IN THE SUPREME COURT OF THE STATE OF NEVADA

SANDRA LYNN NANCE,

Appellant,

v.

CHRISTOPHER MICHAEL FERRARO,

Respondent.

Supreme Court No.: 72454

District Court No.: 426817

APPEAL FROM ORDER GRANTING RELOCATION AND MODIFYING CHILD CUSTODY

Eighth Judicial District Court of the State of Nevada
In and for the County of Clark
THE HONORABLE DENISE L. GENTILE
DISTRICT COURT JUDGE

APPELLANT'S CHILD CUSTODY FAST TRACK STATEMENT

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IN THE SUPREME COURT OF THE STATE OF NEVADA

SANDRA LYNN NANCE, Appellant, v. CHRISTOPHER MICHAEL FERRARO, Respondent.	Supreme Court No.: 72454 District Court No.: 426817

APPELLANT'S CHILD CUSTODY FAST TRACK STATEMENT

1. Name of party filing this fast track statement:

   Sandra Lynn Nance

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

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3. Judicial district, county, and district court docket number of lower court proceedings:

   Eighth Judicial District Court
   County of Clark
   Case No. D-10-426817-D

4. Name of judge issuing judgment or appealed from:

   Honorable Judge Denise L. Gentile

5. Length of trial or evidentiary hearing. If the order appealed from was entered following a trial or evidentiary hearing, then how many days did the trial or evidentiary hearing last?

   Two half days and one full day.

6. Written order or judgment appealed from:

   Findings of Fact, Conclusions of Law and Order entered on January 26, 2017.

7. Date that written notice of the appealed written judgment or order's entry was served:

   January 27, 2017.

8. If the time for filing the notice of appeal was tolled by the timely filing of a motion listed in NRAP 4(a)(2),

   (a) specify the type of motion, and the date and method of service of the motion, and date of filing:

   On July 21, 2016, Defendant filed a Motion to Reopen Trial or in the Alternative for New Trial Limited to Hear Testimony of Desmond Nance; the same was electronically served via the Court's electronic service system.

   (b) date of entry of written order resolving tolling motion:

   January 27, 2017

9. Date notice of appeal was filed:

   February 15, 2017.

10. Specify the statute or rule governing the time limit for filing the notice of appeal e.g., N.R.A.P. 4(a), NRS 155.190, or other:

    NRAP 4(a)

11. Specify the statute, rule or other authority, which grants this court jurisdiction to review the judgment or order appealed from:

NRAP 3A(b)(1)

12. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which involve the same or some of the same parties to this appeal:

None.

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

None.

14. Assignment to the Court of Appeals or Retention in the Supreme Court.

This matter is assigned to the Court of Appeals pursuant to NRAP 17(b)(5).

Appellant does not believe the Supreme Court should retain this case.

15. Procedural history. Briefly describe the procedural history of the case (provide citations for every assertion of fact to the appendix or record, if any, or to the transcript or rough draft transcript):

On March 15, 2010, Sandra filed for divorce (1 AA00001-AA00005) and Motion for Permission to Return the Minor Child to the State of Nevada; UCCJEA Hearing; for an Order Awarding Plaintiff Primary Physical Custory (sic); Supervised Visitation; for a Pick Up Order; Child Support; Back Child Support; for Plaintiff's Legal Costs; Future Attorney's Fees; and Other Related Relief. (1 AA00006-AA00026).

On April 8, 2011, the parties entered a Stipulation and Order. (1 AA00030-AA00094). On November 30, 2012, a Stipulation and Order re: Parenting Plan was filed. (1 AA00181-AA00198).

On June 19, 2015, Chris filed a Motion to Modify Custody, for Relocation of Minor Child, and Other Related Relief. (1 AA00199-AA00229). On August 4, 2015, Sandra filed an Opposition and Countermotion for Confirmation of Primary Physical Custodian… (3 AA00533-AA00581).

On January 13, 2016, Chris filed a Motion In Limine (6 AA01382-AA1393), which was granted via minute order. (3 AA00592-AA00593)

An evidentiary hearing was held from June 27 to June 29, 2016. (3-4 AA00593-830).

On July 21, 2016, Chris filed a Motion to Reopen Trial or in the Alternative for New Trial Limited to Hear Testimony of Desmond Nance. (4 AA00831-AA00864). On August 10, 2016, Sandra filed an Opposition. (5-6 AA01186-AA01311).

On January 26, 2017, the Court filed a Findings of Fact, Conclusions of Law and Order. On January 27, 2017, a Notice of Entry of Order was filed. (6 AA01342-AA01379).

16. Statement of facts. Briefly set forth the facts material to the issues on appeal (provide citations for every assertion of fact to the appendix or record, if any, or to the transcript or rough draft transcript):

In 2010, Sandra filed a divorce case in Nevada against Chris, who resided in New York. (1 AA00001-AA00005). The parties have one child together, Evan, now age 8. (1 AA00002). Sandra also filed a motion to return Evan from New York, outlining physical and emotional abuse by Chris. (1 AA00006-AA00026). Sandra was awarded temporary primary physical custody of Evan. (1 AA00028).

