IN THE SUPREME COURT OF THE STATE OF NEVADA

YOAV EGOSI, Appellant, vs. PATRICIA EGOSI, Respondent.	Electronically Filed Oct 07 2019 11:49 p.m. Elizabeth A. Brown Clerk of Supreme Court Case No. 76144

RESPONDENT'S ANSWERING BRIEF

Appeal from two Findings of Fact and Conclusions of Law entered by the Eighth Judicial District Court, Clark County, Nevada
The Honorable Bryce Duckworth, District Court Judge, Family Division
District Court Case D-16-540174-D

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CERTIFICATE OF COMPLIANCE WITH RULE 26.1

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made so that the Justices of this Court may evaluate for Their possible disqualification or recusal.

1. Respondent, Patricia Egosi ("Patricia") is an individual.
2. The Blackmon Law Group represents Patricia in the district court. McFarling Law Group and Ford & Friedman have both previously represented Patricia below.

Dated this 7th day of October 2019.

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I. Applying Georgia law, was the district court correct in using its discretion to limit the scope of the prenuptial agreement to previously disclosed assets?

II. Was the district court correct in applying Nevada's relocation statute and Nevada case law to Appellant's request to relocate?

III. Did the district court abuse its discretion in its application of facts to the law when considering evidence adduced at an evidentiary hearing and applying it to the relocation factors set forth in NRS 125C.007?

STATEMENT OF THE CASE

This matter is a divorce case started by Patricia in September 2016, three years ago against Appellant Joe Egosi ("Appellant"). The parties married on September 28, 2008, in Georgia. Before their marriage, the parties executed a prenuptial agreement. The parties have one minor child: Benjamin Egosi ("Ben").

Patricia filed a Complaint for Divorce on September 26, 2016. Patricia moved the district court on January 5, 2017, to invalidate the parties' prenuptial agreement. An evidentiary hearing was set on Patricia's moving papers. The parties were before the district court on June 13th and 14th of 2017 on the same moving papers. After the evidentiary hearing, the district court made an oral ruling upholding the prenuptial agreement but limited its application to only those assets disclosed by Appellant. The court below directed Appellant's counsel to draft the order following the above noted evidentiary hearing on Patricia's moving papers. Appellant's counsel never prepared that order. On September 4, 2018, the district court issued a written order, reducing its oral pronouncement to written form.

On June 6, 2018, Appellant moved to relocate with Ben to Israel. On August 31, 2018, the district court conducted an evidentiary hearing. On September 7, 2018, the district court denied Appellant's motion to relocate. Appellant moved the district court to reconsider its denial of Appellant's motion to relocate (after filing his case appeal statement), and the district court denied that motion.

STATEMENT OF FACTS

I. A brief note on NRAP 28(e)(1).

Each party has a duty to cite the appendix or the record to support their respective factual assertions. *See* NRAP 28(e)(1). NRAP 28(e)(2) permits no party to rely on, reference, or incorporate, "briefings or memoranda of law submitted to the district court" to support their "arguments on the merits of [an] appeal." A party's failure to cite adequately the record, can result in this Court's refusal to consider those sections of a party's brief in which there is a dearth, or total omission of citations. *See Allianz Ins. Co v. Gagnon*, 198 Nev 990, 997, 860 P.2d 720, 725 (1993) ("This court need not consider the contentions of an appellant where the appellant's opening brief fails to cite to the record on appeal).

Appellant failed to support many factual assertions in his opening brief, despite so certifying he had.[1] *See generally Appellant's Opening Brief, Statement of Facts, subsection II, and Appellant's Opening Brief* at xi. Based on Appellant's

[1] For instance, Appellant's subsection II contains 4 pages of factual assertions without a single citation to the record below. *See Appellant's Opening Brief at 11-14.* While Appellant raised these arguments in his briefing below, the arguments were not supported by citations to the appendix. However, the district court did not rely on the uncited factual assertions in either of the orders on appeal here.

failure to cite properly the record below, Respondent requests this Court to refuse to consider any of Appellant's unsupported factual assertions.

II. Facts relative to the prenuptial agreement

Appellant married Patricia on or about September 26, 2008.[2] About one month before their marriage, on August 13, 2008, the parties executed a prenuptial agreement.[3] The prenuptial agreement contained a choice of law provision, stating Georgia law would govern the prenuptial agreement.[4] Appellant was, and remains today, a successful businessperson, who owned a business he valued personally, in 2008, at $5,000,000.00.[5]

At the time of their marriage, Appellant acknowledged they resided in a condominium on Miami beach worth $1,200,000.00.[6] Appellant's disclosure of assets then also revealed he owned a condominium in Georgia, a 2005 Mercedes SL55 AMG; and every share in several businesses.[7] No values were provided in the disclosure attached to the prenuptial agreement.[8] The trial on the prenuptial

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[2] 1AA22.
[3] 1AA008-013.
[4] 1AA005.
[5] *See* 1AA023; 3AA177; 3AA187.
[6] 3AA174
[7] 1AA007.
[8] *Id.*

agreement adduced testimony that Appellant did not make the more full disclosure of assets in the prenuptial agreement until minutes before its signing.[9]

