

Docket 72880 Document 2017-30428

Kirk contends that Vivian had already been overly empowering Brooke to stop honoring the joint physical custody agreement and the teenage discretion provision even before this court issued the *Harrison* opinion, as well as during the year since the opinion was issued. Vivian thereby obtained *de facto* primary custody of Brooke, separated Brooke and Rylee from one another for about one-half the time, separated Brooke from Kirk for the vast majority of Kirk's custody time under the 50/50 custody arrangement agreed to by the parties and ordered by the court, and destroyed Kirk's relationship with Brooke. As a result of the provision, Kirk lost **221 days of custody time** with Brooke between August 12, 2015 and January 31, 2017. Kirk is now completely alienated or estranged from Brooke as a result of Vivian's violations.

When Kirk complained to the district court regarding these violations, the district court refused to protect the joint physical custody agreement, refused to grant relief to Kirk, and refused to apply the standards mandated by this Court's ruling in *Harrison*. Brooke is now 18, and the teenage discretion provision is arguably moot as to any direct relief Kirk is seeking for Brooke's situation. But the other daughter, Rylee, is now 14, and she falls within the provision. With Rylee, Kirk is already experiencing virtually the same problems he experienced with Vivian's violations regarding Brooke. Therefore, the history of the teenage discretion provision regarding Brooke—with its profound destructive impact on Kirk's relationship with

Brooke—is highly relevant in any analysis of the provision’s enforcement as to Rylee, and as to any analysis of the district court’s refusal to comply with *Harrison*.

The grounds for Vivian’s motion to dismiss are anything but clear. The motion does not assert any of the usual jurisdictional grounds for dismissal, such as untimeliness, lack of aggrieved party status, or the absence of an appealable order or judgment. Kirk challenged Vivian’s conduct in empowering and fostering violations of the teenage discretion provision, and he asserted his rights as a joint custodial parent. The district court refused to grant relief and refused to enforce the *Harrison* opinion. Kirk has appealed.¹

Vivian argues that the “law of the case” doctrine calls for dismissal of Kirk’s appeal. (Motion p. 3) That doctrine can be raised by Vivian in her answering brief, and the doctrine will be considered by this Court in deciding the merits of Kirk’s appeal. *E.g. Recontrust Co. v. Zhang*, 130 Nev. Adv. Op. 1, 317 P.3d 814 (2014) (law of case doctrine decided as part of decision on merits of the appeal). As such, Vivian’s motion to dismiss is raising the issue prematurely.

In any event, the doctrine is not applicable and does not require dismissal. In his appeal in this case, Kirk has the right to argue that the circumstances involving

¹ Kirk originally appealed from the district court’s order of March 15, 2017, and he subsequently filed a supplemental appeal from the order of July 24, 2017.

the destruction of his relationship with Brooke show that the *Harrison* opinion should be revisited or modified. The destruction of this relationship resulted from the teenage discretion provision and the manner in which the district court allowed Vivian to use it, including events before *Harrison* and during the year since *Harrison*. And in his appeal, Kirk also has the right to argue that, even if the *Harrison* opinion remains fully intact, Vivian has violated the opinion, and the district court has erred by refusing to enforce the opinion or by not enforcing the opinion correctly. Accordingly, the “law of the case” doctrine provides no basis for dismissal of the appeal at this early stage.

Furthermore, the appeal should not be dismissed as moot. The appeal is certainly not moot regarding Rylee. She has attained the age for which the teenage discretion will apply, and the district court’s order of July 24, 2017, expressly addresses her. The same problems that occurred with Brooke are already occurring with Rylee, and Kirk’s appellate challenges are not moot as to Rylee. Further, even though Brooke is now 18, the history of the teenage discretion provision regarding Brooke, with its destructive impact on the father-daughter relationship, is highly relevant in this court’s analysis of the provision’s continuing validity, its interpretation, and the extent to which the provision has been used by Vivian and the children to deviate from the joint custody agreement. Kirk wants to protect Rylee

from the same fate suffered by Brooke; and the fact that Brooke is now 18 does not make the appeal moot.

Issues relating to the teenage discretion provision are also issues that are capable of repetition yet evading review, thereby falling within the exception to the mootness doctrine. *See Personhood Nevada v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) (exception applies where duration is relatively short and there is a likelihood that a similar issue will arise in the future). Children are only within the scope of such provisions for a limited time. And as the situation involving Brooke illustrates, conflicts arising out of such provisions will evade review as the child reaches the age at which the provision ends (age 18).

Accordingly, no grounds exist for dismissal of Kirk's appeal, and Vivian's motion should be denied.²

DATED this 11th day of September, 2017.

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² If the Court denies Vivian's motion to dismiss, her request for attorneys' fees should also be denied. Kirk's appeal was in good faith, he has reasonable grounds to believe the appeal is valid, and there is no basis for an award of fees under NRAP 38.

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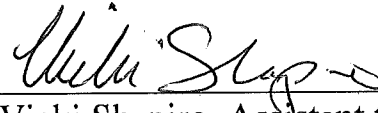
CERTIFICATE OF SERVICE

I certify that I am an employee of Lemons, Grundy & Eisenberg and that on this date the foregoing was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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9/14/17



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