

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM SHAWN WALLACE

Appellant,

vs.

AMMIE ANN WALLACE

Respondent.

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CASE NO. 83591

RESPONDENT'S FAST TRACK RESPONSE

RACHEAL H. MASTEL, ESQ.
Nevada Bar No. 11646
KAINEN LAW GROUP, PLLC
3303 Novat Street, Suite 200
Las Vegas, Nevada 89129
Tel: (702) 823-4900
Fax: (702) 823-4488
Email: service@kainenlawgroup.com

ATTORNEYS FOR RESPONDENT

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1 **1. Party filing Response:** Ammie Wallace

2 **2. Attorney submitting response:** Racheal H. Mastel, Esq., Kainen Law
3
4 Group, PLLC, 3303 Novat Street, Suite 200, Las Vegas Nevada, 89129. (702)
5 823-4900.
6

7 **3. Proceedings raising same issues:** None.

8 **4. Statement of facts and procedural history**
9

10 The parties were married in 2009. **JA000002.** They have three minor
11 children. **JA0003.** On September 4, 2020, they filed a Joint Petition for Divorce.
12
13 **JA0001.** Therein, they acknowledged that from August 1, 2017, until the filing
14 of the Petition (three years later), the children had been living with Ammie; they
15 agreed she would have primary physical custody and specified William's
16 visitation. **JA0003; 0006.** The Decree was entered on September 11, 2020,
17
18 reflecting those terms. **JA0025-0061.** Nine months later, William filed to
19
20 "Modify [the] Decree" with respect to custody. **JA0063.** William claimed that
21
22 from 2017 through March 2020, he had substantially more time with the children
23
24 than the Decree reflected and that he had joint custody from March 2020 through
25 approximately March 2021. **JA0064-0066.** He claimed he was unaware the
26
schedule in the Decree would have any impact on the parties' alleged prior

1 arrangement. **JA0067**. Ammie opposed the Motion. **JA0111**. She contended that
2 the parties had followed the schedule in the Decree from the time of their
3 separation until approximately August 2020, with exceptions for times that
4 William had less time because he did not have a place to exercise visitation.
5 **JA0117-0121**. Ammie stated the timeshare was "flexible" from August 2020
6 through March 2021, but that they returned to the schedule in the Decree once
7 the children resumed in person schooling. **JA0121**. William filed a Reply.
8 **JA0146**. The hearing was held on August 12, 2021, at which both parties argued
9 their positions, including the relevant case law. **JA0267; 0269-0283**. At the end
10 of the hearing, the court took the matter under advisement and indicated that it
11 may have one party prepare the findings and Order. **JA0283**. Neither party
12 objected. **JA0283**. A few hours later, the court entered minutes, denying
13 William's Motion, granting Ammie's countermotion for fees, and directing
14 Ammie's counsel prepare the Order with findings. **JA0286**. This appeal followed.
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22 **5. Issues**

- 23 A. The District Court Did Not Err in Directing Ammie's Counsel to
24 Prepare the Order;
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1 B. The District Court Did Not Err in Denying William's Motion to
2 Modify without an Evidentiary Hearing.
3

4 **6. Argument**

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6 **I.**

7 **Preparation of the Order**

8 **Standard of Review**
9

10 The district court's interpretation of court rules is reviewed *de novo*. *Casey*
11 *v. Wells Fargo Bank, N.A.*, 128 Nev. 713, 715, 290 P.3d 265, 267 (2012). *See*
12 *also, Ford v. Branch Banking and Trust Co.*, 131 Nev. 526, 528, 353 P.3d 1200,
13 1202 (2015). However, "[i]t is well settled that this court will not disturb the
14 decision of the trial court, if there is any substantial evidence to support it."
15 *Thompson v. Tonopah Lumber Co.*, 37 Nev. 183, 141 P. 69, 71-72 (1914),
16 internal citations omitted. "Nevada statutes and case law provide district courts
17 with broad discretion concerning child custody matters." *Rooney v. Rooney*, 109
18 Nev. 540, 542, 853 P.2d 123, 124. "Given such discretion in this area, we hereby
19 adopt an adequate cause standard. That is, we hold that a district court has the
20 discretion to deny a motion to modify custody without a hearing unless the
21 moving party demonstrates "adequate cause" for holding a hearing." *Id.*
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1 **The Court Did Not Err in Delegating Preparation of Findings and the**
2 **Drafting of the Order.**

3
4 William argues that delegating the preparation of findings, where the court
5 did not make an oral or written pronouncement of the same, is in error. First, this
6 issue was not brought before the district court and is therefore waived on appeal.

