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IN THE SUPREME COURT OF THE STATE OF NEVADA

KERSTAN MICONE, NKA KERSTAN HUBBS, Appellant, vs. MICHAEL MICONE Respondents.	Supreme Court Case No.: 67934 District Court Case No. D-1480650-D

FAST TRACK RESPONSE

1. **Name of party filing this Response**: DONN W. PROKOPIUS, ESQ, ATTORNEY FOR MICHAEL MICONE, RESPONDENT.
2. **Name of law firm, address, and telephone number of attorney submitting statement**: Donn W. Prokopius, Esq., 3407 West Charleston Las Vegas, Nevada 89102. 702-474-0500, Fax 702-951-8022
3. **Proceedings raising same issues.** None
4. **Procedural History**: Respondent agrees with Appellant's Procedural History, save for the incorrect reference to the minute order of June 2,2015, referred to in FTS, p 6. This minute order appears at AA II 0455.
5. **Statement of Facts.** Respondent agrees with Appellant's Procedural History. Respondent, however, takes issue with Appellant's statement at

sec. 15 (a), Appellant's Fast Track Statement (FTS) 8, wherein Appellant incorrectly states that the parties did not agree to transfer possession of Isabella to the paternal grandparents. The Court correctly found that that the parties consented to Isabella residing with her paternal grandparents since August 2013. AA 285, LL 9-27. Respondent points out that Isabella will be 18 in March, 2016. AA 278, L 24, thus Isabella has passed the preferential threshold. There is no issue that Isabella's grades have substantially improved, from a 1.0 GPA to a 3.3 GPA. Isabella, through this contentious domestic proceeding, seems to be living to her potential.

Respondent takes issue with the Appellant's reference to video recordings, rather than the transcripts themselves, said references are contained in Appellant's Statement of Facts, FTS, sec. 14 (g), PP 4-6, Respondent moves that and ask that these references be stricken and not considered for any purpose. Appellant did not furnish these recordings to Respondent. Further, reference to video tapes is outside what is properly part of the record, pursuant to NRAP 10 (a):

> **"a) The Trial Court Record.** The trial court record consists of the papers and exhibits filed in the district court, the transcript of the proceedings, if any, the district court minutes, and the docket entries made by the district court clerk. Nev. R. App. P. 10

6. Issue on Appeal.

a. The Court did not abuse its discretion by finding that the grandparents were primary custodians of the minor child, Isabella, who will be 18 in March, 2016. Further, the parties agreed to the Paternal Grandparents having Isabella reside with them, and the Appellant cannot be heard to complain. Additionally, with respect to the notice claim, the Appellant cannot vicariously claim standing for the paternal grandparents, who did not receive notice and are not a part of this appeal. Finally, the findings of fact and order were supported by substantial evidence, and are in the best interests of the minor child.

b. Res Judicata was properly applied with respect to the child support issues from June 25, 2013 hearing.

7. Argument:

THE COURT CORRECTLY FOUND THAT THE GRANPARENTS HAD BEEN THE PRIMARY CUSTODIAN OF ISABELLA SINCE 2013, AND THAT THIS SHOULD NOT BE CHANGED

There is no transcript from the June 25, 2013 hearing. The District Court made findings and entered orders based upon the June 25, 2013 hearing, and based upon the pleadings and the arguments on January 15, 2015. The Court found that Isabella had relocated to Reno, by agreement

of the parties, in August 2013. AA 285. Counsel for Respondent informed the Court that Isabella had with the grandparents since August, 2013. AA 486, LL 1-12. Counsel for Appellant conceded that Isabella was "placed with dad's parents. AA 488, LL 23-24. This was reiterated at P 489 LL 13-16. wherein Appellant's counsel again conceded that Isabella would be placed with the grandparents for ***two and a half years***. Thus the facts are not in dispute, and the Court's finding that Isabella primary resided with the grandparents is supported by the record. On appeal, this court will not disturb a district court's findings of fact if they are supported by substantial evidence. Keife v. Logan, 119 Nev. 372, 374, 75 P.3d 357, 359 (2003).

