IN THE SUPREME COURT OF THE STATE OF NEVADA

JENNIFER ELISE GORDON,

Appellant,

v.

MATTHEW ROBERT GEIGER,

Respondent.

Supreme Court Case No.: 67955
Dist. Court Case No.: D-10-430669-D

REPLACEMENT OPENING BRIEF OF APPELLANT

This Brief is submitted in substitution for the Opening Brief previously filed by Appellant while acting pro se.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, Appellant Jennifer Elise Gordon, through her undersigned counsel, states:

Appellant Jennifer Elise Gordon is an individual.

The following attorneys and law firms have represented Ms. Gordon in this litigation:

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Dated this 11th day of April, 2016.

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Appellant, Jennifer Elise Gordon ("Mother") through her counsel of record, Greenberg Traurig, LLP, respectfully submits her Replacement Opening Brief on Appeal.

INTRODUCTION

> *NRCP 16.215 was proposed in order to assist in the application of the Uniform Child Witness Testimony by Alternative Methods Act ("Act") in domestic relations matters, to ensure that the Act was being applied uniformly, to establish procedures to apply the Act, and to ensure that the Act's purpose of protecting children while also guaranteeing the rights of due process to litigants was preserved.* ***What we found in our work, was that the Act was not being applied uniformly, and sometimes not at all.*** *Child testimony is being obtained in different manners in almost every courtroom throughout this State. Under the current system, it is impossible for attorneys, and more importantly, litigants, to know what to expect with regard to the testimony of their child or children prior to appearing in Court.*
>
> January 8, 2015 Letter in support of ADKT 0502 (emphasis added)
> The Dickenson Law Group
> Margaret Pickard, PLLC
> Kunin & Carman

As reported by the above proponents of ADKT 0502,[1] even though the Nevada Legislature adopted the Uniform Child Witness Testimony by Alternative Means Act ("Act") in 2003*, twelve years later*, some Nevada family courts were still not applying the Act. This appeal arises from such an instance where the Act was wholly disregarded. Indeed, there is absolutely nothing in the record of this

[1] ADKT 0502 involved this Court's adoption of NRCP 16.215, which sets standards by which the family courts are to implement the protections set forth in NRS 50.500.

case to suggest that the District Court judge was even *aware* of the existence of the Act; certainly the District Court showed no regard for the express requirements of that Act, or for the due process rights of either of the parties appearing before it.

The decision below was based on unrecorded "testimony" of the minor children, taken outside the presence of either either parent or their counsel. No record of the actual testimony appears to have been made or preserved, precluding any review of the propriety of the questioning or the nature of the answers. Moreover, despite the *express* statutory requirement that any alternative means of child testimony afford the parties an opportunity for cross examination, no such opportunity was granted, or indeed, even mentioned. The decision also referenced report(s) from Child Protective Services that were not admitted into evidence, and thus, are not contained in the Record on Appeal. The District Court's unnoticed reliance on such reports prevented any opportunity for the cross examination of any person referenced in such reports.

As if this denial of due process were not sufficiently appalling, the issues decided by the Court, *i.e.,* the requirement that the children, aged 10 and 12, never be left alone with Mother's fiancé, and the increase of Father's visitation time so that the two children could spend weekends with their Mother only once per quarter, were not even properly at issue before the court. Indeed, prior to the sudden announcement of the children's "testimony," Father had not requested *any*

restrictions on Mother's status as primary custodial parent, nor had he requested any increased visitation. Indeed, Father's only affirmative request had been for a reduction in his child support obligation based on his purported failure to work, and for an award of attorney's fees.

The denial of an opportunity for cross examination, and the lack of notice of the issues to be decided, were particularly egregious here, given the District Court's acknowledgment that Child Protective Services had investigated the home, and had determined the complaints were *unsubstantiated* and, moreover, *the product of coaching*. Furthermore, the District Court also acknowledged that the child who purportedly testified to having been inappropriately punished had actually stated his own satisfaction with the then-existing custodial schedule.

As a result of this blatant violation of Mother's due process rights, she and her blended family have been placed in turmoil for more than eighteen months, as such an order obviously prevents the full participation of one of two available parents in a household with a total of seven children, as Mother is required to be present at all times that her fiancé and either of the two children subject to the order are present. Furthermore, the Order decreasing Mother's weekend time with the boys to once per quarter[2] can only have been designed to *prevent* any bonding

[2] Mother could have an additional four weekends per year, but only *if* she planned an out of town trip with the children.

of this blended family, as it makes the opportunity for joint family recreational activities so rare.

Mother, acting *pro se*, sought to have the above order reconsidered, expressly raising the issue of the violation of due process. Sadly, the District Court judge who had replaced the original judge in this matter *also* failed to recognize the violations of the Act that had occurred through the child interview process employed here. Accordingly, the denial of the reconsideration was an abuse of discretion as well.

