How Many Days Are in a Week and the Meaning of the *Rivero II* Opinion

by Marshal S. Willick

"Reality is that stuff which, no matter what you believe, just won't go away."
– David Paktor

"For every complex problem, there is a solution that is simple, neat, and wrong."
– H.L. Mencken

"There's no better way of exercising the imagination than the study of law. No poet ever interpreted nature as freely as a lawyer interprets truth."
– Jean Giraudoux

Some lawyers and judges are making the determination of custodial time-shares more difficult than necessary, turning a simple problem into a complex one without real cause. As the trial court judiciary has splintered on the matter, unable or unwilling to reach consensus, reaching predictability and consistency in child custody cases will require yet another trip to the Nevada Supreme Court – which is already in process.

I. BACKGROUND: *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."

The *Opinion* is actually pretty far-ranging, and contains a number of holdings touching on the meanings, and rules for modifying, legal custody, physical custody, and child support. Unfortunately, certain lawyers and judges have unnecessarily fixated on individual words or sentences in the 40+ page *Opinion*, resulting in application of the case at significant variance from its plain meaning.

Specifically, far too many people have got themselves wrapped around the axle when reviewing a single paragraph of the *Opinion*. Before looking at that paragraph, its context should be noted.

The Family law Section was invited to – and did – submit an *Amicus Curiae* Brief to assist the Court in analyzing the legal issues relating to the definitions of legal and physical custody (the brief is posted at http://www.willicklawgroup.com/appeals).

After stepping through preliminary matters, and the facts and procedural history of the case, the Court engaged in a discussion outlined essentially the same way as laid out by the Section; the portions of the Court's outline dealing with the law beyond the parties to that case relevant to this article was:

I. Legal custody

II. Physical custody
    A. Joint physical custody
        1. Defining joint physical custody
        2. The timeshare required for joint physical custody
        3. Calculating the timeshare
    B. Defining primary physical custody

In short, section II was intended to set out an approach to be followed by courts seeking to resolve disputes. It was ***pre***scriptive, not ***pro***scriptive – intended to give courts a roadmap, not laying out a list of "forbidden fruit." Guidance as to how to use the approach set out was illustrated in section II(B) and actually applied to the parties to the case in section III; it is losing the forest for the trees that has led some working in this area astray.

II. THE PROBLEM OF DEFINING TIME

A. THE WORDS USED IN *RIVERO II*

Where some lawyers and judges have over-focused is a single paragraph in section II(A)(3), which states:

> The district court should calculate the time during which a party has physical custody of a child over one calendar year. Each parent must have physical custody of the child at least 40 percent of the time, which is 146 days per year. Calculating the timeshare over a one-year period allows the court to consider weekly arrangements as well as any deviations from those arrangements such as emergencies, holidays, and summer vacation. In calculating the time during which a party has physical custody of the child, the district court should look at the number of days during which a party provided supervision of the child, the child resided with the party, and during which the party made the day-to-day decisions regarding the child. The district court should not focus on, for example, the exact number of hours the child was in the care of the parent, whether the child was sleeping, or whether the child was in the care of a third-party caregiver or spent time with a friend or relative during the period of time in question.

The concepts here are pretty straightforward – a parent has "custody" if a child "resides" with the parent, or if the parent "provides supervision" and "makes day-to-day decisions" regarding the child.

Some judges have fixated on the last sentence of that paragraph, and created their own rules based on that focus. One, in a recent opinion, proclaimed that recognition of the actual custodial time exercised by the parents would violate "counting prohibitions" – a term coined and repeated at least 20 times in the resulting order. Some of the ways judges have spun out based on the Court's language are discussed below.

What was meant by the language used in the above quote was explained in Section II(B) ("Defining

primary physical custody"), which explains a primary focus on "the child's residence" so that "the party with primary physical custody is the party that has the primary responsibility for maintaining a home for the child and providing for the child's basic needs." The text there goes on to note that a primary physical custody arrangement "may encompass a wide array of circumstances."

Unfortunately, this illustrative language has led at least one department of the family court to introduce a second kind of erroneous reading, also discussed below.

