IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN DANIEL ADRIANZEN, Appellant, v. PAIGE ELIZABETH PETIT, Respondent.	Electronically Filed Sep 23 2019 04:51 p.m. Elizabeth A. Brown Clerk of Supreme Court Supreme Court No.: 78966 District Court No.: D489542

APPEAL FROM ORDER DENYING REQUEST TO SET EVIDENTIARY HEARING ON MOTION FOR MODIFICATION OF PHYSICAL CUSTODY

Eighth Judicial District Court of the State of Nevada
In and for the County of Clark
THE HONORABLE T. ARTHUR RITCHIE, JR.
DISTRICT COURT JUDGE

APPELLANT'S CHILD CUSTODY FAST TRACK STATEMENT

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KEVIN DANIEL ADRIANZEN, Appellant, v. PAIGE ELIZABETH PETIT, Respondent.	Supreme Court No.: 78966 District Court No.: D489542

APPELLANT'S CHILD CUSTODY FAST TRACK STATEMENT

1. Name of party filing this fast track statement:

   Kevin Adrianzen

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. D489542

4. Name of judge issuing judgment or appealed from:

   Honorable Judge T. Arthur Ritchie, Jr.

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?

   None.

6. Written order or judgment appealed from:

   a. Order from September 17, 2018 hearing, entered on February 11, 2019; and

   b. Order from April 9, 2019 Hearing entered on this action on May 28, 2019.

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

   February 14, 2019 & May 28, 2019.

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:

   Motion for Reconsideration.

   (b) date of entry of written order resolving tolling motion:
   May 28, 2019.

9. Date notice of appeal was filed:

   June 4, 2019.

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:

This matter was the subject of an appeal in the Supreme Court under Case No. 78966 bearing case caption: Page Petit vs. Kevin Adrianzen.

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**.

This is a post decree action involving child custody and visitation matters.

On August 18, 2014, the parties' Decree of Divorce was filed. [AA000001-AA000006].

On July 31, 2018, Respondent filed a Motion, to modify the parties' timeshare. [AA000007-19].

On August 23, 2018, Appellant filed his Opposition and Countermotion for

Modification of Physical Custody to Joint physical custody, timeshare & child support. [AA000020-43].

On September 17, 2018, the Court denied Respondent's Motion and did not set an evidentiary hearing on Appellant's Countermotion. [AA000291].

On February 28, 2019, Appellant filed a Motion for Reconsideration of the District Court's Orders. [AA000300-323].

On March 21, 2019, Respondent filed an Opposition and Countermotion. [AA000338-344].

On April 9, 2019, the Court denied Plaintiff's Motion for Reconsideration. [AA000544-547]

This appeal follows.

16. Statement of Facts.

Appellant Kevin Adrianzen ("Dad") and Respondent Paige Petit ("Mom") divorced in 2014 and have one minor child together: Ryder Adrianzen ("the child") (DOB: 9/22/13) [AA000001-AA000006].

The parties divorce concluded by way of an evidentiary hearing on June 10, 2014, when Ryder was approximately nine months old. [*Id.*]

On August 18, 2014 the district court issued and filed its decision. [*Id.*] The parties' divorce decree gives the parties joint legal custody, but awards Mom primary physical custody, with Dad having a limited timeshare until the child

turned one-year-old, and then Dad's timeshare thereafter is every week, from Saturday 6:00 p.m. through Monday 6:00 p.m. (48 hours per week) [AA000002].

The district courts decree from the evidentiary hearing only contains *four* findings relevant to custody:

1. Court did not find any acts of domestic violence [*Id.*];
2. Both parties appear to be committed to follow the Court's order to parent the child [*Id.*];
3. Both parties have an obligation to support their child [*Id.*]; and
4. There is a level of conflict between the parties and the grandparents, which is a negative factor for the child. Disputes are not handled in a mature way [*Id.*].

The decree provides *no* analysis or findings under the statutory custody factors in NRS 125C.0035(4) or its predecessor NRS 125.480(4).

The parents exercised this custody arrangement without going back to court for approximately four years.

On July 31, 2018 Mom filed a Motion to Modify Timeshare in district court, requesting the court modify the parents' custodial timeshare because Dad has the majority of the weekend time, as well as other familial reasons related to Mom. [AA000007-19]. Specifically, Mom stated:

> Since the Decree of Divorce was issued, the Defendant [Mom] become engaged [sic] and two children have been born to that

> relationship. Defendant wishes to create a healthy environment of a nuclear family for the minor child and the child's half-siblings while not denying the Plaintiff [Dad] of time with his child. [AA000011].