As the *record* contains no valid support for the District Courts' orders, the modification of the custody order and the visitation scheduled should be vacated. The matter should be remanded for reinstatement of the prior orders regarding custody and visitation.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to NRCP 3A(b)(1), (2) and (7). This is an appeal of an order determining certain issues with regard to custody, visitation, and child support entered March 18, 2015, and an order denying a NRCP 59 Motion for new trial or reconsideration of the March 18, 2015 order, filed April 9, 2015, and noticed on April 10, 2015. **III R. 670-682.** The Notice of Appeal was filed on May 5, 2015. **IV R. 730.**

ROUTING STATEMENT

Pursuant to NRAP 17(2), this matter, which involves family law matters, falls within the presumptive assignment of the Nevada Court of Appeals.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the District Court abused its discretion in modifying Mother's physical custody of the children and in increasing Father's visitation, where such rulings were based on evidence that was improperly considered because:

A. it was obtained through violation of the provisions of NRS 50.500 *et. seq*. in providing for an alternative method of testimony by the minor children; and

B. it was contained in CPS reports never admitted into evidence or proffered by by either party;

II. Whether the District Court erred in failing to afford Mother her due process rights with respect to the care, custody and control of the children.

III. Whether the District Court abused its discretion in denying the Motion for New Trial where it was shown that the Mother's due process rights had been violated.

STATEMENT OF THE CASE

This is an appeal of a post-decree Order imposing certain restrictions on Mother's primary physical custody of the minor children, and extending Father's visitation so as to limit Mother to having as few as four weekends per year with the children.

STATEMENT OF THE FACTS

Mother and Respondent Mathew Robert Geiger ("Father") were divorced on September 27, 2011. **I R. 132-143.** They had two children, Weston, born November 11, 2001, and Chevy, born August 11, 2004 (collectively, the "boys" or the "children"). ***Id.* at 133.** The parties have joint legal custody of the boys, with Mother having primary physical custody. ***Id.* at 134.** As relevant here, no restrictions or conditions related to Mother's fiancé were placed on Mother's award of physical custody in the September 2011 order. On February 11, 2014, Father was ordered to cooperate with the children's wrestling schedules. **II R. 329-330**.

The August 2014 Motion

On August 4, 2014, Mother, acting *pro se,* filed Motions for Order to Show Cause and to Modify Custody and Visitation. **II R. 380-400.** As relevant here, the motions for Order to show cause were based on continuing nonpayment of child support despite prior contempts, and other violations of prior orders**.** ***Id***. The request for a modification of custody was based on Father's arrest for violation of his probation, failure to communicate regarding out of state visitation, and to properly care for Chevy, who has ongoing medical needs. ***Id***. Father, with counsel, filed a response,

primarily devoted to blaming Mother for his arrest,[3] but also requesting a reduction in his child support and requesting attorney fees. **II R. 408-430**.

The matter was set for hearing August 28, 2015. **I APP 1.** Mother appeared *pro se*, and father was represented by counsel. **I APP 1.** Father contended (through counsel) that his arrest was the result of a misunderstanding, based on a change in his probation officers. **I APP 4:12-5:19.** Speaking through counsel, Father also denied the other allegations made by mother regarding failing various requirements of his probation, and taking the children out of state without notice to Mother. Father stated that he has never taken the kids hunting. **I APP 26:15-24.** Father contended that it was Mother's fault that he had been arrested. **I App 27:16-19.**

Mother testified that the children had said that Father took them on hunting trips, and Mother also referenced Father's request, discussed at a hearing in May, to enroll the children in gun safety courses outside of his visitation time. Additionally, Mother explained Chevy's medical condition following brain surgery to relieve pressure on his brain, and the need to record any changes in his condition, including specifically headaches or

[3] Father's theory blaming Mother was primarily based on his wife's claim that within minutes of Father's arrest, Mother had called Father's to demand the children. **I APP 6:22-23.** However, at the subsequent hearing, Father's attorney acknowledged that Father's wife had been mistaken, and that the call asking for the whereabouts of the children had actually occurred the following day. **II APP. 155:18-24.**

vomiting, as well as the environment conditions at the time of such occurrence. **I App. 20:12-29:26.**

The Court decided that an evidentiary hearing was necessary, with the probation officer to be called. **I App. 29:3-11.** The Court then noted that it had a good relationship with Father's attorney in her courtroom, and suggested that Mother bring an attorney to the evidentiary hearing; when Mother said she could not afford one, the Court advised her to "think about it." **1 APP 30:20-31:8.**

Mother proffered exhibits of phone call records, medical records, and a letter from Father's probation officer, but the Court asked her to resubmit her exhibits with a written reply. **1 APP 33:20-34:16.**

The following dialogue then occurred:

> THE COURT: So that will be at – okay. I'll hear those on the – at the time of evidentiary hearing will include going out of state without permission of the Court
>
> And you know what, Mr. Bellon, I've met these children because I interviewed them. I think one or both parents didn't necessarily agree with my take on the kids' interview, but that was it. I interviewed them.
>
> I'm inclined to in—have them interviewed again. I can either do the interview or send them to FMC. So it your client's position on the court interviewing the children again?
>
> MR. BELLON: I have no problem – I would ask my client to allow you to do it, Your Honor, and cut out the middle man. I have total confidence in you regardless of what ha – how it

comes out. They're not gonna have any doubts said in the process of the FMC, so.

THE COURT: Jennifer?

MS. GORDON: That's – that's fine. And – to remind you, they also – you also had appointed them an attorney and – at the time.