7
8 *Old Aztec Mine, Inc., v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).
9

10 William had multiple opportunities to address this issue, and did not. The
11 judge informed both parties: "I may call one of the attorneys to -- if there's an
12 order, to do the order with findings" and asked *both* counsel if that was
13 acceptable. **JA0283**. William did not object. He did not object when the minutes
14 directed Ammie's counsel to prepare the Order, including "detailed findings" and
15 "an analysis of the relevant law." **JA0286**. William did not file an NRCP 52(b)
16 Motion. William has waived this issue.
17
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20 That said, to the extent that this court elects to consider the issue, William's
21 analysis of the law is incomplete. A review of the national case law reflects that,
22 while several states dislike district courts delegating the preparation of findings
23 of fact and conclusions of law:
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1 [a]part from complaints with regard to verbosity and
2 improper content, often lineaments of counsel-drawn
3 findings, the criticisms seem to have three bases: (1)
4 preparation of findings aids in the process of
5 adjudication, (2) by the very nature of proper judicial
6 function, the findings should be those of the trial
7 judge, and (3) the applicable statute concerned with
8 preparation of findings indicated that the duty thereof
9 was that of the trial judge.

10 54 A.L.R.3d 868 § 2[a] (1973).

11 *Matheson v. Harris*, 98 Idaho 758, 572 P.2d 861 (1977), which William
12 cites, is distinguishable. The court in *Matheson* determined that the judge had
13 abandoned his duty specifically because the Idaho Supreme Court has interpreted
14 *their* Rule 52(a), I.R.C.P., as requiring the judge to prepare the findings. *Id.*, at
15 761-762. Subsequent cases in Idaho have held that it is not reversible error for
16 the court to adopt findings verbatim, as long as they are supported by substantial
17 evidence. *Bolger v. Lance*, 137 Idaho 792, 797, 53 P.3d 1211, 1216 (2002),
18 internal citations omitted.

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23 Ironically, although William contends there is no Nevada authority on this
24 issue, that is not accurate. The Nevada Supreme Court has interpreted NRCP 52,
25 exactly opposite of how Idaho has interpreted their rule. *Foster v. Bank of*
26

1 *America Nat. Trust and Sav. Ass'n*, 77 Nev. 365, 365 P.2d 313, (1961), is
2 directly on point to this matter:
3

4 Throughout their brief appellants complain bitterly of
5 the 'so-called' findings, of the 'ex parte' findings 'self-
6 serving' findings, 'one-sided' proposals, of the fact that
7 the defendants had drawn the findings and that they
8 had been signed by the court; that plaintiff's were
9 denied the opportunity to object or propose
10 counterfindings. Appellants' complaints in this regard
11 would have been in order under the old practice. Our
12 present Rule 52(b) NRCP quoted in the margin now
13 contemplates ex parte findings subject to the right of
14 the other part to move to amend the same and departs
15 radically from the old procedure.

16 *Id.* at 373, emphasis added.