On June 13 and 14, 2017, the district court heard testimony and argument about whether the parties' prenuptial agreement was enforceable.[10] After the evidentiary hearing, the district court **then** directed Appellant's counsel to create an order based on the oral findings and pronouncements issued by the trial court.[11] Appellant's prior counsel failed to prepare the order.[12] Only after Appellant changed counsel several times, was a new order issued. Upon reviewing the proposed order Appellant's counsel submitted below, the district court revealed it had conducted another review of the trial and decided to draft its own findings of fact and conclusions of law.[13]

In its findings, the district court noted that Georgia law would apply, and it would adjust its findings to its understanding of Georgia law.[14] The district court noted that it generally was satisfied that the agreement comported with Georgia law,

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[9] 3AA161.
[10] 5AA4007.
[11] 5AA407 at n.3.
[12] *Id.*
[13] *Id.*
[14] 5AA408.

however, the district court also noted several concerns that effected its decision.[15] These concerns were most pronounced around the timing and limited nature of Appellant's disclosure of assets and debts, including testimony that the Appellant made relevant disclosures almost immediately before the parties each signed the prenuptial agreement.[16] The district court found that because of Appellant's late disclosure, a basis was created to limit applying the prenuptial agreement to only those assets in the prenuptial agreement.[17] Indeed, the district court specifically found "with the foregoing limitations, [Appellant] satisfied his burden to demonstrate that there was sufficient disclosure of material facts."[18] The district court found only that the agreement was not substantively unconscionable, but again enunciated its concerns with Appellant's late disclosure of assets.[19] The district court continued to convey its concerns with approving the agreement in whole, and revealed that Appellant's superior grasp of the terms and language of the prenuptial

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16 5AA412-13; *See* 3AA155 *(*Appellant testifying to him adding the list of assets just prior to the signing of the decree); 5AA386-89 (Court's discussion regarding the disclosure and its impact on its decision).

17 5AA413.

18 *Id.*

19 5AA414.

agreement, and Appellant's superior financial position also militated towards a partial equitable approval of the prenuptial agreement.[20]

III. Facts relative to Appellant's motion to relocate with Ben to Israel

On June 6, 2018, Appellant filed a motion to relocate with Ben to Israel. In his pleadings, and at trial, Appellant indicated that the move would financially benefit him, and would be an economic advantage for Appellant and his son. When he moved to relocate, Appellant's financial disclosure form reflected that he had income of $8,993.00 derived from being the owner of his own company, one that he valued ten years prior as being worth $5,000,000.00.[21] One month later, he filed an updated financial disclosure form suggesting he earned income of only $3,000.00[22] per month, and received income from other sources in the amount of $2,750.00. This drastic decrease in income did not occur because he lost a job or company, but was because he sold his business to his father, who now paid to support him each month.[23] Remarkably, Appellant could earn this income, while testifying that he spends virtually his entire day with Ben.[24] That said, Appellant also testified that his

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[20] 5AA414-15.
[21] 10AA738; *See* 1AA023; 3AA177; 3AA187.
[22] *Id.*
[23] *Id.*
[24] *See* 7AA459-470.0

new proposed job in Israel, which would represent an upgrade for him, would pay him $5,000.00 per month.[25] But when questioned about this new job, he represented he would be working at this job full-time.[26] When asked about where Ben would go after school, Appellant suggested that his father would watch him if he lived in a certain part of Israel, or he would simply attend after-school programs if they lived in a different portion of Israel.[27] During the evidentiary hearing no testimony was provided about after-school programs in Nevada, or how Israel's may compare.

In addition to the alleged economic improvements that would come from his relocation to Israel, Appellant also cited preserving his son's Jewish identity as a basis for the proposed move.[28] Appellant complained that in Clark County, Christianity surrounded his son.[29] Appellant complained that exposure to non-Jewish holidays was also a detriment to his son.[30] But Appellant simultaneously testified that his son went to a private Jewish school at Ner Tamid synagogue during the week, and then to religious school on Sunday.[31] Appellant testified that this

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[25] 7AA471.
[26] 7AA472.
[27] 7AA473.
[28] 7AA480.
[29] *Id.*
[30] 7AA481-482.
[31] 7AA4459, 7AA479

school was the best Jewish school in Las Vegas.[32] Ilone Kritzler, the educational director at Ben's school, shared these sentiments; Ms. Kritzler testified that the school fosters Jewish traditions, that the children at Ben's school can maintain their Jewish identity, and the curriculum is designed to assist in those efforts.[33] That said, contrary to Appellant's assertions that Ben was unhappy, or malcontent with school, Ms. Kritzler testified that Ben is a happy, well-adjusted child.[34] Ms. Kritzler also testified that Ben is well-integrated into the school community.[35]

Appellant testified that the reason he wanted to relocate was to be nearer to his family. Appellant simultaneously testified that Ben spoke to his grandfather daily,[36] to his grandmother several times per week,[37] and to his aunts and cousins often as well.[38] Later at trial, when Ben's grandfather testified, he conveyed that he believed his relationship with Ben had deteriorated because he could only speak on the phone with him.[39] While Appellant suggested he desired to be near his father, he also testified that he may decide to move to another city in Israel – testimony which

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[32] 7AA486.
[33] *Id.*
[34] *Id.*
[35] 9AA608-09; 9AA612.
[36] 7AA453.
[37] *Id.*
[38] 7AA453-54.
[39] 10AA651-52.

reasonably suggested Ben could ultimately receive the same telephonic visitation with his paternal family he currently enjoys.[40]

