IN THE SUPREME COURT OF THE STATE OF NEVADA

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AARON ROMANO, Appellant, vs. TRACY ROMANO, Respondent.	)	Docket No: 81259

AARON ROMANO, Appellant, vs. TRACY ROMANO, Respondent.	)	Docket No: 81439

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

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

Statement identifying all parent corporations and any publicly held company that owns 10% or more of the party's stock.

None.

The names of all law firms whose partners or associates have appeared for the party or amicus in the case (including proceedings in the district court or an administrative agency) or are expected to appear in this court:

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REPLY TO RESPONDENT'S STANDARD OF REVIEW

This Court requested supplemental briefing due to what it perceived as inconsistencies in the controlling case authority developed over time 1concerning child custody modification. Questions of law are always reviewed by this Court *de novo*[1] and it is axiomatic that this Court can clarify, correct, expand, or overrule its prior precedent.

Both parties acknowledge that most decisions regarding factual family law issues are reviewed by the appellate courts for an abuse of discretion.[2]

Tracy argues that "[t]his Court will not set aside the District Court's factual findings so long as they are supported by substantial evidence…" but this assertion misses the point. "Substantial evidence is found where there is evidence that a reasonable mind might accept as adequate to support a conclusion."[3] Here there was no "evidence" or "factual findings" because the district court summarily denied Aaron's motion.

Even if an evidentiary hearing had been held, the question presented by this case is one of law, not of fact as there is no factual dispute as to the *de facto* timeshare the parents chose to exercise for the year preceding the hearing, and no dispute that

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[1] *Kilgore v. Kilgore*, 135 Nev. 357, 359-60, 449 P.3d 843, 846 (2019); *see also City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003)(holding that questions of statutory construction, including the meaning and scope of a statute, are questions of law, which are reviewed *de novo*)

[2] *Rivero v. Rivero*, 125 Nev. 410, 428, 216 P.3d 213, 226 (2009); *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996)

[3] *Respondent's Supplemental Response*, at page 3, lines 4 through 8 [internal citations omitted]

what the parties actually did varied enormously from the timeshare set forth in the stipulated Parenting Plan.

This Court's review should include determination of whether, as a matter of law, those agreed facts demonstrate that "adequate cause" existed for an evidentiary hearing and whether the parties' conduct of agreeing to and following a completely revised custodial schedule for a year presented a *prima facie* case for modification of the custodial order, as set forth in *Rooney v. Rooney*.[4] The district court's summary denial of Aaron's motion under these circumstances is inconsistent with existing law and warrants reversal.

ARGUMENT

After five briefs, the crux of the matter comes down to the following:

Aaron contends that when there is a major difference between what the last court order ***says*** and what the parties are actually ***doing***, a "significant change of circumstances" exists, and the district court must consider whether that change serves the children's best interest.

Tracy, by contrast, maintains that it is irrelevant if the parties' order says one thing and they are doing something completely different. She maintains the district court should attempt to divine "why" the parties are not following the order, because if their "true intent" was to misrepresent child custody to manipulate child support, no "change of circumstances" occurred.

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[4] 109 Nev. 540, 543, 853 P.2d 123, 125 (1993), *citing Roorda v. Roorda*, 611 P.2d 794, 796 (Wash. Ct. App. 1980) (holding that "adequate cause" requires something more than allegations which, if proven, might permit an inference sufficient to establish grounds for a custody change)

Aaron submits that objective fact and not "discretion to determine subjective intent," should control the outcome of a custody dispute. This Court has long held that a *de facto* change in custody is a substantial change of circumstances requiring a new custodial order.[5] When the last custodial order does not reflect the actual custody of the children, a "change in circumstances" exists, and efforts to evade that reality, or to prevent a court from having to determine whether the best interests of the children involved are being served, are sophistry to be avoided, as reflected in both law and literature from childhood on.[6]

I. Nevada public policy requires the same legal standard apply to all modifications of child custody.

Tracy's argument that a modification of primary physical custody should require a "*substantial* change in circumstances" but that a change from joint physical custody should only require a "change in circumstances" ignores the underlying public policies of this State.

