

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN DANIEL ADRIENZEN

Appellant

V.

PAIGE ELIZABETH PETIT,

Respondent

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Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court No. 78966

District Court No. D489542

CHILD CUSTODY FAST TRACK RESPONSE

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Appellant

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CHILD CUSTODY FAST TRACK RESPONSE

1. Name of party filing this fast track response:

Paige Elizabeth Petit

2. Name, law firm, address, and telephone number of attorney, or proper person respondent submitting this fast track response:

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3. Proceedings raising same issues.

None

4. Procedural history.

This is a post decree action involving child custody and visitation matters.

On August 18, 2014, the parties' Decree of Divorce was filed. [AA000001-AA000006].

On July 31, 2018, Respondent filed a Motion, to modify the parties' timeshare.

[AA000007-19].

On August 23, 2018, Appellant filed his Opposition and Countermotion for Modification of Physical Custody to Joint physical custody, timeshare & child support. [AA000020-43].

On September 7, 2018 Respondent filed her Reply and Opposition to the Countermotion [AA000097-104].

On September 14, 2018 Appellant filed an improper Surreply [AA000105-121].

On September 17, 2018, the Court denied Respondent's Motion and did not set an evidentiary hearing on Appellant's Countermotion. [AA000291].

On September 17, 2018 Discovery was opened for sixty (60) days for Appellant to find additional information concerning the Respondent's Boyfriend. [AA000291].

On November 17, 2018 Appellant's time to discover and disclose additional information expired.

On February 11, 2019 the Order for the hearing of September 17, 2018 was filed. [AA000292-294]

On February 14, 2019 the Notice of Entry of of Order was filed. [AA000295-299]

On February 25, 2019 the Appellant's time to file a Motion to Reconsider expired pursuant to EDCR 2.24 and EDCR 5.512.

On February 28, 2019, Appellant filed a Motion for Reconsideration of the District Court's Orders. [AA000300-323].

On March 18, 2019 Appellants time expired to file a Notice of Appeal from the Order of February 11, 2019 pursuant to NRAP 4(a)(1).

On March 21, 2019, Respondent filed an Opposition and Countermotion. [AA000338-344].

On April 9, 2019, the Court denied Plaintiff's Motion for Reconsideration. [AA000544-547].

On May 28, 2019 the Order for the Hearing of April 9, 2019 was filed. [AA000544-547].

On May 28, 2019 the Notice of Entry of Order for the Hearing of April 9, 2019 was filed. [AA000548-553].

On June 4, 2019 the Notice of Appeal was filed.

5. Statement of facts.

Respondent incorporates and accepts the assertions contained in Appellant's Statement of facts except where identified.

The Appellant asserts there were defects in the Decree of Divorce and seems to assert that such a deficiency warrants a revisit of the custodial order, it does not. The matter was heard and ruled on August 18, 2014. [AA000001-6]. The time to appeal this matter or have the ruling reconsidered has long passed.

Appellant references and asks this Court to review the Countermotion to Modify Custody filed August 23, 2018. [AA000020-43]. Appellant's request is improper as his time to appeal that order expired March 18, 2019. The Court must ignore the Appellant's references and requests concerning this finding.

Appellant was granted sixty (60) days of discovery to research the medical neglect issue on September 17, 2018. [AA000291]. Appellant did not disclose a single item regarding the issue as permitted by the court. [AA000526].

Appellant raised the issue of an auto accident involving the minor child. [AA000306]. The court determined this issue was too remote in time and happened prior to the last appearance before the court. [AA000529-530].

The court specifically addressed the issues and concerns raised by Appellant in his motion to reconsider. The court stated, "...I got the impression with the motion that was filed dad thought that the court didn't consider any of the issues that were raised in the countermotion last fall. The court considered them and said, they're not adequate to relitigate the issue of custody." [AA000532]. The court continued, "That's a judgment call court's have to make because there is a burden to show that there's adequate cause." *Id.*

The court permitted additional argument from Appellant regarding the standard for reopening the case and ultimately made a ruling. The court held: "I didn't say it wasn't relevant. What I said was it does not—you didn't—you haven't

shown a prima facia case concerning those concerns. You haven't." [AA000535].

