IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW F. ARCELLA, Appellant / Cross-Respondent, vs. MELISSA ARCELLA, Respondent / Cross-Appellant.	No.: 71503 **CHILD CUSTODY FAST TRACK RESPONSE / FAST TRACK STATEMENT ON CROSS APPEAL**

1. Name of party filing this fast track response:

Respondent / Cross-Appellant, Melissa Arcella

2. Name, law firm, address, and telephone number of attorney submitting this fast track response:

F. Peter James, Esq.
Law Offices of F. Peter James, Esq.
3821 West Charleston Blvd., Suite 250
Las Vegas, Nevada 89102
702-256-0087

3. Proceedings raising same issues. If you are aware of any other appeal or original proceeding presently pending before this court, which raise the same legal issue(s) you intend to raise in this appeal, list the case name(s) and docket number(s) of those proceedings:

None known.

4. Procedural history. Briefly describe the procedural history of the case only if dissatisfied with the history set forth in the fast track statement (provide citations for every assertion of fact to the appendix or record, if any, or to the transcript or rough draft transcript):

The parties were divorced on September 23, 2009. (JA 13). The parties agreed to joint legal and joint physical custody of the minor children Rachel Arcella (born May 18, 2005) and Wade Arcella (born January 20, 2007) (hereinafter collectively "the children"). (JA 14). Per the Decree of Divorce, "Subject to both parties mutually agreeing to send their children or child to private school, [t]he parties agree to equally split the cost of private school tuition and costs for the minor children." (JA 16:3-4).

From kindergarten to until the present school year, the children attended Henderson International School, a **non-religious** private school. (JA 112). The parties agreed to keep the children in the **non-religious** private school with Appellant ("Dad") paying for the costs. (JA 44).

As Rachel (the oldest child) came to enter middle school, the parties did not want the children to attend Henderson International School for middle school. (JA 113 at n.1). Dad filed a motion to send Rachel (and ostensibly Wade) to Faith Lutheran School (hereinafter "FL"). (JA 47-84). Faith Lutheran is a religious private school where salvation of each student is the primary concern—

not education. (JA 115:3-7, 176, 181). Respondent ("Mom") opposed the motion and countermoved for attorney's fees.[1] (JA 111-237). Dad did not file a Financial Disclosure Form. (JA 117:18-19,

After a hearing, the district court denied the motion and the countermotion for attorney's fees. (JA 327-331). Dad then moved the district court for a rehearing of the motion. (JA 257-292). Mom opposed the second motion and again countermoved for attorney's fees.

The district court again denied Dad's motion. This time, however, the lower court awarded Mom $2,000 in attorney's fees. (JA 364-65). Dad appealed. (JA 332, 368). Mom cross appealed. (RA 43).

5. Statement of facts. Briefly set forth the facts material to the issues on appeal only if dissatisfied with the statement set forth in the fast track statement (provide citations for every assertion of fact to the appendix or record, if any, or to the transcript or rough draft transcript):

Appeal

The parties are in agreement that the children should not continue to attend Henderson International School past the elementary grades. (JA 113 n.1). Dad wants the children to attend a religious middle school—Faith Lutheran. (JA 47).

[1] Mom countermoved for other relief, which is not at issue on appeal.

Mom objects to the children attending Faith Lutheran on numerous grounds, such as the heavy religious indoctrination (JA 114), the distance from the parties' residences and Faith Lutheran (JA 115), and that Faith Lutheran is not a better school than the school for which Mom is zoned—Bob Miller Middle School (JA 116).

Mom objects to the heavy religious indoctrination that FL has. (JA 114-15, 176, 181, 285). FL's first priority is the salvation of each student—not the education of the students. (JA 181). FL teaches creationism over evolution. (JA 285).

Mom also objects to the distance FL is from the parties' residences. (JA 115). FL is in Summerlin, which is all the way across the valley Henderson. (JA 115). The travel time each way is approximately 45 minutes, which means the children would be in a car for 1.5 hours (at least) each day getting to and from school—more if traffic is heavy. (JA 115-16). The children's study, leisure, and meal times will be negatively affected by the travel—as will school friendships and having neighborhood friends. (JA 115-16).

