

1                   **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2  
3                   **CHRISTINA CALDERON STIPP,**

4                   Appellant/Cross-Respondent,

5                   vs.

Case No.: 57327

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6                   **MITCHELL DAVID STIPP,**

7                   Respondent/Cross-Appellant.

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9  
10                   **BRIEF OF AMICUS CURIAE**

11                   **FAMILY LAW SECTION OF NEVADA STATE BAR**

12  
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## TABLE OF CONTENTS

I.	STATEMENT OF IDENTITY, ETC., PER NRAP 29(d)(3) .....	1
II.	THE CURRENT STATE OF THE LAW .....	1
III.	THE OUTER BOUNDARY AND THE PRACTICAL EFFECTS.....	3
A.	The 40% Outer Boundary.....	3
B.	What is a day?.....	4
C.	What other states do.....	6
IV.	THE STIPP CUSTODY SCHEDULE DOES NOT MEET THE 40% THRESHOLD SET FORTH IN <u>RIVERO</u> OR THE SPIRIT OF JOINT CUSTODY .....	8
V.	THE FLS RECOMMENDATION.....	10
VI.	CONCLUSION.....	11

## TABLE OF AUTHORITIES

### STATE CASES

<u>DaSilva v. DaSilva</u> , 119 Cal.App.4th 1030, 15 Cal.Rptr.3d 59 (2004) .....	7
<u>In re Marriage of Hansen</u> , 81 Wash.App. 494, 914 P.2d 799 (1996).....	7
<u>Mosley v. Figliuzzi</u> , 113 Nev. 51, 930 P.2d 1110 (1997) .....	3
<u>Rivero v. Rivero</u> , 125 Nev. 410, 216 P.3d 213 (2009).....	1, 2, 3, 4, 8
<u>Wesley v. Foster</u> , 119 Nev. 110, 65 P.3d 251, (2003) .....	2
<u>Wright v. Osburn</u> , 114 Nev. 1367, 970 P.2d 1071 (1998) .....	2

### FEDERAL STATUTES

IRC § 152(e).....	7
-------------------	---

### STATE STATUTES

NRAP 29 .....	1
NRAP 29(d)(3).....	1
NRS 125.460 .....	3
Utah Code Ann. § 78-45-2(13) .....	6
VA Code Ann. § 20-108.2(G)(c)(3).....	6, 7
WV Code § 48-1-239 .....	6

### OTHER AUTHORITIES

Brief of <i>Amicus Curiae</i> , Family Law Section of Nevada State Bar, <u>Rivero v. Rivero</u> , 125 Nev. 410, 216 P.3d 213 (2009) (No. 46915) .....	6
IRS Publication 504 (2011), Divorced or Separated Individuals .....	7
Marshall S. Willick, <i>How Many Days are in a Week and the Meaning of Rivero II Opinion</i> , Nev. Fam. L. Rep., Vol. 23, No. 3, 2010 .....	5

### RULES

Oregon Administrative Rule 137-050-0730(2)(c).....	6
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**AMICUS CURIAE BRIEF**  
**OF**  
**THE FAMILY LAW SECTION OF THE STATE BAR OF NEVADA**

The Family Law Section of the State Bar of Nevada (hereinafter “FLS”) submits its *Amicus Curiae* brief in accordance with NRAP 29 and the Court’s April 24, 2012 order. The Court invited input from the FLS regarding whether, in light of the circumstances presented in this case, the Court should revisit or clarify its decision in Rivero v. Rivero, 125 Nev. 410, 216 P.3d 213 (2009). While there are many issues presented in this appeal, the FLS seeks to provide comment only regarding the Rivero timeshare analysis.

**I. STATEMENT OF IDENTITY, ETC., PER NRAP 29(d)(3)**

The FLS is a voluntary association of Nevada attorneys and judges from across the State, interested in the field of family law, forming a section of the bar with the purposes of furthering the knowledge of the members of the Section, the Bar and the Judiciary in all aspects of family law, administering CLE, distributing family law publications, and assisting the Board of Governors in the implementation of programs, policies, standardization and guidelines in the field.

The FLS has no stake in the merits of the underlying dispute, and takes no position regarding the merits of the parties’ substantive claims. Rather, the FLS is concerned with the proper functioning of the Family Courts, and more generally, the evolution of family law in Nevada. By this filing, the FLS intends to provide this Court with an “in the trenches” opinion of how family law practitioners and judges grapple with the issues presented in this appeal.

