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2 **IN THE SUPREME COURT OF THE STATE OF NEVADA**
3

4 AARON ROMANO,
5 Appellant,
6

7 vs.

8 TRACY ROMANO
9 Respondent.
10

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CASE NO. 81439

11
12 **RESPONDENT'S SUPPLEMENTAL RESPONSE**
13

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NRAP 26.1 DISCLOSURE

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 justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: None.

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

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3. If litigant is using a pseudonym, the litigant's true name: None.

Dated this 23rd day of July, 2021.

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7 **Issues Specifically Addressed in Supplemental Brief**

- 8
9 A. Whether the test to modify joint physical custody requires a party
10 to show that a change in circumstances occurred since the entry of
11 the previous Order;
12
13 B. Whether the Court should revisit its holding in *Rivero v. Rivero*,
14 125 Nev. 410, 216 P.3d 213 (2009), requiring the District Court to
15 determine the actual custody status of the children under Nevada
16 law upon the filing of a motion to modify custody and instead direct
17 the District Court to do so as part of a best interest analysis; and
18
19 C. Whether the District Court in this case reached the right result in
20 this matter.
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22

23 **Summary of the Argument**

24
25 The case law in Nevada already supports the fact that the threshold burden
26 of "a change in circumstances" already applies to all custody modifications. It is

1 Tracy's belief that clarification as to the process by which the District Court
2 determines whether to hold an evidentiary hearing on a Motion to modify
3 custody, and the threshold considerations thereof, is needed.
4

5 Tracy further contends that *Rivero* should be modified to direct the District
6 Court to determine the parties' intentions, where a conflict exists between the
7 custodial label and timeshare. And thereafter determine which should control (the
8 label or the timeshare), in applying the appropriate burden for modification.
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10

11 Finally, Tracy believes that the District Court reached the correct result,
12 and the judgment should be affirmed.
13

14 **Argument**

15 **Standard of Review**

16 The District Court has “broad discretionary powers to determine child
17 custody matters,” and this Court will not disturb such determinations absent a
18 clear abuse of discretion. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241
19 (2007). That discretion extends to visitation schedules. *Rivero*, 216 P.3d at 226,
20 citing *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996).
21 Abuse of discretion occurs when the decision is “arbitrary or capricious or if it
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1 exceeds the bounds of law or reason.” *Jackson v. State*, 117 Nev. 116, 120, 17
2 P.3d 998, 1000 (2001).

3
4 This Court will not set aside the District Court’s factual findings so long
5 as they are supported by substantial evidence. *Id* at 149, 242. Substantial
6 evidence is found where there is evidence that a reasonable mind might accept
7 as adequate to support a conclusion. *Whitemaine v. Aniskovich*, 124 Nev. 302,
8 308, 183 P.3d 137, 141 (2008). In making custody determinations, the sole
9 consideration is the best interests of the child, or children, at issue. *Sims v. Sims*,
10 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993).

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14 **A. A Change in Circumstances Is Necessary For Modification**

15
16 A change in circumstances is necessary before the District Court can
17 consider a Motion to modify custody and Tracy believes that the case law already
18 supports that determination. Tracy believes that clarification is needed from this
19 Court as to the process by which that occurs.

20
21
22 The principles of *res judicata* clearly apply to custody matters. This Court
23 settled that issue well over a decade ago in *Mosley v. Figliuzzi*, 113 Nev. 51, 930
24 P.2d 1110 (1997). In *Mosley*, this Court cited *McMonigle v. McMonigle*, 110
25 Nev. 1407, 887 P.2d 742 (1994), in affirmatively stating:
26

1 The moving party in a custody proceeding must show
2 that circumstances have substantially changed since
3 the most recent custody order. Events that took place
4 before the proceeding are inadmissible to establish a
5 change in circumstances.

6 *Mosley*, 903 P.2d at 1114.

7 Subsequent to *Mosley*, *Castle v. Simmons*, 120 Nev. 98, 86 P.3d
8 1042 (2004) and *Nance v. Ferraro*, 418 P.3d 679 (Nev. App. 2018), modified
9 *McMonigle*, allowing evidence which existed prior to the most recent custody
10 Order to be utilized in later proceedings for purposes of establishing, or
11 defending against, a change in circumstances under certain facts. First, in *Castle*,
12 this Court found that evidence (specifically, in that case, evidence of domestic
13 violence), which predated the existing Order may be utilized if unknown to a
14 party or the Court. Then, in *Nance*, the Court of Appeals determined that
15 evidence which predated the Order could be used *defensively* to argue against a
16 modification.
17

