

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

2                   KIRK ROSS HARRISON,

3                                   Appellant,

4                   v.

5                   VIVIAN MARIE LEE HARRISON,

6                                   Respondent.

Supreme Court No. 72880  
District Court Case No. 2017-01161  
Electronically Filed  
Mar 06 2018 10:58 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

7  
8  
9  
10                   **OPPOSITION TO MOTION FOR CONFESSION OF ERROR; OPPOSITION TO**  
11                                   **MOTION FOR ORAL ARGUMENT**

12                                   **COUNTERMOTION FOR ACCEPTANCE OF RESPONDENT'S FAST**  
13   **TRACK RESPONSE BRIEF**

14  
15                   Respondent VIVIAN LEE HARRISON ("Vivian"), by and through her attorney,  
16                   Radford J. Smith, Esq. of Radford J. Smith, Chartered hereby opposes Appellant's Motion  
17                   for Confession of Error and for Oral Argument and Requests to Allow Respondent to File  
18                   Response Brief and requests that the Court deny Appellant's Motions. Further, Respondent  
19                   requests that she be permitted to file the Fast Track Response Brief rejected on February  
20                   28, 2017.  
21  
22

23                                   **I.**

24   **ARGUMENT**

25  
26                   Appellant, KIRK HARRISON ("Kirk") has moved for a confession of error under  
27                   NRAP 31(d). On February 28, 2018, Vivian's counsel submitted the Child Custody Fast  
28                   Track Response Brief ("Response Brief") for filing. *See* Child Custody Fast Track Response

1 Brief attached hereto as Exhibit "A." On March 1, Vivian's counsel received a notice  
2 indicating that the Response Brief was rejected because it was due on January 29, 2018. *See*  
3 Notice from Court regarding rejection attached hereto as Exhibit "B." By this Opposition,  
4 Vivian's counsel requests that Kirk's request for a confession of Judgment be denied, and  
5 Vivian be permitted to file her Response Brief.  
6

7  
8 **A. The Court in its Discretion May Deny Kirk's Motion, and Permit the Filing**  
9 **of Respondent's Fast Track Response Brief**

10 The remedy for a parties' failure to timely file a respondent's brief is within the  
11 discretion of the Court. NRAP 31(d)(2). (failure to file "*may* be treated by the court as a  
12 confession") (emphasis supplied). The case cited by Kirk, *Rhode Island v. Prins*, 96 Nev.  
13 565, 613 P.2d 408 (1980) addressed an order from the State of Rhode Island was that the  
14 respondent father "owed no duty of support to his child." *Id.* at 565, 613 P.2d at 409. It is  
15 plain that the respondent's failure to file a brief two months after the extension was  
16 prejudicial to the mother, and there was no conceivable justification to an order that was  
17 clearly against the public policy of Nevada. In that case, the court entered a confession of  
18 judgment. *Id.*  
19

20  
21  
22  
23 None of the other cases cited in Kirk's motion stand for the blanket notion that a  
24 party's failure to timely file a respondent's brief should be deemed a confession of error.  
25 The decision in *Toiyabe Supply Co. v. Arcade Dress Shops*, 74 Nev. 314, 330 P.2d 121  
26 (1958) revealed that the respondent had already been granted a judgment against an  
27 individual party, Hosang, in the underlying action, and that the individual did not appeal the  
28

1 judgment. *Id.* The appeal was brought by property owners and lessors that alleged that there  
2 was no evidence of their conversion of the fixtures in the record, and that Hosang had  
3 admitted the fixtures were still in her possession. *Id.* The court stated that in that  
4 circumstance it was “an appropriate case” for finding confession of error as the method of  
5 disposition. *Id.* The circumstances of the failing to file the brief was logically viewed as  
6 the respondent’s satisfaction that it possessed a judgment against the party that had the  
7 converted goods.

11 Lack of prejudice and a failure to identify a meritorious defense to an appeal was the  
12 basis of another of the cases Kirk cites. In *Knapp v. Lemieux*, 97 Nev. 450, 634 P.2d 454  
13 (1981) the court addressed the appeal of a default judgment, and an order denying a motion  
14 to vacate the judgment. When the respondent failed to file a brief, the court issued an order  
15 directing the respondents show cause why their failure to file a brief should not be  
16 considered a confession. The court found that the affidavit filed by the respondents did not  
17 demonstrate good cause why that failure should not be treated as confession of error. *Id.*  
18 The court’s decision, however, did not address the reasons it found the affidavit lacking. It  
19 does, however, suggest that the court contemplated reasons why the brief should or should  
20 not be permitted to be filed or heard before entering the sanction of confession of error.

25 The two other cases Kirk cited in his motion address timeframes far beyond the 30  
26 days from the court’s filing deadline present here. *Kitchen Factors v. Brown*, 91 Nev. 308,  
27 535 P.2d 677 (1975), the court’s opinion, dated May 21, 1975 order ostensibly dealt with a  
28

1 respondent's brief that had not been filed for 7 months and three weeks from the date of the  
2 November 1, 2014 filing of the opening brief. The respondents in that case had never sought  
3 a continuance. The appeal addressed a \$1365.72 judgment. The court cited to its hearing  
4 calendar, and indicated that the court could better assign its hearing time to more concerned  
5 litigants. *Id.* In *Hansen Plumbing & Heating v. Gilbert Development Corp.* 97 Nev. 42,  
6 638 P.2d 76 (1981), the respondents did not file an opening brief within the four months  
7 from the filing of the opening brief on August 31, 1981 and were two months late  
8 (presumably from a 30 day extension since the opinion is dated December 31, 1981). The  
9 respondent in that case also failed to respond to the court's show cause order directing the  
10 respondent to show why a confession of error should not have been entered. *Id.* 642-643,  
11 638 P.2d 76.

12  
13  
14  
15  
16  
17 **B. Neither the Law, or the Facts of this Case Applied to that Law, Support a**  
18 **Summary Dismissal of Vivian's Defense to the Appeal**

19 Vivian was late in the filing of her brief, and undersigned counsel is prepared to  
20 address and comply with any additional sanctions the court may impose. The question for  
21 the court now is whether the delay was so great, and the prejudice caused by the delay so  
22 great, and the issues be summarily reversed so apparent or inconsequential, that the remedy  
23 of a confession of error is appropriate. Vivian submits that all those factors mitigate against  
24 such a harsh remedy.  
25  
26  
27  
28

...

...

1                   **a. The delay has not been so great to warrant summary dismissal**

2           The delay in this case was different in both time and circumstance from the facts  
3  
4 addressed in the cases cited by Kirk. Vivian’s counsel did seek continuances of the time to  
5 file her brief, and paid the sanctions contained in the court’s recent order when he could not  
6 file the brief timely. The brief submitted by Vivian is four weeks from the court’s last  
7 deadline of January 29, 2018, not the several month time periods typical the cases Kirk  
8 cites. Vivian has timely addressed Kirk’s motion and submitted a brief for filing. Vivian  
9 has timely responded to Kirk’s request for confession of error and identified substantial  
10 harm that would arise from this court’s summary Confession or Error, including the reversal  
11 of established precedent that cannot be attacked by Kirk as a matter of law.  
12  
13

14           Further, though deemed premature by the Court, Vivian took affirmative steps to  
15 address the issues raised by Kirk on appeal. Vivian filed a Motion to Dismiss Kirk’s appeal  
16 on August 31, 2017 identifying that Kirk’s claims seeking to overturn the Nevada Supreme  
17 Court’s prior decision in *Harrison v. Harrison*, 132 Nev. Adv. Op. 56, 376 P.3d 173 (2016).  
18 The Court denied Vivian’s motion and ordered that “Appellant counters that respondent’s  
19 challenges go to the merits of the appeal. We agree that respondent’s challenges to go to the  
20 merits of the appeal are not properly presented through a motion to dismiss.” *See* Order  
21 Denying Motion filed on September 22, 2017 in the present case. Arguably, the law of the  
22 case doctrine is procedural, and does not address the merits of the appeal.  
23  
24  
25  
26  
27  
28

...