THE COURT: Oh, right.

***

THE COURT: All right. So you're both agreeable to me interviewing the children.

August 28, 55:1-21, 56:20-2. The prospect of having testimony by the children, in any form, originated *sua sponte* with the Court. As can be seen, the Court offered the parties only the option of two forms of testimony by alternative means – either an interview by the FMC or an interview by the Court; the prospect of conventional in-court testimony was not even raised. The Court made no findings that testimony by alternative means was in the best interests of the children. The Court made no provision for an allowance of examination or cross examination by the children.

Additionally, the subjects said to be at issue at the evidentiary hearing involving the children were Father's taking them out of state, and taking them hunting. The interviews were scheduled for September 3, 2014, and the evidentiary hearing for October 3, 2016. **I APP 59:14-60:4; 62:7-10.**

The parties were ordered to submit Pretrial Memoranda no later than September 26, 2014. I**I APP 442.**

Mother timely submitted her Pretrial Memorandum. **III R. 546.** Father did not submit his Pretrial Memorandum until October 3, 2014. **III R. 556.** Therein, Father stated that he had been questioned by CPS regarding the boys' custody, including physical punishment, and hoped the Court could shed light on the "CPS investigation and why it originated." **III R 559-560.**

The Evidentiary Hearing.

Despite the scheduled date, the evidentiary hearing did not occur until October 9, 2014.[4] **II App. 74.** Witnesses at the hearing included Father's probation officer, who testified that a warrant had issued as a result of Father's failure to report during his probation, and that said warrant had been issued on October 11, 2013, **II App 84:15-86:16**, and executed July 26, 2014. **II App. 80-131**. The officer testified as to Mother's interactions with him in August 2014, and as to notes regarding her conversation with another officer in June 2014. **II APP 126:34-131:4.** The officer testified Father would have been arrested regardless of Mother's interactions with

[4] Neither the reason nor the manner of the rescheduling appears in the Record on Appeal.

the officer. **II APP 89:17-90:6.** Under cross examination by Father's attorney, the officer stated that because he had never met or spoken with Father before his arrest, he had not communicated the reporting requirements to him. **II APP 106:6-107:19.**

At the conclusion of the officer's testimony, Mother's attorney asked the Court the purpose of the evidentiary hearing. **II APP 132:12-13.** The Court explained:

> The Court: Okay. The evidentiary hearing was set, my Odyessy register reflects, order to show cause, defendant filed; and then why the warrant was issued for plaintiff; and probation department communication with defendant; child support. The court just thought – the court believed that is was necessary to clear up that whole issue for a lot of different reasons in this case.
>
> And I had – let me see the motions. I had defendant's motion for change of custody. She was seeking sole legal custody based on defendant's [sic] warrant and his conduct, vis-à-vis probation is helped summary – summy – summarizing that up; and to put him on supervised visitation.
>
> And then we had plaintiff's opposition and his counter motion to modify child support, and related relief.
>
> And so if you want to put her on the stand just to testify as to her – her interaction with the probation officer, you may do so. I am not requiring it of course. It's your case.

II App. 133:21-135:16. Thus, the Court indicated, even during the hearing, that the purpose of the hearing was to determine whether Father's

accusations that he was arrested due to Mother's actions were accurate. The Court reiterated this purpose near the conclusion of the hearing, stating:

> Part of why I wanted this today was so that each of them – each of these parents, Matt and Jennifer, would know exactly what happened. So it would be out.
>
> So Matt would know what happened and Jennifer would know what happened. And there would be a record of this, you know, costly as this has been for each of them. And so there wouldn't be any mystery as to what happened. And the court would know, as well.
>
> So that aspersions weren't being cast on Jennifer that she, you know, turned over 100 e-mails that weren't true or whatever was going on there.

II APP 226:23-227:9.

The Court denied the Motion to change custody, finding that Father's arrest had been the result of a lack of communication between him and the probation officer. **II APP 225:18-226:5.** The Court made certain orders regarding the lack of communication and Father's failure to respond to requests from Mother, and noting that if Father removed the children from the state without notice to mother again, he would thereafter be precluded from taking them out of state. . **II APP 227:19-231:1**.

The court then announced it would "go over the kids' interview" that had occurred on September 3, 2014, and provided some details of her conversations with the two children. For several pages of transcript, the

court noted general observations, such as that Chevy was reserved and had little to say, that Weston was more forthcoming, that Weston was content with the then existing visitation schedule, that they no longer went hunting with Father, and that Father's home is quieter than Mother's, because of the other children at Mother's home. **II APP 232:4- 233:23.** The Court then dropped the bombshell that Weston had reported that Matzi (Mother's fiancé) punches him in the stomach and in the arm when he disobeys. **II APP 233:23-234:1.**[5]

The court then announced that it also had obtained CPS records, which were not presented into evidence; instead, the Court "allowed" counsel to "look at them" "for a little bit." **II APP 235:5-11**. The Court then described assorted hearsay statements obtained in the CPS reports, sometimes identifying the declarant and other times not.[6] The Court *also* noted that the CPS reports indicated a conclusion that the complaints were unsubstantiated, and that the children had been coached. **II APP 235:23-236:3.** The Court

[5] The Court acknowledged that Chevy had not told her he was being punched. **II APP 243:3.**

[6] Mother's counsel did not, on the record, object to the Court's statements regarding the contents of the CPS reports on the basis of hearsay. However, such reports were never actually proffered into evidence, and accordingly, no opportunity to object to their admission was given. Instead, the District Court essentially testified as to their contents. Because the District Court was acting as a witness in reciting such hearsay evidence, there is no requirement that the error be preserved by objection. NRS 50.055.

did not elaborate as to whom was suspected of doing the coaching. The Court claimed that it had made prior orders, including an order precluding Weston from participating in wrestling and prohibiting Matzi from disciplining the children.

