

IN THE SUPREME COURT OF THE STATE OF NEVADA

AARON ROMANO,

Appellant,

vs.

TRACY ROMANO,

Respondent.

Electronically Filed
Dec 31 2020 02:13 p.m.
Supreme Court Case No. 81259/81339
Elizabeth S. Brown
District Court Case No. D-16-543114
Clerk of Supreme Court

CHILD CUSTODY FAST TRACK STATEMENT

- 1. Name of party filing this fast track statement:** Aaron Romano.
- 2. Name, law firm, address, and telephone number of attorney submitting this fast track statement:** Michella A. Hauser, Esq., Throne & Hauser, 1070 W. Horizon Ridge Pkwy, Suite. 100, Henderson, Nevada 89012, (702) 800-3580.
- 3. Judicial district, county, and district court docket number of lower court proceedings:** Clark County District Court, Family Division, Eighth Judicial District. Docket No. D-16-543114-D.
- 4. Name of judge issuing judgment or order appealed from:** Honorable Rebecca Burton.

5. Length of trial or evidentiary hearing. The order appealed from was not entered following a trial or evidentiary hearing, but following a motion hearing. The motion hearing lasted less than fifteen minutes. Additionally, Aaron is also appealing from the order awarding attorney's fees and costs, which was entered by the district court on June 19, 2020, without hearing.

6. Written order or judgment appealed from: "Order From Hearing on April 21st, 2020" entered May 17, 2020, and "Order Awarding Attorney's Fees and Costs" entered on June 19, 2020.

7. Date that written notice of the appealed written judgment or order's entry was served: May 21, 2020 and June 19, 2020.

8. If the time for filing the notice of appeal was tolled by the timely filing of a motion listed in NRAP 4(a)(4), (a) specify the type of motion, and the date and method of service of the motion, and date of filing and (b) date of entry of written order resolving tolling motion: Not applicable.

9. Date notice of appeal was filed: May 21, 2020 and June 25, 2020.

10. Rule governing the time limit for filing the notice of appeal: NRAP 4(a).

11. Rule which grants this court jurisdiction to review the judgment or order appealed from: NRAP 3A(b)(7) and (8).

12. Pending and prior proceedings in this court. Not applicable.

13. Proceedings raising same issues. Not applicable.

14. Procedural history: Aaron filed his complaint for divorce against Respondent, Tracy Romano (“Tracy”) on November 29, 2016. JA 1. Tracy answered the complaint on December 29, 2016. JA 6.

The parties resolved all issues relating to the custody, control and care of their seven minor children in a Stipulated Order Resolving Parent/Child Issues entered on March 8, 2019. JA 16. On June 5, 2019, the parties resolved all of the financial issues in their divorce case, including, but not limited to the issue of child support, in a Marital Settlement Agreement (JA 80), which was then confidentially incorporated by reference into a Stipulated Decree of Divorce that was entered on June 12, 2019. JA 72.

On February 28, 2020, Aaron filed a Motion to Confirm De Facto Physical Custody Arrangement of Children. JA 142. Tracy filed her opposition to Aaron’s Motion and a Countermotion to Modify Alimony, Enforce Provisions of the Parties’ Marital Agreement and for Attorney’s Fees and Costs on March 20, 2020. JA 187. After a very brief hearing on April 21, 2020, and without taking any evidence, the district court summarily denied Aaron’s motion. JA 283. Tracy then filed a Motion for Attorney’s Fees and Memorandum of Fees and Costs on May 6, 2020. JA 287. An Order from the hearing on April 21, 2020 was entered on May 17, 2020. JA 301. Aaron filed an Opposition to that motion and a countermotion for his own attorney’s

fees and costs on May 20, 2020. JA 304. After Tracy filed her Reply and Opposition to Countermotion on May 27, 2020, the district court entered an order awarding Tracy attorney's fees and costs on June 19, 2020, without hearing. JA 337. Aaron filed timely notices of appeal of both of these orders JA 328 and JA 359.

15. Statement of facts:

Aaron and Tracy were married on January 7, 1995. JA 1. During their 24 years of marriage, Aaron and Tracy had a total of ten children, seven of whom remain minors at the time the Decree of Divorce was entered on June 12, 2019. JA 145. Julian Romano, born February 27, 2002, (now age 18), Mirabella Romano, born March 23, 2005, (age 15), Etienne Romano, born April 9, 2009 (age 11), Celeste Romano, born July 16, 2011 (age 9), twins, Estelle Romano and Lisette Romano, born July 10, 2014 (age 6) and Emmeline Romano, born July 6, 2017 (age 3). JA 145. In the Order Resolving Parent/Child Issues, filed on March 8, 2019 (JA16-42), the parties agreed to share joint legal and joint physical custody of all seven minor children even though the time share with each individual child outlined in the detailed order *does not* result in each parent having at least 40% of the time with each child. JA 145.