1                   **b. Kirk has not been prejudiced by any delay in filing Vivian's brief.**

2                   Kirk's series of motions, and the orders arising from them that he challenges on  
3 appeal, are grounded in Brooke's refusal, at 16, at about the time she was entering a  
4 combination of college courses and classes, to go Kirk's home during the week, and instead  
5 to live at Vivian's home except for alternating weekends. Kirk filed a series of motions to  
6 hold Vivian in contempt for Brooke's actions, but later withdrew those motions because the  
7 evidence did not support his claim that Vivian had alienated Brooke.  
8  
9  
10

11                  The district court denied Kirk's last motion for contempt because it was not properly  
12 presented, but the court still proceeded forward with an evidentiary hearing on the issue of  
13 Kirk's make-up time with Brooke, his claim that Brooke should be required to attend a camp  
14 to address Vivian's alienation, and his request that the court prohibit Brooke and Rylee from  
15 having any contact with Vivian for months. The district court heard the testimony of the  
16 Brooke's therapist, Dr. Jamal Ali, the neutral expert appointed by the district court, Dr. John  
17 Paglini, and Brooke. The court, based upon that evidence, denied Kirk's motions.  
18  
19  
20

21                  There was substantial evidence in the record to support the Court's exercise of  
22 discretion and findings. Dr. Paglini filed his initial report on January 26, 2016 (15 AA  
23 3316-3373) and testified at the hearing February 3, 2017. In both his detailed 59-page report  
24 (15 AA 3371), and his sworn testimony, Dr. Paglini found that Brooke's issues with Kirk  
25 were not caused by alienation by Vivian, but instead were caused by various factors that had  
26 nothing to do with Vivian.  
27  
28

1                   **i. Kirk has not identified any prejudice caused to any of his**  
2                   **claims by the delay in submission of Vivian's brief.**

3           Kirk's present motion for Confession of Error does not cite any prejudice that has  
4           resulted from the late submission of Vivian's brief. He does not address how his claims  
5           have been affected in any manner, because, as addressed below, they have not.

7                   **ii. Kirk was not prejudiced by the late submission of Vivian's**  
8                   **brief because his claims are moot.**

9           Kirk's various claims blaming Vivian for his issues with Brooke were not affected by  
10          the timing of Vivian's brief because they are moot. Brooke emancipated on her 18<sup>th</sup> birthday  
11          on June 26, 2017 and is thus no longer subject to the jurisdiction of the district court. Thus,  
12          any claim regarding the district court's decision in relation to Brooke is moot. In *National*  
13          *Collegiate Athletic Association v. University of Nevada*, 97 Nev. 56, 58, 624 P.2d 10, 11  
14          (1981) the court held:

15               Cases presenting real controversies at the time of their institution may become  
16               moot by the happening of subsequent events. A moot case is one which seeks  
17               to determine an abstract question which does not rest upon existing facts or  
18               rights.

19          Courts have generally held that a case addressing the custody of a child becomes moot if the  
20          child emancipates during the appeal. *See, e.g., Ngo v. Ngo*, 133 S.W.3d 688, 691 (Tex. App.  
21          2003); *Carnese v. Weigert*, 710 N.Y.S.2d 130 (N.Y. App. Div. 2000); *Wells v. Barile*, 358  
22          P.3d 583, 588 (Alaska 2015). Here, the Court should dismiss all claims Kirk has brought  
23          regarding orders relating to Brooke's custody or care.

1                   iii.     **Kirk was not prejudiced by the late submission of Vivian's**  
2                             **brief because his challenge to the teenage discretion provision,**  
3                             **and challenge to the order appointing a parenting coordinator**  
4                             **are precluded by the law of the case doctrine**

5             In Kirk's previous appeal in this case, the Nevada Supreme Court affirmed the district  
6     court's ruling that the parties' teenage discretion provision was a valid contract, and not  
7     against public policy. *Harrison v. Harrison*, 376 P.3d 173 (2016). The court further ruled  
8     that the district court had the ability under Nevada law to appoint parenting coordinators.  
9     Thus, under the "law of the case" doctrine, Kirk cannot challenge whether a district court  
10    has discretion to uphold the provision, nor can he argue that the provision is against public  
11    policy.  
12    policy.

13             [W]here an appellate court deciding an appeal states a principal [sic] or rule  
14     of law, necessary to the decision, the principle or rule becomes the law of the  
15     case and must be adhered to throughout its subsequent progress both in the  
16     lower court and upon subsequent appeal.  
17

18     *See Board of Gallery of History Inc. v. Datecs Corporation*, 116 Nev. 286, 289, 994 P.2d  
19     1149, 1150 (2000) quoting, *LoBue v. State ex rel. Department of Highways*, 92 Nev. 529,  
20     532, 554 P.2d 258, 260 (1976); *Wickliffe v. Sunrise Hospital*, 104 Nev. 777, 780, 766 P.2d  
21     1322, 1324 (1988); *see also Emeterio v. Clint Hurt and Assocs.*, 114 Nev. 1031, 1034, 967  
22     P.2d 432, 434 (1998) (stating that "[w]hen an appellate court states a rule of law necessary  
23     to a decision, that rule becomes the law of the case and must be followed throughout  
24     subsequent proceedings"); *Geissel v. Galbraith*, 105 Nev. 101, 103, 769 P.2d 1294, 1296  
25     (1989); *Sherman Gardens Co. v. Longley*, 87 Nev. 558, 563, 491 P.2d 48, 51 (1971) (noting  
26  
27  
28



1 that "[t]he decision (on the first appeal) is the law of the case, not only binding on the parties  
2 and their privies, but on the court below and on this court itself" (quoting *Wright v. Carson*  
3 *Water Co.*, 22 Nev. 304, 308, 39 P. 872, 873-74 (1895))).

4  
5 The law of the case doctrine "is designed to ensure judicial consistency and to prevent  
6 the reconsideration, during the course of a single continuous lawsuit, of those decisions  
7 which are intended to put a particular matter to rest." *U.S. v. Real Property Located at Incline*  
8 *Village*, 976 F. Supp. 1327, 1353 (D. Nev. 1997). The law of the case doctrine, therefore,  
9 serves important policy considerations, including judicial consistency, finality, and  
10 protection of the court's integrity. *Tien Fu Hsu v. Cnty. of Clark*, 123 Nev. at 633, 173 P.3d  
11 at 730. (2007). While there are limited exceptions (change in law pending appeals;  
12 determination of manifest error in the first decision), Kirk has not cited, nor is there any basis  
13 to ignore the law of the case doctrine in this case. Here, the provisions Kirk challenges on  
14 appeal were not invoked by either of the children, and, in fact, could not have been invoked  
15 by Rylee.

16  
17  
18  
19  
20  
21 **iv. Kirk's claim that Rylee may be affected by the affirmation of**  
22 **the teenage discretion clause was, speculative, not ripe, and did**  
23 **not create a justiciable controversy, and thus he was not**  
24 **prejudiced by the delay in filing respondent's brief**

25 In his Motion filed December 29, 2016 challenging the district court's teenage  
26 discretion clause, Kirk ostensibly argued that the district court should vacate the teenage  
27 discretion provision so that Vivian did not use it to harm Rylee in the future. (11.AA.2437).  
28 Kirk did not identify any specific acts of Rylee or Vivian relating to the teenage discretion

1 provision. In its order denying Kirk's motion, the district court correctly observed that at  
2 the time of the filing of Kirk's motion, Rylee could not have exercised the limited teenage  
3 discretion permitted under the Parenting Plan at 14 because she was only 13 at the time Kirk  
4 filed his motion. (12.AA.2613).

