IN THE SUPREME COURT OF THE STATE OF NEVADA

JUSTIN MAURICE,

Appellant,

vs.

SARAH MAURICE,

Respondent.

S.CT. NO: 83009

CHILD CUSTODY FAST TRACK RESPONSE

1. **Name of party filing this fast track response:**

   Sarah Maurice.

2. **Name, law firm, address, and telephone number of attorney submitting this fast track response:**

   Rachel M. Jacobson, Esq.
   Nevada State Bar No. 007827
   JACOBSON LAW OFFICE, LTD.
   64 N. Pecos Road, Suite 200
   Henderson, Nevada 89074
   Office Tel: 702-601-0770

3. **Proceedings raising same issues:**

   N/A

4. Procedural history:

Following the parties' separation in 2014, Respondent Sarah Maurice ("Sarah/Respondent") filed the underlying Complaint for Divorce in December of the same year. (I ROA 1-6) Sarah also filed a motion for preliminary relief alleging that Appellant Justin Maurice ("Justin/Appellant") engaged in abusive alcohol consumption and domestic violence. (I ROA 7-23) After several filings and hearings, the parties ultimately entered a Stipulated Decree of Divorce on September 30, 2015. (II ROA 288-296) Three months after entry of the Decree, Appellant Justin Maurice ("Justin/Appellant") filed a motion to lower his child support obligation. (II ROA 288-296) Therein, in part, Justin claimed that he first became unemployed (after entry of the parties' decree) and then also changed employment. (Id.) At the January 2016 hearing upon Justin's motion, the parties placed on the record their agreement to lower Justin's child support obligation effective January 2016. (II ROA 330-331) The parties also then agreed that, provided Justin began to provide health insurance for the parties' children, Justin was to receive an additional offset of $134.00 each month. The Court also ordered that Sarah was awarded $5,102.24, reduced to judgment, as and for Justin's child support arrears. Collection was stayed so long as Justin paid $217.00 per month toward the arrearages until paid in full. The D.A. was instructed to add this amount to the child support amount to be garnished from Justin's pay checks. Justin was also ordered to pay to Sarah an additional $1,080 stemming from his failure to provide health insurance for the parties' children. (II ROA 336-341)

Nearly one year later, on December 5, 2016, the parties filed their Stipulation and Order increasing Justin's child support obligation to $1,200 per month as his income increased to $5,252 per month. (Not included in Appellant's Index) In addition to addressing Appellant's child support

obligation, that order also states "all other prior orders not specifically modified herein shall remain in effect." Thus, even after Appellant's work schedule changed (as provided in his motion to lower his child support obligation), Appellant agreed that the custodial timeshare shall stand.[1] The parties further agreed that Justin shall provide health insurance for the parties' children with no offset to his support obligation (as he bore no additional charge to cover the parties' children). And, as Justin failed to pay his portion of the childcare costs, the parties agreed that his arrearages of $3,950.50 were reduced to judgment with the D.A. to add $350.50 to Justin's monthly arrears payments. That Stipulation and Order also specifically left all other previous orders intact.[2]

Thereafter, on July 6, 2017, the parties filed a document entitled "Partial Payment for Property Equalization." (Document not provided in Appelland's Index.) As in the December 2016 order, this document addressed only finances, and again specifically stated: "all other orders not specifically modified/addressed herein shall remain in effect."[3]

On September 17, 2020, Justin filed his underlying motion "to modify the custodial arrangement; modify child support; modify child tax deduction; and for an award of attorney's fees and costs; and related relief." (II ROA 342-356) On September 18, 2020, the parties received the Clerk's Notice of Hearing, setting Appellant's motion for hearing on October 27, 2020 at the hour of 9:00 a.m. (II ROA 357) Sarah filed her opposition in October 1, 2020 (II ROA 370-390), and Justin filed his reply on October 8, 2020. (II ROA 391-416)