6. Issues on Appeal

- 1) The court properly denied an Evidentiary Hearing as the Appellant failed to show a prima facia case for re-litigation of custody. Furthermore, Appellant is barred from raising this appeal as his time to file the appeal expired on March 18, 2019. Appellant filed his Notice of Appeal June 13, 2019.
- 2) Appellant is barred from raising this issue as the Decree of Divorce was filed August 18, 2014. The time for appeal or reconsideration has long expired.
- 3) Appellant's concerns regarding examples of "adequate cause" are time barred. EDCR 5.512 which permits a Motion to Reconsider specifically states, "A motion for reconsideration does not toll the period for filing a notice of appeal."

7. Legal Argument

1. The Court correctly determined there was inadequate cause for an Evidentiary Hearing

The district court has broad discretionary powers to determine child custody matters, and the court's holdings will not be disturbed absent a clear abuse of discretion." *Rico v. Rodriguez*, 121 Nev. 695, 701, 120 P.3d 812, 816 (2005).

The 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. *Rooney v. Rooney*, 109 Nev. 540, 542 (Nev. 1993). "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. *Id.* at 543.

In Nevada, when a district court determines the custody of a minor child, "the sole consideration of the court is the best interest of the child."¹ This Court stated, "the court may...[a]t any time modify or vacate its order" upon "the application of one of the parties," because numerous courts have documented the importance of custodial stability in promoting the developmental and emotional needs of children, we acknowledge that courts should not lightly grant applications to modify child custody. *Ellis v. Carucci*, 123 Nev. 145, 149 (Nev. 2007). Modification of primary physical custody is warranted only when (1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the child's best interest is served by the modification. *Id.* at 150-151. The party seeking a modification of custody bears the burden of satisfying both prongs. *Id.* at 151.

¹ NRS 125C.0035(1)

Appellant's argument was and remains the conduct of a third-party, the Respondent's fiancé, constitutes a change in circumstance. The *Ellis* court made it clear the change in circumstance must substantially affect the child. *Ellis* at 149. *Rooney* made it clear the affidavit must present the prima facia case. *Rooney* at 543.

Appellate's affidavit states no specific facts in support of the motion but simply avers to the motion and states the factual assertions contained in the motion are true. [AA000041]. Appellant's motion cites the following as the changed circumstances which warrant a change of custody:

1. Dad's changed work schedule. [AA000032].
2. Mom's lack of co-parenting. [AA000032-33].
3. Mom's failure to inform dad about doctors and dentists' appointments. [AA000033].
4. Mom cohabitating with her fiancé. *Id.*
5. Mom moving to a new home. *Id.*
6. Mom enrolling the child in school without discussing the school with the father. *Id.*
7. Mom taking an out of state vacation without informing the father. *Id.*

Each item listed by appellant is a change affecting the parent and not affecting the child. Dad having a change in work schedule supported the original motion to modify the time-share, which appellant opposed. Respondent failing to properly co-

parent regarding legal decision making was largely due to the difficulty in dealing with Appellant and his mother and did not affect the child.

Appellant cites the relocation of the Respondent as a change. Respondent needed a larger home due to her newest child. Appellant fails to show how a larger home with more room constitutes a change in circumstance affecting the child.

Appellant raises the issue of Respondent taking a vacation during her custodial time and not informing the Appellant. Appellant cites no violation of any order nor did Appellant lose any custodial time as a result. The Court will note, this is a non-issue. Appellant fails to tell the court that he also took an out of state trip with the child to Florida. Appellant was arrested while in Florida for resisting an officer without violence and disorderly conduct². Appellant's arrests were while he was exercising custody of the child.

Appellant cites the presence of the fiancé as a final change in circumstance. Appellant fails to inform this court or the court below the fiancé has been present and part of the child's life for more than two years prior to filing the motion. Appellant fails to inform this court Respondent and fiancé took drug tests prior to the hearings and were both negative for all controlled substances.

² State of Florida v. Kevin Daniel Adrienzen. Case number 2019MM000103

The court properly considered the affidavits and offers of proof and determined the Appellant had failed to make a prima facie case and therefore declined to set this matter for an evidentiary hearing.

2. Appellant is Barred from Raising the Deficiency of the Decree of Divorce

Appellant is requesting this Court to set aside a Decree and enter a new decree stating the present decree is impeding Appellants ability to modify custody. Modification of a Decree of Divorce as requested here would be governed by either NRCp 59, NRCp 60 or NRAP 4. Appellant is time barred in each case.

