

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

FILED

MAR 23 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

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”)¹, 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

¹ 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).² Vivian asked for a temporary change of

² 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

2.20³), 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).

³ 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 18th 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 response 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.

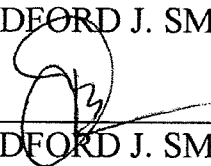
Kirk asserts that the district court's reference to a parenting coordinator is error because it does not consider Vivian's violation of the custody order, the teenage discretion provision, and the court's rulings (FTS 31-32). Kirk's assertion is spurious. He cites to no finding of the court that Vivian 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.

RADEFORD J. SMITH, CHARTERED



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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.⁴
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


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

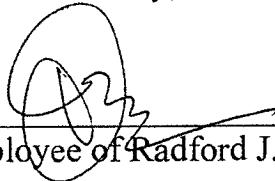
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CERTIFICATE OF MAILING

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:

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