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-16-536401

APPELLANT'S REPLY BRIEF

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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:

Tami D. Cowden, Esq. and Moorea Katz, Esq., Greenberg Traurig, LLP

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Appellant notes that Respondent Father asserted that Margaret F. Pickard had represented him in this matter. Ms. Pickard actually served as a mediator for the Parties. If service in that capacity constitutes "representation" as contemplated by NRAP 26.1, then Appellant includes Ms. Pickard herein.

Dated this 23rd day of June 2016.

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INTRODUCTION

The District Court based its decision on information it claimed to have received from only one of the two minor children, during an interview taken in violation of unequivocal Nevada law. Father essentially concedes that the Court's undertaking such an interview was error, but contends that Ms. Gordon acquiesced to the error. However, Ms. Gordon's "acquiescence" was itself obtained through error by the District Court, who gave Ms. Gordon a choice between only two possibilities – *neither of which actually were consistent with Nevada law*.

Because of the District Court's failure to comply with the statutory requirements for the taking of testimony of children by alternative means, there is no way to determine whether the minor child in question actually did report that Mother's fiancé disciplined him by punching him in the stomach or on the arm, or, even assuming the minor child did make such a report, what precisely he meant by "punch" (assuming, of course, that he even used that specific word). What is in the record, however, is Mother's sworn testimony that no such "discipline" occurred, which statement is the only *evidence* on this issue that was actually admitted (or was admissible) that exists in this record. Furthermore, the record reflects the

District Court's own acknowledgement that the Department of Social Services had concluded that such actions had *not* occurred.

The plain and simple truth here is that the evidence actually admitted to the record does not support any conclusion that Mother's fiancé ("Matzi") improperly struck either minor child. Yet the only reason given for the Court's ruling that eliminated any parenting by Matzi and eliminated any weekend time for this blended family was the unsupported conclusion that Weston had been struck by Matzi. Accordingly, the order must be vacated, and the cause remanded for proceedings that comport with due process and Nevada's evidentiary rules.

FATHER'S "RESTATEMENT" OF THE FACTS

Father's factual recitation was devoted to an issue that is not even remotely relevant to this appeal – his *false* accusation that Mother had engineered his arrest. Indeed, the primary impetus for that false claim was the assertion, made in the initial hearing below, that Mother had called to inquire as to the location of the children within minutes of Father's arrest. **I APP 6:22-23.** However, at the second hearing, ***Father's counsel admitted that this claim had been wholly false***. **II APP. 155:18-24.** Additionally, despite Father's attempts to suggest otherwise, the Record on Appeal is clear that Father was actually found to have violated his parole in numerous ways, *none* of which were based on evidence provided by Mother.

- The warrant for Father's arrest was issued in October 2013; **II APP 11:20-12:11**.
- That warrant was issued on the basis of police contact with Father, reported to Father's probation officer, Mr. Laputt, who attempted to follow up with Father, who had never contacted Mr. Laputt in response to messages left at Father's home. **23:28-25:3**.
- That warrant listed claimed parole violations for possession of alcohol, failure to report, failure to perform community service, and failure to maintain employment. **II APP 13:8:22**.
- Father was arrested on July 26, 2014. **II 22:24-23:9**.
- Mr. Laputt testified that Father was found to have violated parole in each of the above ways, and also, for engaging in out of state travel for his fishing trip to Utah (rather than the aborted trip to California on which Father focused in his "Restatement") and for failing to comply with certain court related financial obligations. ***Id***.
- Mr. Laputt clarified that Mother first communicated with him personally only after Father had been arrested, and his prior testimony to the contrary had been mistaken. **II APP 126:34-131:4**.

- The decision to actually arrest an individual for whom a warrant for parole violation has been issued is made by the Fugitive Apprehension Unit, a fact that Mr. Laputt had even shared with Mother. **II APP 50:16-51:6**.
- There is no evidence that shows Mother had any contact with the Fugitive Apprehension Unit.
- The District Court indicated its conclusion that Mother had *not* caused Father's arrest by stating that the benefit from the hearing was "[s]o that aspersions weren't being cast on Jennifer . . ." **II APP 227:7-9**.