The hearing upon Justin's underlying motion was held on October 27,

---

[1] *See* Stipulation and Order entered December 5, 2016.
[2] *Id.*
[3] *See* Document filed July 26, 2017

2020. (III ROA 540) After waiting more than an hour for Appellant to attend, the District Court, expressing that it was ready to rule on the papers, denied Appellant's motion. (III ROA 540; 548-553) On November 21, 2020, the district court entered the order denying Appellant's motion and the order was noticed upon Appellant on November 23, 2020. (III ROA 548-553)

On December 7, 2021, Appellant filed a motion for reconsideration pursuant to EDCR 5.512. (III ROA 554-598) Respondent filed her opposition and countermotion on January 6, 2021. (III ROA 600-624) And Appellant filed his Reply on January 8, 2021. (III ROA 636-679)

The hearing upon Justin's motion for reconsideration was held on January 13, 2021. (IV ROA 685-686) After hearing from both parties an upon its review of the papers on file, the district court denied Appellant's motion for reconsideration. (IV ROA 685-686; 701-712)

Appellant filed his notice of appeal on May 6, 2021. (IV ROA 727-728)

5. Statement of facts:

The parties to this action married on May 5, 2012. Together they are the parents to two minor children: Savannah Maurice, born April 27, 2007, and Emma Maurice, born February 12, 2014. (I ROA 1-6) The parties separated in September of 2014, and, as provided above, Sarah initiated this divorce action in December of 2014. (Id.) Due to Justin's heavy drinking and domestic violence, Sarah sought primary physical custody. (I ROA 7-23) Contrary to his current representations, Justin opposed Sarah's request for primary custody claiming, in part, that his work schedule allowed him to pick up the children every day at 1:00 p.m. and "there is no reason" he should not have joint physical custody, (I ROA 52-72). At the February 10, 2015 hearing upon the parties' requests, the district court issued temporary orders granting Sarah primary physical custody, and the court referred the parties to Family Mediation Center. (I ROA 216-217; 227-230) (IV ROA 780). Thereafter, the

parties agreed that Sarah would maintain primary physical custody. (II ROA 253; 254-269) And the parties' Decree of Divorce was entered on September 30, 2015. (II ROA 254-269) Since that time, as provided above, Justin filed a motion to lower his child support obligation and the parties entered several financial agreements. But none of the post decree stipulations or filings sought to address custody. Rather, the filings specifically stated that all orders shall stand. (II ROA 288-296; 336-341; and document entered July 26, 2017).

On September 17, 2020, Justin filed his underlying motion seeking, in part, to modify custody. (II ROA 342-356)

As noted above, until his underlying motion to modify custody (as well as reduce his financial obligations), Justin had sought relief only relative to finances. This history is important as it highlights Justin's primary objective in this case. As reflected in his underlying motion, Justin again seeks to lower his financial obligations. Justin would be able to reduce/eliminate his financial obligations by modifying custody. But, as Justin's motion failed to present adequate cause to justify modification to joint physical custody, it appears that Justin was again solely motivated by financial means.

In support of his request to modify custody, Justin falsely claimed that, in 2015, the parties agreed Sarah would maintain primary physical custody "due to his work schedule." (II ROA 345) Justin then claimed that modification was appropriate as "since entry of the Decree" his work schedule changed (claiming to now work only 4 days a week). (II ROA 344). Justin also assumes, in his moving papers, that Sarah's work schedule had increased because she had received a promotion. Justin argues that her schedule, at the time of the entry of the parties' decree, permitted her to have primary custody whereas her current schedule does not. (II ROA 394). A review of this case, however, shows that, at the time of entry of the parties' decree of divorce, Sarah was working Monday through Friday, from 8:00 a.m. to 5:00 p.m. (I

ROA 24) In his underlying motion, Justin asked the court to grant him additional custody on Mondays and Tuesdays. (II ROA 345) But Justin's updated financial disclosure form (filed alongside his motion) reveals that he works, on average, at least 40 hours per week and that he actually works on Mondays and Tuesdays. (II ROA 358; 359; 367-369) Justin also claimed that he was available to care for the parties' children as he "works remotely from home." (II ROA 344)