After discussing life in Israel, Appellant testified about his proposed schedule for Patricia's parent-time with Ben. The schedule was limited to a two week block in the summer, in Israel, with 4 hour supervised visits each day.[41] Four days during Hanukkah in Israel, again with four hours of supervised visits.[42] Last, Patricia could visit Israel every two months for a two day period, and receive four hours each of those days.[43]

One week after the close of trial, the district court issued its findings of fact and conclusions of law from the evidentiary hearing. Contained within this order was a ruling on both pending motions. The district court held early on that Appellant had not met the threshold factors to allow him to relocate with the minor child. Although the court made this notation, the district court wrote nine pages analyzing the various facts adduced at trial to the relocation factors, and concluded that Appellant failed to meet his burden to show the move was in the best interests of the child.[44]

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[40] 7AA454.
[41] 7AA483; 10AA740.
[42] 7AA484; 10AA740.
[43] 7AA484; 10AA740.
[44] *See* 10AA736-45

SUMMARY OF ARGUMENT

Appellant asks this Court to overturn the district court's decisions on three issues: (1) limiting the prenuptial agreement; (2) refusing to apply California law to a Nevada relocation case when Appellant enjoys primary physical custody; and (3) erring in its application of various facts to the relocation factors. On each of these issues, the district court's decisions were discretionary decisions, and were amply supported by the facts as heard by the district at each of the evidentiary hearings it held on the matter.

Appellant argues the district court misunderstood equity in its application of Georgia law to the parties prenuptial agreement.[45] The prenuptial agreement contained a choice of law provision, conveying that Georgia Law would apply to the enforcement of the prenuptial agreement.[46] The district court conducted an evidentiary hearing on June 13th and 14th, 2017 to determine the enforceability of the prenuptial agreement.[47] The district court not only reviewed extensive briefing on

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[45] *See Appellant's Second Opening Brief at 17-26.*
[46] 1AA005
[47] 6AA406-416.

the issue, it heard from an expert, Shiel Edlin, Esq., testimony on a trial court's powers under Georgia law whether to enforce, or otherwise potentially modify, a prenuptial agreement.[48]

After the evidentiary hearing, the district court determined that under Georgia law, a court must first determine the validity of the prenuptial agreement by identifying three factors: (1) whether the agreement was procured by fraud, duress, or mistake, or through misrepresentation or nondisclosure of material facts; (2) whether the agreement is unconscionable, and (3) whether facts and circumstances changed since the agreement was executed, to make its enforcement unfair and unreasonable.[49] Georgia law, however, still allows for a court to approve a prenuptial agreement, in whole, or in part.[50]

After hearing all the evidence, the district court held that while it believed the agreement was valid, it maintained concerns on simply approving the entirety of the prenuptial agreement.[51] Based on five enumerated concerns, the district court limited the prenuptial agreement to cover only and protect those assets disclosed by

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[48] 6AA407.
[49] 6AA412; *Scherer v. Scherer*, 249 GA 521, 522-23, 603 S.E. 2d 273 (1982).
[50] 6AA412-413; *Alexander v. Alexander*, 279 Ga. 116, 117-18, 610 S.E.2d 48, 50 (2005).
[51] 6AA414.

Appellant in the prenuptial agreement appendix.[52] It approved the remainder of the prenuptial agreement.[53] When coming to this conclusion, the district court outlined the case law and relevant facts over several pages.

Appellant's argument that the district court misunderstood equity is incorrect. Appellant seeks to force the district court into taking a black and white approach to a complex, and detailed case. Appellant does so by glossing over the district court's stated concerns about validating the agreement as a whole, and its enumerated concerns about the prenuptial agreement. And Appellant argues that district courts in Georgia are bound by contract law on mutual mistake. That said, a district court's equitable powers in modifying a prenuptial agreement allows it to ignore other contract principles, such as ignoring severability clauses, and having special disclosure requirements.[54] Thus, given the district court's broad discretion in these matters, its decision to limit the scope of the prenuptial agreement was not legal error. The district court did not disregard controlling law, and this Court can find ample support in both the facts and the law to support the district court's equitable decision.

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[52] *Id.*
[53] *Id.*
[54] *Alexander,* 279 Ga. at 117, 610 S.E.2d at 50.

Second, Appellant argues that California law should apply in relocation cases because the district court awarded Appellant sole legal and sole physical custody of the minor child. This Court has defined all custodial designations in Nevada, which have subsequently become statute. A party may have joint or sole legal custody, and joint or primary physical custody only.[55] A parent who exercises custodial time with the child less than forty percent of the time has visitation rights, with the other parent being the primary physical custodian.[56] In contrast, California defines physical custody in terms of joint and sole physical custody.[57] California does not use the term primary physical custody. So, Appellant's actual argument is that this Court should set aside decades of relocation precedent, and disregard Nevada statute in favor of California's relocation standards. While Nevada often finds other states' laws persuasive, Nevada courts are bound to follow Nevada law.[58] The district court

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[55] *See Rivero v. Rivero*, 125 Nev. 410, 420, 216 P.3d 213, 221 (2009) ("To emphasize the distinctions between these two types of custody, and to provide clarity, we separately define legal custody, including joint and sole legal custody, and then we define physical custody, including joint physical and primary physical custody.")
[56] *Id.* at 428.
[57] Cal. Fam. Code § 3004 (West)(defining joint physical custody); Cal. Fam. Code § 3007 (West)(defining sole physical custody).
[58] *See Rivero*, 125 Nev. 410, 420 at n.2 ("Although out-of-state law is not controlling, we look to it as instructive and persuasive. As always, even if this court relies on an out-of-state law, Nevada law still controls in interpreting the decisions of this court.")

therefore did not, and could not have, legally erred in following and applying Nevada case law and Nevada statutory law.