Furthermore, despite Father's arguments to the contrary, the record is clear that when Mother was asked to agree to an interview of the children, she was given a choice between *only* two types of interviews – by the Court or by the FMC—and was not given the choice of refusing any interview at all. **I APP 55:1-21, 56:20-2.** And even if it were true that, at the time the Court previously chose to interview the children, Mother had been represented,[1] (a factual assertion for which Father fails to cite any record support), the only significance of such prior interview is that it indicates

[1] In fact, the record shows that the *children* were represented by counsel during the prior interview, a circumstance that was not repeated in the September 2014 interview. **I APP 55:1-21**

that the District Court's disregard of the requirements of NRS 52.500 was apparently routine.

In short, Father's factual "restatement" was nothing more than a heavy handed attempt to present Mother in a bad light, and to shift responsibility for his life choices on to her. However, try as Father might to make it seem otherwise, the issues in this case do not revolve around the restrictions placed on Father as the result of his parole sentence, or on whether Mother took on the burden of keeping Father informed of his own lack of compliance with his parole obligations. Instead, the issue presented for review is whether the District Court violated Mother's due process rights by disregarding several Nevada evidentiary statutes and by ruling on issues never noticed for hearing.

LEGAL ARGUMENT

The Record on Appeal clearly establishes that Mother's due process rights were violated by the lack of notice of issues to be addressed, the Court's reliance on evidence never introduced into the record, and the Court's failure to comply with Nevada evidentiary law. Furthermore, the successor District Court failed to remedy the situation.

Father contends that Mother has ignored that the custody determinations are to be reviewed based on the best interests of the child.

While the "best interests of the child" is, indeed, the standard by which the District Court is to make custody determinations, the District Court must make such determinations based on the evidence actually contained in the record. Furthermore, the standard of review for a custody determination is, ordinarily, whether the District Court abused its discretion. *Ellis v. Carucci,* 123 Nev. 145, 149, 161 P.3d 239, 241 (2007). A District Court abuses its discretion when its decision is not supported by evidence contained in the record, but instead, on matters outside the record. Moreover, because the District Court's actions violated Mother's due process rights, this Court is not limited to the abuse of discretion standard, but instead, must review the District Court's actions *de novo.*

Here, there is no *evidence* that Weston ever accused Matzi of punching him; there are only statements by the District Court that Weston did make such accusations to her and to CPS, and that CPS, the agency that actually investigated the children's circumstances, found such complaint to be unsubstantiated and the product of coaching. Because the judge was the source of the information in this proceeding, the judge served as both witness and judge – an error so pervasive that, by statute, no objection is necessary to preserve it for review. Additionally, because of the District Court's failure to comply with Nevada law, there has been no opportunity

to test the statements purportedly made by Weston, which statements, significantly, were *not* confirmed by Chevy, the other minor child improperly interviewed by the Court. **II APP 170:3-4**.[2]

In the circumstances here, where Mother had no advance notice of this issue, but instead, was informed of the purported statements only at the commencement of the hearing, and furthermore, was deprived of any meaningful opportunity to test the judge's testimony, her due process rights were violated. Accordingly, the Order modifying Mother's parental rights and the visitation schedule must be vacated, and the matter remanded for proceedings consistent with Nevada evidentiary rules and Mother's due process rights.

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN MODIFYING THE CUSTODY ORDER BY VIOLATING MOTHER'S DUE PROCESS RIGHTS

The District Court's abuse of discretion is plainly demonstrated by the record. 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,

[2] Significantly, Father himself had not made any accusations, to the Court or to CPS, that either Weston or Chevy had had reported mistreatment. **II APP 244:5-8; 254:6-11.** Furthermore, the Court appears to indicate that the reference to punching contained in the CPS report did not actually come from Weston, but instead, from Matzi's daughters. **II APP 244:9-21**. The Court indicated that CPS asserted it conclusion that the children making accusations were coached. **II APP 235:23-236:3.**

563 (1993). Here, the District Court acted in clear disregard of NRS 50.055 and 50.500. Furthermore, the District Court based its ruling on "facts" that were not admitted into evidence. Such an action itself constitutes an abuse of discretion. *See In re Calhoun* 17 Cal.3d 75, 84 (1976); *Pruitt v. Pruitt*, 144 So. 3d 1249, 1253 (Miss. Ct. App. 2014) (consideration of evidence outside the record is an abuse of discretion in divorce valuation case).