As explained in *Murphy v. Murphy*[7] and *Ellis v. Carucci*,[8] it is the policy of this State to promote custodial stability by discouraging the frequent re-litigation of custody disputes. This policy of promoting ***stability for the child*** does not change based on the percentage of time the child spends with either parent. Whether the

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[5] *Khaldy v. Khaldy*, 111 Nev. 374, 892 P.2d 584 (1995)

[6] "I meant what I said and I said what I meant. An elephant is faithful one-hundred percent." Dr. Suess, *Horton Hatches the Egg* (HarperCollins 2d ed. 2004, 1st ed. 1940)

[7] 84 Nev. 710, 447 P.2d 664 (1968) overruled in part by *Ellis v. Carucci*, 123 Nev. 145, 161 P.3d 239, 2007 Nev. LEXIS 28, 123 Nev. Adv. Rep. 18

[8] 123 Nev. 145, 161 P.3d 239 (2007)

parents are sharing joint physical custody or one parent is designated a primary physical custodian, Nevada public policy to promote ***the child's custodial stability*** is the same. Thus, the standard of "substantial change in circumstances" should equally apply in either scenario. To hold otherwise would place an arbitrary preference on the custodial stability of some children, but not others, depending upon the percentage of custodial time exercised by each parent—a basis which is not relevant to a child's needs.

Along with stability for the child is the policy of finality of issues already adjudicated. As explained in *Truax v. Truax*,[9] the doctrine of *res judicata* applies in child custody matters to prevent persons dissatisfied with custody decrees from filing immediate, repetitive, serial motions until the right circumstances or the right judge allows them to achieve a different result based on essentially the same facts. Accordingly, the *Truax* court held that the moving party in a custody proceeding must show that circumstances have ***substantially changed*** since the most recent custodial order.

Tracy asks this Court to adopt a lesser standard of "change in circumstances" to modify an order of joint physical custody.[10] This request would violate Nevada's policies because ***any*** change of circumstances (*i.e.*, not "substantial") meets that very low standard—*e.g.*, the child graduated from elementary school and is now in middle school; the child now has a cell phone; the child recently learned how to ride a

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[9] 110 Nev. 437, 874 P.2d 10 (1994)

[10] Among the contradictions in Tracy's position on appeal is that the low burden for which Tracy is advocating is not consistent with her argument that Aaron failed to show a change of circumstances.

bicycle—which would have the effect of nullifying its purpose and effect. It would allow exactly what the Court sought to avoid in *Murphy*, *Ellis*, and *Truax*—litigants dissatisfied with custody decrees would be free to file immediate, repetitive, serial motions until the right circumstances or the right judge allows them to achieve a different result based on essentially the same facts, thereby destroying the custodial stability of the child.

Further, NRS 125C.001 clearly outlines this State's policy of ensuring that every child has frequent associations and a continuing relationship with both parents and to encourage parents to share the rights and responsibilities of child rearing. This policy is reflected in the preference for joint physical custody evident in NRS 125C.0015, NRS 125C.003, and NRS 125C.0035. Tracy's request that this Court adopt a more stringent test for parents to move ***for*** joint physical custody than ***from*** joint custody is directly contrary to the Legislature's intent.

Tracy acknowledges in her *Supplemental Response* that an award of primary custody to one parent is contrary to the legislative preference for joint physical custody when she calls it a "big deal" at page 8, line 13. Yet, Tracy fails to provide any explanation or justification as to why she is asking this Court to adopt burdens that would favor primary custody to one parent (*i.e.*, she is asking for the higher "substantial change of circumstances" to modify primary and the lower "change of circumstances" to modify joint) in direct opposition to our Legislative scheme.

Lastly, if this Court was to adopt a different standard for modification from joint physical custody than from primary physical custody, in cases such as this one (and *Rivero*, where the *de facto* schedule is not consistent with the order), this Court

and every trial court in every case would also have to decide which custodial designation dictates the standard—the custodial designation in the order, or the *de facto* custodial designation?

Under that regimen, only if the answer is the *de facto* custodial designation would the district court would have to hold an evidentiary hearing to determine the actual custody status of the children under Nevada law before the appropriate standard (*i.e.*, "change in circumstances" or "substantial change in circumstances") could be identified in every case where the *de facto* timeshare is being disputed by the parents. No public policy serving the best interest of children can be served by creating such a different standard.