Third, Appellant argues that the district court abused its discretion in its application of the facts adduced at the evidentiary hearing to Nevada law. But Appellant's long arguments about the impropriety of the district court's application of facts ignores that Appellant was not even able to meet the bare threshold showing under Nevada law to relocate. NRS 125C.007(1) requires a parent seeking to relocate to make threshold showings that a sensible good-faith reason for the move exists, that the move is not intended to deprive a parent of parent-time; that the best interests of the child are served by the relocation; and that the relocating parent will enjoy an actual advantage. In reviewing the facts, the district court could not make these findings. Moreover, even if Appellant made the appropriate showing, the district court made significant findings supporting its decision to deny Appellant's request to relocate with Ben. Appellant's request for this Court to re-weigh evidence cannot amount to an abuse of discretion.

STANDARD OF REVIEW ON APPEAL

In Georgia, a trial court "has discretion to approve [a prenuptial] agreement in whole or in part, or refuse to approve it as a whole."[59] Thus, a reviewing court

[59] *Lawrence v. Lawrence*, 286 Ga. 309, 309, 687 S.E.2d 421, 422 (2009).

analyzes the trial courts decisions on the familiar abuse of discretion standard. In Georgia, a court only abuses its discretion with no evidence in the record to support such a decision.[60]

Similarly, in Nevada reviewing courts analyze relocation and custodial decisions under an abuse of discretion standard.[61] An abuse of discretion occurs only "when the district court bases its decision on a clearly erroneous factual determination or disregards controlling law."[62] An abuse of discretion does not occur when an appellant requests the reviewing court to substitute its own judgment for that of the district court.[63] Moreover, this Court "does not reweigh witness credibility or the weight of the evidence on appeal."[64]

ARGUMENT

I. The district court's decision to limit the scope of the prenuptial agreement was an appropriate application of controlling law.

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[60] *Murray v. Murray*, 299 Ga. 703, 705, 791 S.E.2d 816, 818 (2016); *Anderson v. Svard*, 282 Ga. 53, 644 S.E.2d 861 (2007).
[61] *Flynn v. Flynn*, 120 Nev. 436, 444, 92 P.3d 1224, 1229 (2004).
[62] *LVMPD v. Blackjack Bonding*, 131 Nev. 80, 89, 343 P.3d 608, 614 (2015).
[63] *Schwartz v. Schwartz*, 126 Nev. 87, 91, 225 P.3d 1273, 1276 (2010).
[64] *Quintero v. McDonald*, 116 Nev 1181, 11832, 14 P.3d 522, 523 (2000).

Georgia law allows a district court discretion to "sit in equity" and approve [a prenuptial] agreement in whole or in part, or refuse to approve it as a whole."[65] A district court is also not bound by contract principles, including severability clauses.[66] When reviewing these decisions, a reviewing court will only overturn the district court's decision when there is no evidence in the record to support such a decision.[67] The district court decided to uphold the prenuptial agreement, but made several findings that the only reason it was upholding the prenuptial agreement was because of its equitable decision to limit the scope of the prenuptial agreement. The district court's use of discretion is grounded in evidence in the record and should not be disturbed on appeal.

a. Georgia Law allows a district court to exercise discretion and approve only a portion of a prenuptial agreement.

The district court appropriately sat in equity and limited the enforceability of the prenuptial agreement consistent within the dictates of both Georgia and Nevada law. Unlike Nevada, Georgia law on prenuptial agreements is a creature born of case law. Under Georgia law, a prenuptial agreement that purports to settle alimony issues

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[65] *Alexander v. Alexander,* 279 Ga. 116, 117, 610 S.E.2d 48, 50 (2005) *citing Allen v. Allen,* 260 Ga. 777, 778, 400 S.E.2d 15 (1991).
[66] *Alexander,* 279 Ga. at 17, 610 S.E.2d at 50.
[67] *Murray*, 299 Ga. at 705, 791 S.E.2d at 818.

is classified as an agreement "made in contemplation of divorce," not an agreement "made in contemplation of marriage."[68] When reviewing whether a prenuptial agreement is enforceable, the party seeking enforcement bears the burden of proof to show that:

> (3) The antenuptial agreement was not the result of fraud, duress, mistake, misrepresentation, or nondisclosure of material facts;
>
> (2) The agreement is not unconscionable; and
>
> (3) Taking into account all relevant facts and circumstances, including changes beyond the parties' contemplation when the agreement was executed, enforcement of the antenuptial agreement would be neither unfair nor unreasonable.[69]

Even if a court finds that all three factors are met, a district court still retains discretion to "approve the agreement in whole or in part, or refuse to approve it as a whole."[70] The existence of a prenuptial agreement is also a factor which determines a trial court's discretion to divide equitably the assets created and earned during the marriage. [71]