18 It is clear that, in carving out these exceptions, the intention was to balance
19 the stated principles of *res judicata* with the need to base custody Orders on all
20 of the relevant facts. In deciding *Nance*, the Court of Appeals actually
21 *strengthened* and reaffirmed the application of *res judicata* by finding that prior
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1 facts could be used to defend against a requested modification. In other words,
2 the Court of Appeals determined that a party defending against the requested
3 modification, and the Court, could review and use prior facts to argue that the
4 allegations do not constitute a sufficient change in circumstances.
5

6
7 When this Court heard *Mosley* in 1997, the decision in *Rooney v. Rooney*,
8 109 Nev. 540, 853 P.2d 123 (1993), had been law for approximately four years.
9
10 The *Rooney* case also supports the need to prove a change in circumstances for
11 all custody modifications. In that case, this Court held "that a district court has
12 discretion to deny a motion to modify custody *without* holding a hearing unless
13 the moving party demonstrates 'adequate cause' for holding a hearing" (i.e. a
14 *prima facie* case). *Rooney*, 853 P.2d at 124 (emphasis added). This Court then
15 further defined "adequate cause" as being those facts (as alleged in the
16 affidavits), which are relevant to the grounds for modification and not merely
17 cumulative or impeaching. *Id* at 125. Although not specifically stated in *Rooney*,
18 it is apparent that to have grounds for modification there must have been a
19 change of some kind to merit modification, and not simply a party's belief that
20 modification is in the best interests of a child.
21

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1 At the time *Rooney* was decided, *Murphy v. Murphy*, 84 Nev. 710, 447
2 P.2d 664 (1968), was still the prevailing case law for modification of primary
3 custody. Under *Murphy*, modification of primary custody was appropriate when
4 the circumstances of the parents had *materially changed*. *Murphy*, 447 P.2d at
5 665. (emphasis added). In 2007, the standard for modification of primary
6 physical custody changed. In *Ellis v. Carucci*, 123 Nev. 18, 161 P.3d 239
7 (2007), this Court altered the *Murphy* standard, of "material change " such that
8 the focus of the "change of circumstances" was on whether that change impacted
9 the child substantially.

14 In contrast, *Truax v. Truax*, 110 Nev. 437, 874 P.2d 10 (1994) (which was
15 decided approximately one year after *Rooney*) has not been modified. Pursuant
16 to *Truax*, it has long been held that modification of joint physical custody is
17 appropriate when the *best interests* of a child so require the modification. *Truax*,
18 874 P.2d at 11. *Truax* cites to *Rooney* for the premise that the Court has broad
19 discretion in custody cases, although it does not include the threshold for when
20 a request to modify joint physical custody should be considered. It seems
21 apparent that *Truax* was decided with conscious understanding that if a party
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1 does not meet the adequate cause standard of *Rooney*, the Court need not hear the
2 Motion, although the case itself does not specifically state the same.
3

4 Therefore, the first question is: what meets that "adequate cause" threshold
5 for modifying custody? In a primary custody situation, the answer is clear, a
6 substantial change in circumstances, affecting the child, must be found before the
7 Court can consider the best interests of a child - the *Rooney* burden on a moving
8 party when one party has primary physical custody is therefore to allege facts
9 which show that "substantial change in circumstances."
10
11
12

13 The answer is less clear when the parties have joint physical custody.
14 However, a review of the case law in chronological order supports that, in order
15 to avoid triggering *res judicata*, something must have changed. Therefore, the
16 threshold for *Rooney* where the parties are exercising joint physical custody must
17
18
19 merely be a "change in circumstances."
20

21 Aaron has posited to this Court that *Truax* itself should be overturned and
22 all custody modifications should proceed under *Ellis*. Tracy does not agree.
23 Therefore, assuming that all custody modifications do not proceed under the *Ellis*
24 standard, the second question is: to modify joint physical custody *how much* of
25 a change of circumstance must occur to trigger a hearing on a modification.
26

1 As this Court has noted on several occasions, and as the legislature has
2 affirmed multiple times, there is a preference for joint physical custody in
3 Nevada. *See Mosley*, 803 P.2d at 1116. In 2015, the legislature revised the
4 custody statutes, and strengthened that preference, making it clear that, whenever
5 possible, parties should have joint physical custody. *See* NRS 125C.001, 0025-
6 0035. As such, the guiding principle for the District Court when initially setting
7 custody is that joint physical custody is presumptively in a child's best interest.
8
9

10
11 Therefore, when the Court finds, or the parties stipulate, that preference is
12 overcome, and primary physical custody is granted to one party, it is a "big deal."
13 The Court is effectively saying that the facts in evidence outweigh the clearly
14 stated presumptive preference. It is, and pursuant to legislative guidance, should
15 be, more difficult to succeed in being awarded primary custody. As such, once
16 the Court has granted primary physical custody, it stands to reason that the task
17 of altering that arrangement should be more difficult than it is to alter a joint
18 physical custody arrangement.
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23 Because of the preference and the increased difficulty to obtain primary
24 physical custody, the same standards should not be applied in modifying the
25 different custody arrangements. It should be *easier* to modify a joint physical
26

