IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ARNOLDO HERNANDEZ,
Appellant,
vs.
KARINA ALONSO,
Respondent.

No. 70675

ORDER OF REVERSAL AND REMAND

Arnoldo Hernandez appeals from an order modifying child custody and child support. Eighth Judicial District Court, Family Court Division, Clark County; Cheryl B. Moss, Judge.

Arnoldo and Respondent Karina Alonso had one child together and were never married.[1] After the child was born, Arnoldo filed a complaint for custody of the child. Arnoldo and Karina resolved that dispute by agreeing to a parenting plan, which the district court recognized in a stipulated custody decree.

The decree of custody ordered Arnoldo and Karina to have joint legal custody of the child. It also stated that Arnoldo and Karina would call their arrangement joint physical custody even though "legally it is not a Joint Physical Arrangement."[2] Finally, it ordered Arnoldo to pay

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[1]We do not recount the facts except as necessary to our disposition.

[2]The record contains a stipulation filed months after the custody decree and signed by both Arnoldo and Karina that states the "parties were granted joint physical custody with an equal timeshare arrangement." Arnoldo did not raise any argument concerning this stipulation in his motion to review and modify child support and he did not file a reply to Karina's opposition to that motion. Further, Arnoldo

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$205 per month in child support after making an offset for Arnoldo's other child.

Several years later, Arnoldo filed a motion to review and modify child support. There, he requested the district court decrease his obligation because of the support he provided for another child and to account for Karina's income since she was no longer in school. Karina opposed Arnoldo's motion and counter-moved for primary physical custody of their child and a review and modification of Arnoldo's child support obligation.

Based on the custody decree, the district court found that Arnoldo and Karina intended Karina to have primary physical custody of their child. As a result, it awarded Karina primary physical custody, thereby granting her countermotion. It further found that 18 percent of Arnoldo's monthly income was $343 and, after making several downward deviations and considering arrears, ordered Arnoldo to pay $268 per month in child support, thereby denying his motion and granting Karina's.

. . . *continued*

concedes that neither he nor Karina mentioned this stipulation at the hearing on his motion to review and modify child support. Accordingly, Arnoldo waived any argument concerning the stipulation by not urging it in the trial court. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

The district court abused its discretion by modifying child custody without making findings

Arnoldo argues the district court abused its discretion by failing to make any of the factual findings required by *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009), and *Bluestein v. Bluestein*, 131 Nev. ___, 345 P.3d 1044 (2015). In particular, Arnoldo notes that the district court made no finding about how many days the child spent with him and Karina and did not determine whether a primary custody arrangement would be in the child's best interest.

This court reviews a child custody determination for an abuse of discretion. *See Wallace v. Wallace*, 112 Nev. 1015, 1019-20, 922 P.2d 541, 543 (1996). "On appeal, we must decide whether the district court properly modified an agreed-upon custodial arrangement in accordance with *Rivero*, 125 Nev. 410, 216 P.3d 213; NRS 125.480(1); and NRS 125.510(2)." *Bluestein*, 131 Nev. at ___, 345 P.3d at 1047. "The terms upon which the parties agree will control until one or both of the parties move the court to modify the custody agreement." *Id.* "[O]nce parties move the court to modify an existing child custody agreement, the court must use the terms and definitions provided under Nevada law, and the parties' definitions no longer control." *Id.* (quoting *Rivero*, 125 Nev. at 429, 216 P.3d at 227).

A district court abuses its discretion when it does not "make findings of fact supported by substantial evidence to support its determination that the custody arrangement was, *in fact*, joint physical custody." *Rivero*, 125 Nev. at 430, 216 P.3d at 227 (emphasis added). "Specific factual findings are crucial to enforce or modify a custody order and for appellate review." *Id.* "[T]he district court must evaluate the true nature of the custodial arrangement, pursuant to the definition of joint

physical custody described [in *Rivero*], by evaluating the arrangement the parties are exercising in practice, regardless of any contrary language in [a] divorce [or custody] decree." *Id.*

Here, the district court did not make any findings about the actual custodial arrangement Arnoldo and Karina exercised in practice and no stipulation regarding the actual arrangement appears in the record. Rather, it relied on the language of the custody decree to discern the parties' intent for Karina to have primary physical custody. Furthermore, the district court did not make any findings based upon the best interest factors. *See* NRS 125C.0035(4); *Davis v. Ewalefo*, 131 Nev. ___, ___, 352 P.3d 1139, 1143-44 (2015). In this way, it abused its discretion. Accordingly, we reverse the district court's order awarding Karina primary physical custody of the child and remand this case to the district court to make proper findings in accordance with *Davis*, *Rivero*, and *Bluestein*.[3]

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[3]The Family Law Section of the Nevada State Bar (the "FLS") filed an amicus brief in this case. The FLS requests this court to clarify the process for calculating what percentage of time a parent has had physical custody of her child under *Rivero* so that custody determinations, which the FLS claims are different from court to court, are uniform across Nevada. We decline to reach this issue here, as it is unnecessary to our disposition; however, we elect to take this moment to highlight *Bluestein*'s admonition that the *Rivero* timeshare percentages are guidelines only and the best interest of the child determines the custody designation. *See Bluestein*, 131 Nev. at ___, 345 P.3d at 1049 ("We take this opportunity to clarify that our decision in *Rivero* was intended to provide consistency in child custody determinations, but it was never meant to abrogate the court's focus on the child's best interest.").