**II. THE CURRENT STATE OF THE LAW**

Approximately three years ago, the Court issued Rivero v. Rivero, 125 Nev. 410, 216 P.3d 213 (2009), a seminal and far-reaching child custody case

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1 dealing with issues of legal custody, physical custody, and child support.<sup>1</sup> In  
2 Rivero the court set forth definitions of physical custody. These definitions are  
3 “crucial” to the legal standards applied in custody modifications, child support,  
4 and relocation issues. Id. at 422.

5 This Court confirmed that joint physical custody schedules “must  
6 approximate an equal timeshare,”<sup>2</sup> [but] given the variations inherent in child  
7 rearing, such as school schedules, sports, vacations, and parents' work schedules,  
8 to name a few, an exactly equal timeshare is not always possible. Therefore, there  
9 must be some flexibility in the timeshare requirement.” Id. at 424-25. As the  
10 Rivero Court framed the question, “when does a timeshare become so unequal  
11 that it is no longer joint physical custody?” Id. at 425. To address that question,  
12 the Court established that parents with unequal timeshares share joint physical  
13 custody so long as each parent has physical custody of the child at least 40% of  
14 the time. Id. at 425-26.

15 By ruling so, the Court confirmed that joint physical custodians have  
16 essentially equal time, with the **outer limits** of joint physical custody being a 60-  
17 40% timeshare. Thus, the 40% timeshare is the threshold for defining the bare  
18 minimum of joint physical custody. After all, the goal as stated by the Rivero

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20 <sup>1</sup> The court appropriately noted that the legislature has not explicitly defined joint  
21 physical custody. “However, despite these gaps, attorneys must still advise their  
22 clients, public policy still favors settlement, and parties are still entitled to  
23 consistent and fair resolution of their disputes.” Rivero at 426. The FLS reiterates  
24 that defining joint physical custody is properly a legislative function and thus far,  
the legislature is silent on the issue.

25 <sup>2</sup> Nevada law “presumes that joint physical custody approximates a 50/50  
26 timeshare.” Rivero at 424 (citing Wesley v. Foster, 119 Nev. 110, 112-13, 65  
27 P.3d 251, 252-53 (2003) (discussing shared custody arrangements and equal  
28 timeshare); Wright v. Osburn, 114 Nev. 1367, 1368, 970 P.2d 1071, 1072 (1998)  
(discussing joint physical custody and equal timeshare)).

1 Court and the Nevada Legislature is “[t]o encourage such parents to share the  
2 rights and responsibilities of child rearing.” *Id.* at 423 (citing NRS 125.460).  
3 Further, the goal is to “educate and encourage parents regarding joint custody  
4 arrangements, encourage parents to cooperate and work out a custody  
5 arrangement before going to court to finalize the divorce, ensure the healthiest  
6 psychological arrangement for children, and minimize the adversarial, winner-  
7 take-all approach to custody disputes.” *Id.* at 423 (citing Mosley v. Figliuzzi, 113  
8 Nev. 51, 63-64, 930 P.2d 1110, 1118 (1997)). Both the letter and the spirit of the  
9 Rivero holding and the concept of joint physical custody reflect an equal or nearly  
10 equal division of parenting time and duties. The law should not be used as a tool  
11 to cobble together a joint custody order where one parent routinely takes on  
12 greater responsibility for a child than the other.<sup>3</sup>

### 13 **III. THE OUTER BOUNDARY AND THE PRACTICAL EFFECTS**

#### 14 **A. The 40% Outer Boundary.**

15 With these concepts and goals in mind, the FLS opines that the 40%  
16 timeshare is the **outer boundary** of what constitutes essentially equal time. The  
17 FLS opines and agrees with the Supreme Court that a parent who does not reach  
18 the 40% timeshare is not a joint physical custodian.

19 The practical question becomes “How does a District Court determine  
20 when a parent reaches the threshold 40%?” The Rivero Court provides  
21 significant guidance. Specifically, it instructs in calculating timeshares over the  
22 course of a calendar year:

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25 <sup>3</sup> The FLS does not ignore or diminish the important role of a secondary  
26 custodian who may also be an active, involved parent, and instrumental to the  
27 development of his or her child. The designation of joint physical custody is  
28 focused on the parents having nearly equal custodial time and the nearly equal  
responsibilities that flow from that time.