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[68] *Lawrence*, 286 GA at 311, 687 S.E.2d at 423. (citations omitted).
[69] *See Lawrence,* 286 Ga. at 312, 687 S.E.2d at 424, *citing Scherer v. Scherer,* 249 Ga. 635, 292 S.E.2d 662 (1982).
[70] *Alexander v. Alexander,* 279 Ga. 116, 117, 610 S.E.2d 48, 50 (2005) *citing Allen v. Allen,* 260 Ga. 777, 778, 400 S.E.2d 15 (1991).
[71] *Scherer, 249 Ga. at 640, 292 S.E.2d. 666-67.*

Appellant's focus on the phrase "sitting in equity," and historical notions of equity, while noble, miss the significant discretion given to the district court to approve, disprove, or modify a prenuptial agreement. In a somewhat ironic twist, the quotes cited by Appellant note that notions of equity may vary from judge to judge.[72] It is this significant discretion that is the critical inquiry. In making his analysis, Appellant artificially constrains the district court's decision and seeks to force the district court into a binary decision on each of the factors. Such a simple framework divests a trial court of the wide discretion that is explicitly set forth in Georgia case law. Indeed, this very nuance is why the district court determined that it needed to limit the scope of the prenuptial agreement, rather than simply approving it, or rejecting it, in whole.

The district court made many findings showing it had concerns with enforcing the prenuptial agreement as a whole. These concerns were most pronounced around the timing and limited nature of the disclosure of Appellant's assets and debts, including testimony that the disclosure was made almost

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[72] *See Appellant's Opening Brief at 20-21* ("[E]quity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make thee standard for thee measure we call a foot, a Chancellor's foot; what an uncertain measure would this be? One Chancellor has a long foot, another a short foot, a third an indifferent foot: 'tis the same thing in a Chancellor's conscience.") (*citations omitted).*

immediately prior to the parties signing the prenuptial agreement.[73] In making its findings of fact, the district court noted that it only found the factor about disclosure, and substantive conscionability[74] satisfied because of its equitable power to limit the scope of the prenup.[75] While not explicit, this Court can infer that should the district court not have been able to limit the scope of the prenuptial agreement, its decision may well have been different.

The district court also noted that it also believed it was appropriate to factor in the parties' wealth disparity, and their differing comprehension of the English language in rendering its equitable decision.[76] While Appellant has objected to the district court' including such a factor in its written findings, he has cited no basis on which such an inclusion would be an abuse of the district court's discretion when reducing its oral ruling to a written order.

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[73] 5AA412-13; *See* 3AA155 *(*Appellant testifying to him adding the list of assets just prior to the signing of the decree); 5AA386-89 (Court's discussion regarding the disclosure and its impact on its decision.

[74] 5AA414 ("Nevertheless, and again taking into consideration the late disclosure of an inventory of listing of assets, such a finding and conclusion is limited to the disclosures attached to the agreement.")

[75] 5AA413 ("this is an equitable factor that should limit the application of the prenuptial agreement to those specific assets that were disclosed.")

[76] 5AA413-14.

That said, the above analysis is more than is required under the standard of review to uphold the district court's decision. Indeed, the standard is that a district court only abuses its discretion if no evidence in the record is present to support its decision.[77] The district court more than satisfied its burden to do so, and its decision to limit the scope of the prenuptial agreement should be upheld.

b. Georgia law allows district courts to disregard normal contract law in approving or disproving prenuptial agreements

When reviewing a prenuptial agreement and determining whether to approve, disprove, or modify the agreement, a district court is not bound by regular rules of contract law.[78] In *Alexander*, a district court refused to enforce a prenuptial agreement entered into by the parties.[79] The agreement itself contained an affirmative requirement the parties disclose assets to the other.[80] The husband failed to disclose an investment account, the wife signed under duress, and the parties had a child, which the trial court found to be a change of circumstances.[81] The trial court revealed it would invalidate the prenuptial agreement on any of those grounds.[82] The

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[77] *Murray*, 299 Ga. at 705, 791 S.E.2d at 818.
[78] *Alexander,* 279 Ga. at 117, 610 S.E.2d at 50.
[79] *Id.* at 116.
[80] *Id.*
[81] *Id.* at 117
[82] *Id.*

husband appealed, arguing, in part, that the prenuptial agreement contained a severability clause, and that under Georgia law, his failure to abide by the prenuptial agreement's provisions as it relates to the disclosure of assets, could be severed and could cure this fault.[83] The Supreme Court of Georgia disagreed. It held that even though Georgia law authorized a court to honor severability clauses, a trial court's authority to set aside an agreement was not bound by the severability provision, or to other terms of the contract.[84]

on Appellant argues that the district court erred in approving only a portion of the prenuptial agreement. Appellant argues that equitable reformation of a contract is the law that should apply. Appellant also argues that for equitable reformation to occur, the district court must find that there existed mistake or fraud. Such an argument fails to comprehend and appreciate Georgia's view of a trial court's discretion and authority to sit in equity. Georgia does not require courts reviewing prenuptial agreements to be bound by the rules of contract law. Indeed, the Georgia Supreme Court disregarded the husband's contractual contentions in *Alexander*.

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[83] *Id.*
[84] *Id.* at 118.

This Court should do likewise with Appellant's arguments regarding contract reformation. They are simply inapplicable to whether a court can exercise its discretion in approving only a portion of a contract.

