IN THE SUPREME COURT OF THE STATE OF NEVADA

JUSTIN MAURICE, Appellant, vs. SARAH MAURICE, Respondent.	Supreme Court No. 83009 District Court Case No. D-14-506885-D

CHILD CUSTODY FAST TRACK REPLY

1. Procedural history.

Notably, Sarah presents a misleading and incomplete procedural history that improperly delves into earlier proceedings that have no relevance to the issues on appeal[1]. Sarah resurrects prior financial matters (albeit in a self-serving and inaccurate manner) which she apparently believes are unfavorable to Justin and will detract from the judicial errors related to the subject motion to modify custody[2]. Candidly, child support, health insurance, and arrearages have nothing to do with the issues before this Honorable Court.

2. Statement of facts.

Sarah presents an inaccurate and incomplete narrative, inclusive of defamatory and *ad hominem* attacks upon Justin, rather than addressing the facts

[1] Fast Track Response ("Response"), pages 2-3.
[2] *Id*.

dispositive to the issues on appeal[3]. When Sarah does touch upon those fact, the merit of Justin's appeal is illuminated. For example, Sarah concedes one of the reasons for the motion to modify was due to a substantial change in Justin's work schedule[4]. Sarah acknowledges Justin's belief that her promotion and change in her work schedule limits her ability to care for the children, but notably, ***does not dispute*** that belief.[5]

It is significant to note Sarah does ***not*** challenge Justin's work schedule has changed, nor does she challenge any of the ***additional*** changes Justin identified in his motion to modify, including (2) the change in Sarah's work schedule, her unavailability for the children (II ROA 344: 18-19), and that Sarah is not able to take and pick up the girls from school (II ROA 396:22-397:1-2); (3) Justin's availability as caregiver in lieu of third parties (*see* II ROA 344:19-21, 347:13-15, 397:3-4); (4) the temporary custodial modification where Justin cared for, and helped the children with schooling, *each* day (*see* II ROA 344, 345: 3-4); (5) that a modification was in the best interests of the children (*see* II ROA 344, 16-17, 346-351); (6) the passage of more than five (5) years since the initial custodial determination (*see* II ROA 347:8-10) and now both children were attending school (*Id.*); (7) that Justin has remarried and the subject children have developed close relationships with their

[3] *Id*., pages 4-5.
[4] Response, page 5, lines 18-28; page 6, lines 1-12; page 11, lines 1-3.
[5] *Id*., page 5, lines 22-24.

step-siblings (II ROA 398:6-8); and (8) that both children have conveyed their preference of wanting to spend more time with Justin (*see* II ROA 347:21-22)[6].

3. **Legal argument.**

A. The Lower Court Erred Denying Justin's Modification Motion Without a Hearing.

This Court has repeatedly held lower courts ***must*** conduct an evidentiary hearing when a movant alleges sufficient facts that are relevant to the relief requested and the evidence is not merely cumulative or impeaching[7]. The changes/allegations noted above, coupled with those contained in Justin's motion and reply[8], are irrefutably relevant, and if true, could lead to a modification of custody/visitation. Thus, pursuant to the precedent of this Court, Justin established a prima facie case and with the showing of adequate cause, was entitled to an evidentiary hearing.[9]

However, the lower court failed to consider Justin's allegations and the effect they each had individually, *let alone cumulatively*, and instead based its decision solely on the finding that a change in work schedule(s) is not a substantial change in circumstances as required by *Ellis*—and with such finding, failed to consider the

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[6] Sarah also does not dispute or challenge the additional changes and factors presented to the Court when the motion for reconsideration was heard. *See* Fast Track Statement, pages 6-8.

[7] *Rooney v. Rooney*, 109 Nev. 540, 853 P.2d 122, (1993); *Arcella v. Arcella*, 133 Nev. 868, 407 P.3d 341 (2017).

[8] II ROA 342-56; 391-416.

[9] *See Rooney*, *supra*; *Arcella*, *supra*.

remainder of the allegations in their entirety[10]. Notably, Sarah concedes this in her Response[11].

The lower court abused its discretion. Indeed, once adequate cause has been shown "***the district court does not have the discretion to deny the modification motion without holding a hearing.***"[12] Sarah presents no argument or legal authority to show the lower court's decision was not the result of judicial error.