Significantly, even without regard to NRS 50.500, the District Court's conduct would have been improper, as it violated the Canons of Judicial Conduct, Canon 2, Rule 2.3. In *In re Fine*, 116 Nev. 1001, 1022-23, 13 P.3d 400, 414 (2000), this Court stated that a judge's actions in interviewing witnesses about substantive issues involving cases before her violated the judicial canons, even though the judge reported on the interviews after the fact. This Court quoted the conclusion of the Nevada Committee of Judicial Discipline that conduct involving ex parte communications with witnesses on substantive issues was conduct that "virtually eliminates the judicial process as established in the State of Nevada and the United States of America." *In re Fine*, 116 Nev. at 1011, 13 P.3d at 407. Conduct that violates the judicial canons must surely constitute an abuse of discretion.

By similarly failing to acknowledge these actions by its predecessor, the successor District Court abused its discretion in denying the Motion to Reconsider.

A. Mother Received Inadequate Notice of Issues

A parent is entitled to due process in proceedings involving the issues of custody and and visitation with children. *In re Parental Rights as to A.G.*, 129 Nev. Adv. Op. 13, 295 P.3d 589, 595 (2013). "[D]ue process requires that notice be given before a party's substantial rights are affected." *Wiese v. Granata*, 110 Nev. 1410, 1412, 887 P.2d 744, 745 (1994). Such due process includes the right of the parent to be given notice that her substantial rights might be affected by the outcome of the proceeding. *Wallace v. Wallace*, 112 Nev. 1015, 1020, 922 P.2d 541, 544 (1996). "[T]he party threatened with the loss of parental rights must be given the opportunity to disprove the evidence presented." *Moser v. Moser*, 108 Nev. 572, 576-577, 836 P.2d 63, 66 (1992).

In *Wies*e, this Court reversed where the District Court changed custody from one parent to the other, without any notice that a hearing would involve the issue of child custody. Similarly, in *Wallace,* the issue posed in advance of the proceedings was whether a father would be permitted to have midweek overnight visitations with the child. Ultimately, however, the Court granted father a seven-week out-of-state visitation period. There had been no advance notice to the mother of that prospect. This Court reversed, stating that the mother had "no notice that the court would be considering visitation requiring [the child] to travel

thousands of miles and therefore had no opportunity to present evidence on that issue." *Wallace*, 112 Nev. at 1020, 922 P.2d at 544.

Here, the issues posed by the parties' pretrial memorandums concerned the decrease in Father's visitation and enforcement of child support orders; father requested a decrease in his child support. **III R. 546-559.** While father asked the Court to "shed light on" the CPS investigation and why it originated," **III R. 559**, he made no request to place any limitation on Mother's primary custody or to increase his visitation. Indeed, Father's counsel reiterated that point during the October hearing, when he made an opportunistic request for increased visitation. **II APP 169:6-7; 185:5-10.** Significantly, the Court did not appear to have an interest in the issues presented by the parties in their pretrial memorandums, but instead, stated it had wanted the hearing for the purpose of laying to rest Father's false accusations that Mother engineered his arrest for failure to comply with the terms of his parole. **II APP 226:23-227:9**.

Nothing in the prior proceedings or court filings gave any notice to Mother that accusations would be made that her fiancé was mistreating Weston, that any restrictions on her parenting time could be imposed, or that Father's visitation would be increased. As a result, she, like the mother in *Wallace*, never had the "opportunity to present evidence on that issue." *Wallace*, 112 Nev. at 1020, 922 P.2d at 544.

B. Denial of Mother's Right to Cross Examine Violated Due Process

The introduction of the allegation that Mother's fiancé was "punching" Weston through statements by the Court violated Mother's fundamental right to engage in cross-examination of a witness whose testimony was used against her interests. This Court has previously stated:

> The right to cross-examine witnesses in an adjudicatory proceeding is one of fundamental importance.