All of the "constructed" readings by trial judges ignore the paragraph by the Nevada Supreme Court immediately below the paragraph quoted above – which really does require them to take into account the ***actual custodial time*** of the parents:

> Therefore, absent evidence that joint physical custody is not in the best interest of the child, if each parent has physical custody of the child at least 40 percent of the time, then the arrangement is one of joint physical custody.

B. WHY THE NEVADA SUPREME COURT USED THOSE WORDS

We had suggested to the Court that "the purpose of the 40% threshold is to define a base and ensure that each parent is routinely the custodian of a child for a meaningful and significant period of time." We further cautioned that "anomalous" or transient disruptions in the usual schedule should not be seen or used as opportunities to alter custodial labels.

The Court addressed those concerns by adopting the "one-year lookback" provision quoted above, and further explained in section III(B), which some trial courts seem to inexplicably ignore:

> Under the definition of joint physical custody discussed above, each parent must have physical custody of the child at least 40 percent of the time. This would be approximately three days each week. Therefore, the district court properly found that the 5/2 timeshare included in the parties' divorce decree does not constitute joint physical custody. The district court must then look at the actual physical custody timeshare that the parties were exercising to determine what custody arrangement is in effect.
>
> . . . .
>
> Specific factual findings are crucial to enforce or modify a custody order and for appellate review. . . . the district court must evaluate the true nature of the custodial arrangement, pursuant to the definition of joint physical custody described above, by evaluating the arrangement the parties are exercising in practice, regardless of any contrary language in the divorce decree.

The *Amicus* Brief had suggested making custodial time-shares between 40 and 49% a trigger for a discretionary labeling of custody as joint. The Court elected to make that labeling automatic, indicating a desire to make the matter non-discretionary. Given what trial court judges are doing, this intended direction for consistency has proven to be ironic.

III. WHAT COURTS ARE DOING

The majority of trial courts are apparently doing as the *Rivero* panel suggested at the recent Ely conference – looking at what the normal *de facto* time share is, and apportioning it between the parents in accordance with their supervision of the child. Since kids are normally not exchanged at midnight, this necessarily entails apportioning to parents some partial days – half, one third, etc., which turn into a percentage of time in view of the one-year lookback. 146 days or more equals 40% and is joint custody; less than that does not, and is not.

Some judges, however, have decided to make up altogether different approaches, which are leading to some bizarre conclusions.

One court has announced that any time a parent touches a child in a day constitutes "custody" for that day. So if the parties saw the child, for any length of time, each got a "day" – theoretically, up to 14 in every week, yielding a 730-day year.

Another court has decided that the language first quoted above has created an "all or nothing" situation, so that if one parent had eight hours out of each 24, that reality must be ignored, and the other parent would be found to have 100% custody of the child.

And a third court has managed to so parse the *Rivero* holding so as to do exactly what the case itself specifically prohibited – calling a 5/2 timeshare "joint custody." The court did so by a combination of what the two other jurists noted above did – first rejecting any partial allocations of days as "counting prohibitions," and then finding that "it is feasible for both parties to be credited for the same day during a given calendar year," by finding that time is not "mutually exclusive." All of that extended analysis flowed from the court's observation that "Although it easily could have, nowhere does *Rivero II* refer to a day as being defined as a 24 hour period of time."

That court evaluated a time-share where one parent saw the child from 10:00 a.m. on Tuesdays until 6:00 p.m. Wednesdays, and every other weekend (alternated between Friday at 10:00 a.m. to 3:00 p.m. Saturday, and 3:00 on Saturday until 3:00 p.m. Sunday). Graphically, for three typical months, that time-share looked like this:

.....

In fact, this time-share is essentially a 5/2 custody split (expanded by a few hours) – precisely the same as the time share explicitly ruled ***not*** to be "joint custody" in *Rivero II*. But by redefining terms, this court talked itself into labeling the above time-share ***as*** joint custody! As detailed below, the timeshare displayed is actually 67% to 33% – clearly one of primary custody to one parent, and visitation to the other.