The goal was for the parties to reach a time share with each child that would actually result in all of them being in the custody and care of each parent at least 40% of the time. JA 45. There was supposed to be efforts by Tracy to improve her

relationship with the older three children, who are in Aaron's care much more than 60% of the time and, as the younger children reach certain ages, Aaron's time share with them was supposed to increase to at least 40% of the time. JA145. Despite these aspirations though, the actual time share that the parties had been exercising between March 8, 2019 and February 28, 2020, remain unchanged JA 145. Specifically, for more than one year prior to February 28, 2020, Julian and Maribella spent no time in Tracy's custody and care and Etienne spent only a few hours per week in Tracy's custody and care during the school year. JA146. Etienne never spent the night in Tracy's home and he only saw Tracy a couple hours after school on Mondays through Thursdays each week during the school year. JA146. With regard to Estelle, Lisette and Emmeline, Aaron had them in his custody and care on Mondays and every other Wednesday from 4:30 p.m. to 7:00 p.m., and every other Friday overnight until Saturday at 6:00 p.m. (except Emmaline did not spend the night with Aaron). JA 146. This custodial schedule is what the parties, with the input of the two teenage children, determined works best for the parents and each child. JA146.

Aaron's child support obligation to Tracy set forth in the confidential Marital Settlement Agreement ("MSA"), and Tracy's corresponding zero obligation, was based upon the parties sharing joint physical custody of their seven minor children in accordance with the aspirations set forth in the Order Resolving Parent/Child

Issues entered on March 8, 2019. JA 82. In spite of the parties labelling their custodial time share as joint physical custody, the MSA only requires Aaron to pay Tracy child support for the five youngest children. Specifically, his child support obligation for the youngest four children was set at the then-applicable presumptive maximum of \$1,138 per month, per child and one-half of the presumptive maximum for Etienne, \$569, for a total child support obligation of \$5,121 per month. JA 82. Since entry of the Order Resolving Parent/Child Issues on March 8, 2019, Tracy has acquired an income that is required to be used to calculate her child support obligation for the minor children. JA147. Additionally, new child support guidelines were set forth in the Nevada Administrative Code, Chapter 425.

In the year prior to February 28, 2020, Aaron had primary physical custody of Julianne, Mirabella and Etienne and Tracy had primary physical custody of the four youngest children, Celeste, Estelle, Lisette and Emmeline. JA146-147. Tracy never disputed those facts in her opposition to Aaron's Motion to Confirm De Facto Physical Custody Arrangement of Children, to Modify Child Support, and for Attorney's Fees and Costs. JA192-195.

At the very brief hearing on April 21, 2020, the district court did not take any evidence and did not allow any argument on Aaron's motion. Specifically, the district court stated the following regarding Aaron's motion to confirm the de facto physical custody of the minor children:

I've read everything. I don't need to hear from anyone. Dad's motion to modify custody is denied. This case is very fresh in my mind. The parties carefully considered this extremely unusual case. And they found that their unique arrangement was in the best interest of the children.

There has been no change of circumstance that's been articulated here other than Julian's pending emancipation. And that hasn't yet taken place. JA 284, ll 6-13.

...

I – you know, I'm so familiar with this case, I didn't even need to read the opposition before most of the points that were made in the opposition I already had running through my head as I was reading dad's motion just because I know that this is just such an usual case in the way that it was resolved. It – there isn't anything that's changed since then. JA 285, ll 4-10.

16. Issues on appeal.

A. Whether the district court erred by failing to comply with the mandate found in *Rivero v. Rivero*, 216 P.3d 213, 125 Nev. 410 (2009), that the district court determine the actual type of custody the parties have by looking back at the actual timeshare over the prior year.

B. Whether the district court erred by finding that there had to be a change of circumstances in order for it to follow the mandate found in *Rivero v. Rivero*.

...

...

C. Whether the district court erred by finding that Aaron must show a change of circumstances to have his child support reviewed when the new regulation found in NAC 425 became effective on February 1, 2020. NAC 425.170 is in conflict with the holding in *Burton v. Burton*, 99 Nev. 698, 669 P.2d 703 (1983).

D. Whether the district court erred in determining that there had not been a 20% or more change in Tracy’s gross monthly income when she went from having zero income at the time the Order Resolving Parent/Child Issues was entered on March 8, 2019, to having a gross monthly income of over \$6,000 as a result of interest income and alimony.

E. Whether the district court erred by awarding attorney’s fees and costs to Tracy as the prevailing party when the district court erred in denying Aaron’s Motion to Confirm De Facto Physical Custody Arrangement of Children, to Modify Child Support, and for Attorney’s Fees and Costs.

...
...
...
...
...
...
...