1 [T]he district court should look at the number of days during which a  
2 party provided supervision of the child, the child resided with the  
3 party, and during which the party made the day-to-day decisions  
4 regarding the child. The district court should not focus on, for  
5 example, the exact number of hours the child was in the care of the  
6 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.

7 Id. at 427.

8 Rivero clearly states 40% of the time is approximately three days per week  
9 or 146 days per year. Id. at 427, 430. The 146 days may include vacation time  
10 and extended periods during summer months. Id. at 427. Again, this is in line  
11 with the general concept that when parents share joint physical custody they have  
12 **nearly equal** custodial time with the child; not less than 40%.

13 The instant appeal deals with a situation where the parents were not equal  
14 custodians with a schedule that provided one parent with less than 40% of the  
15 time with the child. From the perspective of the FLS and judges informally  
16 polled, a significant number of litigated custody cases appear to involve a parent  
17 who nearly, but does not meet the 40% mark. The FLS believes the District  
18 Courts will benefit from greater guidance from the Court in determining what  
19 constitutes a “day” pursuant to Rivero. Litigants and the District Courts need  
20 clarity to establish custody schedules, and by determining a “day,” predictability  
21 will benefit everyone involved, and it is likely to promote settlement.

#### 22 B. What is a day?

23 Webster’s Dictionary defines a day as “the time established by usage or  
24 law for work, school, or business” and “the average solar day of 24 hours.” The  
25 FLS, relying in part upon the published works and alchemy of Marshal S.

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1 Willick, also believes that a day is 24 hours.<sup>4</sup> However, the informal polling of  
2 the District Court Judges and practitioners by the FLS demonstrates the need for a  
3 modest amount of flexibility and discretion to the District Court Judges, rather  
4 than a rigid definition and application of a 24-hour period.

5 The District Courts require modest flexibility when determining if a parent  
6 enjoys a significant portion of the day, such that he or she should be awarded that  
7 day for calculation purposes. But, a significant portion of the day must be within  
8 only a few hours of a 24-hour period. As it happens often now, a common  
9 nonsensical result is reached where both parents are assigned the same day by a  
10 qualitative recasting to accommodate activities and involvement with a child.  
11 This occurs most often following litigation at the outer boundaries of the 40%  
12 when trying to determine “joint” or “primary.”

13 Stated differently, if the District Courts and litigants are reminded that in  
14 order to truly share joint physical custody, then parties must share equal, or nearly  
15 equal, time with their child. And this is a different conceptual construct from the  
16 more common outer boundary arguments over custodial schedules, which provide  
17 numerous partial days (often for exchanges). When calculating days to reach the  
18 threshold of 146 days per year (the 40%), significant portions of a particular day,  
19 something less than 24 hours, may be counted providing it is close to the 24-hour  
20 mark.

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22 <sup>4</sup> As stated by Marshall S. Willick in *How Many Days are in a Week and the*  
23 *Meaning of Rivero II Opinion*, Nev. Fam. L. Rep., Vol. 23, No. 3, 2010, Rivero  
24 “does not require judges to ignore reality, or abandon common sense.” Id. at 18.  
25 Willick, a co-author of the FLS amicus brief on the Rivero rehearing,  
26 acknowledges that “neither the Section’s *Amicus* Brief, or the Court’s *Opinion*,  
27 defined a ‘day.’ Frankly, we thought Copernicus had taken care of that problem,  
28 and that it wasn’t necessary.” Id. at 18. He presumes the instant or similar appeal  
was already in the works, and made a case for simply asking courts to take  
judicial notice of a day being a 24-hour period, with seven days in a week, and  
365 days in most years until the Court or legislature clarifies the issue.

