A legal note from Marshal Willick about relocation cases involving parents who share joint physical custody.

An attorney wrote in, asking for assistance in a case where the client had joint physical custody, and sought to relocate, but faced a judge who seemed to think there was a two-step process for relocation in such cases (first establishing a modification of custody under *Truax* and then looking at relocation). There appears to be some confusion, stemming from both judicial and legislative action; given the number of these cases, especially after *Rivero II*, it is worth clarifying the analysis to be followed.

I. THE ISSUE; BACKGROUND DECISIONS

In a situation where the parents have been determined to have joint physical custody, and one parent has a desire or need to relocate (due to a relocating later spouse, job opportunity, etc.) what is the court to determine, and in which order?

Originally, in *Truax v. Truax*, 110 Nev. 437, 874 P.2d 10 (1994), the Nevada Supreme Court held that where there was joint rather than primary custody, "only" the "best interest" standard need be applied in a request for a change in custody, seemingly making any change in custody terms easier for joint custody than any other alteration in custody. But that impression has been eroded.

In *Mosley v. Figliuzzi*, 113 Nev. 51, 930 P.2d 1110 (1997), the Court found that under NRS 125.490, where the parents had "agreed to an award of joint custody," there is a presumption that joint custody is in the best interest of the child. This, necessarily, makes any change in custody harder, since a moving party would have to not only show best interest, but also do whatever is necessary to "overcome a presumption."

In *Blaich v. Blaich*, 114 Nev.1446, 971 P.2d 822 (1998), the parties had joint legal and physical custody of their child. The mother received an unexpected job offer in Texas. The father would not consent to the move, and when the mother moved to relocate, the father responded with a request for primary physical custody. The lower court denied the mother's relocation request and granted the father's motion for primary custody.

On appeal, the Court reversed the lower court holding that it would be necessary to first determine primary physical custody before assessing a move motion, stating that the face of NRS 125A.350 (the relocation statute then in effect) explicitly included joint custody cases. The Court criticized the lower court for its "reluctance" to apply the *Schwartz* line of cases to joint custody cases, and described its holding in *McGuinness v. McGuinness*, 114 Nev. 1431, 970 P.2d 1074 (1998), as requiring the *Schwartz* analysis "regardless of the nature of the custody arrangement." *McGuinness* had spoken of the best interest of the child being "inextricably intertwined" with that of the parents, basically saying that if the relocation was good for mom, there would be a benefit to the child as well. Similar language was used in *Halbrook*.

The Nevada Legislature then amended the relocation statute, recodifying it as NRS 125C.200, in

1999. As altered, the relocation statute no longer explicitly recited the words "joint custody," but referred to the "custodial parent."

Then came *Potter v. Potter*, 121 Nev. 613, 19 P.3d 1246 (2005), where the Court returned to the subject of joint physical custody and proposed relocations. Apparently overruling *Blaich*, the Court observed that the new NRS 125C.200 did not define "custodial parent" and contained no reference to shared or joint custody.

Examining the legislative history of the change to the statute, the Court held that a parent sharing joint physical custody is not ***eligible*** to petition to relocate with a minor child under NRS 125C.200. Instead, a parent with joint physical custody of a child who wishes to relocate outside of Nevada with the child must move for primary physical custody "for the purposes of relocating." Such a motion is to be resolved under the best interest of the child standard established for joint custody situations in NRS 125.510 and *Truax*. The party proposing to relocate has the burden of establishing that it is in the child's best interest to reside outside of the state with the moving parent as the primary physical custodian.

The Court has been quiet on the matter since then, except that in *Rivero II*, the Court somewhat cryptically stated that the form of custody (joint or primary) was important for three reasons, the second of which was "it requires a specific procedure if a parent wants to move out of state with the child." Presumably, the "specific procedure" is the one detailed in *Potter*.

II. WHAT TO DO IN THE REAL WORLD

The exact language of *Potter* would appear to be the problem plaguing the district courts, as they cast about for a "third option" not provided for in the case.