Moreover, FL is not a better school than the public school for which Mom is zoned. (JA 116-17). Bob Miller Middle School is a Five-Star school and is the #1 ranked middle school in the State of Nevada. (JA 113, 116-17). Bob Miller is one of the top ranked middle schools (public and private) in the entire

United States. (JA 113, 173). FL is not even ranked as one of the top middle schools, let alone ranked higher than Bob Miller Middle School. (JA 113 n.2).

Dad has provided nothing more than "private schools are better" in support of his argument that the children should attend FL—no exhibits as offers of proof, no affidavits, nothing. (*See generally* JA 47-84, 238-256). Mom has no *per se* objection to private school, as evidenced by her agreeing to the children attending the non-religious Henderson International School, which is a private school. (JA 112, 377). Mom has a religious objection to FL, in addition to the other arguments against FL. (JA 114-15, 176, 181, 285, 377-78).

When Dad approached Mom with the idea of the children attending FL, Mom agreed to tour FL. (JA 113, 120). Unbeknownst to Mom, however, Dad brought the child with them. (*Id*.). Mom properly co-parented and considered Dad's request for the children to attend FL. (JA 254). As Mom knows how to co-parent with Dad, she did not come right out and tell him all of her objections to FL—she considered it in a diplomatic way. (JA 254). As evidenced by Dad's motion and Mom's opposition, Mom declined Dad's request.

Dad asserts that the child registered for FL. (Fast Track Statement at 6). Children cannot register themselves for school. A parent must register them. Dad must have registered the child as Mom surely did not.

Mom's objection to a religious private school is not cryptic as Dad would suggest. When married to Dad, Mom agreed to the children attending a Jewish preschool. (JA 377-78). Religious indoctrination is very different at 3-4 years old than it is for middle school children. (JA 377). Mom conformed to Dad's religious views while they were married. (JA 378). Since they divorced, Mom is not religious. (*Id*.). Mom asserts that Dad can take the children to church on his time, but that the children should not have religion indoctrinated upon them at school. (*Id*.).

Cross-Appeal

Dad hid his financial position from the district court by failing to file a Financial Disclosure Form. (JA 117). Even through the rehearing stage of the litigation, Dad still did not file a Financial Disclosure Form. (JA 284). Mom asked for both suit fees and fees as a sanction. (JA 120-122). Mom offered that Dad earned far more than she. (JA 120). As Dad hid his income from the district court, the court never knew Dad's income. (JA 117). Mom filed her Financial Disclosure Form. (JA 87-110).

Still, the district court denied Mom's request for attorney's fees. (JA 329).

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6. Issues on appeal. State concisely your response to the principal issue(s) in this appeal:

The district court properly denied Dad's request for the children to attend Faith Lutheran—whether based on Mom's religious objection or for other reasons.

The district court did not abuse its discretion in denying Dad's motion due to limited factual findings.

The district court did not abuse its discretion in not ordering an evidentiary hearing and in not interviewing the child.

Cross-Appeal Issues

Did the district court abuse its discretion in not awarding Mom attorney's fees?

7. Legal argument, including authorities:

APPEAL ISSUES

The district court properly denied Dad's request for the children to attend FL. Dad's arguments are all smoke and mirrors as he failed to make meet his initial burden.

Standard of Review

Child custody decisions are reviewed for an abuse of discretion. *See Rivero v. Rivero*, 125 Nev. 410, 429, 216 P.3d 213, 226 (2009).

Argument

A. The district court properly denied Dad's request for the children to attend Faith Lutheran

The district court properly denied Dad's request for the children to attend FL. It was Dad's burden to show that the children attending FL was in their best interest. *See Rivero,* 125 Nev. at 430, 216 P.3d at 227.

As stated herein, Dad only offered lip service as to why it was better for the children to attend a religious private school—Dad had no offers of proof, no exhibits, no affidavits. (*See generally* JA at 47-84). Mom offered that the alternative to FL (Bob Miller Middle School) was a Five-Star school, the #1 middle school in Nevada, and one of the top middle schools in the entire United State of America—including private schools. (JA 113, 116-17, 173).

