

# Rivero...

... The *New* and  
*Improved*

## Opinion

If you are currently practicing family law, you are familiar with the applicable standards set forth in the recent *Rivero* decision. *Rivero v. Rivero*, 125 Nev. \_\_\_, \_\_\_ P.3d \_\_\_ (Adv. Op. 34, Aug. 27, 2009) (Opinion 34). For those who do not practice family law, some consideration should be given to reading and understanding the *Rivero* decision. Most likely, someone will ask you a question regarding their child custody matters that will require some familiarity with Opinion 34. Hopefully, this article will educate those who are curious as to what the new standards are, and perhaps give some assistance as to how to apply these new standards to certain fact patterns.



By Mandy McKellar

### Facts and procedural snippet

The parties in the case were divorced and each granted “joint physical custody” of the minor child. No child support obligations were ordered. Ms. Rivero had custody of the minor child five days per week, with Mr. Rivero having custody the other two days.

Less than two months after the decree of divorce was entered, Ms. Rivero filed a Motion to Modify Child Support, which the district court dismissed. About a year later, Ms. Rivero filed the same motion again. At the hearing on the motion, the decree of divorce was ordered to remain in effect. The court determined that the parties were to maintain joint physical custody with neither party receiving child support. Additionally, the parties were ordered to attend mediation in order to devise a new timeshare which was more equal.

Soon thereafter, the parties attended the court ordered mediation where no agreement could be reached. A subsequent hearing ensued and the district court modified the parties’ five day/two day timeshare into an equal timeshare. Ms. Rivero appealed to the Nevada Supreme Court, and *Rivero v. Rivero*, 124 Nev. Adv. Op. No. 84, 195 P.3d 328 (Oct. 30, 2008) (Opinion 84) was born.

After Opinion 84, a proverbial monkey wrench was thrown into custodial designation equation: a perplexing definition of joint physical custody, followed by a bewildering child support calculation. Opinion 84 confused many, was controversial at its inception, and left many family law attorney’s scratching their heads wondering what the heck “meaningful contact” meant.

Mr. Rivero later filed a petition for *en banc* rehearing, which the Court granted. The Supreme Court also requested that the Family Law Section (FLS) provide

some input and an *amicus curiae* brief was later drafted and submitted by the FLS. Thereafter, the Court withdrew its October 30, 2009 opinion and issued a new opinion, *Rivero v. Rivero*, 125 Nev. \_\_\_\_, \_\_\_ P.3d \_\_\_ (Adv. Op. No. 34, Aug. 27, 2009).

### The new and improved *Rivero* (Opinion 34)

In Opinion 34, many items of confusion were clarified in order to adequately assist the district court and FLS in child custody, child support, and modification issues. First, the Court clarified that parties are entitled to enter into their own custodial agreements and call it joint, primary and primary, joint, or whatever they wish. However, the Court reiterated that any such agreement is subject to change once one of the parties move the district court to modify a custody agreement. In that instance, the district court must use the terms and definitions under Nevada law, i.e., Opinion 34.

**1. Legal custody defined.** When describing custodial designation to my clients in practice, I usually explain that there are two kinds of custody: legal which deals with decision making, and physical, which is the child's physical placement. Neither of these designations has anything to do with the other, meaning you can have primary physical custody and a joint legal designation. See NRS 125.490(2).

The Court reiterated that legal custody involves having basic legal responsibility for a child which means making major decisions regarding the child's health, education, and religious upbringing. *Mack v. Ashlock*, 112 Nev. 1062, 1067, 921 P.2d 1258, 1262 (1996). There are essentially two forms of legal custody, sole and joint.

Sole legal custody vests the right of making such decisions to one parent. It's just that simple, but in a hotly contested custody case, the parties will most likely agree to joint legal custody.

Joint legal custody requires the parents to cooperate and compromise on these decisions for the best interest of the child. The parents in a joint legal custodial relationship must consult with each other in order to make the major decisions that come with raising a child. This does not include minor day-to-day decisions, which are most likely made by the parent with whom the child resides most of the time, and it also does not mean that the parties have equal decision-making power. However, if the parties reach an impasse and are unable to agree, then they may appear before the court on

an "equal footing" and have the judge make a decision in the child's best interest.

**2. Physical custody defined.** Physical custody determines where the child resides most of the time but also controls many other looming issues. The physical placement of the child can determine the appropriate standard to use in order to modify physical custody, procedures to move out of state, and child support. In Opinion 34, the Court stated that physical custody involves the time that a child physically spends in the care of a parent.

Prior to Opinion 34, the term joint physical custody was never defined in Nevada. Opinion 34 defined joint physical custody as "awarding custody of the minor child or children to BOTH PARENTS." The Court further opined that what constitutes joint physical custody is when the parties have an "approximately" equal timeshare. The Court did not state that this requires a strict 50/50 application. In order to effectuate an "approximately" equal timeshare but also to allow the parties the necessary flexibility they need, the Court held that each parent must have physical custody of the child at least 40 percent of the time to constitute joint physical custody. *Id.* The timeshare becomes so unequal, as to change the designation, when a parent does not have physical custody of the child at least 40 percent of the time.

In order to accurately calculate how much time one parent spends with the child, the Court stated that each parent must determine how much time they spend with the child during one calendar year. Each parent must have physical custody of the child at least 40 percent of the time or 146 days per year. Physical custody means those times that a parent provided supervision of the child, where the child resided, and when the parent was responsible for day-to-day decisions. The Court removed the confusion from Opinion 84 which focused on each parent spending a significant amount of time with the child to ensure that the child has meaningful contact with both parents, without requiring a specific timeshare. The new calculation of days made it easier for the Court to consider weekly arrangements, emergencies, holidays, and summer vacations.

**3. Custody modification.** The Court reiterated two very important points when moving for modification of custody. A modification from a joint physical custody arrange-

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ment is a one-part test which requires the district court to determine if it is in the child's best interest to modify. NRS 125.510(2). A modification of primary physical custody is only appropriate when the parties meet a two-part test: if there is a substantial change of circumstances affecting the child **and** the modification will be in the child's best interest. See *Ellis v. Carucci*, 123 Nev. 145, 150, 161 P.3d 239, 242 (2007). At any time the district court decides to modify a custody arrangement, there must be specific findings of fact and conclusions of law supported by substantial evidence to support that the modification is in the best interest of the child.

**4. Child support.** In Opinion 84, the Court set out a severely twisted formula for determining child support in joint physical custody cases, extending the test under *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998) (establishing how to calculate support in a 50/50 custody case) to account for both income disparities and an unequal timeshare variable. This confused many. Luckily in Opinion 34, the Court declined to mathematically apply any of the new definitions for the purpose of calculating child support and reaffirmed *Barbagallo v. Barbagallo*, 105 Nev. 546, 779 P.2d 534 (1989) and *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998).

As with custody cases, the Court also requires a two-part test to modify child support: that there has been a substantial change in circumstances since the entry of the last order and that the modification is in the best interest of the child. The purpose is to avoid repetitive serial motions for modification, until the right amount of support is obtained. *Mosley v. Figliuzzi*, 113 Nev. 51, 930 P.2d 1110 (1997). A party may also move for the district court to review a child support order after three years. Although a party may not have to show changed circumstances for the district court to review the order after three years, the party must show a change in circumstance for the district court to modify the order.

Although the above stated information may assist some in their pending child custody cases, please keep in mind that the above was a "cliff notes" version of this case. Opinion 34 was 41 pages long with tons of goodies that could effect any position one takes in a child custody case. Careful consideration should be given in dissecting and understanding this opinion, prior to walking into a courtroom or filing your next motion. **G**

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