IV. COSMOLOGY AND COURTROOMS

Rivero II contains no "counting prohibitions." It does not require judges to ignore reality, or abandon common sense.

It is true that neither the Section's *Amicus* Brief, or the Court's *Opinion*, defined a "day." Frankly we thought Copernicus had taken care of that problem, and that it wasn't necessary. Other States have apparently been warier as to the potential creativity of their judiciary. For example, Virginia statute 20-108.2 G 3(c) provides:

> Definition of a day. For the purposes of this section, "day" means a period of 24 hours; however, where the parent who has the fewer number of overnight periods during the year has an overnight period with a child, but has physical custody of the shared child for less than 24 hours during such overnight period, there is a presumption that each parent shall be allocated one-half of a day of custody for that period.

Presumably, the Nevada Supreme Court will have to take on this matter when the next case reaches it. But in the meantime, I do not think it is asking too much for our courts to acknowledge that there are 24 hours in a day. Seven days in a week. 365 days in a year (most years). This is pretty basic "judicial notice" stuff.

Attached to the *Rivero II Amicus* Brief was a chart giving typical "measurements of custodial time." It is posted at http://www.willicklawgroup.com/child_custody_visitation under the heading "Percentage of Custodial Time in Typical Custody Schedules." This really is not all that difficult – a typical every-other-weekend schedule, for example, equates to 14%. Every other weekend, plus one overnight per week: 29%. And every other weekend (52 days), plus two weeks in summer (14 days), plus Mother's Day or Father's Day (1 day), plus Thanksgiving or Christmas (2 days), plus birthdays (2 days), plus a miscellaneous day (1 day): 20% . Etc.

Likewise, it's not hard to convert a number of overnights to approximate percentages of custodial time – 37 = 10%; 146 = 40%; 183 = 50%. As always, however, what the parents actually ***do*** defines their actual time-share, especially in a 24-hour town where one parent may be responsible for a child, providing supervision and making day-to-day decisions for part of a day – even every day – but the child sleeps at the other parent's home, where ***that*** parent necessarily is "responsible" for that time.

As noted by the Court in the text quoted above, the idea of a full one-year look-back is to take into account both the normal "weekly arrangements" and the reality of emergencies, holidays, summer vacation, etc. to determine the reality of who has ***actually*** been providing what percentage of physical custody of a child. It makes no sense to ignore reality while purporting to measure it.

V. TOOLS

For those that find it too difficult to "see" a time-share from words, there are several tools available. This office, for example, typically uses "Custody X Change" (see www.custodyxchange.com), which reports that as for the case discussed in detail above, the overall time-share is 67% to 33%, while the "overnights" (if that was relevant for any reason) would be 73% to 27%. It produced the graphics displayed above, as well. Obviously, other such software exists.

Using such tools, it is relatively simple to load in a "normal" schedule, and any superseding holiday and vacation schedules, and see what the time share actually is. Does this "count hours?" Well, only

in the sense of not defying or ignoring reality – over the course of a year, eight hours a day is about 122 days!

VI. CONCLUSIONS

The purpose of *Rivero II* was to bring consistency and predictability to child custody and support proceedings. As the Court put it:

> District courts can use their discretion to make fair determinations in individual child custody cases. However, this becomes unfair when different parties similarly situated obtain different results. Such unreliable outcomes also make it difficult for attorneys to advise their clients and for parties to settle their disputes. Therefore, the timeshare requirement that this opinion establishes is both necessary to ensure consistent and fair application of the law and proper under this court's precedent.

The failure of the trial court judiciary to achieve consensus on such basic matters as what constitutes a "day" and how many of them pass by in a year will apparently require yet further direction from the Nevada Supreme Court. It can only be hoped that the necessary direction comes soon, simply, and consistently with cosmological reality.

Marshal S. Willick, Esq. is the Principal of the WILLICK LAW GROUP, an A/V-rated Las Vegas family law firm. Mr. Willick can be reached at 3591 East Bonanza Rd., Ste. 200, Las Vegas, NV 89110-2198. Phone: (702) 438-4100; fax: (702) 438-5311; e-mail: Marshal@WillickLawGroup.com.