17. Legal argument, including authorities:

A. *The District Court Ignored the Mandate of Rivero v. Rivero*¹.

The Nevada Supreme Court made it very clear in *Rivero* that, while parents are can agree to the kind of “unusual” terms and definition regarding custody of their minor children that the parents in this case did and district courts can enforce the agreed upon terms so long as they are not unconscionable, illegal, or in violation of public policy, once either of the parents moves to modify the agreement though, the district court is bound by the terms and definitions found in Nevada law.² For example, if parents agree to a custodial schedule where one parent has time with the child for 1 hour every weekday and agree to call that schedule joint physical custody with neither paying the other parent child support, that agreement will stand and be enforced by the district court until a parent files a motion to modify custody. At that point in time, in order to follow definitions found in Nevada law, the district court:

[S]hould calculate the time during which a party has physical custody of a child over one calendar year. Each parent must have physical custody of the child at least 40 percent of the time, which is 146 days per year.³

...

...

¹ 125 Nev. 410, 216 P.3d 213 (2009).

² **Error! Main Document Only.***Id. at 219.*

³ *Id. at 225.*

Once Aaron filed his motion, the district court could not rely on how Aaron and Tracy defined joint physical custody and was required to calculate the time each parent had actual physical custody of their minor children over the prior year and not just look at the labels the parties used in their stipulated Order Resolving Parent/Child Issues (“Order”). With regard to the four youngest children, the custodial schedule set forth in the Order clearly did not provide Aaron with custody of those minor children at least 40% of the time, but it was anticipated that as these children got older, his custodial time with them would increase. JA 24-26. That did not happen. JA 145-146. With regard to the three oldest minor children, the custodial schedule set forth in the Order clearly did not provide Tracy with custody of those minor children at least 40% of the time, but it was anticipated that she would make efforts to improve her relationship with those children and her custodial time with them would increase. JA 23-24. That also did not happen. JA 145-146.

Neither parent disputed these facts regarding the custodial schedule for the minor children for the year prior to Aaron filing his motion. JA 192-195. Since there were no disputed facts regarding the actual custodial schedule exercised by these parents, it was not necessary for the district court to conduct an evidentiary hearing. The district court should have granted Aaron’s motion and held that he has primary physical custody of the three oldest minor children and Tracy has primary physical custody of the four youngest minor children.

B. *There is nothing in the Rivero decision that requires a change of circumstances.*

Aaron specifically asked the district court to confirm his *de facto* primary physical custody of the three oldest minor children and to confirm Tracy's *de facto* primary physical custody of the four youngest minor children in accordance with *Rivero*. The district court denied Aaron's request solely based on a finding that there had been no change in circumstances since the Order was entered on March 8, 2019. JA 284. However, there is nothing in the *Rivero* decision that indicates that a parent has to prove any change of circumstances since entry of the last order in order for the district court to calculate the actual custodial time each parent had exercised for the prior year and to apply Nevada's definitions of joint physical and primary physical custody.

No matter what Aaron and Tracy labeled their custodial arrangement and their best intentions regarding increasing their custodial time with their children, they have never had joint physical custody of their seven minor children according to Nevada law. The district court should have followed *Rivero* and confirmed that Aaron has primary physical custody of the three oldest minor children and Tracy has primary physical custody of the four youngest minor children.

...

...

C. *Aaron's Child Support Obligation Should Have Been Reviewed.*

While the district court found that there had been no change in circumstances that would allow it to review Aaron's child support obligation (JA 285), that finding is erroneous. There were three separate changes in circumstances that warranted a review of Aaron's child support obligation:

1. As set forth above, the parties do not share joint physical custody of their seven minor children. The district court should have reviewed Aaron and Tracy's respective child support obligations once it determined that Aaron has primary physical custody of three minor children and Tracy has primary physical custody of four minor children.
2. Tracy had no income when the Order resolving custody was entered on March 8, 2019, but once the MSA was signed, she acquired a gross monthly income of \$6,018.67. JA 147. It is the policy in the State of Nevada to encourage parents to share in the rights and *responsibilities* of child rearing. NRS 125C.001(2). Tracy has an equal responsibility to financial support her children, particularly the three minor children that are in Aaron's primary physical custody because she does not provide them with a home or any other financial support given that they spend no, or in the case of Etienne,

almost no, time in Tracy's custody and care. NAC 425.025 clarified what constitutes gross income for the purpose of calculating a parent's child support obligation for their minor children and Tracy's alimony and her interest income are part of her gross monthly income for the purpose of calculating her child support obligation for the parties' three oldest children that are in the custody of Aaron. Because the district court erroneously refused to review the parties' respective child support obligations, not only does Tracy have no obligation to contribute financially to the support of the parties' three oldest minor children, Aaron is actually paying her \$569 per month for a child (Etienne) who has not spent a night in Tracy's home since March 8, 2019. JA 146.