Dad really only offered that the child wanted to go to FL as a reason for the same. (JA 50). Dad was unduly influencing the child to the point that Mom had to request an order for Dad to appear and show cause why he should not be held in contempt of court. (JA 119-120, 382).

Dad also suggested that Mom's religious objection is invalid, so the children should go to FL. (*See* JA at 384-86). As it is Dad's burden, his attempt to burden shift is wholly improper. *See Francis v. Wynn Las Vegas, LLC,* 127 Nev. 657, 667 n.5, 262 P.3d 705, 713 n. 5 (2011). That Dad attempted to burden

shift as his main argument shows how he provided nothing for the district court to even be able to rule in his favor.

Dad did not offer anything to meet his burden of proof to have the district court rule in his favor. Dad failed to meet his burden. As such, the district court properly denied his motion.

Dad attempts to reframe the argument as a religious argument. Religion aside, Dad has to meet his burden. As he did not, the district court properly denied Dad's request to have the children attend FL.

As to the religious argument, Dad initially provided nothing in response to Mom's arguments against the issue. Mom provided plenty of mandatory authority that the State could not impose religion on a child over a parental objection. (JA 114-15). The State is prohibited by the United States Constitution from forcing religion on a person. *See e.g. Everson v. Board of Ed. Of Ewing Tp.*, 330 U.S. 1, 15-16, 67 S.Ct. 504, 511-12 (1947). Parents have the right to determine the exercise of their children's religion, or lack thereof. *See* U.S. CONST. amend 1 and NEV. CONST. art. 1, § 4; *see e.g. Prince v. Massachusetts,* 321 U.S. 158, 165-66, 64 S.Ct. 438, 442 (1944). State involvement in a parent's religious decision must be to protect the children from a "clear and present danger". *Prince,* 321 U.S. at 168, 64 S.Ct. at 442 ("[] when state action impinges

on a claimed religious freedom, it must fall unless shown to be necessary for or conducive to the child's protection against some clear and present danger.").

In his Reply Brief, Dad provided no law in support of his position and no law which contradicted the law Mom provided. (JA 238-256). Dad merely rehashed that Mom's religious objection was invalid and that Mom's exhibits were not credible. (*Id*.).

As Dad provided nothing to the district court as to the religious argument, he failed to meet his burden. The district court properly denied Dad's motion.

Dad filed a motion for rehearing. (JA 257-70). The lower court denied the motion for rehearing. (JA 358-361). Dad appealed the denial of the motion for rehearing. (JA 368). Orders denying rehearing are not appealable. *See Phelps v. State*, 111 Nev. 1021, 900 P.2d 344 (1995). Thus, the Court has no jurisdiction to entertain the appeal of the same. (*Id*.). As such, any arguments made in a motion for rehearing are not properly before this Court.

In his motion for rehearing, Dad cites to an Arizona case, *Jordan v. Rae*, 212 P.3d 919 (Ariz. App. 2009), for the position that a court may order that a child attend a religious school over a parental objection. (JA 263-65). As this was not properly raised in the district court in the initial motion, any arguments made in the motion for rehearing are not properly before this Court on appeal. The Court should not entertain any such arguments.

Should the Court entertain Dad's arguments on hearing, the Court should disconsider them as they are misplaced. Arizona law is not binding in Nevada. *See e.g. Rivero*, 125 Nev. at 420 n.2, 216 P.3d at 221 n.2 (2009) (out-of-state law is not controlling).

More to the point, the facts in *Jordan* are not analogous to the present case. In *Jordan*, the children had attended religious private school for years—both before and after divorce. 212 P.3d at 923. The father had asked the court to change the school from a religious private school to a public school. *Id*. The father lost the initial round of litigation citing that he could not afford the schooling. *Id*. This is very disanalogous to the present case where the children have attended a non-religious private school since Kindergarten—not a religious private school. (JA 112).