17 The only difference between the 1961 NRCP 52(b) and the present NRCP
18 52(b), is the statement: "When findings of fact are made in actions tried by the
19 court without a jury, the question of the sufficiency of the evidence to support the
20 findings may thereafter be raised whether or not the party raising the question has
21 made in the district court an objection to such findings or has made a motion to
22 amend them or a motion for judgment." *See Foster*, 77 Nev. 365, footnote 3. That
23 language has been moved to NRCP 52(a)(1) and (5). As there has been no
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1 substantive change in the rule, it was not improper, and the court was clearly
2 permitted, to direct Ammie's counsel prepare the Order, inclusive of the findings.
3

4 Further, under a review of the national case law, even where there is
5 disapproval of such practices, the same affects the level of scrutiny of the Order.
6
7 See 54 A.L.R.3d at § 10, citing *Uptime Corp. v. Colorado Research Corp.*, 161
8 Colo 87, 420 P.2d 232 (1966); *Jahraus v. Bergquist*, 494 P.2d 110 (Colo.App.
9 Div. II 1971); *Nashville, C. & St. L. Ry. Co., v Price*, 125 Tenn 646, 148 S.W.
10 219 (1911) (abrogated by *Smith v. UHS of Lakeside, Inc.*, 439 S.W.3d 303
11 (2014)).¹ See also, *In re Sabrina M.*, 460 A.2d 1009, 1012 - 1013 (Me. 1983).
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16 In *Smith*, the Tennessee court stated, "[t]he current acceptance of the practice of trial courts
17 requesting or permitting counsel for prevailing parties to prepare draft findings of fact,
18 conclusions of law, and orders differs significantly from the categorical disapproval of this
19 practice a century ago... we continue to adhere to the view that findings of fact, conclusions
20 of law, opinions, and orders prepared by trial judges themselves are preferable to those
21 prepared by counsel. We likewise share the concern expressed by federal courts and other state
22 courts about the practice of courts adopting verbatim findings of fact, conclusions of law,
23 opinions, and orders prepared by counsel for the prevailing party...However, despite its
24 concern regarding a court's verbatim adoption and approval of findings of fact and conclusions
25 of law prepared by counsel for the prevailing party, the Court declined to hold that the trial
26 court's request that counsel for the prevailing party prepare the findings and conclusions was

1 It should be noted that, in *Smith*, the Tennessee Supreme Court set forth
2 two conditions for approving verbatim adoption of findings: (1) the findings and
3 conclusions must accurately reflect the decision of the trial court, and (2) the
4 record must not create doubt that the decision represents the trial court's own
5 deliberations and decision. 439 S.W.3d at 315-316.

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8 However, several courts have determined that so long as the decision is
9 supported by substantial evidence, the Order should be affirmed. *See Grayson v.*
10 *Grayson*, 4 Conn.App. 275, 284-285, 494 A.2d 576 (1985), abrogated on other
11 grounds by *Billington v. Billington*, 220 Conn. 212 (1991); *In re Halle T.*, 96
12 Conn.App. 815, 824-826, 902 A.2d 670, 676-677 (2006); *DL v. CL*, 146 Hawai'i
13 328, 338 - 340, 463 P.3d 985, 995-997 (2020), affirming that a clearly erroneous
14 standard applies even to findings adopted verbatim²; *Bolger*, *supra*; *Indiana*
15 *Industries, Inc., v. Wedge Products, Inc.*, 430 N.E.2d 419, 422 (Ind.App.3d
16 1982);

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24 reversible error... 439 S.W.3d at 314-315.

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26 Hawaii's rule, HFCR 52(a), specifically allows family courts to request findings of fact and
conclusions of law from both, or either, party. *DL*, 146 Hawai'i at 339-340.

1 Courts have also found that, absent evidence to the contrary, a judge is
2 presumed to have examined the findings and found them to be correct. *See*
3 *Uptime*, 161 Colo at 92-93; *Outdoor Advertising Ass'n of GA, Inc., v. Dept. of*
4 *Transportation*, 186 Ga.App. 550, 550 - 551, 367 S.E.2d 827, 828 (1988);
5 *Phillips v. Drake*, 215 Ga.App. 210, 211, 449 S.E.2d 879, 881 (1994); *Indiana*
6 *Industries*, *supra*.

7 William cites to several out-of-state cases to support his position that it is
8 improper for the district court to delegate the drafting of findings and Orders.
9 Nevada law is already dispositive on this issue. *Foster*, *supra*. That said, should
10 this court decide a review of the existing law is appropriate, Ammie believes the
11 cases cited by William are distinguishable.