When Mother attempted to respond to the Court's accusations, the Court said "Don't tell me no" and "Don't even argue with me 'cause that's a losing battle on your part." Mother attempted to explain that the complaints had come from Matzi's former wife in Indiana, that the stories had begun after the former wife had kidnapped two of her daughters, and that the complaints had also alleged that Mother also physically abused the children. **II APP 236:11-243:11.** Mother's counsel also attempted to point out there should be clarity regarding what was meant by "punch" in the Weston's statement. **II App 249:20-250:2.** However, the Court made it clear that it had already reached its conclusions, stating:

> What I would like is a brief-focused evaluation on Jennifer's protective capacity because I seriously have serious questions as to her ability to protect these children.

II App. 245:3-5.

But rather than making any orders regarding an evaluation of Jennifer's protective abilities, based on a request from Father's attorney made only at the conclusion of the hearing, the Court instead ordered that the

boys could never be left alone with Matzi, and stated that if the boys are left alone with him, that could be a basis for a change of custody. **II 245:6-16; 254:20-24.** Also at the urging of Father's counsel, the Court also extended Father's visitation by an additional weekend, limiting Mother's weekend time with the boys to once per quarter, plus an additional four weekends if an out of town trip were planned. **II APP 258:5 – 261:21**. The Court further stated:

> this-this order was sua sponte from the court based on the children's interview, which was supported by the CPS record, as far as the court's concerned, an investigation with the detective and a CPS investigator. And the court, quite frankly, doesn't care if its unsubstantiated because CPS has its own guidelines; and the court looks at that investigation from a different light.

II APP 263:5-11.

The Court also ordered both parents to complete a specific parenting class. **II APP 255:19-23.**

The transcript of the evidentiary hearing shows that exhibits admitted into evidence during the hearing included text messages, evidence of child support arrearages, phone records, a register of actions showing a bench warrant date, and documents showing the bench warrant issue date. **II APP 76.** There is no indication that CPS reports were admitted into evidence, even in a sealed form, or that any written record of the Court's interview

with the children even existed, let alone was admitted into evidence. Father's attorney was ordered to submit the written order. **II APP 263:19-22.**

Subsequent Proceedings

Mother, and her fiancé, Baron Lizares (also known as Matzi) submitted evidence of their completion of the parenting class. **III R. 607-610.**

Even though the hearing had taken place in October 2014, no written order had been executed by February 2015. On February 23, 2015, citing the minute order from the hearing, Mother filed a Motion for Reconsideration, New Trial, and Amendment of Judgment pursuant to Rule 59. **III R. 611**. Mother noted that her custodial rights had been modified in violation of her due process rights, based on the purpose for which the hearing had been set; upon the lack of prior access given to Mother regarding the contents of the child interview; and by the court's consideration of the CPS records, also not made available even for review prior to the day of the hearing. ***Id.*** **at 612-614.** Mother noted that the actions of the court in obtaining such evidence and not disclosing it violated the disclosure rules governing family court proceedings. ***Id.*** **at 615.** Father filed an opposition on March 13, 2015, claiming that Mother had stipulated to the child interview, and that the disclosure rules did not apply to evidence

submitted by the Court. **III R. 629.** Mother, acting *pro se*, filed a Reply on March 20, 2015. **III APP 659.**

On March 20, 2015, prior to the hearing of the above motion, a written order of the October hearing's ruling was finally entered. Judge Nathan, who had presided over the evidentiary hearing, was no longer on the bench, and accordingly, the written order was executed by Judge Nathan's successor, Judge Brown. **III R. 670.**

On March 24, 2015, a hearing of Mother's Motion for Reconsideration was held. **II APP 266-281.** Mother appeared *pro se.* **II APP 266:22-23.** The District Court noted that it had not read Mother's Reply. **II APP 268:1-4**. Mother stated that the person who had brought the complaints investigated by the CPS had been brought up on charges in Indiana, and that Matzi had been granted full legal and physical custody of his children by another department of the family court. **II APP 269:10-14.** After hearing argument, the District Court determined that Mother's due process rights had not been violated, but gave no basis for that conclusion. **II App. 281:6-12.** A written ruling similarly did not explain the basis for the finding of no deprivation of due process rights. **III R. 678.**

Record on Appeal

Following the filing of this appeal, this Court entered an order directing the District Court to transmit the entire district court record of this matter to the Supreme Court. *See* Order dated September 8, 2015. The Record on Appeal transmitted by the District Court contains a certification that the four volumes, submitted, containing 812 pages, constitutes "a true, full and correct copy of the complete trial court record." **IV R. 813 (unnumbered, but following page 812).**