In April 2011, the parties entered into a custody agreement, giving Sandra primary physical custody of Evan, subject to Chris's visitations. (1 AA00040).

In November 2011. the parties had co-parenting issues and went back to court (1 AA00095-96). At this hearing, the court ordered a custody evaluation by Dr. John Paglini. (*Id.*). In March 2012, Dr. Paglini submitted his 84-page report, which includes a review of a report by a neuropsychologist who saw Chris, interviews with numerous collaterals on both sides, a home visit, psychological testing of both parties, extensive meetings with both parties, and a consultation with another custody evaluator. (1 AA00097-180). Dr. Paglini concluded the following:

1. Chris appeared defensive and attempted to manipulate the evaluation (1 AA00107);
2. Psychological testing indicates Chris suffers from obsessive compulsive disorder and narcissism— noting the narcissism is present throughout the interviews (1 AA00107) & (1 AA00150);

3. This narcissism causes Chris to denigrate and demean other people (*Id.*);
4. Chris exhibits poor judgment, including being involved with a woman who turned out to be a prostitute and bringing this woman around Evan (*Id.*);
5. Chris has memory and concentration problems, in addition to poor frustration tolerance, frequently losing his temper, decreased patience and anger control issues (1 AA00152);
6. Chris admitted he smashed a rock through the front windshield of a car with Sandra, Evan, and Sandra's daughter Kayla in the car (*Id.*); and
7. A witness reports seeing Chris and Sandra engaged in a commotion in a car with Chris yanking Sandra's hair (*Id.*).

The report recommends Sandra maintain primary custody, the parties use a parenting coordinator, and Chris's custodial schedule stay in place with visits in Nevada only, and then including New York after four months. (1 AA00157).

Despite this favorable report to Sandra, she stipulated to a new custody agreement with Chris on November 30, 2012— giving him much more visitation than Dr. Paglini recommended. (1 AA00181-198). The parties agreed that until Chris "permanently relocated to Las Vegas," Chris's timeshare was only for a maximum 10 days per month with some additional summer visits. (1 AA00185). Chris never relocated to Las Vegas.

In June 2015, Chris filed a motion to modify child custody and for relocation of Evan from Las Vegas to New York. (AA00199-AA00229). The court set an evidentiary hearing on June 27, 28, and 29 of 2016.

Prior to the evidentiary hearing, Chris filed a Motion in Limine to exclude any evidence from before the last custodial order filed November 30, 2012. (6 AA01382-1393).

The Judge granted this motion, stating:

> This court will appropriately apply *McMonigle v. McMonigle*, to testimony, documentary evidence, and the like, relating to the facts and circumstances that pre-date the last custody order. As it pertains to any allegations of domestic violence, this Court also GRANTS Defendant's request to bar any and all allegations of domestic violence, prior to the date of the last custodial order of November 30, 2012, unless it was unknown to the Plaintiff (which means it could not have been perpetrated on the Plaintiff), or unknown to the Court at the time of the last order, as prescribed by *Castle v. Simmons*. Thus, Court GRANTS Defendant's Motion in Limine and will instruct both parties, their counsel, and all witnesses called on their behalves, not to mention or refer to any facts, either directly or indirectly, which occurred prior to November 30, 2012, other than those which fall within the exception of *Castle v. Simmons*, if any. (3 AA00591-592).

After the parties' June 2016 evidentiary hearing, they submitted closing briefs to determine the legal standard to change custody and relocation. In Sandra's closing brief, she provided a chart, based on his flight schedules. At trial, Chris confirmed this was visitation schedule for the one year preceding the evidentiary hearing. (4 AA00869).

MONTH	VISITATION DATES	NUMBER OF DAYS
June, 2014	06/14-06-26	13
July, 2014	07/17-08/01	16
August, 2014	08/08-08/23	16
September, 2014	09/19-09/29	11
October, 2014	10/25-11/2	9
November, 2014	11/21-11/30	10
December, 2014	12/26-1/4/15	10
January, 2015	1/15-1/25	10
February, 2015	2/20-3/03	11
March, 2015	3/17-3/27	11
April, 2015	4/21-5/01	11
May, 2015	05/22-06/01	11
	TOTAL	**139**

According to the chart, if he receives credit for both the pickup and drop off days, Chris has a maximum of 139 days. Otherwise, Chris could have as few as 127 days of visitation. The court found that when school is in session Chris would pick Evan up at 3:31 p.m. and return him on the afternoon or evening of the last day of his visitation. (6 AA01348). If school was not in session, Chris would pick up Evan in the morning. (*Id.*).

During the trial, Evan's therapist, Judith Tolman, testified. (6 AA01362-1365). Ms. Tolman saw Evan weekly and reported that, in her opinion, Evan exhibits signs of Oppositional Defiant Disorder (ODD), and possibly Attention Deficit Hyperactivity Disorder (ADHD). (*Id.*).