Mom expanded on the importance of the child spending time with "step-father" even though Mom is not married to this person ("Shawn"):

> At the time of divorce, the minor child did not have siblings or a stepfather with whom the child needs familiar time to bond with. Further, the minor child will commence all-day kindergarten in the fall, creating a greater need for time to bond with Paige, his siblings, and stepfather. [*Id.*]

Dad filed an Opposition and Countermotion to Modify Physical Custody to Joint on August 23, 2018. [AA000020-43].

Dad's Countermotion to Modify Physical Custody contained the following assertions:

1. Mom has violated Dad's joint legal custody rights numerous times, as verified in her deposition, wherein she stated she never told Dad about *at least* ten medical and dental appointments she had taken the child to unilaterally [AA000025-26];
2. Mom's live-in boyfriend Shawn, or the "step-father" in Mom's Motion, has a criminal record which includes at least two drug charges and two driving under the influence charges—including an open DUI charge [AA000026];

3. Mom has five people, including three small children, living in a two-bedroom apartment [*Id.*];
4. The child had a dental issue and Dad was unable to message Mom as his phone number was blocked [AA000027];
5. The year prior, Mom had been involved in an auto accident with the child which required the child to have to go to the emergency room for treatment. Mom never told Dad [AA000027];
6. Dad had expressed concerns to Mom over a speech issue with the child and requested an evaluation. Mom ignored him. [AA000028];
7. On numerous occasions Dad has asked about injuries to the minor child, without response from Mom [AA000028];
8. The child contracted scabies from Mom's home. It took Mom two weeks to even acknowledge Dad's inquiry on this issue. Both homes had to be exterminated. [AA000028];
9. Mom has verbally degraded Dad at exchanges, and routinely shoves cameras in his and family member's faces at exchanges [AA000029];
10. Dad sent his mother to do the exchange for him, hoping to reduce the conflict. Mom's mother tried to run over Dad's mother at the enxt exchange [AA000029];

11. On the child's first day of kindergarten, it was Dad's custodial timeshare. Dad was reluctant for Mom to be present, as he did not want a situation, but he agreed it was fine as it was a big day for the child. Mom got a photo of the child outside his classroom as he was ready to enter—and then his teacher called him into the classroom, before Dad could take a photo. Dad asked Mom if she could share the photo she had taken. She refused. [AA000029-30].

In addition to the concerns as to Mom and her living environment, Dad's countermotion also provided that in the four years since the parties' divorce, he had another child, of whom he has joint physical custody of with a rotating weekly schedule. [AA000030-31].

On August 30, 2018 Dad filed a supplement to his countermotion [AA000044-58], adding to the information previously provided as to Mom's boyfriend Shawn Prisco ("Prisco").

Dad's supplement provided an excerpt from Mom's prior deposition testimony in April 2018 wherein she was asked if Prisco was ever arrested before. [AA000048] Mom's answer was, "yes" for "marijuana" "two times" and also a DUI in California. [*Id.*] Mom was also asked if Prisco has ever been to rehab for drugs or alcohol, to which she responded, "I'm not sure." [*Id.*].

Dad's supplement points out that: 1. either Mom is lying; or 2. She has no idea who she is living with and allowing around the child. [*Id.*]

The supplement lays out the known facts as to Prisco's criminal history, as taken from the supporting documents filed with the Exhibit Index [AA00059-95].

The additional facts as to Prisco, in Dad's supplement, are as follows [AA000048-52]:

> In May 2017, Prisco was arrested for possession of drug paraphernalia and resisting arrest/obstructing a police officer. While these charges alone are troubling, the facts surrounding them are even more so.
>
> According to the officer's report, on May 5, 2017 around 7:00 p.m. the police were called to the area of 1575 Warm Springs Road in Henderson Nevada with reports that a male was "asking people for drugs." The suspect was described as "thin" and with "black pants with holes in them." He was later identified as Shawn Prisco.
>
> The police approached Prisco to talk to him, but Prisco walked away, and continued to walk away despite the officer saying he needed to speak to him; and Prisco being advised by the officer that if he did not comply, the officer would use force. The officer ended up using force and placing Prisco in handcuffs. The officer searched Prisco and found a "clear glass pipe with a broken end, tinfoil, and burnt residue, lighter, and miscellaneous pill wrapped in paper towel."
>
> Based on the officer's training and experience, he identified all the paraphernalia as the type used to smoke heroin of methamphetamine. The officer suspected at least one of the pills was Xanax.
>
> The case just concluded in May 2018, with Prisco getting 60 days in jail (suspended), and court ordered rehabilitation of a minimum of 24 weeks. Basically, Prisco is right now (or should be) in a rehabilitation program.

The above event is not an isolated incident of substance abuse by Prisco. In 2016 Prisco was charged with driving under the influence in California, as well as carrying a concealed "dirk or dagger."