Specifically, Justin argued "given the fact [that] Justin's work schedule has changed, enabling him to be home with Savannah and Emma during the week and during school, Justin seeks modification of the custody and support provisions of the decree as well as that the tax deductions for the minor children be shared." (II ROA 345)

As provided above, the hearing upon Justin's motion was set for, and took place on, October 27, 2020. Though set for 9:00 a.m., the hearing was ultimately called at 10:03 a.m. as a courtesy to Justin as neither he or his counsel had yet appeared. (III ROA 540; IV 701-712) Despite the significant courtesy, Justin still failed to appear. Having reviewed the papers on file in this case, the district court noted it was prepared to rule and ordered as follows: (IV 770)

> The Court does not find that a modification of a work schedule is a sufficient basis, under *Ellis v. Carucci*, as a substantial change in circumstances affecting the wellbeing of the children *in this instance* that would invoke the Court pursuing a modification of custody pursuant to *Ellis v. Carucci* and then proceeding to the best interest factors.

Following the notice of entry of this order, Justin filed a motion for reconsideration. (III ROA 554-598) The hearing upon Justin's motion for reconsideration was held on January 13, 2021. (IV ROA 685-686) Following that hearing, the district court denied Justin's request for reconsideration and made

additional findings upon the record.

Referencing changes stemming from the current environment due to the Pandemic, the court noted "that this is independent of the request to modify custody." The Court noted that the *Ellis v. Carucci* case essentially modified the *Murphy* test that had been in place up until the time of *Ellis v. Carucci*. And the court noted that the standard that is set forth in both cases does rely in part upon maintaining some stability in custodial arrangements for the children. And, in addressing Justin's alleged new work schedule, the court found: "even when the court hears the phrase 'working from home,' certainly it appears to connote that, because one is working from home one is really not 'working' and is available to provide daycare for one's children, one is available to educate one's children or may be involved in some form of distance learning. The good news for the court, from what the court has read, is that the parties' children actually get some in-person education, which is a fabulous and a fantastic scenario for them. It is not complete, but they at least get some socialization and some classroom time. But when the Court hears 'working from home,' the court views that as actually *working* from home …"(IV 761)

Justin filed his notice of appeal on May 6, 2021.

6. Issues on appeal:

1. The district court did not err in declining to set an evidentiary hearing regarding custody based upon the Appellant's alleged change in work schedule as the district court specifically did not find that modification of a work schedule was a sufficient basis, in this instance, under *Ellis v. Carucci*, as a substantial change in circumstances affecting the wellbeing of the children.
2. Applying the standards in *Rooney v. Rooney*, 109 Nev. 540 (1993) and *Ellis v. Carucci*, 123 Nev. 145 (2007), the district court did not abuse its discretion in denying the Appellant an Evidentiary

Hearing. Based upon the offers that have been made, there was not a sufficient basis nor was there a sufficient showing, pursuant to *Rooney*, that would warrant the court setting further proceedings on a motion to modify custody.

3. The standard for modification of visitation (as compared to that of custody) was not before the court in the subject action and is, therefore, not ripe for consideration in this appeal.
4. The district court did not abuse its discretion by awarding Respondent $1,500 in attorney's fees following the hearing upon Appellant's motion for reconsideration as Respondent should not have had to expend precious resources on matters already adjudicated by the Court.