The court issued its Findings of Fact, Conclusions of Law and Order on January 26, 2017. (6 AA01342-AA01379). The court granted Chris primary

physical custody and relocation with Evan from Nevada to New York. (*Id.*). In its decision, the court made the following findings:

1. Evan was a resident of the State of Nevada (6 AA01345);
2. Chris lives in a home in New York with his mother and brother, the same home he has lived in for 43 years (6 AA01345);
3. Chris became extremely emotional and had a hard time holding back tears during his testimony (*Id.*).;
4. As to why Chris wanted to relocate Evan to New York, he said: "It's my home. It's my community. It's where I live. It's his friends. The community relationships that I have as a hockey player and my family business for almost 50 years and these community connections I will pass onto Evan. The school systems, financial resources, to save on financial resources for my travels back and forth to Las Vegas. I'd like to dedicate those resources solely to Evan and his future." (6 AA01349);
5. Chris testified the relocation would benefit him personally by allowing him to get back to work right away, earn a salary, and be able to dedicate resources directly for Evan's benefit. (*Id*.);
6. The court determined Evan has "two homes." (6 AA01351);

7. Chris' business in which he was a minority partner went bankrupt and at the time of trial he was not working. But he was planning on re-starting Ferraro Brothers Hockey, a hockey training academy. (*Id*.).
8. In 2015, Chris exercised 150 days of custody per year because one day was added to each timeshare, adding 12 days to 2015. (6 AA01348).
9. Daniel Hungerford, Evan's principal, testified that Evan is a "good guy", behaves well in school and attends class; and "behaviorally, academically, he's a model student." (6 AA01352-1353);
10. Mr. Hungerford confirmed his opinions prior to his deposition with Evan's teacher, school counselor, and reviewed Evan's school records.
11. Evan has a brother and a sister who live with Sandra. (*Id*.)

The court then made the following conclusions of law:

1. The court applies *Rivero* and gives Chris credit for every day he had Evan in his care, not just the days he had overnight, and concludes Chris is "well over the 40% threshold in every year" and confirms the parties have joint physical custody (6 AA01368-1369);
2. In the alternative, the court analyzes the changed circumstances doctrine under *Ellis* and determines the following are sufficient changes in circumstances warranting modification of custody even if Sandra has primary physical custody (*Id.*):

a. Sandra kept Evan in weekly therapy when there was very little, if any, evidence that Evan suffers behavioral issues beyond those of an average, active and healthy first grader (6 AA01369);

b. Sandra did not foster extracurricular activities until just before the trial (*Id.*);

c. The specific school district in New York that Evan will be attending is generally better than Las Vegas schools (*Id.*);

d. Since the last custody order was entered, Sandra's oldest son from a prior relationship did not graduate on time from high school and Sandra allowed him to enroll in an online high school program (*Id.*);

e. Chris's "second career" has solidly established itself and his client base in New York (*Id.*).

In assessing the best interest factors, both for custody modification and for relocation, on the issue of the mental health of the parties, the court concluded that "[s]ome testimony was given by Plaintiff on Defendant's health, but it was old and the Court is not concerned for the health of either parent being an issue in meeting Evan's best interests." (6 AA01371).

Lastly, the court addressed domestic violence allegations: "[t]he Court understands that the parties made competing allegations of abuse or neglect

dating back to 2010, but there was not testimony of abuse or neglect by either parent since the last custody order was entered." (6 AA01372).

17. Issues on appeal. State concisely the principal issue(s) in this appeal:

a) It was error for the District Court to exclude all evidence from prior to the last custody order.

b) It was error for the District Court to exclude evidence of domestic violence occurring prior to the last custody order.

c) It was error for the District Court to exclude evidence of the parents' mental health from prior to the last custody order.

d) It was error for the District Court to make a child custody modification decision that did not take into account the case history and evidence in the prior record that indicated that it would not be in the child's best interests for Chris to have physical custody.

e) It was error for the District Court to determine that Chris had joint physical custody as he had not exercised 146 days with the child in the preceding year.

f) It was error for the District Court to include both travel days in the time allocated to Chris in its calculation of his custodial days.

g) It was error for the District Court to determine that Chris had joint physical custody as he was unable to exercise 146 days with the child per year without a change in custody.

h) It was error for the District Court to determine that Chris had joint physical custody as it was not in the child's best interest.

i) It was error for the District Court to award Chris primary physical custody as Chris did not meet the *Ellis* standard to modify from primary with Sandra to primary with Chris.

j) It was error for the District Court to award Chris primary physical custody as Chris did not meet the standard to modify from joint to primary.

k) It was error for the District Court to grant Chris's request to relocate with the minor child as Chris did not meet the standard for relocation.