According to California penal code, a "dirk or dagger" is defined as:

1. a knife or other instrument,
2. with or without a hand guard,
3. that is capable of ready use as a stabbing weapon, and
4. that may inflict a significant or substantial physical injury or death.

As if this all was not enough, Prisco's May 2017 brush with the law brought on by him randomly soliciting strangers for drugs was not rock-bottom. In April of this year (2018), Prisco was again charged with driving under the influence (drugs) and driving on a revoked license. Prisco was charged as first offense, with Nevada apparently not knowing about the prior California charge.

On this DUI, Prisco was under the influence of THC and alprazolam (Xanax)— the same pills found on him a year earlier. This case just concluded on August 22, 2018.

None of these are new developments. On June 11, 2016, Prisco's mother took to Facebook to plea to anyone who would listen about Prisco's drug problems.

The post states:

I am Shawn Priscos mother. My son is a drug addict spiraling out of control. Shawn lies, steals, cheats, and does whatever he can do to feed his addiction. I'm reaching out to all that know Shawn and am asking to all not support his addiction or be the one that gives him 20 bucks so he can buy drugs that kill him. Shawn has an open door to return to Rehab for the help he needs. We have recently learned that Shawn is going to be a father but not if he continues on this path of destruction. . .

She further states that this post is very hard for her, but she is very concerned about those unknowingly feeding her son's addiction.

> This post came at a time when Prisco was living with Mom [Defendant], Mom was pregnant with their first child, and Mom had primary custody of Ryder. In fact, only two weeks prior to this post by Prisco's mother, Prisco posted photos of a "road trip" he took to Pismo Beach. His post includes a photo of Prisco going into the ocean— with Ryder.
>
> According to Mom's deposition, as far as she knows, Prisco has never sought rehab. And Mom's motion wishes to preserve this "nuclear" family for Ryder.

On September 7, 2018 Mom filed a Reply and Opposition to Dad's Opposition and Countermotion. [AA000097-104]. In it, Mom states: "Defendant [Mom] was unaware of the legal and substance abuse allegations made by Plaintiff. Prior to Plaintiff's supplement, Defendant was aware of a DUI and possession of marijuana." [AA000099].

On September 14, 2018, Dad filed his Reply to Mom's Opposition to Dad's motion to modify physical custody to joint. [AA000105-121].

Dad's Reply contained the following, which are supported by the corresponding Exhibit index filed with the Reply [AA000122-290]:

1. Additional criminal records obtained by Dad show a 2013 California arrest of Prisco shows his address as "transient" [AA000109];
2. In the 2013 incident, the police were called for an apparent drug overdose of Prisco. [*Id.*]

3. Prisco's father told police he "knows his son has a drug problem and is addicted to Xanax" and he recently had to kick him out of his home. [AA000110].
4. The police investigated another overdose that day, whom told the police Prisco had given him the drugs [*Id.*].
5. In 2016 Prisco was arrested for DUI and that is when his Mother took to Facebook. [*Id.*]
6. It was within two weeks of Prisco's Mother's Facebook post that the Facebook post with Prisco and the child in the ocean was posted, thus Mom and Prisco were together at this time [*Id*.];
7. In April 2017, Prisco was again arrested for DUI, again for Xanax (and THC) [AA000111];
8. A few weeks later, in May 2017 (while Mom was cohabitating with Prisco and the child), Prisco was arrested for soliciting drugs at a recreation center in Henderson, as well as resisting arrest [AA000111];
9. The police in that arrest found tin foil with burnt residue, a lighter, and Xanax on Prisco. The Xanax was not in a bottle, rather was wrapped in a paper towel. The pipe was identified by police as one typically used for methamphetamine or heroin. [AA000111].

10. As part of his plea deal, Prisco was ordered to abstain from drugs. In October 2017, the criminal court issued an order to show cause against Prisco for being "non-compliant" with the "no drugs" provision of his plea agreement and was taken into custody for two days. [AA000111].

Dad also states that he started finding information online about Prisco in June 2017, and sent it to Mom, and she never responded. [AA000112].

Additionally, Dad provided that it would be impossible for Mom to not have known about the extent of Prisco's issues being that he has spent several days in jail while they have been together, Dad told her, and Prisco's family was publicly posting warnings about his severe drug addiction on social media. [*Id.*]

Dad's Reply also points out how Mom's statement that these issues are behind Prisco and "not an ongoing concern" should not be satisfactory to the court as Mom just admitted she knew nothing of any of this (allegedly); and the public solicitation of drugs in Henderson by Prisco and subsequent probation violation for drug use was very recent in time, with him still being on probation. [*Id.*].

