has physical custody of the child, the district court
25 should look at the number of days during which a party provided supervision of the child, the
26 child resided with the party, and during which the party made the day-to-day decisions regarding
27 the child. The district court should not focus on, for example, the exact number of hours the child
28 was in the care of the parent, whether the child was sleeping, or whether the child was in the care
of a third-party caregiver or spent time with a friend or relative during the period of time in
question.

216 P.3d at 225.

1 failed to meet the 40 percent requirement (or 146 days). Indeed, since *Rivero II* does not grant any
2 bright line criteria for the determination of days, the method or reasoning of a district court's calculation
3 of days is essential for even a basic review of any custodial order. See Order of Reversal and Remand.

4 This error is also present in the final determination by Judge Sullivan. Judge Sullivan granted
5 specific time to Respondent/Cross-Appellant with the intent to grant him joint physical custody under
6 the *Rivero II* criteria. With the additional time he granted---nine (9) more hours on the third Friday of
7 each month---Judge Sullivan indicated that Respondent/Cross-Appellant had joint physical custody.
8 Again, however, Judge Sullivan failed to provide any findings explaining his calculation.
9

10 The part of the district court's order that is clear, however, is that it believed that it was in the
11 best interests of the children that Respondent/Cross-Appellant continue to have joint physical custody,
12 and that there were sufficient facts justifying a change of custody even if it found that
13 Respondent/Cross-Appellant's prior timeshare was not joint physical custody. See also Footnote 2 of
14 the Order of Reversal and Remand.
15

16 Respondent/Cross-Appellant respectfully asks this Court for clarification of the Order of
17 Reversal and Remand and believes the issuance of the Remittitur was in error. The Order of Reversal
18 and Remand appears to remand to the district court this case for the sole purpose of making specific
19 findings as to how it determined what constitutes a custodial day. Under these circumstances,
20 Respondent/Cross-Appellant believes this Court still retains jurisdiction over all other matters on appeal
21 until the district court makes its findings. Once the findings are made, the Court should be able to
22 consider the remainder of the issues on appeal:
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24

25 (a) Did the district court apply the correct legal standard for the modification of the physical
26 custody and/or the timeshare arrangement of the parties?

27 (b) Was either party entitled to an evidentiary hearing?
28

1 (c) Was the evidence used by the district court to support its findings of fact barred by the
2 doctrine of res judicata?

3 (d) Did the district court err in failing to grant Mitchell an equal timeshare arrangement?

4 (e) Did the district court err in failing to appoint a parenting coordinator?

5 (f) Did the district court err in failing to award the specific attorney's fees, costs and
6 expenses requested by the parties?
7

8 Complicating the matter even further, on July 5, 2010, the district court case was
9 administratively reassigned from Judge Sullivan in Department O to Judge William Potter in
10 Department M. Judge Potter's determination of what constitutes a custodial day may be different than
11 the determination of Judge Sullivan who issued the Appealed Order and presided over the litigation
12 between the parties, which formed the basis of his decision from December of 2009 through May of
13 2010.² Accordingly, Respondent/Cross-Appellant also asks this Court for clarification as to whether
14 Judge Potter or Judge Sullivan should determine a custodial day under the Appealed Order. Given the
15 amount of time that has elapsed since Respondent/Cross-Appellant filed his motion on October 29, 2009
16 to confirm the parties as joint physical custodians under *Rivero II*, and to modify the parties' timeshare
17 arrangement to grant him equal time with the children, Respondent/Cross-Appellant believes this Court
18 should set a timeframe pursuant to which such determination should be made by the district court so that
19 the remainder of the issues on appeal can be timely decided.
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21

22 Finally, the Order of Reversal and Remand does not address whether the additional timeshare
23 provided to Respondent/Cross-Appellant under the Appealed Order remains in effect. The parties have
24 continued to operate under the assumption that Respondent/Cross-Appellant is still entitled to the nine
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26
27 ² See *infra* FN 1.
28

1 (9) hours of additional time on the third Friday of each month, which Respondent/Cross-Appellant has
2 enjoyed since the Appealed Order was issued in November of 2010. However, recently,
3 Appellant/Cross-Respondent, Christina Calderon-Stipp, has indicated that Respondent/Cross-Appellant
4 may not be entitled to this time.

5 The district court at a hearing on July 16, 2013 indicated a desire to hold an evidentiary hearing
6 on the issue of physical and legal custody (based on new facts and circumstances).³ Respondent/Cross-
7 Appellant supports the idea of such a hearing. However, without clarification from this Court about the
8 effect of the Order of Remand and Reversal, the district court may not have jurisdiction except through a
9 motion by Respondent/Cross-Appellant under *Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978),
10 as clarified and explained by *Foster v. Dingwall*, 228 P.3d 453 (Nev. 2010), if the Remittitur was issued
11 in error. Before Respondent/Cross-Appellant undertakes the task before the district court, he would like
12 this Court to consider this motion.
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27 ³ Appellant/Cross-Respondent, Christina Calderon-Stipp, has returned to work fulltime Monday through Friday,
28 from 8:00 am to 5:00 pm and delegated her parental responsibilities of caring for the children to her brother in
violation of Respondent/Cross-Appellant's right of first refusal.

1
2 **II.**

3 **CONCLUSION**

4 Based on the foregoing, the Nevada Supreme Court should clarify its Order of Reversal and
5 Remand as set forth above and vacate the Remittitur.
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8 DATED this 17th day of July, 2013.
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COUNTY OF CLARK)
STATE OF NEVADA) ss:

1. I am the Respondent/Cross-Appellant in the above-entitled matter.

3. I declare under the penalty of perjury of the laws of the State of Nevada that the foregoing is true and correct.

Dated: July 17, 2013

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing document described as "EMERGENCY MOTION FOR CLARIFICATION" by mail pursuant to NRAP 25 on this 17th day of July, 2013, to all interested parties as follows:

Patricia L. Vaccarino, Esq.
Vaccarino Law Office
8861 W. Sahara Avenue., Suite 210
Las Vegas, Nevada 89117

DATED this 17th day of July, 2013.



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