18. Legal argument, including authorities:

1. **THE DISTRICT COURT ERRED BY EXCLUDING EVIDENCE PRIOR TO THE LAST CUSTODIAL ORDER**

In a custody proceeding, events that took place prior to the most recent court order are not admissible to demonstrate a *change of circumstances*.[1]

The Nevada Supreme Court later clarified that the changed circumstances doctrine does not apply when the moving party or the court was unaware of the

[1] *McMonigle v. McMonigle*, 110 Nev. 1407, 1408 (1994). (emphasis added).

existence or extent of the conduct when it made its previous order.[2] The *res judicata doctrine* (as articulated as the changed circumstances doctrine in custody cases) is meant to prevent dissatisfied parties from "filing repetitive serial motions in an attempt to manipulate the judicial system."[3] But *res judicata* principles "should not prevent the court from ensuring that the child's best interests are served."[4] *Res judicata* is defined as: "an issue that has been definitively settled by judicial decision."[5]

Here, the district court incorrectly applied the *res judicata doctrine* under *McMonigle* as a blanket prohibition against everything prior to the last custodial order, not just evidence being brought to show a change in circumstances by the moving party. *Res judicata* applies strictly in typical civil-type cases to prevent a party from filing a lawsuit or seeking monetary relief on an issue that has already been decided. But child custody cases are not money disputes—they involve children and are often closed and re-opened numerous times during the child's minority. *McMonigle* seeks to bring some traditional *res judicata* principles to family court proceedings. But *McMonigle's* goal was not to prohibit a family court judge from considering facts relevant to a child's best interest. Rather,

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[2] *Castle v. Simmons*, 120 Nev. 98, 104 (2004).
[3] *Id.*
[4] *Id.*
[5] Res Judicata, Black's Law Dictionary (10th ed. 2014).

McMonigle's goal was to stop a dissatisfied party from filing "repetitive, serial motions," trying to get a different result. It is about judicial economy—not precluding a judge from considering relevant evidence.

Specifically, *McMonigle* provides that events prior to the last custody order are not admissible to show a "change in circumstances", which is required to modify primary custody designations. Meaning, a party cannot use the facts and circumstances before an evidentiary hearing or agreement to meet their "change in circumstances" burden to modify custody later. While this makes sense, what often happens is there are custody orders (either by the judge after trial or by agreement) and later something happens that lands the parties back in court.It prohibits the defending party from maintaining the same facts in defense of a motion to modify that were the basis of a prior order or reason for a prior settlement.

It was error for the District Court to bar all evidence of anything prior to the last custody order as the law only prohibits evidence brought by the movant to prove a change in circumstances.

a. <u>A Party Can Always Bring Evidence Prior to Last Custodial Order Defensively</u>

McMonigle's bar on evidence prior to the last custodial order only applies offensively, when a moving party is trying to demonstrate a change in circumstances in support of their claim to change custody. Defensively, a party can

always use relevant evidence prior to the last custodial order to consider the child's best interests.

For example, because Parent A has a history of domestic violence and mental illness, Parent B get an order for custody. However, under the instant case's interpretation of *McMonigle*, if Parent A later motions the court to modify custody, Parent B is precluded from introducing any prior circumstances to defend against the motion. This strict interpretation of *McMonigle* gives Parent A a clean slate—regardless of how heinous the conduct. That is not in a child's best interest and not what *McMonigle* intended.

Therefore, the District Court erred by excluding any evidence prior to the last custody order presented by Sandra because her use of it was in defending a motion to modify custody.

b. The *Castle* extension of *McMonigle* applies to more than domestic violence and can be used offensively

"The court must hear *all* information regarding domestic violence to determine the child's best interests."[6] The court may review previously litigated

[6] *Castle* at 104.

acts of domestic violence if additional acts occur.[7] Courts must presume that any domestic violence has a negative impact on the best interest of the children.[8]

Castle says the court can consider domestic violence evidence brought by a moving party (offensively), even if prior to the last custodial order, especially if additional acts occur. This is "pattern evidence." *Castle* should not be only limited to domestic violence, but offensive behavior. If *Castle* is only applied to domestic violence, then the following scenario could happen:

1) Parent A has an extensive drug history that was known to the court but cleans himself up prior to finalizing custody proceedings;
2) The parties enter into a custody agreement, with Parent B knowing about Parent A's drug history, but accepting he has rehabilitated himself;
3) After the custodial order, Parent A relapses and begins using drugs again;
4) Parent B files a motion regarding custody because of Parent A's relapse.

Under *McMonigle* and a strict *Castle* reading, Parent B would be precluded from bringing to the court's attention that Parent A ever had a drug history because it was known to Parent B and the Court prior to the last custodial order. This cannot be right. A judge must be able to consider relevant facts and conduct prior to the last custodial order if new events occur, even if known to the court or the

[7] *Id.* at 106.
[8] *Id.*

parties, beyond only domestic violence, because it is relevant to the child's best interests. Thus, the District Court erred to limit the allowance of evidence from prior to the last court order to domestic violence.

c. The district court's granting of the motion in limine under *McMonigle* barred Sandra from presenting evidence relevant to Evan's best interests

In determining a child's best interests, Nevada statutes include a non-exhaustive list of factors the court must consider.[9]

Here, the district court wrongly blocked evidence relating to Chris' mental health, history of Chris instigating conflict, and domestic violence. Dr. Paglini performed a full custody evaluation in 2012. Paglini concluded Chris was not truthful in the process, trying to manipulate the outcome of the psychological testing. Paglini diagnosed Chris with OCD and Narcissism. Chris confirmed to Paglini that he did throw a rock through the window of a car while Sandra, Evan and her other children were inside the car. Paglini also notes another domestic violence incident reported by a witness who saw Chris pulling Sandra's hair. rsLastly, he notes that the parties are high conflict and assigns much of the blame on Chris, stating his narcissism causes him to belittle and demean people. The

[9] *See* Addendum for NRS 125C.0035(4).

district court's *McMonigle* ruling barred Sandra from presenting this evidence against Chris.