Dad's Reply also points out how Ryder's medical records for his primary physician state "lives with Mom and her family. Father limited involvement." Dad has had weekly custody of the child since before Ryder was a year old; and filed his divorce and custody case when Ryder was only two months old. [AA000115].

The district court held a hearing on the parties' Motion and Countermotion on September 17, 2018. [AA000291].

The district court denied both parent's motions. [AA000292-295]. As to Dad's motion, the Court noted the following in its order:

1. Defendant's boyfriend has a serious drug problem, numerous arrests, and served time in jail while they lived together with the minor child [AA000292];
2. The child had a black eye when Plaintiff picked him up and the child stated Defendant's [Moms'] boyfriend put tape on his face and pulled his cheeks [AA000293];
3. The boyfriend in question is actually Mom's fiancé and the father of her two children. Defendant and her fiancé live together [*Id.*];
4. The Court finds the actions of Defendant's fiancé have not caused any neglect on the part of Defendant [*Id.*]; and
5. The Court further finds that there is no adequate cause to re-litigate custody. [*Id.*].

Additionally, the district court granted Dad sixty days to conduct additional discovery, if needed. [*Id.*]

The Order from the September 17, 2018 hearing was entered on February 14, 2019. [AA000295-000299].

On February 28, 2019, Dad filed a Motion to Reconsider the district court's prior order denying his motion without evidentiary hearing. [AA000300-323]. Dad filed a corresponding Exhibit index in support of his motion to reconsider. [AA000324-333].

Dad's motion to reconsider provided the following, in addition to what was already in his original motion, as to a prima facia "adequate cause" standard for evidentiary hearing:

1. Mom is cohabitating and engaged to a person with a serious drug problem who has multiple recent DUI's (with drugs), numerous recent arrests for drug behavior and probation violations [AA000318];
2. Mom violated Dad's joint legal custody rights *numerous* times based on Mom's sworn deposition testimony, by failing to tell Dad about their child's medical and dental appointments. This court has already informed Mom at the October 27, 2014 hearing shortly after trial that Dad has joint legal custody and she needs to include him on these issues [*Id.*];
3. Mom consenting to flu shots for their son without discussing or informing with Dad [*Id*.];
4. Mom has blocked Dad's number on her phone [AA0003319]
5. Mom has moved multiple times (including again recently) without telling Dad where their son is living [*Id*.];

6. Mom failed to tell Dad about their son being in a car accident which resulted in Mom taking their son to the hospital which she didn't inform Dad of either [*Id*.];
7. Mom failed to provide their son's full legal name on official records, omitting Dad's last name, and omitted Dad altogether on hospital and dental paperwork [*Id*.];
8. Mom fails and continues to fail to respond to direct questions regarding their son such as asking about injuries [*Id*.];
9. Mom has failed to accommodate any and all requests for additional time by Dad when he has family in town or other events because "the court did not order it" [*Id*.];
10. Mom took their son out of state without Dad's knowledge [*Id*.];
11. Mom enrolled their son in school without informing Dad which school or discussing which school their son should attend [*Id*.];
12. The child contracted scabies in Mom's home [*Id*.];
13. Mom fails to properly brush Ryder's teeth, causing numerous dental problems which are excessive for a then-four-year-old [AA000320];
14. Dad has another child who he has joint physical custody of, and Dad would like to be able to plan activities with the siblings jointly [*Id*.]; and
15. Mom struck Dad during one exchange [*Id*.].

In addition to the above, Dad's motion to reconsider addresses the fact that in November 2018, Prisco reached out to Dad via Facebook to say the following: "Hey Kevin I'm not with Paige anymore and I want to see you win this shit you got going on so if there is anything you need from me just let me know because she fucked me too." [AA000312].

In his motion to reconsider, Dad provided to the court that this message makes sense because the prior weekend the child had told Dad about a "fight" at Mom's home with the police being called. [*Id.*]

Dad's Motion to Reconsider also points out that the parties' original 2014 divorce decree contains *no* statutory child best interest findings under NRS 125.480(4) [this statute has been replaced by NRS 125C.0035(4)]; and the district court's failure to lay out how or why it came to the custody designation it did after evidentiary hearing in 2014 is now impeding Dad's ability to modify that decree and show a "substantial change in circumstances" as required under the law to modify a primary physical custody order. [AA000314-315].

Prior to the hearing on Dad's motion to reconsider, he also filed a supplement with additional information, including a letter from the child's school stating the child was flagged as a slow reader by Nevada's "read by grade three" act. [AA000488].

On April 9, 2019 the district court had a hearing on Dad's Motion for Reconsideration. [AA492-543]. The district court denied Dad's motion. [AA000544-547] but the court had an extensive hearing, with commentary from the court.