To cite to a federal case coming from a larger neighboring state (California), the 9th Circuit takes a different stance on religious indoctrination by the state. "It is not only that the court must not interfere; even more so, the state and federal government may not seek to indoctrinate the child with their religious views, particularly over the objection of *either* parent." *See Newdow v. U.S. Congress*, 313 F.3d 500, 504 (9th Cir. 2002) (emphasis in original). In *Newdow*, the mother had sole legal custody of the child. Dad objected to religious indoctrination by a school, of which Mom approved. The *Newdow* court held

that even if a parent has sole legal custody of a child, that parent has no power to insist that the child be subjected to unconstitutional state action indoctrinating religion on the child.[2] *Id.*, 313 F.3d at 505.

The 9th Circuit holding goes well beyond the facts of this case. The 9th Circuit ruling provides that courts may not mandate a child to say "under God" once a day during the 1954 version of the Pledge of Allegiance. *A fortiori*, it would be wholly impermissible for a court to order a child to attend a religious private school where "The salvation of each student is our school's first priority" and where students are **required** to take a Theology course each year they attend Faith Lutheran. (JA 181). It is worth noting that education is not the FL's first priority for its students.

The 9th Circuit case clearly provides that the courts cannot order religious indoctrination upon a child in any form if even one parent objects. Here, Mom is objecting. (JA 111-237). Mom has a well-based, clearly-stated objection to the children attending a religious school. Mom reasserts her First Amendment rights (as well as Equal Protection) under the United States Constitution (applicable via the 14th Amendment) and under the Nevada Constitution.

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[2] The parties have joint legal custody of the children. (JA 2). As such, Mom, as the objecting parent, has a stronger position to object to the religious indoctrination than the father did in *Newdow*, as he had no legal custody rights.

So, even if the Court entertains Dad's arguments on rehearing (which is not permissible as the Court has no jurisdiction over the rehearing), federal law from the 9th Circuit simply does not permit religious indoctrination of a child of a parental objection. It is worth stressing that the 9th Circuit upheld the father's right to not have his child subjected to religious indoctrination even though the father had no legal custody rights as the mother had sole legal custody.

* * *

Dad has failed to meet his burden. The district court properly denied the motion for the children to attend FL. Moreover, Dad failed to offer anything whatsoever to counter Mom's argument that United States Supreme Court case law forbids the courts from forcing religious indoctrination upon a child over a parental objection.

Dad's arguments upon rehearing are not properly before this Court as the Court lacks jurisdiction to hear an appeal of a motion denying rehearing. Even if the Court entertains the arguments, federal law prohibits courts from forcing religious indoctrination upon a child over a parent's objection—even one with no legal custody rights.

As such, the district court did not abuse its discretion in denying the motion. Thus, the Court affirm the district court.

B. The district court was not required under Nevada law to make more findings than it made / hold an evidentiary hearing

A district court may deny a motion to modify child custody without holding an evidentiary hearing if the moving party fails to demonstrate "adequate cause". *See Rooney v. Rooney*, 109 Nev. 540, 853 P.2d 123 (1993). To demonstrate adequate cause, the moving party essentially must allege sufficient facts that would warrant a modification of custody if proven and must essentially make an offer of proof more than a he said / she said. *Id*.

Dad cites to *Davis v. Ewalefo*, 131 Nev. ___, 352 P.3d 1139 (2015 in support of the position that a district court must make findings as to all of the best interest factors in denying a motion to modify child custody. Mom asserts that the lower court need not make such findings as to a motion to modify child custody.

Davis concerns an **initial determination** of child custody. 131 Nev. at ___, 352 P.3d at 1139. *Davis* is on point that a district court must make proper findings for an **initial determination** of child custody. Mom agrees with that conclusion.

Mom disagrees with the Dad's assertion that a district court must make findings as to each best interest factor when it **denies a motion to modify child**

custody. *Davis* does not stand for that position as it does not concern a denial of a request to modify custody. *Davis* does not overrule *Rooney*.

Moreover, to make findings as to a child's best interest, the district court would have had to hold an evidentiary hearing. *See* BLACK'S LAW DICTIONARY 1543 (8th ed. 2004) (bench trial: the judge decides questions of fact as well as questions of law). The district court held a motion hearing, which is common in the Eighth Judicial District. But under Dad's reasoning, all motions would have to go to a full-blown evidentiary hearing to take evidence as to the best interest of the child just to deny the motion. There is no other way to find fact but to hold an evidentiary hearing.

