IN THE SUPREME COURT OF THE STATE OF NEVADA

William Shawn Wallace,

Appellant,

vs.

Ammie Ann Wallace,

Respondent.

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Supreme Court No**. 83591**
District Court No. **D-20-613567-Z**

PETITION FOR REHEARING

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I.
INTRODUCTION

As this court is aware, this appeal arises from the district court's refusal to set an evidentiary hearing on William's motion to modify child custody. On January 13, 2022, after William filed his Fastrack Statement in this appeal, the Nevada Supreme Court issued its opinion in *Romano v. Romano*[1] which overturned the standard for child custody modifications established almost three decades ago in *Truax v. Truax*[2] as modified over a decade ago in its landmark opinion, *Rivero v. Rivero*.[3] In light of *Romano*, joint physical custodians can no longer rely solely upon the best interests of the children standard when seeking a modification of child custody.

Then, on June 30, 2022, after this court had rendered its decision in this appeal, this court issued its opinion in *Myers v. Haskin*[4] which substantially clarified what constitutes "adequate cause" for the holding of a hearing on a motion to modify custody.

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[1] 138 Nev. Adv. Op. 1, 501 P.3d 980, 981 (2022)

[2] 110 Nev. 437, 874 P.2d 10 (1994).

[3] 125 Nev. 410, 416, 216 P.3d 213, 218 (2009)

[4] 138 Nev. Adv. Op. 51 (Nev. App. 2022)

Because neither of these two important decisions existed at the time William filed his Fasttrack Statement, much less when he filed his underlying motion, William, under the procedures provided in NRAP 40, respectfully requests rehearing of this matter and to be allowed to demonstrate how this court has misapprehended and misapplied these two very recent controlling decisions.

II.
STANDARD FOR REHEARING

NRAP 40(a)(2) requires a petition for rehearing to state "with particularity the points of law or fact that the petitioner believes the court has overlooked or misapprehended." "Under NRAP 40(c)(2), this court may consider petitions for rehearing when 'a material fact in the record or a material question of law in the case' has been overlooked or misapprehended, or when we have misapplied a controlling decision. *Lavi v. Dist. Ct*.[5]

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[5] 130 Nev. 344, 346 (2014)

III.
THE COURT OVERLOOKED AND MISAPPREHENDED THE APPLICATION OF TWO CONTROLLING DECISIONS WHICH WERE ISSUED AFTER WILLIAM HAD FILED HIS FASTTRACK STATEMENT.

A. *Romano* changed the standard upon which William based his argument for a change of custody in the district court.

In its Order of Affirmance, this court noted that William had argued that *Rivero* required the district court to determine if he had *de facto* joint physical custody and that William need not prove a substantial change of circumstances if he shared joint physical custody. This court further noted that "that aspect of *Rivero* has been overruled by *Romano v. Romano* (citation omitted)." According to *Romano*, the district courts are no longer required to first determine what type of physical custody arrangement exists before considering whether to modify the arrangement.[6] Now all movants, be they joint custodians or visiting parents, are required to show that "(1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the child's best interest is served by the modification."[7]

The new *Romano* standard, however, was not the standard at the time of the August 12, 2021 hearing in the district court. Indeed, the *Romano* standard

[6] *Romano, supra*, at 501 P.3d at 983-84.

[7] *Id.* at 501 P.3d at 983.

was not the standard at the time William filed his Fastrack Statement in this appeal on December 29, 2021. William applied the standard which has governed custody modifications for over decade and which continued to control even after William had filed this appeal and filed his Fasttrack Statement.

Under the law at the time of the district court hearing, if the parties were sharing *de facto* joint physical custody for a year prior to filing his motion, then the only showing which William needed to make under *Rivero* was to demonstrate that the modification was in the best interests of the children.[8] Although at the time of filing his motion and the hearing thereon, William did not know that he would have to argue a "substantial change in circumstances" due to a future change in the law, this court, nonetheless, has found that William waived the argument. William, however, respectfully submits that he cannot have intentionally relinquished or abandoned an argument that he did not know that he needed to make.

In this regard, William respectfully submits that he be permitted to assert that the parties' *de facto* deviation from the terms of the Decree does, in fact, constitute a change of circumstances affecting the welfare of the parties' children.

[8] *Rivero v. Rivero*, 125 Nev. 410, 422, 216 P.3d 213, 222 (2009), *overruled by Romano v. Romano*, 138 Nev. Adv. Op. 1, 501 P.3d 980 (2022)

This argument will be addressed below in conjunction with an analysis of this court's own opinion in *Myers* which has, like *Romano,* made substantial changes to how district courts are now required to address custody changes.

B. *Myers* requires district courts to conduct an evidentiary hearing where the movant has alleged a *prima facie* case for a custody modification.