However, Appellant, in contorting form over substance, somehow believes that she should be considered primary custodian. While it is true that the grandparents did not intervene, likewise, the grandparents are not seeking support. The Appellant does not get to vicariously argue a right that is personal to the grandparents and not Isabella. Further, this matter was not addressed at the trial level, so it is waived.[1] Appellant does not

[1] This Court generally does not address arguments that are made for the first time on appeal and which were not asserted before the district court. *Old Aztec Mine, Inc. v. Brown,* 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) FDIC v. Rhodes, 130 Nev. Adv. Op. 88, 336 P.3d 961, 964 (2014)

question that there was a stipulated agreement, and that Isabella has resided in Reno since from the pleadings and representations of the parties' counsels. The Court, in the exercise of its discretion, rendered its decision on the pleadings and representations/ arguments of counsel.

Isabella resided with her grandparents for since August 2013, over two years. Isabella's GPA more than tripled, not to mention her now being active in several sports. It cannot be argued that the downturn in her grades, followed by the rise to a 3.3 GPA do not a finding that a material change in circumstances had been established. This case presents a stronger case for modification than the facts in Ellis v. Carucci, 123 Nev. 145, 161 P.3d 239 (2007), where this Court held that child's documented 4–month slide in academic performance constituted a substantial change in circumstances affecting welfare of child to warrant modification of custody arrangement giving mother primary physical custody to one in which mother and father were granted joint physical custody; and substantial evidence supported finding that modification was in child's best interest.

The parties agreed that Isabella should move to Reno to live with the grandparents. Parties may enter into custody agreements and create their

own custody terms and definitions. The courts may enforce such agreements as contracts. However, once the parties move the court to modify the custody agreement, the court must use the terms and definitions under Nevada law Rivero v. Rivero, 125 Nev. 410, 417, 216 P.3d 213, 219 (2009). In this case, the parties contracted for the grandparents to assume primary custody. Parties are free to contract, and the courts will enforce their contracts if they are not unconscionable, illegal, or in violation of public policy. Rivero v. Rivero, 125 Nev. 410, 429, 216 P.3d 213, 226 (2009).

The Court correctly determined, both factually and legally, that the grandparents had, and still have, primary custody of Isabella. Further, this is by agreement of the Appellant and Respondent. The following is from Rivero, at 428:

> "The focus of primary physical custody is the child's residence. 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. *See Barbagallo,* 105 Nev. at 549, 779 P.2d at 534 (discussing primary custodians and custodial parents in the context of child support); *see* Tenn.Code Ann. § 36–6–402(4) (2005) (defining "primary residential parent" as the parent with whom the child resides for more than 50 percent of the time). This focus on residency is consistent with NRS 125C.010, which requires that a court, when ordering visitation, specify the " habitual residence" of the child. Thus, the determination of who has primary physical custody revolves around where the child resides."

The facts of this face square completely with the holdings of Rivero and *Ellis v. Carucci*,*supra*. The grandparents have, and still have, de facto primary custody of the child prior to the motion. *see* Potter v. Potter, 121 Nev. 613, 119 P.3d 1246 (20050. The District Court did not err in ordering that Isabella "remain in the primary custody of the grandparents." AA 285, LL 23-27.

THE APPELLANT CANNOT SUSTAIN HER BURDEN TO ESTABLISHE THAT RES JUDICATA DID NOT APPLY WITH RESPECT TO THE JUNE 25, 2013 HEARING

This Court does not have the transcript of the June 25, 2013 hearing.[2] The VTS has not been furnished to the Respondent, and the Appellant has not sought leave to include the VTS in the place of a transcript. The rules regarding record transmission are plain and unambiguous: The burden of ensuring that the appellate record is transmitted to this court in a timely fashion falls squarely upon the appellant. City of Las Vegas v. Int'l Ass'n of Firefighters, Local No. 1285, 110 Nev. 449, 450, 874 P.2d 735, 736 (1994). As further stated, at 451:

> "Placing the burden on appellant to ascertain that the record is transmitted to this court in a timely fashion is not some procedural trap for the unwary. To the contrary, such a rule is vital to ensuring that appeals proceed to finality in an expeditious fashion, which is a

[2] **(a) The Trial Court Record.** The trial court record consists of the papers and exhibits filed in the district court, the transcript of the proceedings, if any, the district court minutes, and the docket entries made by the district court clerk. Nev. R. App. P. 10

> matter of the utmost concern to this court, to litigants in general, and to this State's citizens. It is important, therefore, that this court hold appellants to the requirements delineated in NRAP 11, and that we not condone the behavior of those who sit idly by while their cases clog this court's docket. This court's limited resources are best spent reviewing claims that have been vigorously pursued."