1 custody arrangement. Therefore, the burden for modifying joint physical custody
2 should remain a simple "change in circumstances."
3

4 This Court should *clarify* that the process by which the District Court
5 decides a Motion to modify custody is a two-step process:
6

- 7 1) In either a joint or primary custody case, a party must show, by
8 virtue of their affidavit(s) and offer(s) of proof, that a change in
9 circumstances has occurred. Only in cases where one party has
10 primary custody is it necessary for the facts alleged to show that
11 change of circumstances was "substantial" as to the child. *See Ellis*,
12 161 P.3d at 240.
13
14
15
- 16 2) Only once that adequate cause has been shown, should the District
17 Court hold an evidentiary hearing on the modification. In cases
18 where the parties have joint physical custody, the evidence must
19 thereafter confirm that there was, in fact, a change in circumstances,
20 and the moving party has the burden to show that the best interests
21 of the child are better met by a different timeshare. In cases where
22 one party has primary custody, the evidence must confirm that the
23 change in circumstances was substantial and impacted the child,
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1 and the moving party has the burden to show that the best interests
2
3 of the child are better met by a different timeshare.

4 Pursuant to *Rooney*, and *Grosjean v. Imperial Palace, Inc.* 125 Nev. 349,
5 212 P.3d 1068 (2009), the District Court should have broad discretion to
6
7 determine, based on the papers, offers of proof (in the form of exhibits), and
8
9 affidavits before it, whether a party has shown adequate cause. An evidentiary
10 hearing should not be granted every time a party files for a modification. The
11 Court needs discretion to deny evidentiary hearings when appropriate.

12
13 As this Court stated: "'[a]dequate cause' requires something more than
14 allegations which, if proven, *might* permit inferences sufficient to establish
15 grounds for a custody change." *Rooney*, 853 P.2d at 125 (emphasis added).
16
17 *Grosjean* states, "credibility determinations and the weighing of evidence are left
18 to the trier of fact." 212 P.3d at 1080. Therefore, this Court should also clarify
19 that the District Court has broad discretion, even at the pre-trial stage, and subject
20 to the abuse of discretion standard on appeal, to determine whether or not the
21 allegations made by the moving party credibly meet the "adequate cause"
22 standard.
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1 **B. Determination of Actual Custody Based On *Rivero***

2 *Rivero* has unintentionally had a chilling effect on settlement. Because any
3
4 Motion for modification seems to require the District Court to reassess the
5
6 custodial arrangement to apply Nevada law, parties now understand that no
7
8 matter what they may equitably label their timeshare, the Court will not grant any
9
10 weight to their agreement. And, for better or worse, the case law in Nevada does,
11
12 in fact, tie child support to the custody labels. *Rivero*, 216 P.3d at 222. As this
13
14 present matter highlights, that often times results in a party attempting to
15
16 manufacture justifications for changing the custody *designation* in order to
17
18 impact their child support obligation.

19 While Courts are generally required to apply Nevada Law, settlement
20
21 agreements are also contracts. *May v. Anderson*, 121 Nev. 668, 119 P.3d 1254
22
23 (2005). A contract may be used to modify parties' legal obligations to each other.
24
25 *C.f. Buettner v. Buettner*, 505 P.2d 600 (Nev. 1973), NRS 123, NRS 123A. The
26
exception, of course, exists where the terms of the contract would violate public
policy. *See e.g., Buettner*, 505 P.2d at 602-604; *Fernandez v. Fernandez*, 222
P.3d 1031 (Nev. 2010).

1 This Court, in *Fernandez*, held that because child support is there for the
2 child, the modification statutes are there for the protection of the child's interests
3 and cannot be waived by the parents. *Id* at 1036. Custody too is always
4 modifiable, and custody decisions are based upon the child's interest, akin to
5 *Fernandez*, in that the Court always retains jurisdiction. *However*, unlike child
6 support, the considerations of the court for setting a timeshare are not
7 "exhaustive," the way the deviation factors (now adjustment factors under NAC
8 425) are. *C.f.*, *Davis v. Ewalefo*, 352 P.3d 1139, 1143 (Nev. 2015), stating that
9 the best interest factors are a non-exhaustive list and the Court should address
10 any other relevant considerations; *Fernandez*, 222 P.3d at 1035.