Eight days after issuing its Order of Affirmance, this court issued its published opinion in *Myers*[9] which expounded upon what "adequate cause" means to a district court determining whether to conduct an evidentiary hearing on a custody modification. According to this court, "adequate cause" arises if the movant demonstrates a prima facie case for modification. This court further held:

> In determining whether a movant has demonstrated a prima facie case for modification of physical custody, the court must accept the movant's specific allegations as true. … Thus, the district court should not require that the movant prove his or her allegations before holding an evidentiary hearing. … Furthermore, a district court should not weigh the evidence or make credibility determinations before holding an evidentiary hearing. … In the Rooney context, a district court may not decide a motion to modify custody "upon contradictory sworn pleadings [and] arguments of counsel" (alteration in original).[10]

[9] 138 Nev. Adv. Op. 51.

[10] *Id.* at 7-9.

According to this court's holding in *Myers*, the district court must accept William's allegations as true when addressing his motion for a custody modification. For purposes of his motion, the following facts are deemed to be true:

1. After their separation on September 25, 2017, the parties cooperated in taking care of and sharing time with the children. JA64.

2. The parties did not adhere to a set schedule, and the children frequently spent time in both parents' homes. JA64.

3. In March of 2020, William's employer permitted him to work from home, and the children began home-schooling with him. JA65.

4. The parties began exercising a 2/3/2 timeshare, and, by August 2020, the parties worked out a custody schedule where the children were typically with Ammie from Sunday at bedtime until Tuesday after school (around 3:30 p.m.). JA66. Then the children would be with William from Tuesday evening until Thursday at bedtime. JA66. The parties alternated every Friday and weekend. JA66. If one party had the children for the weekend, the other party would have them for Friday. JA66.

5. During the summer of 2020, Ammie visited Texas to be with her mother, and William had the children for two months. JA65, 150.

6. The parties continued to observe the 2/3/2 through the entry of the decree on September 20, 2020, until April 2021. JA1-20, 147, 121.

7. Ammie was represented by an attorney in the divorce. William was not. JA18.

8. The Decree provided that William would have the children from 3:00 p.m. through 6:30 p.m. on weekdays and alternating weekends. JA47. Since the parties had always worked together to make sure the children spent time with both parents (JA149), William thought the language in the Decree of Divorce meant it would be his

responsibility to pick the children up from school and help with their schoolwork and extracurricular activities each day. JA149.

9. William did not, however, understand that the Decree would operate as a restriction on the time that he otherwise would be able to spend with the children. JA67, 149. In as much as William was already sharing half the time with the children, William had no reason to believe that the Decree prevented the parties from sharing the children as they always had been. JA149.

10. Indeed, the parties did not adhere to such a schedule before the Decree was entered, nor did they adhere to it after the Decree was entered. JA68, 148, 149, 152. The entry of the Decree did nothing to change the parties *de facto* time share. JA66.

11. William would never have signed the Decree had he understood the Decree to mean he would only have overnights with the children every other weekend. JA149.

12. Ammie assured William that, notwithstanding the entry of the Decree, everything would continue as it had been. JA67. And, for six months, everything did continue as it had been. JA66.

13. In April of 2021, six months after the entry of the Decree, Amy began insisting that William could only have the children every other weekend and that the parties were going to begin following the Decree in the "most minute detail." JA68.

14. Despite having an amicable arrangement regarding the children for three years after their separation, and for six months after the divorce decree was entered, Ammie demanded that William adhere strictly to the terms of the Decree. JA68.

15. The children then began begging William to fight for more time with them and were crying nearly every evening he was forced to take them back to Ammie at 6:30 p.m. in accordance with the strictures of the Decree. JA68.

William respectfully submits that the foregoing facts, taken as true, show that there has been a substantial change in circumstances affecting the welfare of the children.[11] William recognizes that this court has held that William has waived the argument that the *de facto* schedule which the parties had adhered to constitutes a substantial change in circumstances. But as argued in Section III(A) above, the law was substantially different at the time William filed and argued his motion in the district court. Had William had the benefit of the *Romano* decision at the time of filing his motion, William would have most certainly have argued that the parties' long-term adherence to a custodial schedule different from that set forth in the decree does, in fact, constitute a change in circumstances.