Specifically, the case header says that the motion for change of custody can be "for the purpose of relocation." And further, that such a motion forces the issue by requiring that the "district court must then determine whether the best interests of the children are better served by living outside of Nevada with the relocating parent as the primary physical custodian or living in Nevada with the nonmoving parent having primary physical custody."

And, of course, the impending move may be considered as a relevant factor in the custody-change motion. As phrased in *Potter*:

> In considering this motion, the district court must determine whether the moving parent will be relocating outside of Nevada with the child if he or she obtains primary custody. The district court may also consider, among other factors, the locales of the parents and whether one parent had *de facto* primary custody of the child prior to the motion. The moving party has the burden of establishing that it is in the child's best interest to reside outside of Nevada with the moving parent as the primary physical custodian. The issue is whether it is in the best interest of the child to live with parent A in a different state or parent B in Nevada.

So the reported question asked by certain judicial officers in such cases – whether "just applying *Traux*, there is a basis to modify the joint custody order before looking at the relocation" is a non-sequitur. The filing of a motion to modify custody in anticipation of relocation ***is*** a basis to modify – the question is to ***which*** parent primary physical custody would be awarded.

While the relocation statute is inapplicable to joint physical custody cases, obviously, most of the same factors as would apply in a relocation case (who would provide access to the child to the other parent, etc., etc.) are involved. But a relocation request in a joint custody case forces the issue – primary custody to the moving parent, or to the staying-behind parent. It does not appear that "motion denied; joint custody remains in effect" is an available option.

III. THE IMPACT OF *RIVERO II*

Under *Rivero v. Rivero*, 125 Nev. ___, 216 P.3d 213 (Adv. Opn. No. 34, Aug. 27, 2009) ("*Rivero II*"), all physical custodial regimes involving 60/40 custodial time shares or closer are now considered "joint physical custody." One of the impacts was the inevitable increase in the number of cases that will be categorized as constituting "joint custody."

In the area of relocation, this indicates that there will be more relocation-based dissolution of joint custody orders as time goes on. There are several other developing ramifications of *Rivero II* that have begun to appear, which will be the focus of future legal notes.

IV. CONCLUSION

Where a relocation request is made by one of two parents sharing joint physical custody, a district court should not look to see if there is a "best interest" reason to change the custodial placement in the abstract, before considering the relocation itself.

Rather, a relocation request in the context of a joint physical custody case terminates joint custody, and forces the district court to choose one of two primary placements. The relocation itself – and the life, schools, housing, economics, etc. in the two possible placements, give the district court specifics which, collectively, are the factors upon which a best interest analysis can and should be made.

V. ASIDE REGARDING UPCOMING QDRO SEMINAR

I've been asked to announce when the next CLE will be regarding pensions and retirement benefits. This Friday, September 17, from 1:00 to 3:15, there is a CLE for the Clark County Bar Association with Senior Financial Advisor Patti Peterson, entitled "State of Nevada Pensions: Information Relevant to Estate Planning & QDROs," at the CCBA Office at 725 South Eight Street. Details at http://www.clarkcountybar.org/index.php?option=com_content&task=blogcategory&id=42&Itemid=77#pensions.

VI. QUOTES OF THE ISSUE

(To a court requesting a precedent for his position): "I will look, your Honor, and endeavor to find a precedent, if you require it; though it would seem to be a pity that the Court should lose the honor of being the first to establish so just a rule."
– Rufus Choate (1799-1859) Lawyer, Congressman, Senator, Mass. Attorney General

"Good ideas are not adopted automatically. They must be driven into practice with courageous impatience."
– Hyman Rickover (1900-1986)

"It does not astonish or make us angry that it takes a whole year to bring into the house three great white peonies and two pale blue irises. It seems altogether right and appropriate that these glories are earned with long patience and faith . . . and also that it is altogether right and appropriate that they cannot last. Yet in our human relations we are outraged when the supreme moments, the moments of flowering, must be waited for . . . and then cannot last."
– May Sarton, *Journal of Solitude*

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