5  
6 "A case is ripe for review when 'the degree to which the harm alleged by the party  
7 seeking review is sufficiently concrete, rather than remote or hypothetical, [and] yield[s] a  
8 justiciable controversy.'" *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 38 n.1, 175  
9 P.3d 906, 907 n.1 (2008) (quoting *Herbst Gaming Inc. v. Heller*, 122 Nev. 877, 887-88, 141  
10 P.3d 1224, 1230-31 (2006)). Kirk's claim on appeal, and in his present motion, is that Rylee  
11 will be harmed when she has the option to utilize the teenage discretion provision. He  
12 provided no proof that Rylee had been harmed to the district court or could have been harmed  
13 prior to the time that she could exercise the teenage discretion. Kirk's argument was and is  
14 speculative, remote and hypothetical.

15  
16 Moreover, Kirk's claims of harm to children caused by the existence of a teenage  
17 discretion provision was not evident in the facts of this case. Brooke did not suffer any ill  
18 effects caused by the existence of a teenage discretion provision. It was undisputed below  
19 that Brooke was an excellent student who had been named student of the year on multiple  
20 occasions. She was active in an intensive dance program that required nightly multi-hour  
21 practices. She was cast as the lead in a play. She engaged in voice and piano lessons. She  
22 competed in DECCA (a business marketing society) at school and was active in that

1 organization. She was scheduled to graduate near the top of her class with the equivalent of  
2 an associate degree in college. She was never in trouble at school or anywhere else. The  
3 district court's impression of Brooke after her testimony was that she was "wonderful."

4  
5 While Kirk argues that the ill effect or harm to Brooke was the breakdown of his  
6 relationship with her, his claim of a link between those problems and the teenage discretion  
7 provision was not supported by the record. As indicated, Kirk's claim that the mere  
8 existence of the clause, or use of it by Vivian, caused harm to his relationship was belied by  
9 the facts underlying the issues. There was substantial evidence in the record that  
10 demonstrated that Brooke's actions, and her problems with Kirk, had nothing to do with the  
11 teenage discretion provision or Vivian, but instead were based upon a series basic issues  
12 that can be summarized in Kirk's continued criticisms and direct or indirect disparagement  
13 of Vivian to Brooke, his failure to have privacy or independence consistent with her physical  
14 and developmental needs, his disparagement of her close friends and activities, his constant  
15 arguments with her, his insults and demeaning names, etc. *See* citations to record contained  
16 in Respondent's Fast Track Response, attached as Exhibit "1" at pages 10-14.  
17 Consequently, the evidence in the record did not support Kirk's speculative notion that  
18 parents who agree to allow an older child to have some level of limited discretion cause  
19 them harm. Kirk's speculation of harm is not affected by the passage of time caused by the  
20 Vivian's delay in submitting her brief for filing. If any harm ever arose to Rylee that Kirk  
21 could identify was related to the teenage discretion clause, the clause itself describes  
22  
23  
24  
25  
26  
27  
28

1 remedies available to him, including the filing of a motion to the district court, even during  
2 the pendency of this appeal.  
3

4 Finally, Kirk's selected citations in his present motion relating to parental alienation  
5 are misplaced. Dr. Paglini extensively addressed the observations of Dr. Ali from Dr. Ali's  
6 notes regarding Brooke's therapy. Dr. Paglini concluded that Dr. Ali did not perceive that  
7 there was parental alienation, but rather "alignment." He noted that Dr. Ali's therapy notes  
8 demonstrate significant issues with Kirk for at least two years. Dr. Paglini outlined a detailed  
9 review of the elements of alienation. (15.AA.3367-3369) Applying the facts he had learned  
10 and observed in his interviews, he did not find that Brooke met any of the elements of an  
11 alienated child. (15.AA.3369) Further, he found that Vivian was **not** an alienating parent.  
12 (15.AA.3371).  
13  
14  
15  
16

17 Dr. Paglini's recommendations to the court concluded, with emphasis, that if Kirk  
18 persisted in his line of thinking that Brooke was suffering from severe parental alienation,  
19 Kirk would likely further damage his relationship with her. Dr. Paglini unequivocally stated  
20 that Brooke does not want to hear negative information about her mother, that she does not  
21 want to be affected by the divorce, and that Kirk needed to create an environment in his  
22 home so that post-divorce stress was not an issue for Brooke. (15.AA.3371). Kirk's response  
23 was more litigation, and his continued claims, like those in his present motion, that Brooke  
24 was the victim of parental alienation.  
25  
26  
27  
28

. . .

1                                   **v.     The Court should not utilize the sanction of Confession of**  
2                                   **Error of as a penalty for procedural matters where no**  
3                                   **prejudice has occurred.**

4           In a reported decision where this court addressed failures to file a brief in a case where  
5 no prejudice resulted, the court chose not to find a Confession of Error. In *Dias v. State*, 95  
6 Nev. 710, 601 P.2d 706 (1979), the respondent State of Nevada was granted thirteen  
7 extensions of time to file its answering brief, which it ultimately filed three days after the  
8 expiration of the last extension, and over a year after the filing of appellant's opening brief.  
9 This Court held, "although we have discretion to treat noncompliance with filing  
10 requirements as a confession of error, since no prejudice to appellant appears, we confine  
11 ourselves to expressing our strong disapproval of such dilatory conduct." *Id* at 715, 601  
12 P.2d at 707 [citations omitted]. Here, because there was no prejudice to Kirk in his motion,  
13 nor any conceivable prejudice to Kirk based upon the claims he has presented to this court,  
14 Vivian suggests that while sanctions against counsel may be indicated, the court should not  
15 cause dismissal of the case by a finding a Confession of Error.  
16  
17  
18  
19  
20

21                                   **vi.    The Court should not utilize the sanction of Confession of**  
22                                   **Error in a child custody matter.**

23           Counsel is cognizant of NRAP and its emphasis on timely adjudications of matters  
24 brought on the child custody fast track. Counsel submits, however, that in determining the  
25 sanction for a late filed brief, the court should consider its precedent prohibiting the  
26 summary disposition of a child custody matter as a sanction for procedural issues.  
27  
28

1 In *Blanco v. Blanco*, 311 P.3d 1170 (2013), this Court held that child custody  
2 determinations should be based on the merits of a case. The Court held that in child custody  
3 and child support matters, a case-concluding discovery sanction is simply not permissible,  
4 and that child custody matters must be decided on their merits. The Court found, however,  
5 that the district court may still consider alternative sanctions, such as contempt, monetary  
6 sanctions, and attorney fees, to punish noncompliance with discovery or disobedience of  
7 court orders. *Id.* But given the statutory and constitutional directives that govern child  
8 custody and support determinations, resolution of these matters on a default basis without  
9 addressing the child's best interest and other relevant considerations is improper. *Id.*

14 By analogy, this Court should be reluctant to decide a custody case on procedural  
15 grounds. Here, Kirk seeks a complete reversal of the court's findings regarding the  
16 treatment of Kirk's various motions, and his attack on the teenage discretion clause. Kirk's  
17 claims all propose that the remedy the court should impose is that the district court's orders  
18 in the best interest of the minor children were error, and overturn its previous published  
19 decision in this case. The court can impose other sanctions consistent with the late  
20 submission of Respondent's brief, but should deny Kirk's motion for confession of error.

24 . . .

25 . . .

27 . . .

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

II.

COUNTERMOTION

For the reasons set forth above, Vivian moves this Court for its order granting permission to the Clerk of the Court to file Vivian's Fast Track Response in the form attached hereto as Exhibit "1."

Dated this 6 day of March 2018.