1                   **C.     What other states do.**

2           Not all states count days as 24-hour periods. Many states count overnights  
3 when necessary under their rules, typically for custody analysis, child support or  
4 eligibility for public benefits.<sup>5</sup> Frequently, the overnight rule is flexible. Some  
5 States take into consideration situations where the child has significant time  
6 periods in the physical custody of the other parent during the day but does not  
7 stay the night.<sup>6</sup> Other states have complex counting formulas, which may result

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9       <sup>5</sup> For example, Utah defines joint physical custody as 30% or more overnights  
10 with a parent. Utah Code Ann. § 78-45-2(13). West Virginia defines joint  
11 custody as more than 35% of overnights per year. WV Code § 48-1-239.  
12 Virginia law states that a day is 24 hours, with the presumption that overnights  
13 with one parent less than 24 hours is counted as a divided day. VA Code Ann. §  
14 20-108.2(G)(c)(3). Please note that a full summation of the law of the fifty states  
15 with respect to custody determination was included as an appendix to Brief of  
16 *Amicus Curiae*, Family Law Section of Nevada State Bar, Rivero v. Rivero, 125  
17 Nev. 410, 216 P.3d 213 (2009) (No. 46915), as Exhibit A. For further reference,  
18 the FLS's Rivero rehearing Amicus Brief discusses other states that use  
overnights at least as a starting point to determine the physical custody timeshare  
percentage for child support purposes. See, e.g., Brief of *Amicus Curiae*, Family  
Law Section of Nevada State Bar, Rivero v. Rivero, 125 Nev. 410, 216 P.3d 213  
(2009) (No. 46915) at Exhibit 3.

19       <sup>6</sup> For example, Oregon calculates child support based in part on the number of  
20 overnights the child is in each parent's physical custody to calculate the  
21 percentage timeshare. However, it allows the use of a "method other than  
22 overnights if the parents have an alternative parenting time schedule in which a  
23 parent has significant time periods where the child is in the parent's physical  
24 custody but does not stay overnight." Oregon Administrative Rule 137-050-  
0730(2)(c). The rule gives examples:

25           12 continuous hours may be counted as a day. Additionally, four-  
26 hour up to 12-hour blocks may be counted as half-days, but not in  
27 conjunction with overnights. Regardless of the method used, blocks  
28 of time may not be used to equal more than one full day per 24-hour  
period.

1 in unnecessary complications and concomitant litigation.<sup>7</sup> Finally, there are at  
2 least two States that define a day as a period of 24 hours for certain purposes,  
3 again with some discretion and flexibility.<sup>8</sup>

4 The Internal Revenue Code also uses overnights as the starting point for  
5 determining which parent is the custodial parent for purposes of allocation of the  
6 child dependency exemption, but includes flexibility if a parent's nighttime work  
7 schedule prevents overnights and the child lives with that parent a greater number  
8 of days.<sup>9</sup>

9 It is tempting to count where a child lays his or her head at night as the  
10 foundational basis for counting a day with a parent. It seems an easy bright line  
11 rule to apply, and some argue this approach is more child-centered (from the  
12 perspective of the "eyes of the child").

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15 <sup>7</sup> California's complex presumptive child support calculation requires a  
16 calculation of the total number of hours a parent has primary physical custody of  
17 a child. There are cases in that state that deal with how to assign the hours a child  
18 spends in school. DaSilva v. DaSilva, 119 Cal.App.4th 1030, 15 Cal.Rptr.3d 59  
19 (2004). Once the total number of hours are calculated in a given year for each  
20 parent, the percentage timeshare is calculated using the total number of hours  
21 available in a year or dividing the total hours by 24 to yield the number of days  
22 assigned to each parent.

23 <sup>8</sup> VA Code Ann. § 20-108.2(G)(c)(3). In re Marriage of Hansen, 81 Wash.App.  
24 494, 914 P.2d 799 (1996).

25 <sup>9</sup> Under IRC § 152(e), the custodial parent is the parent with whom the child lived  
26 for a greater number of nights during the year. If the child lived with each parent  
27 for an equal number of nights, the custodial parent is the one with the higher  
28 adjusted gross income. However, the IRS recognizes an exception and gives the  
exemption to the parent whose nighttime work schedule prevents overnights and  
the child lives a greater number of days but not nights with that parent. See also,  
IRS Publication 504 (2011), Divorced or Separated Individuals.