In addition to all of the issues in Dad's original motion, as well as his motion for reconsideration, Dad also raised at the April 9th hearing that Mom had now moved four times in four years, with the child requiring a zone variance to finish the school-year for kindergarten, and would be required to switch schools already for first grade. [AA000494].

Additionally, When Dad's counsel informed the district court that the five-year-old child had several "crowns" already, as documented in the provided dental records, the Court was skeptical:

Court: Oh stop that. Come on.

Mr. Burton: I--- it's in the record, Your honor. I'm…

The Court: Yeah, okay. They—they--- it—okay. Great. You're---you're really thinking that they put a crown on a kid that's five years old?

Mr. Burton: It's in the dental records your honor. [AA000507-508]

The February 2019 dental records provided to the court state the following:

> Mom also reports the pt [minor child] was seen recently at another office and a crown was recommended. Dr. Thompson evaluated x-rays from the other office and advised there is a large decay on #S-

> SSC indicated. Possible mesial decay on #T difficult to tell due to slight overlap on the xrays. Recommend SSC #S. [AA000330]
>
> SSC stands for stainless steel crown.[1]

Mom stated at the hearing that she is not employed and is supported by Shawn Prisco. [AA000521]. Mom further stated that she does not have a physical phone because hers broke and she cannot afford a new one. [AA000523].

Near the end of the hearing, the Court narrows in on the issues and its decision:

> **Court:** And I got the impression with the motion that was filed that dad thought the Court didn't consider any of the issues that were raised in the countermotion last fall. The Court considered them and said, they're not adequate cause to relitigate the issue of custody. That's a judgment call courts have to make because there is a burden to show adequate cause. [AA000532].
>
> Now I could have just left it at that. But I didn't. I said, we're gonna allow discovery for 60 days to see if you can develop these facts because there are some legitimate issues that you raise about joint legal custody, certainly. [AA000533]
>
> And then the motion was filed. And so I'm lookin' at this. And I'm--- and I'm—I'm looking at the issues that require some dialogue. But I don't s- there's no prima facie case for change of custody. And the fact that he has week-to-week time share with his other child is not adequate cause to relitigate the issue of custody in this case. He has to show material changes in circumstance and that it would be in the best interest of the child. [*Id.*]

[1] https://healthengine.com.au/info/stainless-steel-crowns-ssc.

> **Mr. Burton:** Your honor, on the discovery issue, though, I provided numerous criminal records about the person living in their child's home. I provided medical records. Aside from being a fly on the wall in their home, I can't even think of what other discovery mechanism—mechanisms could be used to get more information on these issues. [AA000535]
>
> This isn't just about dental. This isn't just about---this is a totality of co-parenting; medical neglect; education neglect, poor choices of who you're allowing around your children on a daily basis, when your having children with (indiscernible) to this home; serious drug problems this guy has. And to act—and to say that this is not relevant in this, I just don't think is . . .[*Id.*]
>
> **Court:** I didn't say it wasn't relevant. What I said was it does not – you didn't—you haven't shown a prima facie case concerning those concerns. And it is a --- I mean, I would – I would say it's a close call as it relates to whether to relitigate the issue of custody. But just because he says it, doesn't mean it's true. [*Id.*]
>
> **Mr. Burton**: But that's what a prima facie case is that we take it as true. And then he's got to prove it. [*Id.*]

After denying Dad's request for failing to meet the adequate cause standard, the Court opined on Mom's living situation:

> **Court:** I'm concerned that if she's in a relationship that doesn't work very well for her, she has no economic power to be able to deal with it. Okay. She has—she can't even buy a cell phone for four months. She's dependent on her significant other. She's got young children. It is a concern. [AA000538].

Then, the district court addressed Dad's hypothetical in his motion to reconsider as to "what does it take" for adequate cause for an evidentiary hearing:

> **Court:** Let's say for the sake of argument, you say, well, what is it gonna take? That's a rhetorical question you raise in your papers.

> They have a DV [domestic violence] incident. It results in arrest. They have a drug charge, is some other kind of catalyst there. They have a --- they get put out of they house because they get evicted for not paying a more—all of these things become material to the consideration. [AA000538].

17. Issues on appeal

1. Whether the court improperly denied an evidentiary hearing citing "no adequate cause" raised, despite numerous serious issues raised.

2. Whether the district court's original divorce decree, which contains no statutorily required child custody findings in its determination, now unfairly inhibits Appellant's ability to seek custody modification under the "changed circumstances doctrine" as the court's original order contains no findings as to how the court reached the current custodial designation and timeshare.