RADFORD J. SMITH, CHARTERED

  
RADFORD J. SMITH, ESQ.

Nevada Bar No. 002791

2470 St. Rose Pkwy – Suite 206

Henderson, Nevada 89074

*Attorney for Vivian Harrison*

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of Radford J. Smith, Chartered ("the Firm"). I am over the age of 18 and not a party to the within action. I am "readily familiar" with firm's practice of collection and processing correspondence for mailing. Under the Firm's practice, mail is to be deposited with the U.S. Postal Service on the same day as stated below, with postage thereon fully prepaid.

I served the foregoing document this 6<sup>th</sup> day of March 2018, described as "Opposition to Motion for Confession of Error; Opposition to Motion for Oral Argument Countermotion for Acceptance of Respondent's Fast Track Response Brief".

☐ BY MAIL: Pursuant to NRCP 5(b), I placed a true copy thereof enclosed in a sealed envelope addressed as follows;

☐ BY FACSIMILE: Pursuant to EDCR 7.26, I transmitted a copy of the foregoing document this date via telecopier to the facsimile number shown below;

☒ BY ELECTRONIC SERVICE: I transmitted a copy of the foregoing document this date via the Nevada Supreme Court's electronic filing system

Robert Eisenberg, Esq.  
Lemons, Grundy & Eisenberg  
6005 Plumas Street, #300  
Reno NV 89519

Kirk Harrison, Esq.  
112 Stone Canyon Road  
Boulder City, NV 89005

  
\_\_\_\_\_  
An employee of Radford J. Smith, Chartered



# **EXHIBIT “A”**

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

KIRK ROSS HARRISON,

Appellant,

v.

VIVIAN MARIE LEE HARRISON,

Respondent.

Supreme Court No. 72880

District Court Case No. D-11-443611

**CHILD CUSTODY FAST TRACK RESPONSE**

**1. Name of party filing this fast track response:** Vivian Marie Lee Harrison (“Vivian”), Respondent.

**2. Name, law firm, and telephone number of attorney submitting this fast track response:** Radford J. Smith, Esq. of the firm Radford J. Smith, Chartered. Phone number: (702) 990-6448.

**3. Proceedings raising same issues:** There are no current appeals addressing the issues raised by this appeal. Kirk’s previous appeal in Case No. 66157, however, addressed the identical issues Kirk raises again in the present appeal: Whether the Supreme Court should find that the parties’ “teenage discretion” provision, and the district court’s order appointing a Parenting Coordinator (“PC”), are against public policy and should be vacated.

#### **4. Procedural History / Statement of Facts:**

##### **A. The Law of the Case**

This appeal is the sixth attempt by Appellant Kirk Harrison (“Kirk”) to vacate a portion of the parties’ stipulated Parenting Plan filed July 11, 2012 (5.AA.934-950). The Parenting Plan granted the parties joint legal and physical custody of their then two minor children, daughters Emma Brooke Harrison (“Brooke”), born June 26, 1999 (now age 18 and emancipated), and Rylee Harrison, born January 24, 2003 (now age 15).

The Parenting Plan included an agreement to appoint a Parenting Coordinator (“PC”)<sup>1</sup>, and granted the parties’ daughters, after age 14, a limited right to “from time to time” to make adjustments to the regular timeshare to spend more time with one of the parents. (5.AA.939-940). The terms of the teenage discretion provision prevent it from being used to “avoid spending time with the other parent[.], (5.AA.939-940) and states that it is not “intended to limit the discretion of the District Court in making child custody determinations.” (5.AA.939-940)

Kirk’s first three challenges were in the form of various post-order motions (5.AA.1060, 6.AA.1282, and 6.AA.1357). Kirk also challenged the district court’s

---

<sup>1</sup> The district court issued its Order appointing a PC on May 10, 2013. (6.AA.1224-1232).

order to appoint a parenting coordinator. (5.AA.1010-1044, and 6.AA.1357-1388). The district court denied all of Kirk's motions (6.AA.1355-1356, and 7.AA.1519-1524).

Kirk's fourth challenge was through appeal to the Nevada Supreme Court. Kirk argued that a provision in a parenting plan that grants any right to a minor to adjust their timeshare is against public policy. *See Harrison v. Harrison*, 376 P.3d 173 (2016). In its decision in *Harrison*, the court upheld the teenage discretion provision:

States may limit parental authority, but those limitations are generally only necessary where the opposing interest is the fundamental right of a child [. . .] It is not the judiciary's role to limit parental authority where similarly severe concerns are not at stake. Weekly schedule changes do not carry the magnitude of concern that we deem sufficiently comparable to enter "the private realm of family life."

*Id.* at 177 (citations omitted).

The *Harrison* court correctly found that the provision did not give the children the right to change the agreed joint custody schedule, and thus could not violate the court's joint parenting plan. *Id.*

On December 29, 2016, Kirk filed his fifth challenge to the teenage discretion provision after a series of failed motions he filed seeking to hold Vivian in contempt (8.AA.1623, 8.AA.1744, and 9.AA.1923) that he either withdrew (9.AA.1953), or that he failed to properly present (and thus the district court denied them). (9.AA.1954).

Kirk claims that the district court erred when it failed to enforce the parenting plan, did not find that Vivian had alienated Brooke from Kirk, and misapplied the *Harrison* decision when it denied his motion to vacate the teenage discretion provision. (FTS p.3).

Further, Kirk requests that this Court reverse its decision in *Harrison*, and find that an agreement granting teenage discretion, or appointing a parenting coordinator, is against public policy (FTS p.42). The problem with Kirk's arguments is that the orders he challenges in this appeal did not address any exercise of the "teenage discretion" provision by either child, and had nothing to do with any action of a PC because no PC has ever been appointed in this case. (12.AA.2609-2617)

**B. Upon Kirk's Motions, the District Court Entered a Series of Orders Designed to Enforce the Parties' Parenting Plan**

In August 2015, Brooke, then 16, indicated to both Kirk and Vivian that she would not go to Kirk's home during the weekdays, and would limit her time at Kirk's house to alternate weekends. (8.AA.1632) On August 21, 2015, Kirk filed a motion to hold Vivian in contempt for alienating Brooke from Kirk and causing Brooke to forego visitation with him. (8.AA.1625). Kirk argued that Brooke's actions were caused by Vivian. (8.AA.1625). Kirk claimed that Vivian used a medical expense dispute to enrage Brooke against him (8.AA.1625). On September 1, 2015, the district court issued an order directing Vivian to appear on

September 22, 2015 and show cause why she should not be held in contempt. (8.AA.1676-1692)

Vivian opposed Kirk's motion (8.AA.1672) and pointed out that Brooke's relationship with Kirk had been strained since the time of the parties' divorce action. (8.AA.1677-1678). Vivian had outlined Kirk's problems with Brooke in a comprehensive pleading filed in 2013 (5.AA.1081-1148), two years before Kirk's August 21, 2015 contempt motion. (8.AA.1681) Brooke based her actions on her desire to have a more stable schedule and home environment, and upon the difficulties in her relationship with Kirk, not based upon an insurance incident (8.AA.1682-1683). Vivian argued that Brooke was only involved in the insurance dispute for 45 seconds because she was required to give authorization to Vivian because Vivian was not the owner of the policy. (8.AA.1678).