1 The FLS does not agree that counting overnights is the appropriate method  
2 to calculate the Rivero timeshare for several reasons. First, in States that define  
3 “day” as an overnight rather than a 24-hour unit, it was accomplished legislatively  
4 rather than by the judiciary. To date, the Nevada Legislature remains silent on  
5 this issue. Second, Rivero says not to focus on whether a child was sleeping in  
6 the timeshare analysis. Rivero at 427. Third, by focusing on overnights, the  
7 schedule may be manipulated even when the other parent actually has the  
8 significant portion of the remaining day (for example, picking up the child at 7:00  
9 a.m.). It becomes clear very quickly that overnight counting is insufficient to  
10 address parenting responsibilities and child involvement.<sup>10</sup>

11 As noted, Nevada custodial schedules reflect every conceivable  
12 arrangement to accommodate a child’s best interest and the parents’ work  
13 schedules. Given the 24-hour nature of the lives of many Nevadans, especially  
14 those involved in hospital care, emergency services and casinos, the overnight test  
15 may not work as well as in other states where the majority of professions seem to  
16 fall into “day jobs.” Accordingly, the FLS does not recommend adopting an  
17 overnight counting rule.

18 **IV. THE STIPP CUSTODY SCHEDULE DOES NOT MEET THE**  
19 **40% THRESHOLD SET FORTH IN RIVERO OR THE**  
20 **SPIRIT OF JOINT CUSTODY**

21 In the instant appeal, the District Court ordered a custodial schedule that  
22 provided Mr. Stipp with the children on the first, third, and fifth (when there is a  
23 fifth weekend in the month) weekends of each month. On the first and fifth  
24 weekends, Mr. Stipp’s time would begin Friday at 6:00 p.m. through Sunday at  
25 6:00 p.m. On the third weekend, Mr. Stipp’s time would begin at 9:00 a.m.,  
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27 <sup>10</sup> It has a certain logic whereby each parent would be mutually disadvantaged,  
28 but that is contrary to the goals of trying to reach justice and equity.

1 rather than 6:00 p.m. On the second and fourth weekends of the month, Mr. Stipp  
2 had the children from Thursday at 6:00 p.m. through Sunday at 6:00 p.m. Ms.  
3 Stipp had the option of having the children for the first weekend of the month, but  
4 if she exercised this option, Mr. Stipp would then have the children from  
5 Wednesday at 6:00 p.m. through Friday at 6:00 p.m.<sup>11</sup>

6 Under the FLS's interpretation of this timeshare, Mr. Stipp has the children  
7 for two days on the weekends that his time begins on Friday at 6:00 p.m., and for  
8 three days on the weekends that his time begins on Thursday at 6:00 p.m. Without  
9 considering holiday visits, Mr. Stipp has 130 days (26 weeks x 2 days + 26 weeks  
10 x 3 days) or an approximate 36% timeshare.

11 When the two-week contiguous vacation time is considered, Mr. Stipp  
12 gains nine days when he exercises vacation (not including the weekends that were  
13 already counted in the above total), but he loses five days (two of his weekends)  
14 for Ms. Stipp's vacation time.

15 As to the 3-day holiday weekends, there are four specified. Since they are  
16 alternated, the presumption is two are assigned to Mr. Stipp, and two are assigned  
17 to Ms. Stipp. On those weekends, Mr. Stipp loses an entire weekend on Ms.  
18 Stipp's 3-day holiday weekends (at least two days, sometimes three days), and  
19 Mr. Stipp gains a day on his holiday weekend.

20 For the children's birthdays, Mr. Stipp loses two days overall because Ms.  
21 Stipp receives the children for one of his weekend days.

22 The remainder of the holidays appear to have no net effect because they are  
23 split or are alternated one-day holidays.

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26 <sup>11</sup> In addition to being fairly complex, this schedule does not readily lend itself to  
27 easy calculation of time. For example, on average it provides Mr. Stipp with 130  
28 days per year, but can range from 129 days to 131 days depending on the leap  
year. However under any count, Mr. Stipp is still not a joint physical custodian.

1 In total, when holidays and birthdays are added and subtracted to the  
2 normal schedule, Mr. Stipp has physical custody between 128 and 130 days per  
3 year, or approximately 35.6% of the time.

4 The above analysis did not take into account the eight hours from 9:00 a.m.  
5 until 6:00 p.m. on the third weekend of each month because it is not significant  
6 under the above FLS interpretation of Rivero. However, even if the additional  
7 eight-hour periods were considered full "days," the schedule still only provides  
8 Mr. Stipp with 142 days total per year, which is approximately 38.9% of the  
9 custodial time and accordingly not joint physical custody.