For the reasons set forth above, this Court should adopt a uniform two-prong test for all custody modification determinations:

1. Prong one: "Substantial change in circumstances"

The first question should be: "Has there been a substantial change in circumstances affecting the child from the terms set out in the last custody order?" If there is no substantial change since the last custodial order, then the doctrine of *res judicata* applies and the holding in *McMonigle*[11] bars further consideration of the issue. If there has been a substantial change in circumstances affecting the child since the last custody order, the analysis would continue to prong two.

2. Prong two: "Best interest analysis"

The second question should be: "Would the modification serve the child's best interests?" A threshold analysis of prong two as outlined in *Rooney*, would require

[11] *McMonigle v. McMonigle*, 110 Nev. 1407, 887 P.2d 742 (1994)

the district court to first determine whether the movant made a *prima facie* case that the modification would be in the child's best interests. If the movant meets this initial burden, the district court should set an evidentiary hearing to make a final decision on the best interest factors outlined in NRS 125C.0035(4).

II. The holding in *Rivero* is consistent with this two-prong analysis and should be clarified accordingly.

The holding in *Rivero* requires a district court to determine the actual custody status of the children under Nevada law on the filing of a motion to modify custody. While that holding is consistent with the two-prong analysis set forth above, it should be clarified to specify that: (1) A material deviation by the parents from the timeshare set forth in the last custodial order over the prior 12 months constitutes a "substantial change in circumstances" and; (2) When the *de facto* schedule followed by the parents for the prior 12 months was by mutual agreement of the parents (whether express or implied) and is undisputed, it is presumed to be in the child's best interest. Under these circumstances, the court should modify the order to conform to the *de facto* custodial timeshare without need for an evidentiary hearing.

If there is a material dispute between the parents as to what the *de facto* timeshare has been or whether or not that *de facto* timeshare was by mutual agreement, then the threshold analysis of prong two as outlined in *Rooney* would be conducted. The district court would first determine what the actual timeshare has been and then whether the movant made a *prima facie* case that the modification would be in the child's best interests by applying the factors outlined in NRS 125C.0035(4).

III. Aaron and Tracy's agreement to modify the custodial timeshare as recited in the last custodial order constituted a change in circumstances and was in the best interest of the children. Parol evidence of "intent" or an "ulterior motive" is inadmissible as to the clear and unambiguous parenting agreement that was abandoned by the parents.

Tracy proposes violating 100 years of legal authority by offering inadmissible and concocted "parol evidence" of some "ulterior motive" to explain the parties' abandonment of their clear and unambiguous parenting agreement. She argues that the "intent" of their parenting agreement was merely to: (1) avoid statutory child support orders and; (2) to provide the parties "flexibility" regarding their parenting timeshare. This argument is not supported by the facts or the law.

Tracy takes the position for the first time in her Supplemental Response that the parties "manufactured" their parenting time schedule on paper to obtain a certain child support determination.

Child support determinations are always ancillary to child custody decisions. The child support regulations set forth in NAC Chapter 425 (and the prior statutes in NRS Chapter 125B) calculate child support based on the physical custody designation and only then consider the respective incomes of the parties.

The child support statutes require each parent to provide a minimum level of child support depending on the number of children and "[t]his requirement is independent of the custody arrangements."[12] The *Wright* Court made clear that the physical custody arrangement governs how much support a parent owes to the other

[12] *Wright v. Osburn*, 114 Nev. 1367, 1368-69, 970 P.2d 1071, 1072 (1998)

parent[13]—not that the child support award governs what "fake" physical custody designation should be fabricated to support it.

There is zero evidence to suggest that either Aaron or Tracy entered into their original parenting agreement with the intent avoid a child support obligation. This is just not a common occurrence, as parents do not stipulate to complex, multi-page custodial schedules for each individual child—as Aaron and Tracy did in this instance just to avoid child support.