In its Order of Affirmance, this court held that "William has not cogently argued how the parties' temporary deviation from the controlling decree

[11] William recognizes that under *Romano*, the movant must also show that the children's best interest is served by the modification. William argued the best interests at length in his Fasttrack Statement filed in this matter on December 29, 2021. Because this court's determination of the appeal turned on the substantial change of circumstances prong of *Romano,* William addresses only that prong in this Petition. To the extent that this court deems the best interest standard is relevant to its resolution of the present petition, William refers the court to pages 21 through 28 of his Fasttrack Statement which describes in great detail how a modification of the custody schedule serves the children's best interests.

constituted a substantial change in circumstances."[12] This Court also held that William "fails to cite authority or cogently explain how 'exercising significantly more time' than contemplated by the decree establishes substantially changed circumstances."[13]

While William recognizes that a minor variance from an existing parenting schedule is insufficient to establish a material change in circumstances, "substantial variances can support a finding of a material change in circumstances."[14] In *Boumont v. Boumont*,[15] for example, the North Dakota Supreme Court remanded the case for the trial court to determine whether the mother's claim that she was "shouldering more than half of the custodial responsibilities"[16] constituted a substantial change from the parties' Marital Termination Agreement which provided for the parents to have physical custody "one-half of the time."[17] In this regard, the *Boumont* court held:

> If the trial court finds a significant change in circumstances, for example, that the parties' current custodial arrangements are substantially different than contemplated in the divorce decree, then

[12] Order of Affirmance at 7.

[13] *Id.* at 8.

[14] *Ehli v. Joyce*, 789 N.W.2d 560 (N.D. 2010).

[15] 691 N.W.2d 278 (N.D. 2005)

[16] *Id.* at 280.

[17] *Id.*

> the divorce judgment's custody provision must be amended and a calculation of child support can be made under N.D. Admin. Code § 75–02–04.1–02.[18]

Similarly, in *Ehli*, the North Dakota Supreme Court reversed the denial of an evidentiary hearing after concluding a substantial deviation from an existing equal primary residential responsibility arrangement was sufficient to demonstrate a prima facie change in circumstances warranting modification of primary residential responsibility.[19] Notably, the North Dakota Supreme Court declined to weigh the parties' conflicting allegations about any underlying reasons for the parties' exercise of primary residential responsibility or parenting time:

> Those allegations can be evaluated in an evidentiary hearing. We hold statements in Ehli's affidavit regarding the parties' actual arrangement for primary residential responsibility are sufficient to establish a prima facie case requiring an evidentiary hearing.[20]

William respectfully submits that this court has misapprehended the fact that the parties' deviation from the decree was not temporary nor was it minor. The parties had shared physical custody of the children for almost four years since their separation in 2017. By 2020, the parties had established a de facto

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[18] *Id.* at 284.

[19] *Ehli*, *supra*, at 564.

[20] *Id.*

routine in which they shared the children on a 2/3/2 schedule. This schedule existed for months before the decree and persisted for six months thereafter. Since William was the parent who primarily picked the children up from school, helped them with their homework, coached their baseball teams, took them to their practices and attended their extracurricular activities with them (JA148, 164-202), William did not understand that the Decree relegated him to a visiting parent and he did not have the assistance of counsel. Ammie's sudden demand that the parties adhere to the terms of the Decree which the parties had never done before came as a surprise to William.

Taking William's allegations as true that the parties shared physical custody equally during the months leading up to the divorce and for over 6 months thereafter is indeed a substantial change in circumstances especially if viewed from the children's perspective. The children have gone from spending 182 days per year in their father's home to 52. In addition, William is relegated to a shuttle driver who transports the children to their daily activities but is not permitted to take them home except for 2 days out of every 14. This time share is far different from the weekend and afternoon visitation relegated to him in the Decree. Such a significant departure from the Decree is, in fact, a substantial change in circumstance, especially if the facts William has alleged are taken as true.

IV.
CONCLUSION

This court and the Nevada Supreme Court have made significant changes to Nevada law governing the modification of child custody orders. These changes took place after this matter was already on appeal. The Nevada Supreme Court abandoned the best interest standard it had adopted in *Truax* in the 1990s. This court clarified that district courts must take the movant's allegations as true when determining whether the movant has stated a prima facie case for a custody modification. In light of the foregoing changes in jurisprudence, William respectfully submits that this court has misapprehended his waiver of "substantial change of circumstances" argument. William further submits if this court accepts his allegations as true, William has demonstrated a substantial change in circumstances warranting an evidentiary hearing on his motion.

DATED this 25th day of July, 2022.

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VERIFICATION

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Word for Microsoft 365 with a proportionally spaced typeface in 14-point, double-spaced Times New Roman font.

2. I further certify that this brief complies with the type-volume limitations of NRAP 40(b)(3) because it contains 2918 words, excluding exempted tables.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure and that if it does not, I may be subject to sanctions.

DATED this 25th day of July, 2022.

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CERTIFICATE OF SERVICE

I certify that on the 25th day of July 2022, the foregoing Petition for Rehearing was served via the Supreme Court's electronic filing service system (eFlex) to:

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