In her Countermotion, Vivian further pointed out that Brooke was a mature and intelligent child that should be interviewed to determine her preference, and the basis for her action. (8.AA.1682).<sup>2</sup> Vivian asked for a temporary change of

---

<sup>2</sup> Brooke at that time, and throughout her minority, was nearly a straight "A" student. She had enrolled in Nevada State High School, and entered the dual college credit program. She was Student of the Year, and Student of the Quarter three times. (8.AA.1684). She was actively involved in an Intensive Dance Group with lessons nearly every day, and she had auditioned and received a lead role in a play. She was taking both piano and voice lessons. (8.AA.11684).

custody, and interviews and therapy to determine and address Brooke's concerns.  
(9.AA.1852-1879)

At the September 22, 2015 hearing on Kirk's Motion and the Order directing Vivian to show cause, the district court stated its belief that Brooke's actions were based upon the insurance claim, and Vivian's reaction to it. (13.AA.2752-2754) The court stated, without taking testimony or evidence, that it had never heard of a child being required to give insurance authorization. While it recognized there was no evidence of any disparagement of Kirk by Vivian, it found that "the child can feel the emotion that exists." The court further found that Vivian "was ultimately responsible for the lack of time" with Kirk caused by Brooke's actions. (13.AA.2793). The court found that there had been a "violation of the Court's order, and it's incumbent upon [Vivian] to show cause why she should not be held in contempt for that denial." (13.AA.2757).

When Vivian argued that the court could not find a contempt without an evidentiary hearing, the court disagreed. It opined that Vivian was not entitled to an evidentiary hearing because it was not considering incarceration. (13.AA.2758). The district court then stated it was not finding contempt, (13.AA.2759) but in its order from the hearing the district court stated that "[a]lthough the court has made a finding that contempt has been committed as it relates to Plaintiff's missed time, the contempt issue shall be DEFERRED to the next hearing." (8.AA.1742)

(Emphasis in original). Consistent with its intent to enforce its order, the district court refused to alter the joint custody schedule, and summarily denied Vivian's motion for temporary modification. (8.AA.1742) The district court further ordered that it expected Kirk "to have his time" under the existing order, and that it is Vivian's "responsibility to facilitate" the visitation. (8.AA.1742).

Further, the court indicated at the September 22, 2015 hearing that it would grant an order to show cause on Kirk's claim that Vivian had disparaged him to Brooke in violation of section 2.11 of the Parenting Plan (13.AA.2752), and that Vivian had convinced "Brooke that she is empowered to determine her own custody and enraging Brooke to exercise that false power in violation of Section 5" of the parenting plan. (13.AA.2752) On October 14, 2015, district court issued its order setting a December 14, 2015 for the show cause hearing. (8.AA.1759-1760). Kirk's claim that the district court failed to enforce the custody order is not supported by the record.

In addition to setting a show cause hearing, the district court granted Kirk and his counsel's request for a child "examination" by an expert. (13.AA.2786-2787) Based upon Kirk's request, the court directed that the issues underlying Brooke's actions, particularly Kirk's claim that Vivian alienated Brooke, would be the subject of child assessment with John Paglini, Ph.d. Dr. Paglini was a logical



choice because he had been appointed as the court's expert to perform a child custody assessment during the parties' divorce. (16.AA.3532)

On October 12, 2015, Kirk filed another motion to hold Vivian in contempt. Kirk claimed again in that motion that Brooke's failure to go to his home as provided in the parenting plan was due to Vivian's contemptuous failure to "facilitate" Brooke's visitation with Kirk. He claimed again that Vivian had alienated Brooke from him, and that she had been utilizing "programming and brainwashing techniques for more than four years." (8.AA.1744-1758). At the hearing on that motion held December 14, 2015, the district court again directed the issuance of an order that Vivian show cause why she should not be held in contempt. (9.AA.1921-1922).

On October 15, 2015, Vivian filed her Motion for Clarification regarding the court's finding of "contempt." Vivian also requested that the Court defer the hearing on the contempt motions until the court received Dr. Paglini's report. (8.AA.1766), Vivian further indicated that because Brooke was not visiting her father, Vivian had:

- a. Taken Brooke's car away from her except for travel to school and dance;
- b. Not allowed her to have anyone else in her car;
- c. Placed her on restriction;
- d. Taken her cell phone away; and,

e. Restricted her from watching any television.

(8.AA.1773). She had asked both Kirk (8.AA.1846) and the district court (8.AA.1773) what she could do to comply with the district court's order that she "facilitate visitation," and she welcomed the court's further instruction as to steps she could take to cause Brooke's compliance. (8.AA.1773). She again requested, based upon Kirk's allegation that Vivian had "denigrated him for four years" to Brooke and Rylee, that the district court also have Rylee interviewed. (8.AA.1774).

Kirk opposed Vivian's motions, claiming that though the district court "found" contempt, that was not equivalent to holding Vivian in contempt. (9.AA.1852-1879) Kirk also included in his opposition over 20 pages of claims of alienating behavior by Vivian. (9.AA.1855-1873) In her Reply, Vivian indicated that Kirk had provided material that was irrelevant to the dispute over the language regarding contempt. (9.AA.1904-1920). It only became clear later why Kirk went through that exercise.

On December 10, 2015, Kirk filed a "supplement" to his motion seeking, again, that Vivian be held in contempt. (9.AA.1887-1903) The court heard argument on Kirk's October 12, 2015 motion, Vivian's Motion for Clarification and Kirk's supplement on December 14, 2015. The then applicable rules required that Kirk seek leave of court to file a supplement to the existing motion (EDCR

2.20<sup>3</sup>), and he failed to do so. Consequently, the district court struck the supplement, but indicated that Kirk could refile the supplement as a motion and set it for the next hearing date. (9.AA.1922). The court continued the “show cause” hearing January 26, 2016 based upon Dr. Paglini’s request for additional time to complete his report. (9.AA.1922; 13.AA.2856-2858). The court ostensibly granted Vivian’s motion by moving the show cause hearing.

### **C. Dr. Paglini’s Report**

On January 25, 2016, Dr. Paglini issued his 59-page report. He reviewed all the pleadings before the district court. (15.AA.3316-3373). He conducted multiple interviews of the parties, with and without Brooke present, and multiple interviews of Brooke.

When Kirk first met with Dr. Paglini, Kirk stated his belief that the Brooke had been alienated by Vivian. (15.AA.3320) He provided Dr. Paglini with a book on “brainwashed children,” and stated that Rylee would likely “fall prey” to Vivian’s actions too. (15.AA.3320) He suggested that Brooke be enrolled in an “out of state therapeutic program” and that Vivian should “enroll in therapy” because of her “severe problems” and because she is an alienating parent. (15.AA.3320).

---

<sup>3</sup> Family law rules regarding filing of supplemental pleadings are now set forth in the revised EDCR 5.508.

Kirk then revealed why he placed all the superfluous claims in his 27-page reply to Vivian's Motion for Clarification. Kirk provided that pleading to Dr. Paglini, who then outlined in his report the various claims and allegations contained in that pleading. (15.AA.3320-3321). Kirk then went through other allegations he had made during the time of the divorce action in which he falsely claimed that Vivian suffered from a personality disorder. (15.AA.3320).

Kirk claimed that he did not know why Brooke had rejected him. (15.AA.3321) He stated that he had extensively read about parental alienation, and that she had not rejected him for anything he had done, but instead it was Vivian's negative influence. (15.AA.3321). He claimed that Brooke was brainwashed, and had accepted Vivian's information at face value, and therefore he is the targeted parent. (15.AA.3321) Kirk claimed to Dr. Paglini that the only way to "save" Brooke was to place her in a residential parental alienation program. (15.AA.3321).