SUMMARY OF THE ARGUMENT

The District Court's ruling placing limitations on Mother's physical custody, and increasing Father's visitation, must be vacated, as the decision was made in violation of Mother's due process rights. Mother was not afforded proper notice that issues relating to her physical custody of the children would be considered at the hearing, nor was she provided notice of the contents of the interview and reports never admitted into evidence, but improperly considered by the District Court. The District Court relied on evidence that was not actually admitted into the record, including "testimony" by the children taken in violation of multiple evidentiary statutes, including NRS 50.500. The Court also relied on reports from Child Protective Services that were obtained by the Court's own efforts, but not introduced into evidence. Mother was not apprised of her fundamental due process

rights with respect to the child interviews, was given no opportunity to participate in the child interview process despite statutory requirements, and was given no opportunity to subpoena witnesses to bolster, challenge, or explain information contained in the evidence improperly considered by the District Court. Mother expressly raised the due process issues in her Motion for Reconsideration, but the District Court abused its discretion in finding that Mother's due process rights had not been violated.

STANDARD OF REVIEW

This Court reviews constitutional challenges de novo. *Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007). This Court reviews determinations of modification of child custody under an abuse of discretion standard. *Ellis v. Carucci,* 123 Nev. 145, 149, 161 P.3d 239, 241 (2007). This Court reviews the denial of a motion for new trial under an abuse of discretion. *Gunderson v. D.R. Horton, Inc.*, 130 Nev. Adv. Op. 9, 319 P.3d 606, 611 (2014).

LEGAL ARGUMENT

The events that occurred in this proceeding can be explained only by a shocking lack of awareness by the District Court of a parent's due process rights; of this state's longstanding evidentiary laws, and even of the judicial canons governing the conduct of the courts. The record shows that Mother was deprived of both notices that her rights to custody were at issue, as well as the opportunity to

disprove the "evidence" on which the reduction of her custodial rights was based. Indeed, Mother was not even given any reasonable opportunity to review or investigate the "evidence" presented against her.

Furthermore, rather than relying on the evidence presented by the parties, the District Court personally obtained evidence, interviewing the children ex parte, in violation of statutory provisions, and precluding any right to cross examination of the witness testimony obtained through such interviews. Significantly, while the District Court obtained Mother's "permission," it did so by requiring Mother to choose between two options, *neither of which actually conformed to the statutory requirements to permit an alternative form of testimony*.[7] The child interviews performed by the court do not conform to any procedure authorized for the taking of evidence by any rule or statute in Nevada.

Because the District Court's decision was made in violation of Mother's due process rights, it must be vacated. Additionally, because the "evidence" relied upon by the Court was never actually admitted as such, the record on appeal provides no support for the District Court's ruling. Finally, the successor District

[7] Such conduct, displaying an appalling ignorance of Nevada evidentiary statutes was apparently sufficiently common in Nevada's family courts that this Court very properly saw fit to adopt rules to prevent such actions in the future. See NRCP 16.215. Unfortunately, the rule was adopted too late to prevent the deprivation of Mother's due process rights in this case.

Court also failed to recognize the blatant violations of due process, and accordingly, abused its discretion in denying Mother's motion for new trial.

I. MOTHER'S DUE PROCESS RIGHTS WERE VIOLATED BY THE LACK OF NOTICE AND OPPORTUNITY TO BE HEARD ON THE ISSUES RELIED UPON BY THE DISTRICT COURT IN MAKING ITS RULING.

> *The Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.*
>
> *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

Like the U.S. Supreme Court, the Nevada Supreme Court has also recognized a parent's right to due process with respect to court proceedings related to custodial decisions. *See e g., In re Parental Rights as to A.G.*, 129 Nev. Adv. Op. 13, 295 P.3d 589, 595 (2013); *Wallace v. Wallace*, 112 Nev. 1015, 1020, 922 P.2d 541, 544 (1996); *Wiese v. Granata*, 110 Nev. 1410, 1412, 887 P.2d 744, 745 (1994) ("[D]ue process requires that notice be given before a party's substantial rights are affected"). Such due process rights are not limited to situations where the parent's rights are actually terminated. In *Wallace*, for example, this Court expressly recognized the right of a parent to have notice regarding the prospect of visitation rights being significantly enlarged, as occurred in this case. Similarly, in *Wiese,* this Court determined that where a father's fundamental due process

rights were violated where custody was modified, but mother had only requested modification of visitation.

Here, Mother had requested a change of legal, not physical custody, and had requested that Father's visitation be limited to supervised visitation. While Father opposed those motions, he did not, in his written filings, seek any modification of custody or visitation; he sought only to modify his child support. Accordingly, Mother was not given any notice that any issues related to her physical custody would be addressed, and was not given any notice that an increase of Father's visitation would be addressed.