12 In *Perlow v. Berg-Perlow*, 875 So.2d 383 (Fla. 2004), the appellate court
13 highlighted specific issues with the Order on appeal, to wit: (1) the trial judge did
14 not permit the husband an opportunity to submit his own proposed judgement or
15 to object to the wife's proposed judgment, despite the fact that he asked more
16 than once if he should or could, and (2) the order was very long and adopted
17 verbatim without modification within two hours of its submission. *Id* at 389.
18 Under those facts, the court determined "there was an appearance that the trial

1 judge did not independently make factual findings and legal conclusions, i.e., an
2 appearance of impropriety." *Id. Perlow* further states: "[w]hile a trial judge may
3 request a proposed final judgment from either or both parties, the opposing party
4 must be given an opportunity to comment or object prior to entry of an order by
5 the court." *Id* at 390.
6
7

8 This court's interpretation of NRCP 52 provides a different procedure than
9 the one laid out in *Perlow* for objecting to an Order. Additionally, this case is
10 factually different. The Order is substantially shorter (15 pages instead of 31),
11 and it was entered approximately 24 hours later.³ Clearly the district court herein
12 had time to conduct a review of the Order, ensuring its independent analysis.
13 Finally, both parties herein accepted without objection the possibility that the
14 court may direct preparation of the Order. *Perlow* sets forth a much different
15 factual scenario, where there may be an appearance of impropriety. But that
16 situation simply does not exist in this case.
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24 ³ The initially submitted Order, and correspondence indicating the date of submission is not
25 traditionally filed and is therefore not a part of the record on appeal. However, to the extent
26 that this court desires the same, a copy can be provided at the court's request.

1 *Perlow* has been factually distinguished by the Florida courts, and other
2 cases where trial courts have adopted verbatim findings have been upheld. *See*
3
4 *In re T.D.*, 924 So.2d 827 (Fla. 2d DCA 2005); *Hillier v. City of Plantation*, 935
5 So.2d 105 (Fla. 4th DCA 2006); *Nadrich v. Nadrich*, 936 So.2d 15 (Fla. 4th DCA
6 2006); *Strand v. Escambia County*, 992 So.2d 150 (Fla. 2008).

8 William next cites *Bishop v. Bishop*, 47 So.3d 326 (Fla. 2d DCA 2010).
9
10 Again, the factual scenario is very different. Importantly, *Bishop* acknowledges
11 that adopting findings and conclusions of a party is not error *per se*. *Id* at 328.
12
13 Florida permits a court to adopt verbatim an Order proposed by a party. *Id*. The
14 court in *Bishop* stated:

16 ...we will reverse any judgment entered under
17 circumstances that create an appearance that the
18 judgment does not reflect the judge's independent
19 decision-making. However, the fact that the judgment
20 was adopted from a proposal submitted by a party
21 does not, standing alone, raise that possibility.

22
23 *Id*, quoting *M.D. v. Dep't of Children & Family Servs.*, 924 So.2d 827, 831 (Fla.
24 2d DCA 2005).
25
26

1 In *Bishop*, the basis for reversal were errors and omissions in the judgment,
2 including legal errors (which were such that they constituted independent causes
3 for reversal), that created the appearance the judge failed to exercise due care in
4 reviewing the Order. *Id* at 328-329.
5

6
7 It cannot be said that the Order in this case was so one-sided, or contained
8 errors of law (or fact), which created any appearance of impropriety. In fact, the
9 Order recognized that the parties exercised a "flexible schedule," which William
10 called joint (and was presumed to be joint for the purposes of the Order), from
11 August 2020, through spring of 2021. **JA0257; 2059**. The Order reflects that the
12 facts William alleged, viewed in the light most favorable to him, met the best
13 interests prong under *Ellis v. Carucci*, 123 Nev. 145, 161 P.3d 239 (2007).
14
15 **JA0260**. The Order stated that William did not allege sufficient facts to prove a
16 substantial change in circumstances, and therefore did not meet the first prong
17 of the *Ellis* standard.⁴ **JA0260**.
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23 ⁴
24 William's Motion claimed the standard he was required to meet was the one set forth in *Truax*
25 v. *Truax*, 110 Nev. 437, 874 P.2d 10 (1994), based on his allegation that the parties had been
26 exercising a joint custody arrangement (rather than the one in the Order). *See Rivero v.*
Rivero, 125 Nev. 410, 216 P.3d 213 (2009). While this appeal was pending, this court issued