In his report, Dr. Paglini recounted his July 6, 2012 interview with Brooke that was part of the work he performed in the divorce action. (15.AA.3326) In that interview, Brooke indicated that she loved Kirk, but that they had occasional disagreements and arguments. Though generally expressing positive feelings toward Kirk, Brooke stated her feeling that Kirk invaded her privacy, and did not consider what she wanted to do. She described Vivian in loving terms, and Brooke

indicated that she needed Vivian a lot now that she was a teenager. She described Vivian as giving her private space. (15.AA.3328)

Dr. Paglini outlines his extensive interviews of Brooke in detail in his report. After providing her background and comments about her childhood, she discussed her father discouraging her about dance, and how she regretted that she left intensive dance for a year as a result. (15.AA.3336) Brooke related that Kirk wanted her to stop dance and do other things he felt were more valuable. Dr. Paglini commented that it was clear to him as the evaluator that dance was a major part of Brooke's life, and that she had felt a tremendous amount of support from her mother in dance and did not felt emotional support from her father. (15.AA.3336)

She indicated that she and her father did not see eye to eye. (15.AA.3333) She advised Dr. Paglini that her father had an open-door policy at his home, and even after he changed that policy due to Dr. Ali's intervention, Kirk failed to knock when entering her room. (15.AA.3333). She described how Kirk would call her names, and provided examples of "dumb, stupid, dramatic, rude, and selfish." She indicated that Kirk stated to her "all the time" that she is being alienated and brainwashed. She further recounted how Kirk claimed that her mother's friends, the Atkinsons (to whom she claimed to be "super close" and like

a second family), told her lies. Even though Brooke advised her father that he was wrong, he continued to speak poorly of the Atkinsons. (15.AA.3336).

Brooke also expressed her view that the multiple weekly changes in the parenting plan's schedule was too stressful. (15.AA.3333) She stated that going back and forth on the schedule had taken a toll on her happiness, and that she was happier living in one home. Brooke indicated that she does not get along with Kirk, and that she did not like going between houses, and that she had contemplated not doing so "for a long while" and that she had finally made a decision that she was going to act on what she wants. She indicated that when she went to Kirk's house on a 50/50 basis, she was more likely to argue with him and be unhappy. When describing her father, she indicated that Kirk believes she is not mature enough, cannot make decisions on her own, that he claims to know what is best for her, and that she is not an adult and has no say. (15.AA.3333)

During the joint interview of Kirk and Brooke, Dr. Paglini asked Kirk to describe his previous relationship with Brooke. Instead of answering that question, Kirk claimed that Vivian was not involved with the children between the Fall of 2008 and 2011. He talked about her plastic surgeries, claimed that she became obsessed with an actor, etc. (15.AA.3347) Dr. Paglini's recount of Kirk's statements in front of Brooke revealed them to be almost exclusively criticism of Vivian, and a recount of his disputed, discredited and disparaging claims in the

divorce action. (15.AA.3347) His statements were a clear violation of EDCR 5.301, and an extremely transparent attempt to alienate Brooke against Vivian.

Brooke recognized that Kirk was not answering the question, and instead was attacking her mother. Dr. Paglini commented that Brooke appeared angry at Kirk for constantly putting her mother down. When Dr. Paglini then tried to refocus Kirk by asking him about his emotional connections to Brooke, instead of addressing that, he claimed that in his study of alienation, he learned he had to defend himself, and that he had to tell Brooke his side of the story. (15.AA.3348). Even in the sessions with Dr. Paglini and Brooke, he could not stop himself from denigrating Vivian, and insisting to Brooke that Vivian had told her lies.

Dr. Paglini also extensively addressed the observations of Dr. Ali from Dr. Ali's notes regarding Brooke's therapy. Dr. Paglini concluded that Dr. Ali did not perceive that there was parental alienation, but rather "alignment." He noted that Dr. Ali's therapy notes demonstrate significant issues with Kirk for at least two years. Dr. Paglini did a detailed review of the elements of alienation. (15.AA.3367-3369) Applying the facts he had learned and observed in his interviews, he did not find that Brooke met any of the elements of an alienated child. (15.AA.3369) Further, he found that Vivian was *not* an alienating parent. (15.AA.3371).

Dr. Paglini's recommendations to the court concluded, with emphasis, that if Kirk persisted in his line of thinking that Brooke was suffering from severe parental alienation, he would likely further damage his relationship with her. He unequivocally stated that Brooke does not want to hear negative information about her mother, that she does not want to be affected by the divorce, and that Kirk needed to create an environment in his home so that post-divorce stress was not an issue for Brooke. (15.AA.3371).

**D. The District Court did not Deny Kirk's Three 2015 Motions for Order to Show Cause; Kirk Withdrew Them.**

It was Kirk, not the district court, that did not act to enforce the Parenting Plan. On January 26, 2016, Vivian appeared at the scheduled show cause hearing and indicated that she was ready to proceed. (9.AA.1953) Kirk instead of proceeding with the contempt hearing, withdrew his motions for contempt, (9.AA.1953) and instead indicated that he wanted to follow Dr. Paglini's recommendations regarding therapy with Dr. Jamal Ali, the therapist that had been appointed under the parties' parenting plan. (9.AA.1953) Vivian asked for sanctions based upon the fact that Kirk's claims of alienation (his basis for his motions) were proven false by the interviews and report of Dr. Paglini. (9.AA.1954) The court denied that motion. (9.AA.1954). The district court issued a written order on May 25, 2016. (9.AA.1950). Vivian appealed that order. (9.AA.1964).



**E. Kirk's 2016 Motion for Order to Show Cause was Dismissed  
Because it was Defective**

On July 26, 2016, Kirk filed a motion seeking reunification therapy based upon his further claim that Vivian had severely alienated Kirk from Brooke. (9.AA.1976-1979). The district court first denied that motion for lack of jurisdiction resulting from the appeal (9.AA.2077-2079). Undeterred by the court's order, Kirk filed a Motion for Reconsideration (9.AA.2080) and yet another Motion for Order to Show Cause (9.AA.2096).

Vivian opposed Kirk's motions. In her Opposition, filed September 23, 2016, Vivian noted that Kirk's Motion for Order to Show Cause was defective, because it did not provide an appropriate affidavit, and thus the district court did not have jurisdiction to hear the Motion. (10.AA.2197–2199). The district court initially ignored that defect, and set a hearing on the Kirk's Motion, but later, in its order dated January 3, 2017, correctly found that Kirk's affidavit was insufficient, and denied Kirk's Motion on that ground. (17.AA.3690-3691).

On September 28, 2016, Kirk filed a meritless motion to “nullify and void” Dr. Paglini's Expert report even though Kirk's counsel had already accepted the recommendations of Dr. Paglini at the January 26, 2016 hearing when Kirk withdrew his motions for contempt. (10.AA.2326). Vivian opposed the motion, and the district court denied it. (11.AA.2426)

#### **F. The District Court's Denial of Kirk's Motion to Vacate the Teenage Discretion Provision**

On December 29, 2016, Kirk filed a motion seeking a new expert recommendation and discovery in lieu of the scheduled evidentiary hearing. He moved to prevent Brooke from testifying, arguing that such testimony would harm his relationship with Brooke. (11.AA.2430). He further alleged that Dr. Paglini's prior recommendation against reunification therapy was based upon Brooke and Vivian's misrepresentations to Dr. Paglini, and that Dr. Paglini should be directed to prepare, with the aid of Dr. Ali, a new recommendation. (11.AA.2431 -2432). Finally, Kirk argued that the court vacate the teenage discretion provision so that Rylee does not go down the same road as Brooke. (11.AA.2435-2438).

The Court issued an Order on January 3, 2017 (17.AA.3684) that addressed the topics raised in Kirk's December 29, 2016 motion. In that Order, the court expedited the evidentiary hearing to March 7, and March 13, 2017. The court also defined the scope of the hearing to be Kirk's request that Brooke "participate in a program to restore their relationship accompanied by make-up time for the custodial days he lost," and no other relief. (17.AA.3691-3692). The Court also approved Brooke testifying at the hearing. (17.AA.3689). The court hearing was later expedited to January 18, 2017 and February 3, 2017.