3. The enactment of NAC 425, which became effective on February 1, 2020, constitutes a change in circumstances that requires the district court to review the parties' respective child support obligations. The Nevada Supreme Court held in *Rivero* that "[t]he district court has authority to modify a support order if there has been a factual or legal change in circumstances since it entered the order." *Id* at 228. A change in the law is a change in circumstances. *Burton v Burton*, 99 Nev. 698, 669 P.2d 703 (1983). When the states

first adopted child support guidelines in the 1980s, parents were not required to wait out an arbitrary period of time in order to receive the benefits of the new guidelines. However, when the Administrator of the Nevada Division of Welfare and Supportive Services of the Department of Health and Human Services enacted the new child support guidelines found in NAC 425, there was a concern about the volume of parents who might inundate the courts with requests to review their child support once the new guidelines became effective. That concern led to the inclusion of NAC 425.170(3), which states that the enactment of the new guidelines alone could not constitute a change in circumstances sufficient to justify the modification of an existing order. That part of the Nevada Administrative Code does not comply with decisions of the Nevada Supreme Court, including *Burton v Burton*, 99 Nev. 698, 669 P.2d 703 (1983). Additionally, it violates the Equal Protection Clause of the 14th Amendment to the Constitution of the United States of America. There is no valid reason why parents who had their child support calculated on or before January 31, 2020 should be denied the benefits of the new child support guidelines that went into effect on February 1, 2020. One of the reasons that the child support

guidelines were modified is because of changes in the economic data regarding the cost of raising a child in Nevada. Parents who had the misfortune of having their child support calculated on or before January 31, 2020 are just stuck paying or receiving a child support obligation that was calculated based on guidelines that were based on outdated economic data for three years, while parents who were lucky enough to have their child support calculated on February 1, 2020 get to take advantage of the new guidelines three years earlier than the other parents. This disparate treatment of similarly situated parents and minor children cannot be justified based solely on the concern about how many child support review motions might be filed.

The district court's order denying Aaron's request for a review of the child support for the parties' seven minor children was an abuse of discretion and should be reversed and remanded and the child support in this case should be calculated pursuant to NAC 425.

...

...

...

...

D. *The Award of Attorney's Fees to Tracy Should be Reversed.*

The district court awarded Tracy \$7,378.50 in attorney's fees and costs from Aaron pursuant to NRS 18.010 and section 26.1 of the MSA *solely* because she was the prevailing party on Aaron's motion regarding custody and child support. JA 337-346. Since the district court's rulings on these two issues should be reversed and remanded for the reasons set forth herein, the award of attorney's fees and costs to Tracy must also be reversed.

18. Routing Statement. This appeal is presumptively assigned to the Court of Appeals per NRAP 17(b)(5) because it involves an issue of family law. Aaron believes that this case should be assigned to the Court of Appeals.

DATED this ___th day of December, 2020.

THRONE & HAUSER

Michelle A. Hauser, Esq.
Nevada Bar No. 007738
THRONE & HAUSER
1070 W. Horizon Ridge Pkwy., Ste. 100
Henderson, Nevada 89012
(702) 800-3580
Attorney for Appellant

VERIFICATION

1. I hereby certify that this fast track statement 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 statement has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Times New Roman type style; or

This fast track statement has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

2. I further certify that this fast track statement complies with the page- or type-volume limitations of NRAP 3E(e)(2) because it is either:

Proportionately spaced, has a typeface of 14 points or more, and contains 3,903 words; or

Monospaced, has 10.5 or fewer characters per inch, and contains words or lines of text: or

Does not exceed pages.

3. Finally, I recognize that under NRAP 3E I am responsible for timely filing a fast track statement and that the Supreme Court of Nevada may impose sanctions for failing to timely file a fast track statement, or failing to raise material

issues or arguments in the fast track statement. I therefore certify that the information provided in this fast track statement is true and complete to the best of my knowledge, information, and belief.

DATED this 31st day of December, 2020.

THRONE & HAUSER

/s/ Michelle A. Hauser

Michelle A. Hauser, Esq.

Nevada Bar No. 007738

THRONE & HAUSER

1070 W. Horizon Ridge Pkwy., Ste. 100

Henderson, Nevada 89012

(702) 800-3580

Attorney for Appellant

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: None
2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court: Throne & Hauser

3. If litigant is using a pseudonym, the litigant's true name: None.

DATED this 31st day of December, 2020.

THRONE & HAUSER

/s/ Michelle A. Hauser

Michelle A. Hauser, Esq.

Nevada Bar No. 006145

THRONE & HAUSER

1070 W. Horizon Ridge Pkwy., Ste. 100

Henderson, Nevada 89012

(702) 800-3580

Attorney for Appellant