Bivins Const. v. State Contractors' Bd., 107 Nev. 281, 283, 809 P.2d 1268, 1270 (1991). Denial of that right is a violation of due process. *Id.*

Father attempts to prey on the emotions of the Court, suggesting that any mother cross-examining her own child is a horrific prospect. However, Father ignores that none of the parties here even know the exact words spoken by the child, or the nature of the questioning that evoked whatever words were actually spoken. Cross-examination "'is beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 J. Wigmore, *Wigmore on Evidence*, § 1367, at 32 (Chadbourn ed. 1970). Mother was entitled to have this opportunity for the discovery of the truth. Because of the District Court's actions, there has been no opportunity to determine the context of the actual statements, no opportunity to comment on the child's demeanor, and no opportunity to explore the notion that the child had been–as CPS had apparently determined—coached.

The denial of an opportunity for cross-examination violates due process. *Bivins Const., supra.* As there is no dispute that Mother was given no opportunity for cross-examination, the District Court's order must be vacated.

II. MOTHER DID NOT WAIVE ANY RIGHTS, INVITE ERROR, OR FAIL TO PRESERVE ERROR

Just as Father attempted to make it appear that Mother was responsible for his arrest for his parole violations, he also claims that Mother is responsible for the District Court's failure to comply with Nevada law. The record does not support this claim.

A. Mother Did Not Waive Any Rights

While Respondent speaks of waiver, he completely fails to acknowledge that there is no evidence of a valid waiver here. "To establish a waiver, the party asserting waiver must prove that there has been an intentional relinquishment of a known right." *Gramanz v. T-Shirts & Souvenirs, Inc.*, 111 Nev. 478, 483, 894 P.2d 342, 346 (1995). This is particularly true when, as here, fundamental rights are involved. *Mack v. State*, 119 Nev. 421, 427, 75 P.3d 803, 807 (2003) ("A valid waiver of a fundamental constitutional right ordinarily requires "an intentional relinquishment or abandonment of a known right or privilege.").

This Court has recognized that:

> [t]he right to cross-examine witnesses in an adjudicatory proceeding is one of fundamental importance.

Bivins Const. v. State Contractors' Bd., 107 Nev. at 283, 809 P.2d at 1270. A denial of the right of cross-examination violates due process. *Id.*

Here, there is no evidence showing that Ms. Gordon was informed that *before* an alternative method of providing testimony is even discussed, the District Court was required to make a determination, upon notice, as to whether such alternative form of testimony is necessary. She was *not* informed that she had a right to have counsel present while the interview occurred. She was *not* informed that a Nevada statute required that any alternative form of testimony by her children was required to include an opportunity for cross-examination. Instead, the record shows only that Mother was required to choose between two options, both of which were contrary to Nevada law. This does not constitute a waiver.

Moreover, contrary to Respondent's assertion, *Answering Brief,* 20-21, NRS 50.500 *does* outlaw the sort of Star Chamber interview undertaken here – and it makes no exception for agreement by the parties. Specifically, NRS 50.610 expressly states:

> An alternative method ordered by the presiding officer *must* permit a full and fair opportunity for examination or cross-examination of the child witness by each party.

NRS 50.610. The plain language of the statute indicates that provision of an opportunity for cross-examination is mandatory. While a party might decline to *take advantage of* an opportunity for cross-examination, the opportunity itself must

have been proffered. Here, however, the interview by the District Court did not permit any opportunity for examination or cross-examination of the child witness by *either* party. As such, it violated NRS 50.500.

The situation here differs considerably from those in the waiver cases relied upon by Father. For example, in *Wolff v. Wolff*, 112 Nev. 1355, 1363, 929 P.2d 916, 921 (1996), a party raised an equitable argument regarding the distribution of marital assets for the first time on appeal. Unlike the situation here, this newly raised argument did not challenge the District Court's engaging in conduct that is contrary to the express terms of a Nevada statute, without disclosure of that governing statute to a *pro se* litigant. The case of *Truax v. Truax*, 110 Nev. 437, 439, 874 P.2d 10, 11 (1994) similarly involved the introduction of a new legal theory on appeal; furthermore, the legal theory in question in *Truax* was the result of a misreading of a statute.