The district court abused its discretion by modifying child support

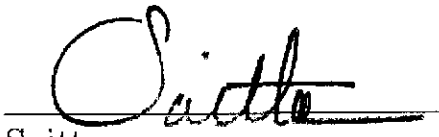
Arnoldo argues that the district court abused its discretion by modifying his child support obligation without making proper findings regarding the custodial arrangement of the child. In addition, Arnoldo argues that the district court abused its discretion by increasing his child support obligation without making any finding regarding a change in circumstances or the best interests of the child. We agree.

This court reviews a district court's child support decisions for an abuse of discretion. *Culbertson v. Culbertson*, 91 Nev. 230, 233, 533 P.2d 768, 770 (1975). "[T]he type of physical custody arrangement affects the child support award." *Rivero*, 125 Nev. at 422, 216 P.3d at 222. Further, "a court cannot modify a child support order if the predicate facts upon which the court issued the order are substantially unchanged." *Id.* at 431, 216 P.3d at 228. If there is a "factual or legal change in circumstances," then, "[u]pon a finding of such a change, the district court can . . . modify the order consistent with NRS 125B.070 and 125B.080." *Id.* at 433, 216 P.3d at 229. Moreover, "the modification must be in the best interest of the child." *Id.* at 431, 216 P.3d at 228.

Here, as discussed above, the district court abused its discretion in awarding Karina primary physical custody without making the required findings under *Davis*, *Rivero*, and *Bluestein*. Because the physical custody arrangement affects the child support award, *see id.* at 422, 216 P.3d at 222, the district court's modification of Arnoldo's child support obligation after improperly awarding Karina primary physical custody must be revisited. Moreover, the district court did not find increasing Arnoldo's child support obligation was in the child's best interest. In these ways, we hold the district court abused its discretion by modifying the child support order in this case. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[4]


_____, J.
Gibbons


_____, Sr. J.
Saitta

TAO, J., concurring:

I agree with my colleagues that a remand is necessary because based upon the existing record it's not entirely clear what the district court did. I write separately to provide some additional thoughts on the amicus brief submitted by the Family Law Section of the State Bar, and also on the larger question at issue here regarding how "primary" and "joint" custody ought to be defined in the wake of the Nevada Supreme Court's decision in *Bluestein v. Bluestein*, 131 Nev. ___, 345 P.3d 1044 (2015).

In their written settlement agreement, the parties contemplated that their arrangement wasn't actually "joint" but instead should have been properly labelled "primary" but for their stipulation to

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[4]Chief Judge Abbi Silver voluntarily recused herself from this case. The Honorable Nancy M. Saitta, Senior Justice, participated in the decision of this matter under a general order of assignment entered on September 20, 2017. Nev. Const. art. 6, § 19(1)(c); SCR 10.

the contrary. But, after *Bluestein*, was that even a correct conclusion, and could their arrangement actually have been considered "joint" all along?

I.

It's an odd thing to live in a state that advertises itself simultaneously as both the marriage and divorce capital of the nation. But maybe it's just a sign of the times. The word "family" no longer means what it once did. Too many new marriages end in divorce, and traditional family roles are no longer the norm in much of America anymore. The generation of Americans about to come of age will be the first in American history in which a majority wasn't raised in a two-parent nuclear family. *See* http://www.pewresearch.org/fact-tank/2014/12/22/less-than-half-of-u-s-kids-today-live-in-a-traditional-family/. For better or worse, "Leave It to Beaver" this isn't. (ABC Television, 1957-1963). Social scientists can debate whether in the long run that's a good or bad thing for the social and moral fabric of our country. One way or another, we may all be about to find out soon.