NRCp 59(e) provides, A motion to alter or amend a judgment must be filed no later than 28 days after service of written notice of entry of judgment. The Decree of Divorce was entered August 18, 2014. Time to file a motion to alter or amend expired September 15, 2014. Appellant cannot amend the Decree pursuant to NRCp 59. Appellant's time to file a motion under NRCp 60 expired February 15, 2015. The Court should note there has never been a motion filed pursuant to NRCp 60 in this matter.

Appellants last option is to seek an appeal pursuant to NRAP 4. NRAP(4)(a)(1) mandates a notice of appeal must be filed after entry of a written judgment or order, and no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served. Appellant's time to file expired September 22, 2014.

Appellant has no basis to bring an appeal at this late date to a Decree entered more than four (4) years ago. Appellants requests must be denied.

3. Appellants Appeal is Untimely and Must be Dismissed

The Court has addressed the issue of tolling motions succinctly in *AA Primo Builders, LLC v. Washington*, Nos. 53983, 54471, at 9 (Nev. 2010). Appellants missed several timelines that fatally bar the present action.

NRAP 4(a)(4) provides:

If a party timely files in the district court any of the following motions under the Nevada Rules of Civil Procedure, the time to file a notice of appeal runs for all parties from entry of an order disposing of the last such remaining motion, and the notice of appeal must be filed no later than 30 days from the date of service of written notice of entry of that order:

(A) a motion for judgment under Rule 50(b);

(B) a motion under Rule 52(b) to amend or make additional findings of fact;

(C) a motion under Rule 59 to alter or amend the judgment;

(D) a motion for a new trial under Rule 59.

This Court addressed this issue further holding “so long as a post-judgment motion for reconsideration is in writing, timely filed, states its grounds with

particularity, and request[s] a substantive alteration of the judgment, not merely the correction of a clerical error, or relief of a type wholly collateral to the judgment there is no reason to deny it NRCP 59(e) status, with tolling effect under NRAP 4(a)(4)(C).” AA *Primo Builders*, at 9. The Court went further stating, “It is hard to imagine a post-judgment motion that would qualify for tolling under NRCP 59(e) and NRAP 4(a)(4)(C) if AA Primo's did not.” *Id.* at 5.

AA Primo filed a timely motion to amend an Order. *Id.* at 2. The motion was heard and denied by the District Court. *Id.* AA Primo filed a Notice of Appeal following the denial of the motion to amend. *Id.* at 3.

In this case, Appellant failed to file a timely motion to reconsider. Appellant’s motion was governed by EDCR 5.512 which permits the movant fourteen (14) days to file a motion to reconsider. Appellant’s time to file the motion to reconsider expired February 25, 2019. Appellant failed to file the motion to reconsider until February 28, 2019. Appellant’s failure to file a timely motion forfeits the protection of the tolling effect of NRAP (4)(a)(4).

Appellant was granted leave to conduct discovery in this matter and re-notice the original motion for hearing based on the discovery. Appellant declined to take that action and chose the Motion to Reconsider. The court even asked what discovery had been conducted during the sixty (60) day period and there was none executed. The court correctly determined there was not sufficient information to make a prima

facia case and denied the motion and refused to set the matter for an evidentiary hearing.

The Court should affirm the Order below and Dismiss the appeal as untimely.

8. Preservation of issues

Appellant does not cite any issues to preserve.

VERIFICATION

1. I hereby certify that this fast track response complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this fast track response has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in Times New Roman font size 14

2. I further certify that this fast track response complies with the page- or type-volume limitations of NRAP 3C(h)(2) because it is proportionately spaced, has a typeface of 14 points or more and contains 2636 words.

4. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track response is true and complete to the best of my knowledge, information and belief

DATED this 18th day of November 2019.

THE GRIMES LAW OFFICE

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CERTIFICATE OF SERVICE

The undersigned, an employee of The Grimes Law Office, hereby certifies that on the 18th day of November 2019, I served a true and correct copy of Respondent's Fast Track Statement, to the following via the Supreme Court's electronic filing and service system (eFlex):

Michael Burton, Esq.

By: /s/*Kristine Bernhardt*
Kristine Bernhardt