While Sandra previously settled with Chris knowing the above, she settled for a timeshare where she had most of the custodial time. Chris was then allowed to file to modify custody to him having primary custody; and then the court precluded Sandra from introducing this evidence against Chris in defense of his motion. It is relevant to Evan's best interest if Chris suffers from incurable personality disorders, such as OCD and narcissism, and presents a myriad of child-rearing and co-parenting issues. It is relevant to Evan's best interests that at least two documented incidences of domestic violence and that Chris creates conflict by belittling and demeaning people. And lastly, it is relevant that Chris tried to manipulate and game the custody evaluation with dishonesty and create a false image. Instead, Chris presented himself with a clean slate.

It was error for the District Court to bar any evidence that may be relevant to the child's best interest when making a custody determination. This court should therefore reverse and remand to the district court with instructions that it must hear all evidence relevant to the child's best interests when making a custody determination, regardless of when it occurred.

2. **THE DISTRICT COURT ERRED BY DETERMINING THE PARTIES HAVE JOINT PHYSICAL CUSTODY**

Parties are free to come to custody agreements and the courts will enforce these agreements so long as they are not unconscionable, illegal, or in violation of public policy.[10] But, when a party moves the court to modify an existing child custody agreement, the court must "use the terms and definitions provided under Nevada law, and the parties' definitions no longer control."[11]

Joint physical custody requires an equal timeshare, but some latitude is given to account for irregularities in schedules and to account for schedules, work schedules, and school activities, to name a few.[12] Under Nevada law, a parent must have physical custody of a child at least 40% (146 days) of the time to have joint physical custody,[13] otherwise the physical custody is then primary physical custody with the other parent having visitation.[14] A party can ask the Court to re-label the designation using the 40% guideline, but the court must also consider best interest, not simply change custody based on historical percentages.

Counting custodial time is not a black and white issue. The Nevada Supreme Court has provided the following guidance:

> In calculating the time during which a party has physical custody of the child, the district court should look at the number of days during which a party provided supervision of the child, the child resided with

[10] *Rivero v. Rivero*, 125 Nev. 410, 429 (2009).
[11] *Id.*
[12] *Id*. at 424-425.
[13] *Id.* at 425-426
[14] *Id.* at 426.

> the party, and during which the party made the day-to-day decisions regarding the child. The district court should not focus on, for example, the exact number of hours the child was in the care of the parent, whether the child was sleeping, or whether the child was in the care of a third-party caregiver or spent time with a friend or relative during the period of time in question.[15]

Recently, the legislature enacted a statute that provides that there is a presumption that joint physical custody is not in the best interest of a child if a parent is unable to adequately care for a child for at least 146 days per year (40% of a calendar year).[16]

Here, there is no counting mechanism that gets Chris to 40% timeshare and without that, he cannot be a joint physical custodian. The timeshare calculation instructions have been interpreted numerous ways by the family court. Many view believe *Rivero* prohibits counting hours, while others see it as an instruction to count days. The result has been inconsistent, but the law is clear: a parent cannot be a joint physical custodian unless he has at least a 40% timeshare.

Bluestein states the 40% rule is a guideline and the court must still consider the child's best interests before modifying custody. *Bluestein* was a re-labeling case in accordance with Nevada law custody definitions, but still held that the district court must also consider the child's best interest in its decision to modify custody. The "guideline" principle only meant to not solely rely on the parties'

[15] *Id.* at 427.
[16] NRS 125C.003(1)(a).

historical timeshare. It does not abrogate *Rivero* and allow a parent with less than 40% time to be confirmed as a joint custodian if a district court judge determines it is in a child's best interest to do so. That would create a legal fiction which is what *Rivero* says you cannot do. The Nevada legislature codified this concept when it created a presumption that joint physical custody is not in a child's best interest if a parent cannot provide care for at least 40% of a year, 146 days.

In this case, the court concluded Chris exercised 150 days of visitation in 2015. However, Chris confirmed through his testimony that the chart in Sandra's closing brief was accurate. This exhibit shows (based on flight records) every visit Chris had with Evan the calendar year preceding the evidentiary hearing. Even if Chris was credited for both exchange days, he only has 139 days of visitation. However, he should not be given credit for the pickup *and* drop off days, Sandra was not given any such credit.

In a situation like this, the court should count hours. The *Rivero* court only said the court should "not focus on" the exact number of hours a child is with each parent, it did not say shall not consider. *Rivero* wanted court to do away with considering hours for when a parent may not have the child in their physical custody, they are still responsible for them, i.e. school, third party caretaker. This is not the case for Chris. Because he lives out of State, he is not the responsible parent while Evan is in school or with third parties.

Despite counting hours for Chris, he still falls short of 40%.