7. Legal argument, including authorities:

Standard of Review

"Decisions regarding child custody rest in the district court's sound discretion, and this court will not disturb the decision absent a clear abuse of that discretion."[4] "An abuse of discretion occurs when a district court's decision is not supported by substantial evidence or is clearly erroneous."[5] Substantial evidence is evidence that a reasonable person may accept as adequate to sustain a judgment.[6] Likewise, in the context of an award of attorney's fees, the court's decision will not be disturbed on appeal absent a manifest abuse of discretion.[7]

---

[4] *Sims v. Sims*, 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993)
[5] *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009) (providing that a district court's factual findings regarding child custody are reviewed for an abuse of discretion).
[6] *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009)
[7] *Kantor v. Kantor*, 116 Nev. 886, 8 P.3d 825 (2000) (where the trial court reviewed billing records, the amount to be awarded was within the court's discretion); *Love v.*

A. A change in a party's work schedule alone does not per se constitute a substantial change in circumstances affecting the child's welfare.

Modification of a custody decision requires both that (1) there has been a substantial change in circumstances affecting the child's welfare, and (2) the modification would serve the child's best interest.[8] In the case at hand, Appellant argues that the district court erroneously found that his changes of schedule did not satisfy the first *Ellis* prong. Under the facts presented the district court reasonably found that Appellant's work schedule was not a sufficient basis, under *Ellis v. Carucci*, to be a substantial change in circumstances affecting the wellbeing of the children that would invoke the Court pursuing a modification of custody pursuant to *Ellis v. Carucci*. (IV ROA 701-712) In that regard, the district court also considered that the standard that is set forth in *Ellis* relies in part upon maintaining some stability in custodial arrangements for the children. With an eye toward stability, the court also reasoned that Justin's alleged change in circumstances did not sufficiently affect the welfare of the parties' children. (IV ROA 759)

And, based upon the offers that have been made, the court found that there has not been a sufficient basis nor has there been a sufficient showing, pursuant to *Rooney*, that would warrant this court setting further proceedings on a motion to modify custody. The Court is not persuaded, based upon those papers, and pursuant to *Rooney*, that there is sufficient cause to set further proceedings. (IV ROA 759-761)

Further, it is also helpful to note that, as provided below, Appellant's claim that the parties stipulated to awarding primary physical custody to

---

Love, supra, 114 Nev. 572, 959 P.2d 523 (1998); *Mack v. Ashlock*, 112 Nev.1062, 921 P.2d 1258 (1996) (remanding so trial court could state some basis for making its award of fees); *Sprenger v. Sprenger*, 110 Nev. 855, 878 P.2d 284 (1994)

[8] *Ellis v. Carucci*, 123 Nev. 145, 161 P.3d 239 (2007)

Respondant because of his unavailability and work schedule is false. (I ROA 7-23; 52-75; IV ROA 753) Before the parties' Stipulated Decree, there were physical, mental, emotional, and drug abuse allegations.(Id.) This was a part of the record preceding Appellant's current motion. Further, as for Appellant's reliance on the fact that he no longer works for Yesco LLC, Appellant has not worked for that employer since 2016. (II ROA 288-296) Yet, he waited several years to claim such a change in employment served as a basis to modify custody.

Appellant's insistence on relying on the purported change in his work schedule puts the cart before the horse. Noticeably missing from Appellant's motions below and his Fast Track Statement is how his purported change in work schedule has affected the welfare of the children.

Appellant's reference to *Rivero v. Rivero* is misplaced. A reading of Rivero's reference to a "work schedule" does not contemplate a modification to physical custody. As such, that comparison is not applicable to this case.[9] The other state court cases referenced in Appellant's Fast Track Statement are also distinguishable from the case at hand as they address, primarily, a parent's visitation schedule. Appellant misapplies *Silva v. Silva*, 126 P.3d 371 (Idaho Ct. App. 2006) which he recognizes to state "a parent's work schedule may be one factor among many that can assist a magistrate court in tailoring custody …"[10] Even under application of this Idaho case, the district court herein acted in conformity. The *Silva* case appears to grant the court discretion regarding a parent's schedule (among many other factors). At no point did our district court in our case find that a change in schedule *per se* nullifies further proceedings. It did not review this case in a vacuum and the court reviewed all papers on file here. (IV ROA 753-754; 758; 759; 761)

[9] *Rivero v. Rivero*, 125 Nev. 410, 425 (2009)

[10] *See* Appellant's Fast Track Statement at page 12

Appellant alleges now that "he does not work on Fridays," (IV ROA 754; 757) but a review of his previously filed statements show that is not new. (II ROA 297).