1 William also references *White v. Fort Myers Beach Fire Control Dist.*, 302
2 So.3d 1064 (Fla. 2d DCA 2020). Therein, the Florida court delineated several
3 factors to determine whether the court exercised independent judgment. *Id.* at
4 1075. It should be noted that the judgment in *White* was affirmed. That said, even
5 if this court were to apply that test, the Order in this case is proper.
6

7
8 The first factor, pursuant to *White*, is the timing of the Order. In this case,
9 the court had the Order for approximately 24 hours to review, sufficient time to
10 make a comprehensive review.
11

12
13 The second factor addresses the opportunity for the opposing party to
14 object. As addressed, the Nevada Supreme Court has found that opportunity
15 exists within the framework of NRCP 52; a process to which William failed to
16 avail himself. Additionally, the court openly told both parties that it may request
17 one party to prepare the Order and provide the findings. William did not object.
18
19 *White* looks at opportunity, not whether a party chose to *avail* themselves of that
20 opportunity. It is clear William had ample opportunities to object.
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25 the decision in *Romano v. Romano*, 138 Nev. Ad. Op. 1 (2022), which abrogated the test in
26 *Truax* for modification of joint physical custody. Under *Romano*, all modifications must now
show a substantial change in circumstances.

1 The third factor in *White* is the extent to which the court made substantive
2 changes. While the proposed Order is not part of the record, Ammie concedes
3
4 there were not substantive changes except the court's addition of the attorney's
5 fees amount. However, the district court in *White* also did not make substantive
6
7 changes, and that alone was insufficient to overturn the decision.

8
9 The fourth and sixth factors deal with the court's actions during the
10 hearing, specifically the court's participation and the presence or absence of
11 findings. The transcript makes it clear that the district court herein was active and
12
13 engaged, asking pertinent and specific questions to seek analysis and opinions
14
15 from counsel on both the facts and law. **JA0267 - 0284**. While the judge may not
16
17 have spoken substantially, his comments and questions make it clear that he was
18
19 actively engaged in analyzing the case. Further, although specific oral findings
20
21 were not made, the record provides direction as to the judge's analysis. **JA0278-**
0279.

22 The fifth factor directs review of a judgment for errors or omissions.
23
24 Neither is present in the Order in this case. Even if this court find the factors set
25
26 forth by the Florida court persuasive, the Order in this case is proper.

1 Finally, William cites to *Cormier v. Carty*, 381 Mass. 234, 408 N.E.2d 860
2 (1980). *Cormier* does not stand for the premise that a judge's order, when
3
4 adopted wholesale from a party's proposal, constitutes reversible error. In fact,
5 the decision in *Cormier* was affirmed. As in *Matheson*, supra, there was a civil
6
7 procedure rule at issue, and the Massachusetts Supreme Court found that seeking
8
9 findings from only one party's counsel (and adopting them verbatim), rather than
10 articulating findings on the record, was improper under the their specific rule. *Id.*
11 at 236 -237. *Despite that fact*, the court found that "failure to conform to the
12
13 requirements of the rule does not automatically require reversal. Findings
14
15 adopted by the judge remain 'formally his; they are not to be rejected out-of-
16
17 hand, and they will stand if supported by evidence.'" *Id.* at. 237, quoting *U.S. v.*
18 *El Paso Natural Gas Co.*, 376 U.S. 651, 84 S.Ct. 1044, 12 L.Ed.2d 12 (1964).