II. California law should not supplant decades of relocation case law and statute in Nevada

For years in Nevada, custody was a fluid concept, and was not well-defined, until the Supreme Court set out to define the full spectrum of the types of custody that would be recognized in Nevada.[85] The Supreme Court from that point defined the full-spectrum of physical custody.[86] A parent may have either primary physical custody or joint physical custody of their children.[87] Joint physical custody requires parents to each share at least forty-percent of the time with the child.[88] A parent who exercises custodial time with the child less than forty percent of the time has visitation rights, with the other parent being the primary physical custodian.[89] "Likewise, a primary physical custody arrangement could encompass a situation where one party has primary physical custody and the other party has limited or no

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[85] *Rivero v. Rivero*, 125 Nev. 410, 420, 216 P.3d 213, 221 (Nev. 2009).
[86] *Id.*
[87] *Id.* at 420.
[88] *Id.* at 425-46.
[89] *Id.* at 428.

visitation."[90] California decided to define primary physical custody, by terming it "sole physical custody."[91] Nowhere in *Rivero*, or its progeny, has this Court sought to expand or narrow its definition, nor has it sought to adopt California's custodial nomenclature. Indeed, while *Rivero,* and Justice Pickering's partial concurrence and partial dissent, contained a discussion of California custody law,[92] it never suggested that California custody definitions would or should be adopted by this Court. While district courts may still, at times, use old custodial terms, it does not change that the only legally recognized physical custodial designations in Nevada are joint physical and primary physical custody.

Moreover, Nevada recently codified into statute the standards for a parent having any type of custody to be able to relocate with a minor child outside the state of Nevada, in large part a codification of significant previous case law.[93] When a parent with either joint physical custody, or sole physical custody orders[94] seek to

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[90] *Id.*
[91] Cal. Fam. Code § 3004 (West)(defining joint physical custody); Cal. Fam. Code § 3007 (West)(defining sole physical custody).
[92] *Rivero*, 125 Nev. at 425, 447-448.
[93] *See e.g. Schwartz v. Schwartz*, 126 Nev. 87, 91, 225 P.3d 1273, 1276 (2010); *Potter v. Potter*, 1221 Nev. 613, 119 P.3d 1246 (2005); *Truax v. Truax*, 110 Nev. 437, 874 P.2d 10 (1994).
[94] As should be apparent by now, in reality this means **any** parent seeking to relocate from the state of Nevada with a child who is subject to Nevada custodial orders.

relocate from the state of Nevada, they must first seek to obtain the permission of the non-moving parent.[95] If they do not receive that permission, they must petition the district court for permission to move with the minor child.[96] "In every instance of a petition for permission to relocate with a child that is filed pursuant to NRS 125C.006 or NRS 125.0065, the relocating parent must demonstrate to the district court," various threshold factors and then factors justifying the move.[97]

To be clear, there is no gap in Nevada law for a parent who has a court order claiming they are the "sole physical custodian" of the child. Such a designation was abolished by the *Rivero* Court. Nevada made clear its policy through the relocation statute that any parent who obtained a custody order from a Nevada court would need to go through the same process, and the same factors would be used to determine whether permission would be granted. Appellant's argument that a gap exists solely relies on his attempt to obfuscate the true custody arrangement of the parties - with Appellant having primary physical custody and Patricia enjoying visitation rights.

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[95] NRS 125C.006 (primary physical custody); NRS 125C.0065 (joint physical custody).
[96] NRS 125C.006(1)(b); NRS 125C.0065(1)(b).
[97] NRS 125C.007(1).

Moreover, a review of the different nomenclature used by Nevada and California to define physical custody demonstrates that it is simply a distinction without a difference. Sole physical custody in California mirrors primary physical custody in Nevada.

Therefore, Appellant's actual argument is that he disagrees with Nevada law. While California has significantly different relocation law than Nevada, one that is ostensibly more permissive than Nevada's, it does not meaningfully differentiate between a parent with sole physical custody and primary physical custody, because primary physical custody is non-existent in California. While Nevada regularly finds other states' laws persuasive, Nevada courts are bound to follow Nevada law.[98] Appellant has not provided this Court with any other reason, save and except a non-existent gap in the law, to substantiate his demand to apply California law. For these reasons, this Court should reject Appellant's call to adopt California relocation law.

III. The district court appropriately applied the facts adduced at the evidentiary hearing to Nevada relocation law.

a. Appellant cannot demonstrate he met both the threshold requirements of NRS 125C.007(1)(A) to allow him to relocate.

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[98] *See Rivero*, 125 Nev. 410, 420 at n.2 ("Although out-of-state law is not controlling, we look to it as instructive and persuasive. As always, even if this court relies on an out-of-state law, Nevada law still controls in interpreting the decisions of this court.")

NRS 125C.007 provides the appropriate analysis for this Court when a party petitions for relocation. Appellant is first required to make the requisite showing that he meets three factors:

> "(a) There exists a sensible, good-faith reason for the move, **and** the move is not intended to deprive the non-relocating parent of his or her parenting time;
> (b) The best interests of the child are served by allowing the relocating parent to relocate with the child; and
> (c) The child and the relocating parent will benefit from an actual advantage as a result of the relocation."

NRS 125C.007(1) (emphasis added).

Of note, because of the statutory construction, and the use of "and" each of these factors must be met to move to the secondary inquiry set forth in NRS 125C.007(2).