B. The Lower Court Erred Finding a Change in Work Schedule(s), either Individually or Cumulatively as one of the Other Alleged Changes Cannot Constitute a Substantial Change of Circumstances as Proscribed by Ellis v. Carucci that is Needed for Modification of Custody or Visitation.

Despite the substantial material changes and facts alleged by Justin in the subject motion, the lower court improperly relied solely upon its espoused belief, albeit legally untenable, that a ***modification of a work schedule is not a substantial change in circumstances that would invoke the Court pursuing a modification pursuant to Ellis*** and summarily denied Justin's motion as a result. (III ROA 551:18-25). It is significant to note that even with Sarah rephrasing the issue before this Court as set forth above[13], Sarah failed to present ***any*** legal authority in support of

[10] The lower court acknowledged Justin's work schedule changed and "is more than a temporary circumstance." IV ROA 705:9-13.
[11] Response, page 13, lines 8-12.
[12] 109 Nev. at 542.
[13] Sarah stated the issue as "A change in a party's work schedule alone does not per se constitute a substantial change in circumstances affecting the child's welfare". Response, page 9, lines 1-2.

the issue as phrased by her, and more importantly, failed to present ***any*** legal authority ***contrary*** to the legal authority provided by Justin in his Opening Brief.

Instead, Sarah merely cites the case provided by Justin, to wit: *Ellis v. Carucci*[14], which is considered a seminal case establishing the standard that must be met with custodial modifications. *Ellis* does ***not***, however, address whether the change in work schedule(s), alone or cumulatively with other relevant factors, may constitute a substantial change of circumstances that must be shown with any custodial modification. Justin cited no less than a dozen cases where courts have properly recognized a change in work schedule(s) to constitute, or at a minimum, be a relevant factor, for a finding of a substantial change in circumstances[15]; Sarah presents no legal authority to the contrary or in support of the lower court's decision.

Sarah also falsely states "the court also reasoned that Justin's alleged change in circumstances did not sufficiently affect the welfare of the parties' children."[16] The record confirms the lower court engaged in ***no*** such reasoning and made ***no*** such finding. As noted, the lower court noted the "primary focus" of Justin's motion was his "work schedule" (IV ROA 759) and its decision predicated solely on that issue alone. (III ROA 551:18-25).

[14] 123 Nev. 145, 161 P.3d 239 (2007).
[15] See Fast Track Brief, section A.
[16] Response, page 9, lines 14-16 citing IV ROA 759).

Although the lower court noted the preference of the older child to spend more time with Justin (IV ROA 759:17-19), the court incredulously held such a factor *cannot* be used or constitute, even as part of a cumulative assessment of whether a substantial change of circumstances has been sufficiently alleged (in order to establish adequate cause) ***or*** satisfied (in order to warrant a modification) (IV ROA 759:19-21, 760:1-2, 761:16-20).

Indeed, the lower court stated that such a factor can only be considered when considering the best interests of a child (the second prong of *Ellis*), but the lower court never addressed the second prong of *Ellis* because of its ruling that a change in work schedules (either individually or in conjunction with other relevant factors) cannot constitute a substantial change of circumstances (IV ROA 759-760). Respectfully, a child's preference is properly a factor that can be used to determine adequate cause ***and*** when determining ***either*** *Ellis* prong. Sarah presents ***no*** legal authority refuting this or that supports the lower court's finding.

Hence, the lower court committed judicial error. Sarah simply parrots the finding of the lower court, which does not remedy or remove the legal error(s) committed by the lower court. Sarah does not dispute Justin's work schedule has changed[17]; she does not address her work schedule change and unavailability for the children as raised by Justin.

[17] Response, page 11, lines 1-3.

Sarah's argument that Justin's motions and appeal does not address the best interests of the children[18] is patently false and a clear misrepresentation of the record (*see* II ROA 342-56, 391-416, III ROA 554-98, 636-79; Opening Brief). Sarah fails to distinguish *Rivero v. Rivero*[19] (legal authority provided by Justin) because Rivero confirmed that "work schedules" ***are*** an inherent variation of joint physical custody[20], and being instrumental with an initial custodial determination, must necessarily be relevant to a request any modification thereto.