19 While *Cormier* did state that stricter scrutiny was appropriate where the
20
21 court adopts the findings of a party (and that in a "close case," the Massachusetts
22
23 court may disregard a finding), the court also importantly stated that such Orders
24
25 are still reviewed under the "clearly erroneous " standard. *Id.*

26 The district court did not err in directing Ammie's counsel to draft the
Order, including findings of fact and conclusions of law. Nevada law specifically

1 allows for the same. Further it is clear that there was no impropriety; even
2 applying the strictest scrutiny, and utilizing tests of other states, the Order in this
3 case is proper and should be affirmed.
4

5 II.

6 CUSTODY

7 Standard of Review

8
9 The district court has "broad discretion concerning child custody matters."
10 *Rooney v. Rooney*, 109 Nev. 540, 853 P.2d 123, 124 (1993), citing NRS 125.510
11 (repealed), *Culbertson v. Culbertson*, 91 Nev. 230, 533 P.2d 768 (1975), *Paine*
12 *v. Paine*, 71 Nev. 262, 287 P.2d 716 (1955)200. This court will not disturb such
13 determinations absent a clear abuse of discretion. *Ellis*, 123 Nev. at 149. Abuse
14 of discretion occurs when the decision is "arbitrary or capricious or if it exceeds
15 the bounds of law or reason." *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998,
16 1000 (2001). Further, deference is not owed to legal error. *Davis v. Ewalefo*, 131
17 Nev. 445, 450, 352 P.3d 1139, 1142-11143 (2015).
18
19
20
21

22 "A district court has the discretion to deny a motion to modify custody
23 without holding a hearing unless the moving party demonstrates 'adequate cause'
24 for holding a hearing." *Rooney*, 109 Nev. at 542-543. "'Adequate cause' arises
25
26

1 where the moving party presents a prima facie case for modification. To
2 constitute a prima facie case it must be shown that: (1) the facts alleged in the
3 affidavits are relevant to the grounds for modification; and (2) the evidence is not
4 merely cumulative or impeaching." *Id.* at 543.
5

6 **The Court Properly Denied William's Motion to Modify Custody**

7
8
9 At the time the district court issued its decision in this case, Nevada law
10 recognized two standards for modification of custody, one that applied to joint
11 physical custody, and one that applied to primary physical custody. *Romano v.*
12 *Romano*, 138 Nev. Ad. Op. 1 (2022). Because of the existence of two distinct
13 tests, courts were required to determine what the *exercised* timeshare was, rather
14 than relying on what the *written* timeshare was in determining which test to
15 apply. *Rivero v. Rivero*, 125 Nev. 410, 26 P.3d 213 (2009). For this reason,
16 William, like many litigants, alleged to the court that, despite the written order,
17 the parties had been exercising joint physical custody in order to have the *Truax*
18 test apply.
19
20
21
22
23

24 Ultimately, however, the district court determined that, even if William
25 exercised joint custody from August 2020 through March 2021, the same was
26

1 insufficient, under the facts, to provide him joint physical custody for a one year
2 period, as set forth in *Rivero*.⁵ **JA0257-0259**. As such, the court properly applied
3 the standard set forth in *Ellis*.
4

5 William argues that it was necessary for the court to "show its work,"
6 because for three hours a day, on five days each week, William had "custody" of
7 the children. He asks this court to assume that schedule gave him "care and
8 control" of the children "27 days" per month. Ironically, this argument also gives
9 Ammie 27 days per month, somehow creating a 54 day month. This was the
10 complication of the directive regarding calculation in *Rivero*, and it is where the
11 district court's discretion *must* be allowed. As the standard for review for custody
12 decisions is one of an "abuse of discretion," this court should not overturn the
13 finding that Ammie had primary custody on this basis. The district court was well
14 within the realm of reasonable to determine that merely having 3 hours of time
15 did not constitute having "care and control" of the children for that day.
16
17
18
19
20
21
22

23
24 ⁵
25 The parties agreed that from April 2020 through August 2021 (which is included in the one
26 year period the court used), the parties exercised the timeshare in the Decree, although they
disagreed as to the reason why.