Vivian believed that all the issues raised by Kirk's December 29, 2016 motion were addressed by the district court's January 3, 2017 Order. Vivian,

nevertheless, filed her Opposition January 21, 2017 that cited and incorporated the other seven oppositions and replies she had filed to Kirk's repeated motions to vacate the teenage discretion provision. (11.AA.2483-2484). On that same date, Kirk filed a reply affidavit adding claims about Rylee never raised in his original motion. (11.AA.2490). The Court permitted Vivian to file a limited reply. Vivian filed that reply on February 13, 2017, rebutting Kirk's allegations about Rylee. (11.AA.2538).

By order filed March 15, 2017 the district court denied Kirk's motion to vacate the teenage discretion provision. (12.AA.2609-2613). The court noted three grounds for its denial: 1) that it was not inclined to entertain a request to eliminate the teenage discretion provision when the parties are not abiding by the Order appointing a PC; 2) Rylee was not 14, the triggering date of the provision, at the time Kirk filed his motion; and 3) the facts cited by Kirk in his papers are not sufficient to cause the court to "yet again" revisit or strike the provision. (12.AA.2613).

## **5. Issues on Appeal**

Kirk's rather confusing statement of issues on appeal can be distilled to:

- A. Whether the district court erred by failing to enforce the parties' parenting plan;

- B. Whether the district court failed to enforce the teenage discretion provision by preventing Brooke and Vivian's use of the provision to change custody;
- C. Whether the court misinterpreted *Harrison* when it gave deference to the parties' agreement rather than solely utilizing the best interest standard to adjudicate Kirk's motion to "eviscerate" the teenage discretion provision;
- D. Whether the court should reverse its decision in *Harrison* regarding the validity teenage discretion provision;
- E. Whether the district court erred by not ignoring the district court's PC order based upon evidence that Vivian would not have followed the PC order; and,
- F. Whether the parties' agreement regarding teenage discretion, parenting coordination, and confidential therapy for the parties' children is contrary to public policy.

The underlying premise of all of Kirk's issues is the notion that Kirk's problems in his relationship with Brooke were caused by the actions of the judge, Vivian or the provisions in the parenting plan. Thus, Vivian submits that the issues on appeal should include:

- A. Whether the issues that the district court addressed regarding Brooke are now moot because of her emancipation;

B. Whether Kirk’s challenge of the teenage discretion provision is precluded by the law of the case doctrine; and,

C. Whether the district court’s exercise of discretion in ruling on Kirk’s various motions was supported by substantial evidence.

## **6. Legal Argument**

### **A. Standard of Review.**

A district court may at any time enter an order for the custody and care of a minor child “as appears to be in his or her best interest.” NRS 125C.0045. District courts have broad discretion in child custody matters, but substantial evidence must support the court’s findings. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241-242 (2007). Substantial evidence “is evidence that a reasonable person may accept as adequate to sustain a judgment.” *Id.* at 149, 161 P.3d at 242.

A district court must give deference to the custody agreements entered by the parties when presented a motion to modify custody unless the agreements are unconscionable, illegal, or in violation of public policy. *Rivero v. Rivero*, 125 Nev. 410, 429-430, 216 P.2d 213, 226 (2009).

### **B. Kirk’s Challenge to the Teenage Discretion Provision is Precluded by the Law of the Case.**

In Kirk’s previous appeal in this case, the Nevada Supreme Court affirmed the district court’s ruling that the parties’ teenage discretion provision was a valid contract, and not against public policy. *Harrison v. Harrison*, 376 P.3d 173 (2016).

Thus, under the “law of the case” doctrine, Kirk cannot challenge whether a district court has discretion to uphold the provision, nor can he argue that the provision is against public policy.

[W]here an appellate court deciding an appeal states a principal [sic] or rule of law, necessary to the decision, the principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress both in the lower court and upon subsequent appeal.

*See Board of Gallery of History Inc. v. Datecs Corporation*, 116 Nev. 286, 289, 994 P.2d 1149, 1150 (2000) *quoting*, *LoBue v. State ex rel. Department of Highways*, 92 Nev. 529, 532, 554 P.2d 258, 260 (1976); *Wickliffe v. Sunrise Hospital*, 104 Nev. 777, 780, 766 P.2d 1322, 1324 (1988); *see also Emeterio v. Clint Hurt and Assocs.*, 114 Nev. 1031, 1034, 967 P.2d 432, 434 (1998) (stating that “[w]hen an appellate court states a rule of law necessary to a decision, that rule becomes the law of the case and must be followed throughout subsequent proceedings”); *Geissel v. Galbraith*, 105 Nev. 101, 103, 769 P.2d 1294, 1296 (1989); *Sherman Gardens Co. v. Longley*, 87 Nev. 558, 563, 491 P.2d 48, 51 (1971) (noting that “[t]he decision (on the first appeal) is the law of the case, not only binding on the parties and their privies, but on the court below and on this court itself” (quoting *Wright v. Carson Water Co.*, 22 Nev. 304, 308, 39 P. 872, 873-74 (1895))).

The law of the case doctrine “is designed to ensure judicial consistency and to prevent the reconsideration, during the course of a single continuous lawsuit, of those decisions which are intended to put a particular matter to rest.” *U.S. v. Real Property Located at Incline Village*, 976 F. Supp. 1327, 1353 (D. Nev. 1997). The law of the case doctrine, therefore, serves important policy considerations, including judicial consistency, finality, and protection of the court's integrity. *Tien Fu Hsu v. Cnty. of Clark*, 123 Nev. at 633, 173 P.3d at 730. (2007).

**C. All Actions Relating to Brooke’s Custody, Including Kirk’s Challenge of Issues Related to her Custody, are Moot Because she has Emancipated**

Brooke emancipated on her 18<sup>th</sup> birthday on June 26, 2017 and is thus no longer subject to the jurisdiction of the district court. Thus, any claim regarding the district court’s decision in relation to Brooke is moot. In *National Collegiate Athletic Association v. University of Nevada*, 97 Nev. 56, 58, 624 P.2d 10, 11 (1981) the court held:

Cases presenting real controversies at the time of their institution may become moot by the happening of subsequent events. A moot case is one which seeks to determine an abstract question which does not rest upon existing facts or rights.

Courts have generally held that a case addressing the custody of a child becomes moot if the child emancipates during the appeal. *See, e.g., Ngo v. Ngo*, 133 S.W.3d 688, 691 (Tex. App. 2003); *Carnese v. Weigert*, 710 N.Y.S.2d 130 (N.Y. App. Div. 2000); *Wells v. Barile*, 358 P.3d 583, 588 (Alaska 2015). Here, the Court should

dismiss all claims Kirk has brought regarding orders relating to Brooke's custody or care.

**D. Kirk's Claim that Rylee may be Affected by the Affirmation of the Teenage Discretion Clause is Not Ripe, and Does not Create a Justiciable Controversy**

In his Motion filed December 29, 2016 challenging the district court's teenage discretion clause, Kirk ostensibly argues that the district court should vacate the teenage discretion provision so that Vivian does not use it to harm Rylee in the future. (11.AA.2437). Kirk did not identify any specific acts of Rylee or Vivian relating to the teenage discretion provision. In its order denying Kirk's motion, the district court correctly observed that at the time of the filing of Kirk's motion, Rylee could not have exercised any teenage discretion because she was only 13 at the time Kirk filed it. (12.AA.2613).

"A case is ripe for review when 'the degree to which the harm alleged by the party seeking review is sufficiently concrete, rather than remote or hypothetical, [and] yield[s] a justiciable controversy.'" *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 38 n.1, 175 P.3d 906, 907 n.1 (2008) (quoting *Herbst Gaming Inc. v. Heller*, 122 Nev. 877, 887-88, 141 P.3d 1224, 1230-31 (2006)). Here, Kirk's claim is that Rylee will be harmed when she has the option to utilize the teenage discretion provision. He provided no proof that Rylee had been harmed, or could have been harmed prior to the time that she could exercise discretion. Kirk's



argument was speculative, remote and hypothetical. The court should affirm the district court's denial of Kirk's motion based upon Rylee's age at the time of the filing of the motion, and because the claim that Rylee may be harmed by the teenage discretion clause was not ripe.