Sarah's reliance on *Culbertson v. Culbertson*, 91 Nev. 230, 533 P.2d 768 (1975), is misplaced. Justin does not dispute (nor ever has) "[i]t is presumed that a trial court has properly exercised its judicial discretion in determining the best interests of the children"[21]. In this case, the lower court refused to even consider the best interests of the minor children (second prong of *Ellis*) and thus *Culbertson* is inapposite.

Sarah's argument that "as a matter of public policy and common sense" to allow a change of work schedule(s) as being able to establish a substantial change in circumstances would "open the floodgates" of litigation and undermine a child's stability. Frankly, to disallow consideration of the parties' work schedules would actually jeopardize a child's well-being and stability. Indeed, a change in work

[18] Response, page 10, lines 9-2.
[19] 125 Nev. 410, 216 P.3d 213 (2009)
[20] 125 Nev. 424-425
[21] 91 Nev. at 233.

schedules may, in fact, ***necessitate*** a custodial change. Ignoring, or refusing to consider such events that affect a child, under a misguided belief that a court cannot modify custody or visitation because of changed work schedules, would generate absurd results. For those reasons, our legislature has addressed public policy and the best interests of minor children by providing Family Courts with continuing jurisdiction.

Rejecting both changes in work schedules, the children's' preferences, and the additional changes identified by Justin as establishing a substantial change and adequate cause for an evidentiary hearing, constituted an abuse of discretion and judicial error.

C. The Court Should Distinguish The Standard For Modification Of Custody And Modification Of Visitation.

This Court has expanded the requirement of changed circumstances to modifications of visitation as well[22]. Of course, modifications of custody and visitation can be minor or substantial, and depending upon the facts of each case, the burden to support a minor change in visitation should be less than the burden needed for a major change in custody. Many courts have recognized this reality, but this distinction has never been addressed by this Court[23]. As a result, many changes that

[22] *See Rennels v. Rennels*, 127 Nev. 564, 257 P.3d 396 (2011); *Martin v. Martin*, 120 Nev. 342, 90 P.3d 981 (2004); *Davis v. Ewalefo*, 131 Nev. 445, 352 P.3d 1139 (2015); *Gordon v. Geiger*, 133 Nev. 542, 402 P.3d 671 (2017).

[23] Such authority remains unchallenged by Sarah (Fast Track Brief, section C) and are incorporated by reference.

would benefit a subject minor are not realized with the rigidity and universal application of the Ellis standard.

Sarah ignores all the legal authority provided by Justin and fails to submit any legal authority to support that the substantial change that is needed is less with a modification of visitation than of custody. Justin was not provided the opportunity to address or seek such relief because his requests for an evidentiary hearing were summarily denied. Accordingly, Sarah's argument of waiver is misplaced.

It is also significant to note Sarah also ignores the possibility that a motion to modify custody may result in a modification of the parenting time but not result in an actual modification of custody. That determination should appropriately vest with the district court, but the standards should likewise differ.

D. The district court abused its discretion awarding attorney's fees following its abuse of discretion.

Because the lower court abused its discretion in failing to set an evidentiary hearing based upon the above referenced precedent, and finding that a change in work schedule(s), especially in light of the additional changes alleged by Justin, cannot constitute a substantial change of circumstances, Sarah was not the prevailing party and an award of fees based upon such error(s) is likewise erroneous and cannot stand.

4. Conclusion.

The response cites no legal authority supporting the findings and decisions of the lower court. Sarah's parroting of them does not remedy the judicial errors and the law requires reversal of the lower court's decisions.

DATED: October 14, 2021.

Respectfully Submitted,

/s/ Bradley Hofland

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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 2010 in Times New Roman 14 – point font**.

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:

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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: October 14, 2021.

Respectfully Submitted,

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Certificate of Service

I hereby certify that on this date, October 14, 2021, I filed and served a copy of the foregoing **CHILD CUSTODY FAST TRACK REPLY**, as follows:

X By filing it with the Supreme Court via eFlex.

Electronic notification will be sent to the following:

Rachel M. Jacobson, Esq.

☐ By personally serving it upon him/her.

X By mailing it by first class mail with sufficient postage prepaid to the following address(es):

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/s/ Bradley Hofland
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