MONTH	VISITATION DATES	NUMBER OF DAYS
June, 2014 School not in session	06/14-06-26 8:00 am pickup to 5:00 p.m. drop off approximately	Days & Hours: 12 day, 9 hours
July, 2014 School not in session	07/17-08/01 8:00 am pickup to 5:00 p.m. drop off approximately	Days & Hours: 15 days, 9 hours
August, 2014 School not in session	08/08-08/23 8:00 am pickup to 5:00 p.m. drop off approximately	Days & Hours: 15 days, 9 hours
September, 2014 School in session	09/19-09/29 3:21 p.m. pickup to 8:00 a.m. drop off approximately	Days & Hours: 9 days, 16 hours, 39 minutes
October, 2014 School not in session for drop off or pickup	10/25-11/2 8:00 am pickup to 5:00 p.m. drop off approximately	Days & Hours: 8 days, 9 hours
November, 2014 School in session for pickup but not drop off	11/21-11/30 3:21 p.m. pickup to 5:00 p.m. drop off approximately	Days & Hours: 9 days, 1 hours, 39 minutes
December, 2014 School not in session for pickup but in session for drop off	12/26-1/4/15 8:00 am pickup to 8:00 a.m. drop off approximately	Days & Hours: 9 days, 0 hours
January, 2015 School in session	1/15-1/25 3:21 p.m. pickup to 8:00 a.m. drop off approximately	Days & Hours: 9 days, 16 hours, 39 minutes
February, 2015 School not in session for pickup but in session for dropoff	2/20-3/03 8:00 a.m. pickup to 8:00 a.m. drop off approximately	Days & Hours: 11 days, 0 hours

March, 2015 School in session for pickup but not for dropoff	3/17-3/27 3:21 p.m. pickup to 5:00 p.m. drop off approximately	Days & Hours: 10 days, 1 hour, 39 minutes
April, 2015 School in session for pickup but not for dropoff	4/21-5/01 3:21 p.m. pickup to 5:00 p.m. drop off approximately	Days & Hours: 10 days, 1 hour, 39 minutes
May, 2015 School in session for pickup but not for dropoff	05/22-06/01 3:21 p.m. pickup to 5:00 p.m. drop off approximately	Days & Hours: 10 days, 1 hour, 39 minutes
	TOTAL	**139**

If Chris is credited for every hour of his visitation, even on exchange days, the total is approximately: 127 days, 72 hours, & 234 minutes; or 130 days, 3 hours and 54 minutes—less than the minimum 146 days Chris needs to be a joint physical custodian.

A district court judge has no discretion to label a parent a joint physical custodian if they do not have at least 40% of the custodial time and certainly not if they are unable to exercise 146 days per year.

It was error for the District Court to determine that the parties had joint physical custody when Chris exercised less than 40% of the time and was unable to exercise 146 days per year. The court should therefore reverse and remand with instructions that under Chris's confirmed schedule, he is not a joint physical custodian.

3. THE DISTRICT COURT ERRED BY FINDING THERE WAS A SUBSTANTIAL CHANGE IN CIRCUMSTANCES WARRANTING A CUSTODY CHANGE, THAT A CUSTODY CHANGE IS IN EVAN'S BEST INTERESTS OR EVEN THAT A CUSTODY CHANGE WAS IN EVAN'S BEST INTERESTS

Although there is not a statute or case law outlining criteria for a non-custodial parent in another state to relocate a child whose home state is Nevada to their state[17], it stands to reason that the out-of-state non-custodial parent would have to at least meet the burden of obtaining primary physical custody—the same as a joint physical custodian seeking relocation.

NRS 125C.0065 they must: "(a) Attempt to obtain the written consent of the non-relocating parent to relocate with the child; and (b) If the non-relocating parent refuses to give that consent**,** petition the court for primary physical custody for the purpose of relocating."

If the parties have joint physical custody, the party requesting primary physical custody need only show that the modification of custody is in the child's

[17] This standard does not exist likely because the situation rarely arises where an out-of-state non-custodial parent would have just cause to do so, or the justification would be so obvious based on the facts of the case that an appeal would never arise.

best interests.[18] Whereas if one parent has primary physical custody, for the parent seeking modification to meet his burden he must prove two things: (1) there has been a substantial change in circumstances affecting the welfare of the child—with the change in circumstances occurring since the last custodial order[19], and (2) the modification served the child's best interest.[20]

The District Court found that Chris met the standard to modify from Sandra as primary physical custodian to Chris as primary physical custodian and the lesser standard to modify from joint physical custody. Even when taking the findings as true, these findings do not meet the standard required to move a child from the home with their custodial parent across the country to live with another parent.

a. <u>The district court erred when it found there was a substantial change in circumstance affecting the welfare of the child since the last court order warranting custody modification</u>

Under *Ellis*, a modification from primary to primary requires a showing of a substantial change in circumstances affecting the welfare of the child since the last court order. The district court cites five things to support its conclusion that there has been a substantial change in circumstances affecting the welfare of the child sufficient to warrant a change in custody under *Ellis*:

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[18] NRS 125C.0045(2).
[19] *See McMonigle*, 110 Nev. 1407 (1994).
[20] *See Ellis v. Carucci*, 161 P.3d 239 (2007).