This reasoning is wholly inconsistent with *Rooney*. Under *Rooney*, the district court may deny a motion to change custody if adequate cause for the same is not shown. 109 Nev. at 540, 853 P.2d at 123. This is sound policy as it prevents costly evidentiary hearings on issues where the moving party cannot prevail even if everything alleged is proven. Under Dad's reasoning, all motions to modify child custody must go to an evidentiary hearing so the district court can find reasons under the best interest of the child factors to deny the motion. That is unsound policy which should not be adopted. *Rooney* should be upheld as it is good law and good policy.

Should the Court find that the district court's findings were incomplete, the Court may imply findings where the evidence supports the conclusion. *See Gorden v. Gorden*, 93 Nev. 494, 496, 569 P.2d 397, 398 (1977). As stated herein Dad failed to meet his burden. If the district court's findings were a bit incomplete, it is inconsequential. Dad failed to meet his burden. No further findings are needed.

C. The district court did not need to interview the child

Dad's motion is devoid of a request to have any child interviewed. (*See* generally JA 47-84). Failure to cogently state issues before a court properly results in the denial of the same. *See Edwards v. Emperor's Garden Restaurant*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006).

As Dad did not properly request a child interview, the district court did not abuse its discretion in not granting one.

CROSS-APPEAL ISSUES

The district court abused its discretion in denying Mom attorney's fees.

Standard of Review

Awards of attorney's fees are reviewed for an abuse of discretion. *In re Estate and Living Trust of Miller*, 125 Nev. 550, 552, 216 P.3d 239, 241 (2009).

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Argument

The district court abused its discretion in denying Mom's request for attorney's fees. Mom requested both suit fees under *Leeming v. Leeming*, 87 Nev. 530, 490 P.2d 342 (1971), and as a sanction under NRS 18.010 and EDCR 7.60. (JA 120). EDCR 5.32 requires that parties file Financial Disclosure Forms when any party requests financial relief. Mom filed her FDF. (JA 87-110). Dad refused to file his. (JA 284). Dad's failure to file his FDF may be construed as an admission that he has the resources to pay the fees Mom requested. *See* EDCR 5.32(b).

Mom gave an offer of proof that Dad earned significantly more than she earned. (JA 120). Dad gave nothing to refute this—he did not file a Financial Disclosure Form. As it turns out, Dad has disposable income of at least $46,000 per year, as that is what the schools Dad proposed cost for two children. (RA 5).

The district court was in the blind as to Dad's income (at Dad's own choice) when it denied Mom's requests for fees. This is an abuse of its discretion.

As such, the Court should overturn the district court and remand the matter for an appropriate award of attorney's fees.

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ROUTING STATEMENT

Pursuant to NRAP 3E(d)(1)(H), Respondent submits the following routing statement:

- This appeal is not presumptively retained by the Supreme Court pursuant to NRAP 17(a);
- This appeal is presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(5) as it is a family law matter not involving termination of parental rights or NRS Chapter 432B proceedings;
- Respondent asserts that the matters should be routed to the Court of Appeals as there are no issues that would keep the matter with the Supreme Court;
- Respondent agrees that this case concerns important issues as to rights under the U.S. Constitution and that these issues are an issue of first impression in Nevada. Still, these issues are likely not properly before the Court as stated herein.

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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:

[X] This fast track response has been prepared in a proportionally spaced typeface using Times New Roman in 14 point in MS Word 2013; or

[ ] This fast track response has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

2. I further certify that this fast track statement complies with the page- or type-volume limitations of NRAP 3E(e)(2) because it is either:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 4101 words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains ___ words or ___ lines of text: or

[ ] Does not exceed ___ 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 19th day of January, 2017

/s/ *F. Peter James*

_____

LAW OFFICES OF F. PETER JAMES
F. Peter James, Esq.
Nevada Bar No. 10091
3821 W. Charleston Blvd., Suite 250
Las Vegas, Nevada 89102
702-256-0087
Counsel for Respondent / Cross-Appellant

CERTIFICATE OF SERVICE

The following are listed on the Master Service List and are served via the Court's electronic filing and service system (eFlex):

Pecos Law Group
Bruce I. Shapiro, Esq.