1 More importantly, because *Romano* modified the test for joint physical
2 custody, whether the district court was correct in determining the actual schedule
3 no longer matters.
4

5 ... when the controlling law of this state is
6 substantially changed during the pendency of a
7 remanded matter at trial or on appeal, courts of this
8 state may apply that change to do substantial justice.
9 In other words, 'the doctrine of the law of the case
10 should not apply where, in the interval between two
11 appeals of a case, there has been a change in the law
12 by... a judicial ruling entitled to deference.

13 *Hsu v. County of Clark*, 123 Nev. 625, 632, 173 P.3d 724, 729-730 (2007),
14 quoting *Brezinka v. Bystrom Bros., Inc.*, 403 N.W.2d 841, 843 (Minn. 1987). *See*
15 *also, Hopper v. Clark County School Dist.*, 89 Nev. 466, 466, 514 P.2d 1294,
16 1294 (1973); *City of Las Vegas v. Swingers, Inc.*, 89 Nev. 456, 457, 514 P.2d
17 1189, 1189-1190 (1973); *Lightenburger v. Gordon*, 89 Nev. 226, 510 P.2d 865
18 (1973).
19
20
21

22 The test for joint physical custody is now the same as the test for primary
23 physical custody: (1) a substantial change in circumstances impacting the well-
24 being of the minor child(ren), and (2) the proposed modification is in the minor
25
26

1 child(ren)'s best interests. *Romano*, 138 Ad. Op. at 2. As the court applied *Ellis*,
2 it is no longer necessary to determine if the court calculated the exercised
3 timeshare correctly.⁶

4
5 That said, since the "change in law" exception appears discretionary,
6
7 Ammie will address William's other points, should this court decide to apply the
8 law as existed prior to *Romano*.⁷

9
10 William claims this to have been a matter of "disputed facts," and argues
11 that the district court, under *Druckman v. Ruscitti*, 130 Nev. 468, 327 P.3d 511
12 (2014), was not permitted to include the time period Ammie (allegedly) "forced"
13 him to follow the Decree, as he claims the same constituted parental misconduct.
14
15

16 Most of the record is not based on disputed facts. Both parties agreed that
17 after April 2021, the parties exercised the schedule in the Decree. **JA0083; 0121;**
18 **0150.** The Order gives William credit for an exercise of joint custody from
19

20
21 ⁶
22 *Romano* specifically overturned *Rivero* "to the extent it indicates that a district court must first
23 determine what type of physical custody arrangement exists before considering whether to
24 modify that arrangement." 138 Nev. Ad. Op. at 9.

25 ⁷
26 "[C]ourts of this state *may* apply that change to do substantial justice." *Hsu*, *supra*, emphasis
added.

1 August 2020 - March 2021, even though Ammie did not specifically agree that
2 the timeshare was "joint." **JA0257; 0259**. The *only* "disputed facts" were (1) *why*
3
4 the parties returned to the schedule in the Decree, and (2) what the timeshare was
5 for June and July 2020 - which is only relevant if the court was required to
6
7 analyze the timeshare from the date of William's motion.

8
9 The determination of *who* to believe is a determination of the credibility
10 of the parties, based on their affidavits and exhibits. The Supreme Court "will not
11 reweigh the credibility of witnesses on appeal; that duty rests within the trier of
12 fact's sound discretion." *Castle v. Simmons*, 120 Nev. 98, 103, 86 P.3d 1042,
13 1046 (2004), citing *Krause Inc., v. Little*, 117 Nev. 929, 933, 34 P.3d 566, 569
14
15 (2001). Where the facts were disputed, the district court clearly believed Ammie,
16 and that decision was well within the court's discretion. Ultimately, William's
17
18 complaint is simply that the district court didn't believe him, and should have.
19

20
21 There is no requirement for the district court to have begun its analysis
22 with June, when William filed, instead of August, when the hearing occurred.
23
24 Further, it is reasonable to presume that the court believed Ammie with regard
25 to the timeshare in June and July 2020. "[T]his court will imply findings of fact
26 and conclusions of law so long as the record is clear and will support the