3. Whether the court's specific listed examples as to what constitutes "adequate cause" to set an evidentiary hearing in a child custody matter are inconsistent with prior Nevada precedent.

18. Legal argument, including authorities:

a) The Court Abused its Discretion When it Denied Appellant an Evidentiary Hearing Based on "No Adequate Cause"; and the Examples of Adequate Cause Given by the District Court are Extreme

The Nevada Supreme Court has held that the district court has discretion to deny a motion to modify custody without an evidentiary hearing, *unless* the moving party "demonstrates adequate cause" to hold an evidentiary hearing.[2]

[2] *Rooney v. Rooney* 109 Nev. 540, 542 (1993). *See Pridgeon v. Superior Court, 134 Ariz. 177, 655 P.2d 1 (Ariz. 1982)*(court shall deny a motion to modify custody unless it finds that the pleadings establish adequate cause for hearing the motion); *Betzer v. Betzer, 749 S.W.2d 694 (Ky. Ct. App. 1988)* (if the trial court determines

A party meets "adequate cause" when it presents a prima facie case that the requested modification is in the child's best interest: with a prima facie case being satisfied by the moving party showing that: (1) the facts alleged in the affidavits are relevant to the grounds for modification; and (2) the evidence is not merely cumulative or impeaching.[3]

When looking to modify a primary physical custody order, the moving party must show that: (1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the child's best interest is served by the modification, with the moving party bearing the burden on both prongs.[4]

In *Ellis*, the Nevada Supreme Court, in dictum, emphasized the importance of stability:

> 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 promoting

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that the affidavits fail to establish adequate cause for a hearing, the motion for modification of custody shall be denied without a hearing); *Lutzi v. Lutzi, 485 N.W.2d 311 (Minn. Ct. App. 1992)* (court did not wrongfully deny an evidentiary hearing on a proposal to modify custody where the moving party failed to demonstrate a prima facie case for the modification); *Roorda v. Roorda, 25 Wash. App. 849, 611 P.2d 794 (Wash. Ct. App. 1980)* (court shall deny a motion to modify custody unless the affidavits establish adequate cause for hearing the motion). "Adequate cause" requires something more than allegations which, if proven, might permit inferences sufficient to establish grounds for a custody change. *Roorda v. Roorda, 25 Wash. App. 849, 611 P.2d 794, 796 (Wash. Ct. App. 1980)*.

[3] *Id.*

[4] *Ellis v. Carucci*, 123 Nev. 145, 150-151 (2007).

> the developmental and emotional needs of children, we acknowledge that courts should not lightly grant applications to modify child custody.[5]

The Nevada Supreme Court has held that the district court improperly denied an evidentiary hearing based on no adequate cause in a custody case where there were Facebook messages between the other parent and a fifteen-year-old, with some of the messages *discussing* a sexual relationship. The court in that case also gave deference to a third-party affidavit wherein someone stated the other parent ran into their car, which had the child inside.[6]

Similarly, in *Ellis,* "substantial change in circumstances" was a four-week slip in the child's grades.[7] The child's teacher [Banta] provided the following to the district court in her testimony:

> At the hearing, Bridgett Banta, Geena's elementary school teacher, testified that Geena, an exceptionally bright student, performed very well during the first two quarters of the school year but had struggled during the third and fourth quarters.
>
> Banta explained, for example, that Geena's weekly progress reports between December 2003 and March 2004 included several notations indicating that Geena had failed to turn in homework and had been talking in class. Banta also testified that Geena's school performance had dropped significantly because she was not applying herself as she had in the past.

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[5] *Id.* at 149.
[6] *Bautista v. Picone*, 419 P.3d 157, 160 (2018).
[7] *Id. generally.*

> According to Banta, Geena did not complete her assignments and refused to revise her work when Banta requested that Geena do so.
>
> Banta further testified that she often discussed Geena's academic performance with Carucci because he regularly inquired about her progress, but, by contrast, Banta had very little contact with Ellis.
>
> In summary, Banta concluded that Geena's school performance had deteriorated and that she needed more encouragement from both parents.[8]

In reviewing whether there has been a "substantial change in circumstances' in *Ellis,* the Nevada Supreme Court held that "[w]hile this case presents a close question, Banta's testimony constitutes substantial evidence in support of the district court's finding that a change in circumstances affecting Geena's welfare warranted a modification of child custody. We perceive no abuse of discretion on the district court's part in determining that Geena's documented 4–month slide in academic performance constituted a substantial change in circumstances."[9]

Here, the district court improperly denied Dad an evidentiary hearing on his motion to modify custody, even though he met a prima facie case that custody modification is in the child's best interest, as the district court placed a heightened emphasis on stability—over the child's best interest.

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[8] *Ellis,* 123 Nev. 145, 147 (2007).