In fact, NAC 425.110 specifically allows parents to simply "stipulate to a child support obligation that does not comply with [the] guidelines" to obtain the result Tracy now argues was the purported "secret intent" of their complex custody agreement. Even under the prior requirements of NRS 125B.080, the district court had discretion in awarding child support, by first following the statutory guidelines when calculating the initial child support award and then deviating from the statutory calculations when appropriate and when supported by substantial evidence.[14]

Even *Fernandez*[15] recognized that parties can and do make child support agreements which courts will recognize and enforce if those agreements are in the best interest of children. This Court held "[t]he child's best interest, in the support setting, is tied to the goal of the support statutes generally, which is to provide fair support, as defined in NRS 125B.070 and 125B.080, in keeping with both parents'

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[13] *Id.* at 1368-69, 970 P.2d at 1072

[14] *See* NRS 125B.080(6) (2018); *Wallace v. Wallace*, 112 Nev. 1015, 1021, 922 P.2d 541, 544-45 (1996); *Flynn v. Flynn*, 120 Nev. 436, 440, 92 P.3d 1224, 1227 (2004)

[15] *Fernandez v. Fernandez*, 126 Nev. 28, 40, 222 P.3d 1031, 1039 (2010)

relative financial means." If the parties had wanted to vary from statutory child support, they had no reason to fabricate custodial orders to do so.

Tracy's argument that the parties were only "being flexible" in their parenting time arrangement and were following a schedule "very close to the stipulated schedule" is simply not true. Julian and Mirabella spent ***no time at all*** in Tracy's care, despite the parties' parenting plan providing for Julian to be in Tracy's custody two days each week and Mirabella to be in Tracy's care four days each week. Tracy was also supposed to make efforts to improve her relationship with Julian and Mirabella for her parenting time to increase; this never happened during the year before Aaron filed his motion—no such efforts were made at all.

Tracy has not even *seen* Etienne since the Summer of ***2019***.

As for the four youngest children, Aaron had parenting time with them for a couple hours one to two days each week and an occasional overnight (except for Emmeline)—certainly not every weekend, as stated in the stipulated order. **This is not "flexibility" (*e.g.*, an occasional tweak of the timeshare to accommodate schedules)[16]; this is a wholesale abandonment of the parenting agreement that was designed to eventually achieve a true joint physical custody arrangement and was an entire re-write of their parenting timeshare.**

Further, the parties both agreed that Julian would have teenage discretion immediately, and that *all* the remaining children would also have teenage discretion upon reaching age 15. Under *Harrison*, parents are permitted to provide their

[16] *Harrison v. Harrison*, 132 Nev. 564, 376 P. 3d 173 (2016)(discussing the parameters of "teenage discretion" as "flexibility" to a custody order)

sufficiently-mature teenage children with the limited discretion to be flexible with their custodial exchanges, provided the children do not deviate from the custodial designation that district court found was in their best interests.[17] In contrast to the requirements of *Harrison*, Julian and Mirabella (who is now 16 years old) have spent ***zero*** time with Tracy for (now) over two years—this reality bears no relation to the schedule in the parenting agreement.

Tracy did not dispute these facts, nor did she move the court to enforce the timeshare in the parenting agreement. It was Aaron who brought this matter back before the district court to enter orders consistent with the *de facto* schedule the parents had been following for the prior year. This illustrates that the parties were content with the actual custodial arrangement as their permanent custody schedule and had no issue with the older children having the discretion to stay in Aaron's sole physical custody.

Tracy also argues that the district court should "determine the parties' intentions" and "thereafter determine which should control" in applying the appropriate burden for modification—while she simultaneously argues the contradictory position that a district court should uphold contracts between parties so that they do not "lose the benefit of their bargain." In doing so, she appears to suggest that this Court should do away with the parol evidence rule in family court cases. Tracy then misapplies this Court's holding in *Mizrachi*[18] to support her argument.

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[17] *Id.*, 132 Nev. at 569-70, 376 P.3d at 176-77

[18] *Mizrachi v. Mizrachi*, 132 Nev. 666, 385 P.3d 982 (2016)

The parties' agreements should be upheld, and parol evidence should only be allowed where there is an ambiguity, need for clarification, or inconsistency. This is in line with the holding in *Mizrachi* where the parties did not define Jewish holidays sufficiently, so the district court's consideration of parol evidence and the parties' "intent" was necessary.

Here, there is no requirement—nor should there be—for the district court to determine the "intent" of the parties when they are willingly not abiding by the ordered parenting time schedule. The district court can only assume they "intended" what they agreed to in writing and submitted to the court, and that they "intended" to follow a different schedule. That is why, if the parties are *not* following their stipulated order, a substantial change in circumstances has occurred.