1. Sandra kept Evan in weekly therapy when there was very little, if any, evidence that Evan suffers behavioral issues beyond those of an average, active and healthy first grader;
2. Sandra did not foster extracurricular activities until just before the trial;
3. The specific school district in New York that Evan will be attending is generally better than Las Vegas schools;
4. Since the last custody order was entered, Sandra's oldest son from a prior relationship did not graduate on time from high school and Sandra allowed him to enroll in an online high school program;
5. Chris' "second career" has solidly established itself and his client base in New York.

Of the above five bases to support a substantial change in circumstances, all fail as either not changes, not affecting the welfare of the child, contradicted by the evidence, or are not sufficient to change custody.

The first basis cited by the district court was Sandra leaving Evan in therapy with Ms. Tolman "when there was very little, if any, evidence that Evan suffers behavioral issues beyond those of an average, active and healthy first grader." This was a conclusion by the district court judge after hearing Ms. Tolman's testimony at trial and determining she was not credible. However, the court cannot fault

Sandra for following and believing the findings of a licensed therapist. There is nothing in the record to indicate the therapy was inappropriate, the therapist was not qualified, or that Evan was being harmed by being in therapy. The court should not remove a child from a custodial parent for putting a child in therapy, particularly when the child's father is diagnosed with mental health issues.

The second basis the court cites is that Sandra did not foster extracurricular activities for Evan until recently. If Chris's and the court's position is that Sandra never did this, then this is not a substantial change in circumstances since the last custodial order. No evidence was presented that Evan is maladjusted socially or is failing in some way because he has not participated in extracurricular activities to the level the court or Chris deem sufficient. In fact, many people testified that Evan is a great, smart, and social kid.

The third basis the court cites is that the school in New York Evan will attend is "generally" better than Las Vegas schools. First, this is not a substantial change in circumstances. And second, there is no evidence Evan is not doing well in school and would benefit from a change. Evan's principal called him a "model student." Therefore, this does not qualify as a substantial change in circumstances affecting Evan's well-being.

The fourth basis the court cites is that since the last custodial order Sandra allowed her oldest son Desmond to attend an online high school and graduate at his

own pace. This has nothing to do with the instant case. Desmond is a different child, with a different father, with different circumstances. The court's concern is academic, but again, Evan has no academic issues according to his teachers and principal. The court is trying to search for negatives against Sandra to justify its decision. Desmond's situation is not a substantial change of circumstance affecting Evan's well-being sufficient to justify a change in custody.

The fifth and final basis the court cites is "Chris's 'second career' has solidly established itself and his client base in New York." This is the most perplexing basis. Chris testified that he has been *unemployed* since his most recent business venture went bankrupt the year prior. The court should not consider it a benefit to a child to be removed from their custodial parent to go live with an unemployed parent.

Based on the above, the court erred by determining there had been a substantial change in circumstances affecting Evan's welfare sufficient to modify custody. It was error for the court to find such trivial reasons were sufficient basis to justify a change in custody.

b. <u>The court erred by determining it was in Evan's best interests to modify custody—especially in light of the omitted evidence.</u>

If a court is modifying from primary to primary, it must show the change addressed in subsection (a) above and also show that it is in the child's best interest

to modify under *Ellis*. If a court is modifying from joint to primary, it must show that it is in the child's best interest to modify.[21]

The court cites the following in support of modification and relocation:

1. Education;
2. Extracurricular activities;
3. The guidance of a parent who has some unique skills derived from his coaching career to augment his skills as a parent;
4. A large, close family to support father and son;

The court then went through the statutory best interest factors and noted no new health issues and no new domestic violence allegations since the prior order.

The court accepts all his testimony at face value and buys his super-dad/super-family image. Chris is a narcissist. Paglini specifically finding that Chris is obsessed with image and portraying an unrealistic and inaccurate portrayal of himself and his family. He also reported that Chris was not being truthful and was trying to manipulate the outcome. Paglini is a trained mental health professional; thus, it is understandable he would be more in-tune to Chris's issues. Therefore, the Court should have considered Chris's past domestic violence and mental health issues when determining custody here.

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[21] NRS 125C.0045(2).

Additionally, the court's stated reasons as to why a custody change is in Evan's best interest do not outweigh the stability factor the Nevada Supreme Court previously stressed the importance of in *Ellis*. The district court therefore erred by determining a custody change was in Evan's best interests regardless of whether the starting order was considered joint or primary to Sandra.