#### **E. The District Court did not Fail to Enforce its Orders**

A district court enforces its orders through the power of contempt, and the right to order sanctions. *See*, NRS 22.010; EDCR 7.60. Kirk sought to enforce the Parenting Plan by Motions seeking the issuance of an order to show cause. The district court granted three of those motions in 2015, and set the matter for hearing first on December 14, 2015, and then on January 26, 2016 (9.AA.1950-1958). The court did not fail to proceed on Kirk's motions, Kirk withdrew them because it was apparent that he could not sustain his claims of alienation in a contested hearing.

Kirk's final motion for an order to show cause was properly addressed and ruled upon by the district court. The district court found that Kirk's affidavit supporting his Motion for an Order to Show Cause, in a summary form incorporating the text of the motion, was improper, and not sufficient to grant jurisdiction to the court to issue the proposed order. (17.AA.3690-3691)

Even after the court denied the motion, it still proceeded forward on Kirk's claim of alienation, and his request to seek reunification therapy. The court correctly denied Kirk's motion based upon the testimony of the court's expert, Dr.

John Paglini, who indicated that Kirk's proposed reunification therapy, and its requirement that Brooke cease communication with Vivian for sixty days, was unnecessary because Vivian had not caused Brooke to be alienated, and it would not be in Brooke's best interest. (9.AA.1950-1958).

Moreover, in addition to setting show cause hearings, the district court wisely addressed the merit of different types of remedies that would most likely have the best chance of preserving the parties' plan of joint physical custody. It engaged in intelligent and thoughtful dialogue with the parties regarding the realities of motivating a 16, then 17-year-old to follow the court order imposed on her. (14.AA.2991-2996) The court was cognizant of Nevada statute and policy, and never stopped its efforts to guide the parties to a result that considered the best interest of the child in its statements and orders (14.AA.2991-2996)

**F. Kirk's Ostensible Claim that Vivian Allowed Brooke to Use the Teenaged Discretion Clause to Change Custody is not Supported by the Record**

The premise of almost all Kirk's claims is that Vivian alienated Brooke by utilizing the teenage discretion provision. The record of the case does not support Kirk's premise.

Neither Brooke nor Vivian ever suggested that Brooke's actions were based upon the exercise of the teenage discretion provision. Such a construction would be contrary to the express language of the provision prohibiting it from being used

to change custody. (5.AA.939-940). The district court understood that Brooke's actions did not constitute an exercise of the teenage discretion provision:

**This is not an issue of teenage discretion.** This is enforcement of a court's order that provides the parties with joint physical custody, and what has happened the last two months is not joint physical custody, period. And Mom is ultimately responsible for the lack of time with Dad. That's the issue of contempt that's before me that I find that there has been a violation of the Court's order and it's incumbent on Mom to show cause why she shouldn't be held in contempt for that denial.

(13.AA.2757) (Emphasis supplied).

Brooke's explanation regarding her decision to not go to Kirk's home as frequently was not, as Kirk argues, "empowerment" under a legal clause. Instead, it was a complicated mix of her difficulty in her relationship with Kirk, her affinity to Vivian, Kirk's direct and indirect disparagement of Vivian and Brooke's close friends, his insults of Brooke, his failure to support her in her dance, and any combination of the above. (*See*, Section B, above).

**G. The District Court's Order Denying Kirk's Motion to Vacate the Teenage Discretion Clause is Supported by Substantial Evidence**

The district court denied Kirk's motion to vacate the teenage discretion provision based upon three factors: 1) insufficient factual basis for the motion; 2) Rylee's age of 13 under the trigger of 14 for the provision; and, 3) the parties' failure to appoint and utilize a parenting coordinator. The district court's finding is ostensibly designed to prompt the parties to engage a parenting coordinator.

Kirk asserts that the district court's reference to a parenting coordinator is error because it does not consider Vivian's violation of the custody order, the teenage discretion provision, and the court's rulings (FTS 31-32). Kirk's assertion is spurious. He cites to no finding of the court that Vivian has violated the custody order or other orders he cites. It is well within a court's discretion to refuse to modify an order until the parties have complied with its terms.

**H. Kirk's Claim that the District Court Erred by Failing to Find that the Parties' Stipulated Agreement is a Draconian System, was not Raised by Motion, and Is not Supported by the Record**

Kirk did not file a motion below seeking to vacate the parties' contractual agreement to engage a parenting coordinator and therapist contained in the Parenting Plan. He filed a motion to vacate the teenage discretion clause, but filed no motion addressing the non-existent parenting coordinator or the engagement of the therapist. Consequently, Kirk did not preserve this issue for appeal. *See Powers v. Powers*, 105 Nev. 514, 516, 779 P.2d 91, 92 (1989) ("A party may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below.") Even if Kirk had raised the issue below, it would have been addressed to the care of Brooke and would now be moot.

Dated this 28 day of February 2018.

RADFORD J. SMITH, CHARTERED



---

RADFORD J. SMITH, ESQ.

Nevada State Bar No. 002791  
GARIMA VARSHNEY, ESQ.  
Nevada State Bar No. 011878  
2470 St. Rose Parkway, Suite 206  
Henderson, Nevada 89074  
*Attorney for Respondent*

## **CERTIFICATE OF COMPLIANCE**

1. 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 the Respondent's Child Custody Fast Track Response has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Font Size 14, in Times New Roman;
2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 3E(e)(2) it is either proportionally spaced, has a typeface of 14 points or more, and including the footnotes, contains 6,238 words.<sup>4</sup>
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 28 day of February 2018.

RADFORD J. SMITH, CHARTERED

RADFORD J. SMITH, ESQ.

Nevada State Bar No. 002791

GARIMA VARSHNEY, ESQ.

---

<sup>4</sup> By Order entered on December 12, 2017, the Court granted Respondent 6,686 words for the Fast Track Response.

Nevada State Bar No.011878  
2470 St. Rose Parkway, Suite 206  
Henderson, Nevada 89074  
*Attorney for Respondent*

### **CERTIFICATE OF MAILING**

I hereby certify that I am an employee of Radford J. Smith, Chartered, and that on the 28 day of February 2018, a copy of Respondent's Child Custody Fast Track Response in the above entitled matter was e-mailed and was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list, to the attorney listed below at the address, email address and/or facsimile number indicated below:

ROBERT L. EISENBERG, ESQ.  
Lemons, Grundy, & Eisenberg  
6005 Plumas Street, Third Floor  
Reno, Nevada 89519

KIRK HARRISON, ESQ.  
112 Stone Canyon Road  
Boulder City, Nevada 89005



---

An employee of Radford J. Smith, Chartered



# **EXHIBIT “B”**

## Garima Varshney

---

**From:** efilings@nvcourts.nv.gov  
**Sent:** Thursday, March 01, 2018 11:03 AM  
**To:** Garima Varshney  
**Subject:** Rejection of Electronic Document. No. 72880.

Docket Number: 72880  
Case Category: Civil Appeal  
Submitted by: Radford J. Smith  
Date Submitted: Feb 28 2018 04:08 p.m.  
Date Rejected: Mar 01 2018 11:02 a.m.  
Note from Clerk: Your Fast Track Response is being rejected because the due date was 1/29/18.  
Document Category: Fast Track Brief  
Document Title: Child Custody Fast Track Response  
**Filing Status: Rejected**

This notice was automatically generated by the electronic filing system. Do not respond to this email. If you have any questions, contact the Nevada Supreme Court Clerk's office at 775-684-1600 or 702-486-9300.