When the district court made its decision, it set forth substantive findings regarding each and every factor in the relocation statute.[99] As to the first factor, the district court found that it could not find that Appellant's proposed reason for the move was sensible and it also determined that it could not find that the move was not intended to deprive the non-relocating parent of his or her parent-time.[100]

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[99] 10AA731-46.
[100] 10AA737-39.

Appellant claimed that the district court abused its discretion[101] in finding that Appellant's stated move for the relocation was not sensible.

At trial, Appellant offered two (2) reasons for the move – (1) family support and (2) economic opportunities. Appellant argues that because Appellant would be entitled to a vast array of social programs that he should be entitled to move. However, the district court made explicit findings regarding this issue. It noted that based on Appellant's historical earnings throughout much of the litigation, his income, and thus his economic position, would not materially increase as a result of the move.[102] Indeed, the district court specifically cited to Appellant's financial disclosure form, which was in force at the time he filed his initial motion, demonstrating that his income was $8,933.00 per month when he filed the motion to relocate, and it only reduced to $5,000.00 per month when he filed his next financial disclosure one month before the evidentiary hearing.[103] Thus, the district court was correct in finding that Appellant's citation to economic opportunities for the move was not sensible.

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[101] While Appellant alleges numerous abuses of discretion throughout the remainder of his argument, he fails to demonstrate how the district court disregarded controlling law. Instead, Appellant requests the reviewing Court to substitute its own judgment for that of the district court, and reweigh evidence on appeal.
[102] 10AA737-38.
[103] 10AA737.

Moreover, Appellant simply glosses over the district court's additional findings supporting its decision that the move was not sensible. The district court specifically found that it was not sensible to relocate the minor child thousands of miles across the world to be nearer to Defendant's family, especially given that the minor child was thriving in Las Vegas.[104] This finding of the district court remains uncontroverted, and alone would be sufficient to cause Appellant to fail to show that his move was sensible.

b. The district court's focus on the practicality of the visitation schedule was concerned with whether the motivations for such a schedule was designed to deprive Patricia of her parent-time.

Appellant also argued that the district court's focus on the practicality of such a move was also error. However, this argument was made in the context of whether Appellant's motives for the move were to deprive Patricia of her parent-time.[105] Appellant twisted the district court's findings in this regard, and its inability to find that the move was not for this purpose, into a claim that the district court focused on Appellant's economic status regarding the practicality of the visitation schedule. While the district court noted that it did not have economic figures relative to the

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[104] 10AA738.
[105] *Id.*

cost of the move, such mention was made in a footnote.[106] Instead, the district court noted that all visitation would occur in Israel,[107] and found it was not practical.

Appellant next argued that *Schwartz v. Schwartz*,[108] precluded an analysis of the time with each parent because an expanded summer block of time could make up for the time which Patricia would lose each week. However, *Schwartz*, indicated that such an expanded summer block would include a one-month block of uninterrupted time for the mother.[109] However, Appellant's proposed schedule did not include an uninterrupted summer block of time for the minor child with Patricia. Indeed, as the district court noted in its best interests analysis regarding Appellant's willingness to foster Patricia's relationship with Ben,[110] his proposed schedule for her was limited to a two (2) week block in the summer, in Israel, with 4 hour supervised visits each day.[111] Four days during Hanukkah in Israel, again with four hours of supervised visits.[112] Last, Patricia could visit Israel every two (2) months for a two (2) day period, and receive four (4) hours each of those days.[113] Notably,

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[106] *Id.* at n.1.
[107] 10AA738
[108] 107 Nev 378, 385, 812 P.2d 1268, 1272 (1991).
[109] *Id.*
[110] Notably, such a best interest factor seems intertwined with the analysis that would be required regarding Appellant's motivations for the relocation.
[111] 10AA740.
[112] *Id.*
[113] *Id.*

no other types of contact were contemplated by Appellant. It was this schedule that the district court found impractical. It is also had to determine how such a schedule would amount to an expanded summer block of visitation that the district court envisioned in *Schwartz.*

c. The district court appropriately focused on whether the move was intended to deprive Patricia of her parent-time. It did not focus on economic factors as Appellant claims

Appellant next argues that the district court inappropriately focused on the effect a move would have on Patricia's parent-time rather than on Appellant's motivations. Appellant claims "the law requires that Joe's motives are honorable and not designed to frustrate or defeat any visitation." However, this is a standard from case law, not the new statutory requirement, which is the court must find "the move is not intended to deprive the non-relocating parent of his or her parenting time."[114] Appellant's lengthy focus on *Vara v. Barlas*[115] and economic benefits are simply irrelevant here. Moreover, Appellant's focus on *Vara* is prohibited by this Court's rules, as the decision is unpublished and was issued prior to 2016.[116] Instead, the focus must remain on whether Appellant's motivations for the move, and the district court's findings that Appellant's motivations were made to deprive Patricia of her

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[114] NRS 125C.007(1)(A)
[115] 127 Nev. 1182, 373 P.3d 970 (table) 2011 WL 1258563 (2011).
[116] NRAP 36(2)-(3).

parent-time. As set forth more fully above, the district court could not make a finding that this proposed schedule was made for a purpose other than to deprive Patricia of her parent-time with Ben.

d. The district court appropriately analyzed, and found lacking, Appellant's stated advantages for moving to Israel