#### 10 V. THE FLS RECOMMENDATION

11 The schedule defined as joint physical custody by the lower court in the  
12 Stipp matter is unsupportable under Rivero, and the governing rules set forth  
13 under Rivero do not need to be revised or clarified. However, if this Court is  
14 inclined to issue a clarification, the FLS recommends that it hails from the  
15 Nevada Legislature. We note States which count days for important decisions,  
16 such as child support, largely do so by way of statute. Thus far, the Nevada  
17 Legislature has not offered clarification on this issue.

18 Despite this, if the Court determines that a clarification is appropriate, the  
19 FLS suggests the starting point to recognize when counting a day, the District  
20 Courts should begin with the 24-hour unit of measure. The District Courts must  
21 have flexibility when the parent has physical custody of the child for a significant  
22 portion of a 24-hour day, but it should be a close approximation of the 24-hour  
23 unit.

24 The FLS does not believe parties will benefit by a rule splitting or  
25 excepting school days and daycare time. Regardless of whether a child is in  
26 school or daycare, the parent who has custodial responsibility that day has  
27 primary control and decision making for the child even when the child is at  
28 school. The custodial parent must make arrangements for the child to be prepared

1 for and get to and from school, as well as to deal with issues, which may arise  
2 during the school hours, such as illnesses or discipline problems. This custodial  
3 responsibility role does not diminish the legal custody obligations to  
4 communicate with each other on these issues, and communication with each other  
5 should be encouraged.

6 The FLS similarly does not believe sleeping hours should be disregarded.  
7 The child is in the parent's physical custody and that parent has tremendous  
8 responsibility should anything occur, such as illness or an emergency during  
9 sleeping hours. The FLS suggests that, to the extent further clarification is  
10 warranted, days are 24-hour periods, or for a significant portion thereof.

## 11 VI. CONCLUSION

12 The FLS reiterates that joint physical custody is equal or nearly equal  
13 custodial time, but no less than 40% of the total custodial time. If a parent with  
14 nearly 40% of the custodial time is to be designated a joint physical custodian,  
15 then the bright line outer limit becomes diluted such that the parents neither have  
16 essentially equal physical time with the child, nor share equal parenting  
17 responsibilities. When joint physical custody is appropriately in a child's best  
18 interest considering the individual facts of the case, there should be no difficulty  
19 in crafting a nearly equal timeshare with each parent having physical custody of

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1 the child for at least 40% of the time. If it is not possible, joint physical custody  
2 is not in the child's best interest.

3 **Affirmation pursuant to NRS 239B.030.** The undersigned affirms that  
4 the preceding document does not contain the social security number of any person

5 DATED this 17<sup>th</sup> day of September, 2012.

6 STATE BAR OF NEVADA,  
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1                   **ATTORNEY CERTIFICATE PURSUANT TO NRAP 28.2**

2           I certify that I have read this Brief of *Amicus Curiae*, and to the best of my  
3 knowledge, information and belief, it is not frivolous or interposed for any  
4 improper purpose, such as to harass or to cause unnecessary delay or needless  
5 increase in the cost of litigation.

6           I further certify that this Brief complies with all applicable Nevada Rules of  
7 Appellate Procedure, in particular NRAP 28(e), which requires every assertion in  
8 the Brief regarding matters on the record to be supported by appropriate  
9 references to the record on appeal.

10          I further certify that this Brief complies with the formatting requirements of  
11 Rule 32(a)(4)-(6), and either the page- or type-volume limitations stated in rule  
12 32(a)(7).

13          I understand that I may be subject to sanctions in the event the Brief is not  
14 in conformity with the requirements of the Nevada Rules of Appellate Procedure.

15          Dated this 17<sup>th</sup> day of September, 2012.

16  
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27  
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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Routsis Hardy-Cooper, over the age of 18, and that on the date set forth below, I served a true copy of:

• **BRIEF OF AMICUS CURIAE FAMILY LAW SECTION OF NEVADA STATE BAR**

on the party(ies) below by:

XX Placing an original or true copy thereof in a sealed envelope, postage prepaid for collection and mailing in the United States Mail at Reno, Nevada.

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DATED this 17<sup>th</sup> day of September, 2012.

/s/ Crystal Huss

Crystal Huss