Appellant now argues that his mention of an alleged statement made by one of his children, under a best interest analysis, to spend more time in his care should also constitute sufficient change of circumstances under *Ellis*. (II ROA 347) In this case, the child's preference comes under the analysis of best interest. But this court declined to allow such a loose allegation to qualify as a substantial change affecting the welfare of the child. (IV ROA 759) Indeed, Father made no mention of any decline in the child's life nor did he provide any support for his allegation and, as with father's alleged self-serving change in schedule, a comment of this kind cannot be made without any kind of support. While "a child's preference is one of many factors for the court to consider in determining the child's best interest, ..." "matters of custody rest within the district court's sound discretion."[11]

Next, Appellant argues that, for an alleged period of three (3) weeks, the children were in his care during school hours. (II ROA 345) Even if that is true, the fact that the parties were flexible with one another concerning the children's schedule (during remote learning due to COVID), it does not equal a substantial change in circumstances. Appellant appears to contend that a party should be allowed to modify custody if one parent can stay home all day with a child whereas the other parent has to rely on childcare services. Such conclusion is also contrary to public policy as it may discourage parents from working together in reaching temporary solutions that best serve their children.

Rather, the parties' recent cooperation does not constitute a substantial

[11] *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996)

change in circumstances. And, certainly, the alleged three-week period, wherein the parties agreed that the children would spend more time with Appellant, does not equal a *de facto* change custody as provided in *Rivero*'s one year look back period.

Further, there is a presumption on appeal in child custody matters that the trial court has properly exercised its judicial discretion in determining what is for the best interest of the child."[12] Nothing in Appellant's Statement overcomes this presumption. And we cannot simply assume that the court reviewed Appellant's request in a vacuum. In that regard, as mentioned above, notice should be had that the history of this case is significantly different from what the Appellant presented to the court in his latest moving papers, i.e., that the parties agreed to Sarah having primary physical custody due to Appellant's previous work schedule. (I ROA 7-23; 52-75)

Nothing presented in Appellant's underlying papers and/or appeal demonstrates that reasonable minds could not have made the same conclusion and findings the district court made in this case.

Further, as a matter of public policy and common sense, as anyone can easily change his/her work schedule, it is respectfully presented that equating change in employment/schedule to a substantial change in circumstances sufficient to warrant further proceedings upon a motion to modify custody would necessary open the floodgates of such future litigation and, thereby, undermine much of the essence of *Ellis* to protect a child's stability.

B. The district court properly denied Appellant's motion as Appellant failed to establish adequate cause under Rooney.

A district court is not required to hold an evidentiary hearing unless the

[12] *Culbertson v. Culbertson*, 91 Nev. 230, 233, 533 P.2d 768, 770 (1975); *see also Cosner v. Cosner*, 78 Nev. 242 (1964)

party requesting the custodial modification demonstrates "adequate cause."[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." *Id.*

As provided above, modification of primary custody requires (1) a substantial change in circumstances affecting the welfare of the child and (2) that the modification is in the child's best interest.[14] In this instance, the district court found that Appellant's work schedule was not a sufficient basis, under *Ellis v. Carucci*, to be a substantial change in circumstances affecting the wellbeing of the children that would invoke the Court pursuing a modification of custody.As the court did not find Appellant's purported change of circumstances to be substantial changes affecting the welfare of the children, Appellant failed to make a prima facie case to warrant further proceedings.

C. This Court Should not Distinguish the Standard for Modification of Custody and Modification of Visitation as that Matter is not Properly before this Court.