A contrary rule—that written court order may, or may not, actually reflect the parties' "intended" custody schedule is an invitation to chaos. Tracy's suggested adoption of a rule by which the district court must look beyond the four corners of every settlement agreement to determine "intent"—such as "were the parties confused or did they understand what they were doing"—would result in every contract or settlement agreement being subject to scrutiny and modification at the discretion of the district court. Such a rule would erode the ability of parties to contract.

As briefed by Aaron, the *actual* written custody arrangement between the parties is relevant in the first prong as to whether there was a substantial change in circumstances from the last custodial *order*. The "substantial" requirement is determinative, as merely switching a few weekends or pick up and drop off times

would likely not meet this burden. Whereas fully adopting a radically different parenting time arrangement for the course of an entire year (as in this case) provides a *de facto* physical custody determination that satisfies that test.

Tracy next argues that *Rivero* has "unintentionally had a chilling effect" on settlement because the district court is required to consider the parties' actual timeshare upon a motion to modify custody.[19] She believes that the district court grants no weight to the parties' original agreement in such circumstances.

In fact, the opposite is true. *Rivero* does not treat parents in different custody scenarios differently and does give parents a chance to step up to the plate and share joint physical custody. If one parent does not do what they promised, the other parent can return to the district court to have the order match the *de facto* custody schedule.

Tracy's quoting of *Rivero* regarding this Court cautioning against the district court "focus[ing] on…the exact number of hours the child was in the care of the other parent" is taken out of context. Her example of a father having parenting time from 12:00 p.m. to 4:00 p.m. for a breast-fed baby is misplaced. If the parties in that scenario agreed on the arrangement, called it joint physical custody, and followed it, then there was no substantial change in circumstances. However, if they abandoned the court-ordered arrangement for something entirely different, then there *was* a substantial change in circumstances and the *de facto* custody arrangement should control.

[19] It should be noted that this Court's holding in *Rivero* was the product of two rounds of briefing, *amicus curie* participation, and two published opinions (the first being withdrawn). The idea that anything "unintentional" came out of *Rivero* is farfetched.

In circumstances such as this case, where the substantial change in circumstances is based on a *de facto* change in custody at radical variance from the written order, the district court should determine whether the change was mutual or unilaterally imposed by one parent on the other. If the parties agreed to the change, it should be presumed to be in the child's best interest.[20]

Where there is no dispute between the parents as to the custodial arrangement and the parents agree to that schedule, the district court should only correctly apply the label as determined under Nevada law without revisiting the entire best interest analysis.[21] When the parents are not in agreement that the *de facto* custody arrangement is in the best interest of their child, the district court must then resolve the dispute and apply its analysis.

CONCLUSION

Tracy's suggestion that district courts should look behind unambiguous custody orders to determine what parties "really" intended would be terrible public policy. Parties should say what they are doing and should do what they say. If they don't, district courts should find that there has been a "substantial change of circumstances."

Determining whether there has been a substantial change of circumstances requires a comparison of the terms of an unambiguous custody order with what

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[20] *Ellis*, 123 Nev. at 151, 161 P.3d at 243

[21] Aaron agrees with Tracy's statement that "parents need latitude to determine what is best for their children, and the Court should be deferential to what parents think is best for their children." This is why the district court should look at the timeshare they are actually exercising for what they believe is in their child's best interest—otherwise, they would not be following that schedule.

parties have actually been doing for the term of the *Rivero* one year look-back, not a forensic inquiry into the parties' historical, subjective intentions. Tracy's assertion (at page 20) that the court should consider as "joint custody" a situation where the parties do not actually ***exercise*** joint custody of any child is curiously fraudulent.

If a change actually occurred and was agreed, the district court can presume that the parents have agreed that it serves the child's best interest. If they disagree as to what the change actually was, or whether it serves the child's best interest, the district court should make those determinations.

Based on the foregoing, this Court should adopt the two-prong test outlined above for *all* custody modification determinations and reverse and remand this matter for the district court to confirm that Aaron had primary physical custody of the three oldest minor children, while Tracy had primary physical custody of the four youngest minor children.

DATED Monday, August 23, 2021.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[x] It has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in font-size 14 of Times New Roman; or

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

accompanying Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED Monday, August 23, 2021.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Appellant's Supplemental Reply Brief was filed electronically with the Nevada Supreme Court in the above-entitled matter on Monday, August 23, 2021. Electronic service of the foregoing document shall be made in accordance with the Master Service List, pursuant to NEFCR 9, as follows:

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