The Bible views marriage as a sacred gift from God intended to bring out the best in men and women; marriage was to be "held in honour among all." Heb. 13:4. Some no longer believe that to be true. But what's too often true is that divorce brings out the worst in everyone involved. Divorce and custody negotiations can be amicable and smooth. But they can also devolve into contentious, bitter, petty, emotionally and financially draining, exhausting, prolonged wars of attrition; published case law includes countless examples. *See Vaile v. Porsboll*, 128 Nev. 27, 268 P.3d 1272 (2012) (divorce granted in 1998 still being litigated in 2012); *United States v. Jeffries*, 692 F.3d 473, 474 (6th Cir. 2012) ("Tangled in a prolonged legal dispute over visitation rights to see his daughter, Franklin

Delano Jeffries tried something new" that led to criminal charges and convictions). In the heat of battle, sometimes parents who ought to know better simply don't act reasonably and rationally at every step and don't always do what's in the best interests of their children in each and every decision, however well-intentioned they might have been in calmer and more peaceful times. It's precisely for this reason that the Legislature drafted statutes giving judges the power to oversee what divorcing parents are doing with their children and to make sure that someone is looking out for the children when parents are not. Fit parents are presumed to act in the best interests of their children. *See Rennels v. Rennels*, 127 Nev. 564, 571, 257 P.3d 396, 401 (2011). But for good reason this presumption is rebuttable. NRS 47.250.

But having a judge decide things is almost never an ideal solution. Litigation is generally a poor fit for resolving questions of how children should be raised: it's adversarial and confrontational; it's expensive, protracted and time-consuming; it reduces complex and nuanced questions of parental bonding and child rearing into overly simplified general legal truisms. In the end, it places fundamental questions of parenting and child rearing into the hands of overworked judges with crushing dockets, too little time to really dig into any single case, and whose knowledge of the parents and children comes from interacting with them in tiny blocks of time from an impersonal distance in the most formal and least real-to-life setting imaginable. Sadly enough, though, sometimes it's the only option for parents who can't work together or simply don't want to; and then it falls upon the courts to sort through the wreckage of a failed marriage and decide what's best for the children by applying those generalized legal truisms as best they can.

II.

Fortunately, the case at hand hasn't been as contentious as some, at least for the most part. Here, the parents initially resolved most child custody and support questions in a relatively amicable manner through a written settlement agreement. The agreement stipulated to an unequal custody timeshare allocation which the parties nonetheless labeled as "joint physical custody [even though] it is not a Joint Physical Arrangement." A few years later things fell apart, as they so often do. The father asked the court to re-calculate his child support obligations, and the mother responded by asking the court to modify the physical custody arrangement as "primary" in her favor rather than "joint" based upon how the timeshare actually turned out over the preceding year.

At stake in this appeal is the meaning of one of those general legal truisms that judges must resort to when parents can't agree. Under Nevada law, child custody arrangements are broadly divided into three types: "sole," "primary," and "joint" arrangements. The dispute in this case is over whether the arrangement should have been better characterized by the district court as "primary" or "joint." But what, exactly, do these terms mean after *Bluestein v. Bluestein*, 131 Nev. ___, 345 P.3d 1044 (2015)? By law, classifying a custody arrangement as one or the other determines, among other things, how much child support one parent owes the other. But in the wake of *Bluestein*, how are district judges supposed to utilize those terms?

The Family Law Section's amicus brief raises the same question from a slightly different perspective. The amicus brief asks us to define, once and for all, how a "day" of custody is counted in assessing whether a particular timeshare can be characterized as either joint or

primary, and thereby determining the standard for any later modification of custody as well as the amount of child support one parent might owe the other. The Section's brief notes that different district judges in the Family Division define a "custody" day differently in calculating whether a particular arrangement is either "joint" or "primary," resulting in confusion and uncertainty for litigants and attorneys. For example, some judges credit a custody "day" to the parent with whom the child spent more than twelve hours within a 24-hour calendar day; others count a day for the parents at whose house the child slept regardless of how the rest of the day was allocated; others count only the hours during which the child was awake. Other judges have employed a wide variety of other counting methods as well.

How a custody "day" was calculated and assigned to one parent or the other used to matter quite a lot. Many judges interpreted *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009), as defining the difference between joint custody and primary custody as an absolute threshold of where the children spent 40% of their time, and nothing else. In those courtrooms, the mathematical allocation of "days" and how those days added up during a year was entirely dispositive of the question: if one parent's timeshare dropped even a fraction below 40% of the timeshare, then the arrangement necessarily became one of primary custody in favor of the other parent rather than joint custody. But the Nevada Supreme Court recently clarified that's not how the threshold works, and a joint custody arrangement can remain joint even if one parent's timeshare mathematically dips somewhat below 40%. *See Bluestein*, 131 Nev. at ___, 345 P.3d at 1049 (clarifying that the 40% division is a "guideline" that "should not be so rigidly applied" to deny joint custody if the court

determines that joint custody would otherwise be in the child's best interest).

The problem that now exists is that there are two ways to understand *Bluestein*. It's clear that 40% is no longer an absolute threshold marking the difference in black and white between primary custody and joint custody. The new question after *Bluestein* is how far below 40% a parent's timeshare can fall before the dividing line is crossed.