An argument or issue not raised before the district court is deemed waived and cannot be advanced on appeal. *Old Aztec Mine v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981); *see also Powers v. Powers*, 105 Nev. 514, 516, 779 P.2d 91, 92 (1989) (holding that "[a] party may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below").

As Justin did not present a request to modify visitation in the underlying

---

[13] *Arcella v. Arcella*, 133 Nev. 868, 871, 407 P.3d 341, 345 (2017) (*citing Rooney v. Rooney*, 109 Nev. 540, 542, 853 P.2d 123, 124 (1993)).

[14] *Ellis*, 123 Nev. at 150, 161 P.3d at 242.

matter, this appeal presents an improper vehicle for such consideration. The same is irrelevant and misapplied and should not be considered on appeal.

D. The District Court did not err by awarding Respondent $1,500 in attorney's fees.

The decision whether to make an award of fees (and its size) is a matter of the district court's discretion.[15] After holding two hearings, reviewing 307 pages of documents, and entertaining oral arguments by the parties, the district court ordered the Respondent to file a memorandum of fees and costs.

On March 26, 2021, Respondent filed her memorandum of attorney's fees and costs for $3,071.00 and provided supporting billing statements. (IV ROA 687-695) Appellant filed his objection. (IV ROA 696-700) The District Court applying the standards put forth in EDCR 7.60 and *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 346 (1969) then awarded Respondent $1,500 in attorney's fees. (IV ROA 701-712) As the court had the opportunity to review detailed billing sheets showing the breakdown of the amount of the work, the award has some identifiable basis. As such, it is presented that the attorney's fees awarded in this case were reasonable and appropriate and should, therefore, not be oveturned on appeal.[16]

In this section of his Fast Track Statement, Appellant misstates the events of and surrounding the October 2020 hearing in this matter. As those false allegations are not relevant to the matter at hand, however, they will not be herein addressed for purposes of judicial economy. In any event, the record speaks for itself. (IV ROA 762-766)

---

[15] *Kantor v. Kantor*, 116 Nev. 886, 8 P.3d 825 (2000) (where the trial court reviewed billing records, the amount to be awarded was within the court's discretion); *Love v. Love*, supra, 114 Nev. 572, 959 P.2d 523 (1998); *Mack v. Ashlock*, 112 Nev.1062, 921 P.2d 1258 (1996) (remanding so trial court could state some basis for making its award of fees); *Sprenger v. Sprenger*, 110 Nev. 855, 878 P.2d 284 (1994)

[16] *Id.*

E. Conclusion.

Respondent respectfully requests this Court affirm the District Court's orders entered November 21, 2020 and April 23, 2021 as Justin's appeal is both (1) untimely and (2) does not prove abuse of discretion.

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:

[X] This fast track response has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Size 14 and Equity Text B.

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

[x] Proportionately spaced, has a typeface of 14 points or more,and contains 4,183 words; or

3. Finally, I recognize that under NRAP 3E I am responsible for timely filing a fast track response and that the Supreme Court of Nevada may impose sanctions for failing to timely file a fast track response. 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 4th day of October 2021.

/s/ Rachel M. Jacobson

Rachel M. Jacobson, Esq.
Nevada State Bar No. 007827
JACOBSON LAW OFFICE, LTD.
64 N. Pecos Road, Suite 200
Henderson, Nevada 89074
Office Tel: 702-601-0770

Certificate of Service

I hereby certify that on this date, October 4th , 2021, I filed and served a copy of the foregoing CHILD CUSTODY FAST TRACK REPLY by filing it with the Supreme Court via eFlex and providing electronic notification will be sent to the following:

Bradley Hofland, Esq. (bradh@hoflandlaw.com)

And by mailing it by first class mail with sufficient postage to the following address:

Bradley Holfand, Esq.
HOFLAND & TOMSHECK
228 South 4th Street, 1st Floor
Las Vegas, Nevada 89101

/s/ Rachel M. Jacobson
JACOBSON LAW OFFICE, LTD.