5. **THE DISTRICT COURT ERRED IN GRANTING THE RELOCATION AS CHRIS FAILED TO PROVE IT IS IN EVAN'S BEST INTERESTS AND THE RELOCATION DISRUPTS EVAN'S STABILITY**

Nevada requires a joint physical custodian (or non-custodial parent) seeking relocation to 1) petition the court for primary physical custody; and 2) prove the relocation is in the child's best interests.[22]

Under the statutory best interest factors, the court shall consider and set forth its specific findings concerning, among other things … (g) The physical, developmental and emotional needs of the child." Although "the court may … [a]t any time modify or vacate its order" upon "the application of one of the parties," because numerous courts have documented the importance of custodial stability in

[22] *See* NRS 125C.006, NRS 125C.0065, and NRS 125C.007. There are other factors outlined in these statutes but the burden for primary custody modification and the burden to prove best interests by the petitioner are the most relevant.

promoting the developmental and emotional needs of children, courts should not lightly grant applications to modify child custody.[23]

Not only did Chris not meet his burden showing a sufficient change in circumstances affecting the child's welfare, but Chris failed to prove relocating Evan from his home State of Nevada to New York was in his best interest. This is especially true considering the importance of stability in Evan's life. Stability is a critical factor here. Sandra was the primary parent for Evan's entire life. Evan is not an at-risk child—he is doing well. Evan has lived his entire life in Nevada, sans minimal time in New York several years ago. Evan is doing well in Nevada. His principal called him a model student and child. There is no reason to disrupt the life of a child who is thriving and the court should not do so lightly.

Because Chris failed to prove a case for primary custody and failed to prove a relocation from Evan's home State of Nevada was in his best interest, the district court erred by granting the relocation.

B. CONCLUSION

The district court's order blocking all evidence prior to the last custodial order was an improper application of *McMonigle*. *McMonigle* only bars evidence prior to the last custodial order when it is being used offensively by the moving

[23] *Ellis*, 123 Nev. at 149 (2007).

party to show a change in circumstances. However, under *Castle*, "pattern evidence" prior to the last custodial order can be used offensively because new acts have occurred and the court must be able to consider the history to weigh the child's best interests. Evidence from prior to the last custodial order is admissible if used for other purposes, such as to defend against the other party's claims.

Under Nevada law, a parent must exercise at least 40% of the time to be a joint physical custodian. No Nevada case law gives a district court judge discretion to do otherwise. *Bluestein* did not abrogate *Rivero*, it only made clear that in all custody determinations a judge must consider a child's best interests, even if just re-labeling. Only how to count custodial time is subject to judicial discretion.

Lastly, *Ellis* expresses the importance of stability and that courts should not modify custody lightly. When parties have a lengthy historical custodial arrangement, best interest means more than just determining a child *might* have more opportunities or support with the other parent. The stability factor outweighs trivial findings— especially when there is no evidence a child is doing poorly with the custodial parent.

19. Issues of first impression or of public interest. Does this appeal present a substantial legal issue of first impression in this jurisdiction or one affecting an important public interest: Yes____ No__X__. If so, explain:

VERIFICATION

1. I hereby certify that this fast track statement 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 fast track statement has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, font size 14.

2. I further certify that this fast track statement complies with the page- or type-volume limitations of NRAP 3E(e)(2) because it is proportionately spaced, has a typeface of 14 points or more, and contains 7256 words.

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 8th day of May, 2017.

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CERTIFICATE OF SERVICE

The undersigned, an employee of McFarling Law Group, hereby certifies that on the 8th day of May, 2017, I served a true and correct copy of Appellant's Fast Track Statement and Appellant's Appendix, to the following:

___✓__by United States mail in Las Vegas, Nevada, with First-Class postage prepaid and addressed as follows:

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By: __*/s/Maria Rios Landin*___
Maria Rios Landin

ADDENDUM

NRS 125C.0035 Best interests of child: Joint physical custody; preferences; presumptions when court determines parent or person seeking custody is perpetrator of domestic violence or has committed act of abduction against child or any other child.

1. In any action for determining physical custody of a minor child, the sole consideration of the court is the best interest of the child. If it appears to the court that joint physical custody would be in the best interest of the child, the court may grant physical custody to the parties jointly.

2. Preference must not be given to either parent for the sole reason that the parent is the mother or the father of the child.

3. The court shall award physical custody in the following order of preference unless in a particular case the best interest of the child requires otherwise:

(a) To both parents jointly pursuant to NRS 125C.0025 or to either parent pursuant to NRS 125C.003. If the court does not enter an order awarding joint physical custody of a child after either parent has applied for joint physical custody, the court shall state in its decision the reason for its denial of the parent's application.

(b) To a person or persons in whose home the child has been living and where the child has had a wholesome and stable environment.

(c) To any person related within the fifth degree of consanguinity to the child whom the court finds suitable and able to provide proper care and guidance for the child, regardless of whether the relative resides within this State.

(d) To any other person or persons whom the court finds suitable and able to provide proper care and guidance for the child.

4. In determining the best interest of the child, the court shall consider and set forth its specific findings concerning, among other things:

(a) The wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his or her physical custody.

(b) Any nomination of a guardian for the child by a parent.

(c) Which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent.

(d) The level of conflict between the parents.

(e) The ability of the parents to cooperate to meet the needs of the child.

(f) The mental and physical health of the parents.

(g) The physical, developmental and emotional needs of the child.

(h) The nature of the relationship of the child with each parent.

(i) The ability of the child to maintain a relationship with any sibling.

(j) Any history of parental abuse or neglect of the child or a sibling of the child.

(k) Whether either parent or any other person seeking physical custody has engaged in an act of domestic violence against the child, a parent of the child or any other person residing with the child.