We all know that a timeshare division of 61%/39% can still be called "joint" custody even though it missed the 40% mark; that's what *Bluestein* expressly says, so long as the court based its division upon an analysis of the "best interests of the child." But suppose a judge divides the timeshare as disparately as 90%/10% in favor of one parent. Or suppose an even more extreme division of 99%/1%. Would that judge still have discretion to label that a "joint" custody arrangement with the right factual findings? If the answer is yes, then the classification is purely a matter of judicial discretion based upon an assessment of the children's best interests. In that case, the math doesn't matter at all, and neither would it then matter how judges count a custody "day." As a matter of simple mathematics, if we no longer care whether a fraction falls above or below 40%, then it follows that we also wouldn't care about how we identify the numerator or denominator used to calculate that fraction. In that scenario, it makes no difference if that judge chose to define a "day" in a way that differed by a few seconds, minutes, or hours from another judge's definition.

But the other possibility is that the answer is no, and a division of 99%/1% is so unequal that the judge can no longer legitimately call it "joint" custody. In that event, that means that the judge's discretion

ran out somewhere before between 40% and 1%, and it's no longer a purely discretionary matter. Rather, there's a point at which the classification becomes resolved as a matter of law outside of the district judge's individual discretion no matter what other findings it may have made about the children's best interests. If that's what *Bluestein* means, then all that case did was shift the threshold away from 40% and move it to another number somewhere else on the spectrum. It may be lower than 40%, but it still exists. We just don't know what the number is yet. In that case, the math still matters, and so would the definition of a "day."

I don't know which of these the Nevada Supreme Court intended. But the answer to that question determines whether or not we ever need to clarify how a "day" ought to be defined. Depending on how that question is answered, then the question of how "days" should be counted may or may not become important. It also determines whether the parents in this case were correct in originally thinking of their arrangement as automatically "primary" instead of potentially "joint."

III.

If I had to guess, I'd say that this isn't supposed to be just about math. As I read it, the point of *Bluestein* isn't just that judges no longer need to do the math as carefully as they used to, although to the math-deficient among us I'm sure that's a benefit as well as something of a relief. Instead, the point is that the district court's focus shouldn't primarily be on math at all. Focusing on math may make it easier to apply one label or the other. But what's easy isn't always what's right. As I understand *Bluestein*, the focus ought to be less on math and more on what arrangement actually works best for the children.

Prior to *Bluestein*, one recurring problem with the math-centric interpretation of *Rivero* was that it sometimes encouraged parents to play a game of "gotcha" with each other, holding stopwatches on each other's comings and goings to see if the other parent was late and adding up all the occasions in the hope of using it to modify timeshare or reduce the amount of child support due (which, after all, depends in part upon whether custody status is joint or primary). Getting stuck in traffic or having the boss order a parent to work late became a dangerous trap that could threaten long-term custody status instead of simply being an annoying reality of modern life that the parents must work together to accommodate. If the law is at all rational, it ought to encourage parents to work together to figure out what's best for the children, not entice them into luring each other into missed time slots then adding it all up to see if anyone's time dropped below 40% by even a few minutes in order to gain adversarial advantage in future litigation.

So I read *Bluestein* as intended to take math out of the question, and to give courts discretion to call things "joint" or "primary" based upon what's in the best interests of the children regardless of how the timeshare is divided up. Consequently, we need not, and should not, single out the one true way that everyone henceforth must count custody "days," since that seems unnecessary under my understanding of *Bluestein*.

But what then becomes more important than ever is that the district court clearly and thoroughly analyze each and every factor relating to the "best interests of the child." Indeed, although a district court now may have the theoretical discretion to call any division of timeshare either "joint" or "primary" as it pleases according to what best

suits the needs of the children, it seems to me that the farther a court deviates outside the "guideline" range of 40%-60% for presumptively "joint" custody, the more careful and detailed its "best interests" findings must be to justify choosing to still label things as "joint" and have it all stand up on appeal. But within the guideline or not, no matter how the math works out, findings on what's best for the children are never unimportant.

IV.

For these reasons, I wonder if the parties' original stipulation wasn't based upon faulty assumptions about what the words "primary" and "joint" are supposed to mean that may have clouded the district court's subsequent analysis of the motions now being appealed. If I'm right about *Bluestein* and the formal classification of either "joint" or "primary" custody is unrelated to or (phrased more elegantly) stands independent of the timeshare allocation, then a post-decree motion to modify custody status no longer depends solely or even principally upon how the actual timeshare ended up during the year preceding the motion, nor upon whether the actual timeshare may have diverged from the original agreement. The question that matters is whether the classification itself serves the children's best interests, notwithstanding where the children spent their time before the motion.

In this case it makes little difference to the outcome of this appeal, since the district court's findings in this case were unclear and must be better explained on remand. But perhaps these observations will aid the district court on remand, as well as in future cases.

Tao, J.

Tao

cc: Hon. Cheryl B. Moss, District Judge, Family Court Division
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