Furthermore, this Court has expressly noted that a parent must be given an opportunity to disprove evidence used to reduce the parent's rights. *Moser v. Moser*, 108 Nev. 572, 576-77, 836 P.2d 63, 66 (1992). Here, the "evidence" that purported to support the District Court's ruling was never actually proffered or admitted in the proceedings. The evidence was obtained by the Court,[8] and was not disclosed to Mother or her counsel prior to the hearing date; indeed, Mother's counsel was only given a brief, off the record, opportunity to review this in advance of the hearing. Mother was not given any notice that because of evidence obtained and considered by the Court, *but not disclosed to Mother until* ***during*** *the*

[8] As shown in more detail below, the Court's acquisition of this evidence violated both statutory law and judicial canon.

evidentiary hearing, the District Court was considering taking custody away from the Mother.

Mother does not suggest that allegations that a child has been punched should not be explored. Nor does Mother challenge a district court's authority to make factual determinations after considering all the evidence *presented by the parties*. But Mother did, and does, deny that such an act occurred. She was entitled to be apprised in advance of the hearing that such an issue would be addressed, so that she could properly prepare and arrange for rebuttal witnesses. She was entitled to be given reasonable access to the evidence that was to be presented.

She was additionally entitled to cross examine Weston, who at the time was, twelve years old, regarding the statement. Such cross examination could have addressed whether the purported punch, (which implies a severe blow by a closed fist), actually occurred, or whether a lighter touch occurred and was exaggerated, or indeed, whether there had been any such contact at all. Such a cross examination might also have explored issues of resentment based on Father's unfounded accusation that Mother had caused Father's arrest, or the issues surrounding the kidnapping of the other children in the home by their other parent.

Additionally, to the extent that statements in the CPS report were used against Mother, she was entitled to present evidence and witnesses to challenge

those statements. She was also entitled to subpoena the investigators, to allow them to testify as to their reasons for finding the complaints unsubstantiated, as well as to identify the persons they suspected of having coached the children.

In *Micone v. Micone*, 132 Nev. Adv. Op. 14, – P.3d – (2016), after a father moved to change physical custody from the mother to him, the district court granted custody to the nonparty paternal grandparents, an outcome neither party had proposed. In reversing on the basis of a violation of due process, this Court stated, "Neither party briefed or argued whether awarding primary physical custody to the grandparents was justified or would be in I.M's best interest." *Id.*, at *2.

Here, as in *Micone*, Mother was not provided sufficient notice of the issues that were ultimately decided. Accordingly, her due process rights were violated. *See Micone, supra; Wallace, supra*; *Wiese*. *supra.* Additionally, Mother was not afforded any reasonable opportunity to rebut the allegations made against her and her fiancé. Accordingly, her due process rights were violated, and the order must be vacated. *See Moser, supra.*

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN MODIFYING THE CUSTODY ORDER.

The District Court abused its discretion in modifying custody of the minor children by placing limitations on Mother's primary physical custody that were unsupported by the record. The District Court relied on purported statements and

documents that were not actually admitted into evidence, *i.e.*, purported statements by the boys given during the Court's interview of the children, and purported CPS reports to which Mother was given no access. The reliance on the children's purported statements violated the express provisions of NRS 50.500, *et. seq*, Furthermore, Mother was provided no notice of the prospect that restrictions on her primary physical custody would be imposed, as that issue had not been noticed as part of the hearing. Because of the reliance on evidence outside the record, and the lack of notice, Mother was given no opportunity to prepare for or to challenge the evidence presented. Accordingly, her due process rights were violated.

Because of the violation of due process, and the lack of evidentiary support for the District Court's ruling, the District Court's order placing restrictions on Mother's primary physical custody of the children must be vacated.

A. The District Court Abused Its Discretion In Conducting The Child Interview, and in Relying on the "Testimony" from such Interviews.

A District Court's failure to apply the law properly constitutes a manifest abuse of discretion. *State v. Eighth Judicial Dist. Court (Armstrong*), 127 Nev. 927, 931–32, 267 P.3d 777, 780 (2011) (providing that a manifest abuse of discretion occurs when a district court clearly misinterprets or misapplies a law or rule). Additionally, a district court abuses its discretion when it acts in "clear disregard of the guiding legal principles." *Bergmann v. Boyce,* 109 Nev. 670, 674,

856 P.2d 560, 563 (1993). Here, the District Court disregarded and failed to apply the express requirements of statutes governing testimony, including NRS 50.035; NRS 50.055; NRS 50.145; and NRS 50.500 *et.seq*. Because the District Court relied on "evidence" it obtained in violation of these statutes in making its ruling, the ruling must be vacated.

The District Court violated NRS 50.055, as the District court essentially acted as a witness in the case, reporting on both the contents of the CPS reports, and the "testimony" by the children.[9] The Court violated NRS 50.145, by failing to permit cross examination of witnesses called by the judge, and by failing to preserve the questions, so as to allow objection to questions or answers. It is not possible to determine whether the District Court applied NRS 50.035, which requires that all witnesses in a proceeding be sworn. There is nothing in the record to support the conclusion that the children were sworn during their interview.

