


IN THE SUPREME COURT OF THE STATE OF NEVADA

CATHY D. WENDELL,
Appellant,
vs.
CHRISTOPHER WENDELL,
Respondent.

No. 48490

FILED

OCT 11 2007

ANETTE M. BLOOM
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order denying a motion to modify the parties' child custody arrangement. First Judicial District Court, Carson City; Michael R. Griffin, Judge.

The parties were granted a divorce in 1995. Under the divorce decree, the parties were awarded joint legal custody of their minor children, with appellant having primary physical custody and respondent having liberal visitation.

In 2004, proceeding in proper person, appellant moved the district court for permission to relocate with the children to Hawaii. Respondent, through counsel, opposed the motion and filed a countermotion for primary physical custody. Ultimately, the district court denied appellant's motion to relocate and granted respondent's motion to change the custody arrangement. The written order memorializing the district court's decision was not filed until March 2006. Appellant did not appeal from the March order.

Before the March 2006 order was entered, appellant filed a motion for reconsideration, and six weeks after the March 2006 order was entered, appellant moved the district court to alter or amend the order.

On May 23, 2006, the district court entered an order denying appellant's motions.

On July 25, 2006, appellant moved the district court to modify the custody arrangement on the basis that she had relocated back to Carson City from Hawaii and that the children had expressed a desire to live with her. Respondent opposed the motion. In October 2006, approximately ten weeks after the opposition was filed, appellant untimely filed a reply.

Without conducting a hearing on appellant's July 2006 motion to change the custody arrangement, the district court denied it. Specifically, the district court found that the motion could be resolved without a hearing, as appellant had not demonstrated "adequate cause" to hold a hearing. The court also found that appellant's relocation back to Carson City from Hawaii did not constitute a substantial change in circumstances to warrant changing the custody arrangement. Appellant has appealed, and respondent has filed a response.

Matters of custody rest in the district court's sound discretion.¹ This court will not disturb the district court's custody decision absent a clear abuse of discretion.² The district court may grant a motion to modify a primary physical child custody arrangement if it is established 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

¹Wallace v. Wallace, 112 Nev. 1015, 922 P.2d 541 (1996).

²Sims v. Sims, 109 Nev. 1146, 865 P.2d 328 (1993).

modification.”³ Further, the district court has discretion to deny a motion to modify custody without conducting a hearing, unless the movant demonstrates adequate cause for holding a hearing.⁴

“Adequate cause” was explained in our 1993 Rooney v. Rooney decision, as follows:

“[a]dequate cause” [for holding a hearing] requires something more than allegations which, if proven, might permit inferences sufficient to establish grounds for a custody change. “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.⁵

Here, the district court considered three separate motions filed by appellant within a six month period concerning the custody arrangement, and the court determined that appellant’s July 2006 motion failed to demonstrate the adequate cause required for holding a hearing. Moreover, the court found that appellant’s move back to Carson City from Hawaii did not constitute a “substantial change of circumstances”⁶ to warrant altering the custody arrangement.

³Ellis v. Carucci, 123 Nev. ___, ___, 161 P.3d 239, 242 (2007).

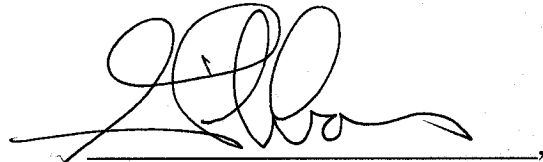
⁴Rooney v. Rooney, 109 Nev. 540, 542-43, 853 P.2d 123, 124-25 (1993).

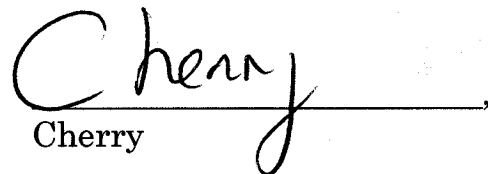
⁵Id. at 543, 853 P.2d at 125 (internal citation omitted).

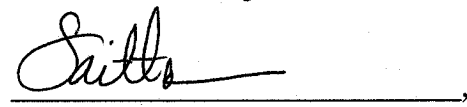
⁶In reaching its decision, the district court relied on Martin v. Martin, 120 Nev. 342, 90 P.3d 981 (2004), which cites Murphy v. Murphy, 84 Nev. 710, 711, 447 P.2d 664, 665 (1968), for the proposition that a
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Having reviewed the appellate record, appellant's proper person civil appeal statement, and respondent's response, we conclude that the district court did not abuse its discretion when it denied appellant's motion to modify custody without conducting a hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Gibbons


_____, J.
Cherry


_____, J.
Saitta

cc: First Judicial District Court Dept. 1, District Judge
Cathy D. Wendell
Peter B. Jaquette
Carson City Clerk

... continued

district court can consider changing primary physical custody if the circumstances of the parents have been materially altered, and the child's welfare would be substantially enhanced by the change. The Murphy test was recently overruled and has been replaced with the test announced in Ellis v. Carucci, 123 Nev. at ___, 161 P.3d at 242. Under that test, a district court may grant a motion to modify a primary physical child custody arrangement if it is established 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."