Father's reliance on *Mack v. Estate of Mack*, 125 Nev. 80, 96, 206 P.3d 98, 108 (2009) is perplexing, as this case addresses whether the reading of the terms of a negotiated settlement agreement in open court can demonstrate the existence of a contract where one party of the contract was murdered prior to execution of the agreement. Nothing in this decision supports the conclusion that a Court may obtain a waiver of due process rights of which the parties are ignorant. Similarly puzzling is Father's reliance on *Lehrer McGovern Bovis, Inc. v. Bullock*

Insulation, Inc., 124 Nev. 1102, 1119, 197 P.3d 1032, 1043 (2008). In *Bullock*, during trial, the parties entered into stipulations regarding the value of certain mechanics' lien claims in the case, which stipulations were memorialized on the record, as required under the local court rules.

None of these authorities justify upholding a District Court's action that was not only contrary to Nevada Evidentiary law, but also contrary to the Canons of Judicial Conduct, on the basis of unknowing waiver.

B. Mother did not Invite Error

Father's claim that Mother invited the District Court's error is equally unsupported by the record. "The doctrine of 'invited error' embodies the principle that a party will not be heard to complain on appeal of errors which he himself *induced or provoked* the [district] court to commit." *Pearson v. Pearson,* 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) (quoting 5 Am.Jur.2d *Appeal and Error* § 713 (1962)) (emphasis added). Here, there is no dispute that the District Court raised the issue of child interviews *sua sponte.* **I APP 55:1-21, 56:20-2.**

Father's reliance on *Benjamin v. Benjamin*, 370 S.W.2d 639, 643 (Mo. Ct. App. 1963) is misplaced. In *Benjamin*, a child whose age made her presumptively incompetent to testify was examined by the trial court off the record for the purpose of determining whether the presumption could be rebutted. The Court found the child incompetent. The Missouri Court of Appeals found the off the

record examination to be error, stating that an off the record interview of a child "is tantamount, in legal contemplation, to no examination at all, there being no means by which it can be judicially noticed or reviewed." 370 S.W.2d at 643. However, the matter was not reversed because 1) Mother had herself requested the child be examined by the Court, thus inviting the error, and 2) Mother had presented no offer of proof as to what the child's testimony had been.

While *Benjamin* is instructive for its recognition that off the record examinations of child witnesses are error, it otherwise has no application here. First, unlike the situation here, there is no indication that the process followed in *Benjamin* was contrary to any statute. Additionally, here, as noted above, examination of Weston was not conducted as the result of any request by Mother, but instead, at the District Court's own insistence. Furthermore, here, unlike *Benjamin,* where no testimony from the child was considered in the decision, purported statements made by the child in the off the record examination were not only relied upon by the District Court, but such statements were the sole basis for the District Court's decision. Nothing in *Benjamin* supports overlooking such plain error.

C. Mother Did Not Fail to Preserve Error

Finally, Father's contention that Mother failed to preserve the error is contrary to statute. The sole source of information regarding both the purported

statements by the children, and of the CPS reports contained in this record, came from words spoken by the District Court. In such circumstances, the District Court served as a witness in the case. Such an occurrence is plain error. NRS 50.055. There is no requirement that such an error be preserved by a contemporaneous objection. NRS 500.055(2).

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

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). Here, Mother pointed out the lack of notice and the lack of opportunity to present evidence regarding the accusations. The successor District Court also failed to acknowledge the existence of NRS 50.500, and failed to correct the matters brought to its attention. Accordingly, it abused its discretion in denying Motion for Reconsideration or New Trial.

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 obtained that was not presented into evidence by either party. Accordingly, the District Court's March 2015 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 23rd day of June 2016.

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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 3,851 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 23rd day of June 2016.

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CERTIFICATE OF SERVICE

This is to certify that on the 23rd day of 2016, a true and correct copy of the foregoing ***Appellant's Reply Brief*** was served 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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