[9] *Id.* at 152.

At the April 9, 2019 hearing on Dad's motion to reconsider, the district court provided examples of what it considers a prima facie case that meets adequate cause for evidentiary hearing:

1. A domestic violence incident. But *only* if it results in an arrest.
2. A drug charge (by the other parent, live-in boyfriend not applicable apparently).
3. An eviction for non-payment of rent or mortgage.

The case law, and the general notion of a child's best interest belie the high-standard to modify custody imposed by the district court. If a four-month slide in grades for a child warrants an evidentiary hearing (and custody modification), then the issues raised in this case do as well.

Dad outlined numerous concerning things in his motion to modify custody and motion for reconsideration. Dad provided significant documentation to the court that Mom's "fiancé" has an ongoing and serious drug issue, which includes numerous drug and DUI arrests. The fiancé lives in the same home as the child.

Dad's documentation shows Prisco was arrested (while the parties have been together) for panhandling drugs in public and had a pipe for either methamphetamine or heroin on him when arrested. The documentation further shows Prisco has a history with pills.

The district court abused its discretion when it denied Dad an evidentiary hearing on custody by finding that Prisco's conduct did not meet adequate cause for a custody modification evidentiary hearing. The district court's order from the

September hearing states: "The Court finds that the actions of Defendant's [Mom] fiancé have not resulted in neglect on the part of Defendant."

The standard is not neglect. The standard is whether a prima facie case was met that *the child's best interest* would be served with custody modification. And *Rooney* further states the offerings in support of evidentiary hearing must be "relevant" to a request for custody modification—the facts need not even support absolute modification on their face. Simply stated, has Dad put forth enough evidence, that if true, demonstrates the child might benefit from more time with Dad (and less with Mom). Dad does not have to prove that Mom is currently committing abuse or neglect of the child to meet adequate cause for an evidentiary hearing, nor does Dad need to prove that his prima facie case is a "slam-dunk." The court only has discretion to deny an evidentiary hearing if "no adequate cause exists." Otherwise, it has no discretion to deny.

As stated, Dad has only 48 hours of custodial time a week. Therefore, the medical issues raised by Dad, the home life issues regarding Mom raised by Dad, the schooling issues raised by Dad, the joint legal custody violations raised by Dad—these all are impacted (for the better) if Dad were more involved.

In addition to the issues surrounding Mr. Prisco, between Dad's original motion, motion to reconsider, and the April 9, 2019 hearing, Dad presented the following additional issues to the court for consideration:

1. Mom violated Dad's joint legal custody rights *numerous* times based on Mom's sworn deposition testimony, by failing to tell Dad about their child's medical and dental appointments. This court has already informed Mom at the October 27, 2014 hearing shortly after trial that Dad has joint legal custody and she needs to include him on these issues;
2. Mom consenting to flu shots for their son without discussing or informing with Dad;
3. Mom has blocked Dad's number on her phone;
4. Mom has moved multiple times (including again recently) without telling Dad where their son is living;
5. Mom failed to tell Dad about their son being in a car accident which resulted in Mom taking their son to the hospital which she didn't inform Dad of either;
6. Mom failed to provide their son's full legal name on official records, omitting Dad's last name, and omitted Dad altogether on hospital and dental paperwork;
7. Mom fails and continues to fail to respond to direct questions regarding their son such as asking about injuries;
8. Mom has failed to accommodate any and all requests for additional time by Dad when he has family in town or other events because "the court did not order it";
9. Mom enrolled their son in school without informing Dad which school or discussing which school their son should attend;
10. The child contracted scabies in Mom's home;
11. Mom fails to properly brush Ryder's teeth, causing numerous dental problems which are excessive for a then-four-year-old and even brought skepticism to the court as to the seriousness;
12. Dad has another child who he has joint physical custody of, and Dad would like to be able to plan activities with the siblings jointly (court completely disregarded this fact as irrelevant);
13. Mom struck Dad during one exchange;
14. Because of Mom's excessive moving, the child already has to switch schools after kindergarten.

Also, in Dad's motion to reconsider he put for the message he received from Prisco stating he and Mom had broken up—which coincided with the child telling Dad there was a "fight" at Mom's home and the police were called.

Considering *all of the above*, the district court denied an evidentiary hearing by saying Dad had not made a prima facie case that there is adequate cause to modify custody. This is the case even though the district court at one point stated:

"And it is a --- I mean, I would – I would say it's a close call as it relates to whether to relitigate the issue of custody. But just because he says it, doesn't mean it's true." The court is supposed to reasonably take the assertions in a motion as true when deciding whether a party has met adequate cause—that is what a prima facie case is.