Further, this Court has not directed the transmittal of exhibits pursuant to NRAP 11 (b), nor has Appellant moved this Court to direct the transmittal of the VTS. This court should not consider what is represented in an unsubscribed tape with respect to the June 26, 2013 hearing.

As reflected in the District Court order that forms the basis of this appeal, on March 13, 2013, Appellant filed a lengthy Motion to Stay, in which Appellant raised this matter of child support, and asked the District Court to hear the modification. RA 004. AA 281. This matter was set on June 25, 2013, it was Appellant's Motion, and according to footnote one of the Court's Order AA 279, certain stipulations were entered. There is no transcript of this hearing. Further, as reflected in the District Court's order, 1) the matter was set on March 12, 2013 and Appellant did not appear, 2) Appellant re-noticed the hearing for June 25, 2013, and3) certain stipulations were put on the record on that day, *the extent and detail of the stipulations were omitted from the order*. AA 281. With no

record of the proceedings, Appellant cannot sustain her burden of establishing error.

The Court found that the child support issues were resolved at the June 25, 2013 hearing. Appellant did not place any objections to Respondent's failure to file a written response, any objection raised to this Court are waived. FDIC v. Rhodes, 130 Nev. Adv. Op. 88, 336 P.3d 961, 964 (2014). The record is not clear before this court whether or the purported child support arrearages were discussed. In any event, the Appellant could have raised this issue more clearly, and did not do so. Per the holding of Five Star Capital Corp. v. Ruby, 124 Nev. 1048, 194 P.3d 709 (2008) holding modified by Weddell v. Sharp, 131 Nev. Adv. Op. 28, 350 P.3d 80 (2015), claim preclusion would apply in any event. Claim preclusion, under which a valid and final judgment on a claim precludes a second action on that claim or any part of it, embraces all grounds of recovery that were asserted in a suit, as well as those that could have been asserted, and thus has a broader reach than issue preclusion. The Appellant raised the issue of support in her Motion to Stay, and the District Court heard all motions on that date, and signed orders on August 29, 2013 AA 146-147. Appellant prepared the order, and cannot be heard now to complain that res judicata did not apply. Claim preclusion applied, and whether it was

res judicata or claim preclusion, the Appellant cannot establish that the Court abused its discretion is applying res judicata, or claim preclusion, to the June, 2013 hearing. The District Court was correct, even if for the wrong reasons. See Kraemer v. Kraemer, 79 Nev. 287, 291, 382 P.2d 394, 396 (1963), holding that a correct judgment will not be reversed simply because it was based on the wrong reason.

VERIFICATION

1. I hereby certify that this fast track response complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

1. This fast track response has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman;

2. I further certify that this fast track statement complies with the page- or type-volume limitations of NRAP 3E(e)(2) because it does not exceed 10 pages.

3. Finally, I recognize that under NRAP 3E I am responsible for timely filing a fast track statement and that the Supreme Court of Nevada may impose sanctions for failing to timely file a fast track statement, or failing

to raise material issues or arguments in the fast track statement. I therefore certify that the information provided in this fast track statement is true and complete to the best of my knowledge, information, and belief.

Dated this 9th day of November, 2015.

/s/ Donn W. Prokopius, Esq.
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CERTIFICATE OF MAILING

I certify that on this 9th day of November, 2015 I deposited for mailing in the U.S. Mail at Las Vegas, Nevada, a true copy of the following enclosed in a sealed envelope upon with first-class postage prepaid: Fast Track Custody Response and Appendix to:

JOHN D. JONES, ESQ.
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DATED this 9th day of November, 2015

/s/ Donn W. Prokopius, Esq.
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