Most significantly, the District Court wholly disregarded the requirements of NRS 50.500. First, in order to permit the use of evidence from a child that is not in the form of testimony made in open court, in the presence of the parties and the fact finder, *see* NRS 50.520, the Court *must* conduct a hearing to determine whether it is in the best interests of the child or to enable the child to communicate

[9] Pursuant to NRS 50.055(2), no objection is necessary to preserve this error.

with the fact finder. NRS 50.570. Such a hearing *must* be taken on the open record, after reasonable notice to all parties. NRS 50.570(b). In a noncriminal proceeding, a judge *must* make such a finding based on the preponderance of the evidence, and after considering several factors, including the age and maturity of the child. NRS 50. 580. The Court *must* also consider the relative rights of the parties, the importance of the testimony of the child, as well as other factors. NRS 50.590. An order that allows such alternative testimony must *inter alia,* make findings and conclusions supporting the decision, must state the alternative method; list persons who may be present or must be excluded from the testimony; and state any conditions for the alternative testimony. NRS 50.600. The alternative method of testimony cannot be "more restrictive of the rights of the parties than is necessary under the circumstances to serve the purpose of the order. NRS 50. 600(3). Any alternative method of testimony *must* "permit a full and fair opportunity for examination or cross examination of the child witness by each party." NRS 50.610.

Significantly, NRS 50.500 *et. seq.*, repeatedly employs the word "must," signifying mandatory requirements. *Washoe County v. Otto*, 128 Nev. Adv. Op. 40, 282 P.3d 719, 725 (2012) ("The word "must" generally imposes a mandatory requirement.). Thus, in order for the testimony of the children here to be taken in

an alternative manner, the procedures set forth in the statute were mandatory. Yet, the District Court followed *none* of these procedures.

1. ***Mother did not validly waive her due process rights.***

In the lower court, Father contended that Mother had waived any objections to the child interviews, because she had agreed to the process. However, Mother, while she was acting *pro se,* was given one of two choices by the District Court – an interview by Family Mediation Services or by the Court. *Neither* choice conformed to any of the requirements of NRS 50.500; neither choice was authorized by any other rule or statute. Selecting from the only two options offered, *neither* of which conforms to one's rights, cannot be said to be a waiver of one's rights.

Moreover, a parent's right to due process with respect to proceedings relating to the care, custody, and control of children is constitutionally protected. *Troxel v. Granville*, 530 U.S. 57, 66 (2000). A waiver of a constitional right must be knowing, intelligent, and intentional. *Ford v. State*, 122 Nev. 796, 805, 138 P.3d 500, 506 (2006) ("The test for the validity of a waiver of a fundamental constitutional right is whether the defendant made 'an intentional relinquishment or abandonment of a known right or privilege.") (citations omitted). This Court has expressly recognized that waivers of the rights afforded under NRS 50.500 must be knowing, by adopting NRCP 16.215(h). There is no reasonable basis to

conclude the Mother's agreement to the child interviews was a knowing and intelligent waiver of her due process rights.

B. The District Court Abused its Discretion in Obtaining Copies of CPS Reports and in Relying on Hearsay Statements Contained within such reports.

There is no statutory authority which permits a District Court to rely on CPS reports obtained and reviewed *in camera*, but never admitted into evidence. [10] Such reports are obviously themselves hearsay statements, and filled with double or triple hearsay, and thus, if proffered into evidence, would have been subject to objection by hearsay. Indeed, ironically, the District Court actually sustained an objection made by Father when Mother attempted to testify regarding the children telling her that he had taken them hunting; the court ruled that the statements could not be used for the truth of their content. **II APP 147:23-148:12**. Yet, the District Court had no compunction in relying on the statements of the children made off the record during the interview, and the assorted reports of statements made in the CPS reports.

In addition to violating due process and statutory law, the practices in which the District Court engaged are expressly prohibited by the Judicial Canons:

[10] NRS 432H.290(h) permits CPS to provide documents to a court for in camera review; that same statute permits the court to disclose the contents of the reports if necessary for determination of issues in the case. Thus, if the Court determines that the contents are relevant to issues in the case, the CPS reports should be publicly disclosed.

> A judge shall not initiate, permit, or consider ex parte communications or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter . . .

Judicial Canon 2, Rule 2.9. (A). Here, the judge initiated the child interviews, and also obtained the CPS reports, and considered this improperly obtained evidence in deciding the matter before it. While the rule provides for certain exceptions, none of those exceptions permit the court to interview witnesses outside the presence of the parties or their counsel, or to obtain government agency reports without disclosure to the parties. Furthermore, the Rule provides:

> A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

Judicial Canon 2, Rule 2.9 (C). Neither the child interviews nor the CPS reports were presented as evidence, and neither constituted facts that may be judicially noticed. *See* NRS 47.130 (requiring judicially noticed facts to be generally known, capable of accurate and ready determination and not subject to reasonable dispute).[11]

Significantly, this Court has previously determined that engaging in such *ex parte* communications regarding substantive matters to be decided by the Court constitutes judicial impropriety that justifies removal from office. See *In re Fine*,

[11] While the *existence* of the statements in the CPS reports might, possibly, be suitable for judicial notice, the veracity of their content is clearly subject to reasonable dispute.