Appellant once again fails to give the district court appropriate credit for its findings regarding actual advantage. The district court analyzed Appellant's stated advantages for the move, especially as it relates to family connections. Appellant argues that his circumstances are identical to those found in *Gandee v. Gandee*,[117] and thus should be allowed to move.[118] However, the district court analyzed the similar factors and found them wanting for different reasons. The district court found, based on Appellant's testimony, that the actual advantage to the minor child would revolve around family connections existing in Israel and being immersed in Jewish culture.[119] Notably, much of Appellant's testimony regarding the loss of

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[117] 111 Nev. 754, 895 P.2d 1285 (1995).
[118] Notably, *Gandee v. Gandee*,was a consolidated case, and this Court also dealt with the case, *Montelione v. Montelione.* The Supreme Court only briefly addressed actual advantage in *Gandee*. Its focus in *Gandee* was instead focused on *Schwartz* factors. Thus, Appellant's analogizing to *Gandee* is misplaced. The Supreme Court did focus more on actual advantage in *Montelione*, and found that such an advantage could be found where the minor child's standard of living would increase, he would have extended family, and a stay-at-home mother.
[119] 10AA742.

Jewish identity revolved around the minor child being exposed to non-Jewish holidays.[120] Such testimony was undercut by Ilone Kritzler, the director of education at Ben's school.[121] This testimony was also later controverted when Appellant testified that he himself had celebrated these holidays, but remained staunchly Jewish.[122] The district court found that based on the evidence on the wrong, the child was immersed in the Jewish culture, and thus a move to Israel did not demonstrate an advantage. While the district court credited Appellant family connections, such connections alone were not sufficient, especially when reviewing the case in totality.

e. Appellant's remaining arguments solely revolve around the district court's weighing of evidence, and his disagreement with the same. Such cannot be an abuse of discretion.

Appellant makes three (3) final arguments claiming that the district court abused its discretion regarding visitation schedule, the parties' level of conflict, and Appellant's willingness to foster a relationship between Ben and Patricia. Appellant did not cite any case law in support of such a decision. Each of these errors alleged by Appellant related to NRS 125C.007(2). Notably, a district court is supposed to weigh each of the listed factors. Appellant's argument boiled down is that the district

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[120] 7AA481-83.
[121] 10AA742.
[122] 8AA515.

court inappropriately weighed the evidence. When a party requests that this Court re-weigh evidence, an abuse of discretion cannot be found.[123]

Moreover, while Appellant objects that he is willing to comply with substitute visitation orders, Appellant has largely been non-compliant with other court orders. Importantly, at the day of trial, Appellant refused to comply with a direct order from the district court.[124] The district court therefore appropriately stated its concerns with Appellant's willingness to comply with substitute visitation orders.

Regarding the issue of conflict, a trial court is required to make findings to support a best interest analysis under NRS 125C.007(2)(B) and NRS 125C.003. Such best interest factors also revolve around the district court's finding regarding Appellant willingness to allow Ben to have a continuing relationship with Patricia. The district court's finding regarding the level of conflict and Appellant's willingness to ensure Patricia has a relationship with her son are important best interest factors. Indeed, the district court applied conflict specifically in the relocation context, and found that with the minimal flexibility, and the level of conflict, the ability for the minor child to retain a relationship with his mother, or

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[123] An abuse of discretion does not occur when an appellant requests the reviewing court to substitute its own judgment for that of the district court. *Schwartz v. Schwartz*, 126 Nev. 87, 91, 225 P.3d 1273, 1276 (2010).

[124] Appellant was ordered to disclose his physical address when questioned by Patricia's counsel. Appellant refused to do so. *See* 8AA540-46.

with a co-parent, would be virtually impossible. These findings are not in error. Appellant simply does not like the conclusions the district court drew.

In sum, the district court appropriately made findings on each of the factors required for relocation. While the district court was not required to make any findings after it found that Appellant's move was not sensible, it made extensive findings on each of the relocation factors. While Appellant has sought to simply deluge this Court with errors, he failed to set forth how the district court abused its discretion. Instead, much of his analysis requested this Court to re-weigh evidence, which is inappropriate, and cannot amount to an abuse of discretion.

CONCLUSION

The district court appropriately applied Georgia law, which granted the district court significant discretion to revise a prenuptial agreement. In revising the prenuptial agreement, the district court utilized discretionary factors to do so, which it was authorized to do under Georgia law. Moreover, Appellant's reliance on equitable discretion is misplaced as the discretionary authority granted to modify a prenuptial agreement specifically allows the district court to apply normal contract law. As such, this Court should uphold the district court's decision.

Furthermore, Appellant misapprehends Nevada physical custody definitions and how the newly implemented relocation statute applies. Nevada law does not

contain gaps that should be filled by California law, and this Court should not overturn decades of case law and statutory law to follow California relocation law. Instead, this Court should uphold the district court's decision.

Respectfully submitted this 7h day of October 2019.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this answering brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this answering brief has been prepared in a proportionally spaced font using Microsoft Word 2016 in 14-point Times New Roman font.

2. I further certify that this fast answering brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and contains 6,265 words.

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

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4. I understand that I may be subject to sanctions in the event that the accompanying answering brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure

Dated this 7th day of October 2019.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONDENT'S ANSWERING BRIEF** was filed electronically with the Nevada Supreme Court on the 7th day of October, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Alex Ghibaudo, Esq.

/s/ Bailey Donnell
Paralegal to John R. Blackmon, Esq.