Based on the foregoing, the district court abused its discretion when it failed to set an evidentiary hearing on Dad's custody modification motion as Dad put forth sufficient prima facie "adequate cause" with relevant facts that show custody modification is in the child's best interest.

b) The District Court's 2014 Divorce Decree is Legally Deficient and Impeding Dad from Modifying Custody in the Child's Best Interest

NRS 125.480(4) [now NRS 125C.0035(4)] states:

> 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.

(l) Whether either parent or any other person seeking physical custody has committed any act of abduction against the child or any other child.

The statute states the court "shall" make best interest findings under the statutory best interest factors. The Nevada Supreme Court has reiterated the importance of factual findings to support custody decisions in several cases over the last few years.[10]

"Crucially, the decree or order must tie the child's best interest, as informed by specific, relevant findings respecting the NRS 125.480(4) and any other relevant factors, to the custody determination made."[11] Specific findings and an

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[10] *See Davis v. Ewalefo*, 352 P.3d 1139 (2015); *Bluestein v. Bluestein*, 345 P.3d 1044 (2015).

[11] *Davis v. Ewalefo*, 352 P.3d 1139, 1143 (2015)(citing *Bluestein v. Bluestein,* —— Nev. ——, ——, 345 P.3d 1044, 1049 (2015) (reversing and remanding a custody modification order for further proceedings because "the district court abused its discretion by failing to set forth specific findings that modifying the parties' custodial agreement to designate [mother] as primary physical custodian was in the best interest of the child"); *see* NRS 125.510(5) ("Any order awarding a party a limited right of custody to a child must define that right with sufficient particularity

adequate explanation of the reasons for the custody determination "are crucial to enforce or modify a custody order. . ."[12]

A parent cannot reasonably be expected to show that "a substantial change in circumstances" as to the child's best interest warrants modification of an existing child custody determination unless the determination at least minimally explains the circumstances that account for its limitations and terms.[13]

Here, the parties divorce decree after evidentiary hearing on custody contains *no* statutory best interest analysis and does not even *minimally* provide why it gave Mom primary custody and Dad 48 hours a week of visitation. The only findings alluded to in the decree are neutral, such as no evidence of domestic violence and the parties have high conflict. There are no findings—at all, as to how the court's custodial decision serves the child's best interest.

While it is too late to appeal a 2014 decree, the deficient decree is impeding Dad's ability to modify custody in the child's best interest. The Nevada Supreme Court has held that "[s]pecific findings and an adequate explanation of the reasons

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to ensure that the rights of the parties can be properly enforced and *that the best interest of the child is achieved.*") (emphasis added); NRS 125C.010(1)(a) (identical, except it substitutes "a right of visitation of a minor child" for "a limited right of custody"); *Smith v. Smith,* 726 P.2d 423, 426 (Utah 1986) (deeming it "essential" that a custody determination set forth "the basic facts which show *why* that ultimate conclusion is justified").

[12] *Id.*

[13] *Davis*, 352 P.3d 1139, 1143 (2015).

for the custody determination 'are crucial to enforce or modify a custody order' and "[a] parent cannot reasonably be expected to show that "a substantial change in circumstances" as to the child's best interest warrants modification of an existing child custody determination unless the determination at least minimally explains the circumstances that account for its limitations and terms." Dad agrees.

The district court felt that despite the overwhelming offers of proof provided to it as to the issues the child is having and the person Mom is allowing to live with the child, there was not adequate cause to set an evidentiary hearing. Adequate cause is satisfied by a prima facie case that modification serves the child's best interest. But in a primary custody case, the court's adequate cause analysis must be whether adequate case, as presented by the prima facie case, would satisfy *Ellis* as to a substantial change in circumstances since the last custodial order; and the modification serves the child's best interest. To make this analysis, the court must know the facts and circumstances as to how it arrived at its order. But more importantly, the parent must know this information as well to competently proceed with a modification request.

Without this analysis, the district court is left putting whatever standard is determines is the benchmark starting point as to "substantial change in circumstances" because there are no findings after evidentiary hearing—and it is now five years later.

Based on the decree being legally deficient in this case, this court should remand this case back to the district court for an evidentiary hearing on Dad's motion, removing the substantial change in circumstances prong from *Ellis,* as there are no findings in the controlling custody order in this case for the district court to make that analysis.

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 7,018 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 23rd day of September, 2019.

MCFARLING LAW GROUP

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CERTIFICATE OF SERVICE

The undersigned, an employee of McFarling Law Group, hereby certifies that on the 23rd day of September, 2019, I served a true and correct copy of Appellant's Fast Track Statement, to the following via the Supreme Court's electronic filing and service system (eFlex):

Mel Grimes, Esq.

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