116 Nev. 1001, 1022-23, 13 P.3d 400, 414 (2000).[12] Significantly, among the actions taken by the judge in *Fine* was to "request and receive an oral report in chambers, instead of waiting to receive the ***report on the record and in open court***." *Id.*

C. The Record Does Not Support the District Court's Ruling.

A district court's findings with respect to a custody order must be supported by evidence in the record. *Rivero v. Rivero,* 125 Nev. 410, 428, 216 P.3d 213, 226 (2009). Here, the District Court's "finding" that it was in the best interests of the children to place limitations on Mother's primary physical custody is not supported by any evidence that was proffered to the Court and admitted in accordance with Nevada's evidentiary rules. Instead, the finding was based on the Court's independent investigation, performed outside the presence of the parties and their counsel, *i.e.,* unrecorded *ex parte* interviews of the children, and review of purported CPS reports never even provided to the parties. Such evidence was not properly part of the record, and indeed, does not actually appear in the Record on Appeal. Because the Record on Appeal does not support the District Court's ruling, the ruling must be vacated.

[12] As the District Court judge who engaged in the conduct here is no longer on the Court, the filing of a complaint against that Court was deemed by the undersigned to serve no worthy purpose. However, if this Court disagrees, the appropriate complaint will be made.

Additionally, the District Court made reference to prior orders it purportedly had made in 2011, involving the restrictions on discipline of the children, and a prohibition from permitting Weston to participate in wrestling. **III R. 671:21-28.** However, the record does not contain any written orders to that effect.[13] Furthermore, the Decree of Divorce, entered in December 2011, does not contain any such restrictions.

Furthermore, just eight months prior to the October hearing, the District Court had entered a *written* order that expressly required Father's *cooperation with the wrestling schedules of the boys*. **II R. 329-330.** Accordingly, even if the Court had ever made an effective order precluding Weston from participating in wrestling, such order had clearly been subsequently modified.

[13] A minute order from March 29, 2011 was submitted by Mother as an exhibit in support of the Motion below, which minute order indicates that the Court made oral rulings regarding discipline and wrestling. **III R. 529.** This Order too was apparently based on an improper *ex parte* child interview. The order also indicated that the Court "would obtain CPS records and do an in camera inspection." Thus, it is clear that the District Court engaged in a pattern of improper investigation in violation of judicial canons. As this Court has stated, a "court's oral pronouncement from the bench, the clerk's minute order, and even an unfiled written order are ineffective for *any purpose*." *Millen v. Eighth Judicial Dist. ex rel. County of Clark*, 122 Nev. 1245, 1251, 148 P.3d 694, 698 (2006) (noting that only exceptions to this rule are "pronouncements concerning case management issues, scheduling, administrative matters, or emergencies that do not permit a party to gain an advantage.)

Because there were no valid orders regarding wrestling or discipline of the children, the District Court abused its discretion in relying on purported violations of such orders.

III. THE SUCCESSOR DISTRICT COURT ABUSED ITS DISCRETION IN DENYING THE MOTION FOR RECONSIDERATION WHERE IT WAS APPARENT THAT THE PREDECESSOR COURT HAD FAILED TO FOLLOW APPLICABLE LAW.

The violation of Mother's due process rights might have been easily remedied long before now had the successor District Court properly applied the case law brought to its attention in Mother's Motion for Reconsideration or New Trial. Mother challenged the child interview process and the reliance on the CPS reports on due process grounds. The District Court denied the Motion, finding, without explanation, that there had been no violation of Mother's rights. However, the record does not support such a finding, and the finding is in derogation of clear precedent from this Court, which Mother properly brought to the attention of the Court in her briefing.

As noted above, a district court abuses its discretion when it acts in "clear disregard of the guiding legal principles." *Bergmann v. Boyce,* 109 Nev. 670, 674, 856 P.2d 560, 563 (1993). [14] Accordingly, the successor District Court abused its discretion in denying Motion for Reconsideration or New Trial.

[14] Because the District Court was faced with the issue of a violation of Mother's constitutional rights, this Court is not limited to review for an abuse of discretion.

CONCLUSION

As shown above, Mother's due process rights were violated by the lack of notice of the issues to be determined by the District Court at the hearing, and by the failure of the District Court to allow any meaningful opportunity to rebut the evidence on which the District Court relied. Additionally, the District Court abused its discretion and violated judicial canons by obtaining and relying on evidence outside that proffered by the parties. Accordingly, the District Court's March 2014 ruling should be vacated. Alternatively, the successor District Court's denial of the Motion for Reconsideration was an abuse of discretion, where the record clearly indicated violations of Mother's due process rights. Accordingly, that order should be reversed, and the cause remanded for a new trial.

Respectfully submitted this 11th day of April, 2016.

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Callie v. Bowling, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007), but instead, may review de novo. However, even applying the more lenient abuse of discretion standard, Mother is entitled to reversal.

CERTIFICATE OF COMPLIANCE WITH NRAP 28 AND 32

I hereby certify that this brief 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 this brief has been prepared in a proportionally spaced typeface using MS Word 2003 in Times New Roman 14.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 7,212 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 11th day of April, 2016.

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CERTIFICATE OF SERVICE

This is to certify that on April 11, 2016, a true and correct copy of the foregoing **Replacement Opening Brief** was served by via this Court's e-filing system, on counsel of record for all parties to the action below in this matter, as follows:

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