1 judgment." *Luciano v. Diercks*, 97 Nev. 637, 639-640, 637 P.2d 1219, 1220
2 (1981). The evidence provided, even from William's own exhibits, show that the
3
4 minor children were in Ammie's care during July and July. **JA0205; 0213-0215.**

5 It is not parental misconduct for a parent to demand to follow the existing
6
7 order. However, even if it were, a court cannot change custody because of
8
9 parental misconduct - it can merely be considered as to how it reflects on a
10 parent's judgment. *Abid v. Abid*, 133 Nev. 770, 406 P.3d 476, footnote 4 (2017).
11
12 Again, the court found that William had met the prong for "best interests;" but
13 he had not met the prong for "a substantial change in circumstances." As the *Ellis*
14 test is now the rule for all custody modifications, how the court calculated the
15
16 timeshare is irrelevant.

17 Many of William's arguments are analyzed under the best interest factors,
18
19 and seemingly relate to the court's initial determination of custody. But, William
20 ignores the fact that he is seeking a *modification* of custody. He did not address
21
22 *any* change in circumstance, except that, after the children went back to in person
23 learning, the parties resumed operating under the Decree. **JA0260.** The district
24
25 court believed Ammie as to why the parties resumed that schedule, and what the
26
timeshare had been *before* August 2020.

1 The district court did not abuse its discretion in finding that Ammie had
2 primary physical custody, or in applying the *Ellis* test to William's Motion. Nor
3
4 did the district court err in determining that William did not sufficiently allege
5
6 a "substantial change in circumstances." The district court did not err in denying
7 William's Motion.

8 **8. Conclusion**
9

10 Ammie respectfully requests that the judgment of the district court be
11 affirmed on all issues.
12

13 **9. Routing Statement**
14

15 Nevada Law is well-settled as to the issues on appeal. There is no basis for
16 this matter to proceed under NRAP 17(a). This case should be assigned to the
17 Court of Appeals, pursuant to NRAP 17(b)(10).
18

19
20 
21 By: _____
22 RACHEAL H. MASTEL, ESQ.,
23 Nevada Bar No. 11646
24 Attorney for Respondent
25
26

CERTIFICATE OF COMPLIANCE

1
2 1. I hereby certify that this fast track response complies with the
3 formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP
4 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this fast track
5 response has been prepared in a proportionally spaced typeface using Word
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9 type-volume limitations of NRAP 3E(e)(2) because, excluding the parts of the
10 brief exempted by NRAP 32(a)(7)(C), because it is proportionately spaced, has
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13 3. Finally, I hereby certify that I have read this appellate brief, and to the
14 best of my knowledge, information, and belief, it is not frivolous or interposed
15 for any improper purpose. I further certify that this brief complies with all
16 applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1),
17 which requires every assertion in the brief regarding matters in the record to be
18 supported by a reference to the page and volume number, if any, of the transcript
19 or appendix where the matter relied on is to be found. I understand that I may be
20
21

22 ...

23 ...

24 ...

25 ...

1 subject to sanctions in the event that the accompanying brief is not in conformity
2 with the requirements of the Nevada Rules of Appellate Procedure.

3 Dated this 26th day of January, 2022.

4
5 
6 By:

7 RACHEAL H. MASTEL, ESQ.,
8 Nevada Bar No. 11646
9 KAINEN LAW GROUP, PLLC
10 3303 Novat Street, Suite 200
11 Las Vegas, Nevada 89117
12 (702) 823-4900
13 Attorney for Respondent
14
15
16
17
18
19
20
21
22
23
24
25
26

CERTIFICATE OF SERVICE

I the undersigned hereby certify that I am an employee of the KAINEN LAW GROUP, PLLC, located at 3303 Novat Street, Suite 200, Las Vegas, Nevada 89129, and on the 26th day of January, 2022, I served a true and correct copy of the ***Respondent's Fast Track Response*** on all interested parties to this action as follows:

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