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16 Further, unlike child support, the legislature has clearly indicated a
17 preference for parties to settle their custody issues, granting greater weight to
18 those agreements. *See Mosley*, 930 P.2d at 1116-1117; *Mizrachi v. Mizarchi*, 385
19 P.3d 982, 985-986 (Nev. App. 2016); NRS 125C.001, 0025. Therefore, where a
20 party is seeking modification, it behooves the District Court to determine *what*
21 the parties' actual agreement was (not just what the timeshare was), and the intent
22 behind their agreement, to ensure that, in applying Nevada law, the Court, as best
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1 as possible, effectuates, and does not unduly undermine, the agreement of the
2 parties.
3

4 An agreement between the parties wherein the custodial label assigned to
5 the timeshare does not comport with the actual timeshare creates an ambiguity
6 in the settlement agreement. Such an ambiguity should be resolved as directed
7 by the Court in *Mizrachi*, by reviewing the parties' intent. If the District Court,
8 as *Rivero* directs, simply determines what the timeshare is, then the Court is
9 substituting its judgment for the parties', and potentially rewriting the parties'
10 agreement, creating substantial alterations to the parties' related rights.
11
12
13

14 Marital Agreements often consist of multiple interlocking parts; Courts
15 should be cautious about re-interpreting those agreements. Courts should do
16 their best to conform their decisions with the parties' agreements and avoid a
17 situation where one party loses the benefit of the bargain made, except under
18 such circumstances where the result would violate public policy or have a clear
19 detrimental impact on the minor children.
20
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22

23 The reasons why parties resolve cases with certain timeshares and certain
24 labels are many and varied, as are the timeshares themselves; a fact born out by
25
26

1 Tracy and Aaron's custody schedule in this case. Just as this Court, in *Rivero*,
2 cautioned against:

3
4 focus[ing] on, for example, the exact number of hours
5 the child was in the care of the other parent, whether
6 the child was sleeping, or whether the child was in the
7 care of a third-party caregiver or spent time with a
8 friend or relative...

9
10 when determining if the parties meet the 40% threshold, and cautioned against
11 applying the 40% threshold too strictly in *Bluestein v. Bluestein*, 345 P.3d 1044
12 (2015), the District Courts should be cautious about labeling timeshares as an
13 "either/or," especially when they fall well outside the typical.
14

15
16 Aaron and Tracy's schedule is only one example of such a schedule.
17 Another example may occur where parties are settling custody of an infant who
18 is being breast fed. In such a situation, the parties may have a timeshare that
19 grants the father time with the minor child every day from 12:00 p.m. - 4:00 p.m.
20
21 The parties may call that schedule joint custody. If the District Court were to
22 follow the mandate in *Rivero* not to count hours, that schedule could very easily
23 be considered joint custody. However, in practicality, despite fairly extensive
24 contact, one parent clearly has substantially more time than the other. In this
25
26

1 scenario, it may be the parties' intention that the father have joint custody, but the
2 fact that they agree the minor child should be breast fed may presently prevent
3 the father from exercising longer blocks of time. Later down the line, that father
4 should not face the uphill burden set forth in *Ellis* to modify the schedule to a
5 more traditional joint physical custody schedule, once the child is no longer
6 being breast fed.
7
8
9

10 In contrast, however, the parties could have agreed to that schedule not
11 because the minor child is breast feeding, but because the mother does not
12 believe father can safely be responsible for the child overnight, and she may have
13 gotten that concession to a schedule that both parties actually recognize as
14 primary, by calling the same joint custody, in order for the father to receive a
15 break on his child support. In that example, the father should be bound by *Ellis*
16 in seeking modification of the schedule.
17
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19

20 Parents need latitude to determine what is best for their children, and the
21 Court should be deferential to what parents think is best for their children. As
22 with all settlement agreements and contracts, the *intentions* of the parties matter.
23
24
25 *Mizrachi*, 385 P.3d at 989.
26

1 Aaron would have this Court believe that only the actual timeshare should
2 matter, and that all other considerations (and the existence of two separate
3 standards for modification) will create inconsistency by virtue of parties' inability
4 to understand the nuances of the law. Aaron would have this Court believe that
5 "inconsistency" will create over-litigation and inequity. But granting the District
6 Court the discretion to determine the parties intentions in selecting the label and
7 timeshare addresses those issues.

11 Where the parties have a label which does not comport with the timeshare,
12 arguably they have some understanding of how the legal distinctions and
13 obligations of each label work and therefore, likely either had counsel or a
14 sufficient understanding of law to know what they were doing. But, even if they
15 did not, by allowing the District Court to determine whether the parties *intended*
16 the label or the timeshare to best reflect their agreement, actually allows the
17 District Court to determine if mere confusion was the cause of the ambiguity, and
18 resolve that issue as best comports with the parties' intentions. Once that happens,
19 the different standards can be applied consistently, and in congruence with the
20 parties' actual intentions. This should prevent the concerns with inequity.

1 As far as the issues with over-litigation, a substantial amount of litigation
2 presently occurs, as people argue about both the propriety of the custody labels
3 and the timeshare itself, particularly as it relates to child support. In any event,
4 the District Court must currently take evidence on what the timeshare is. Under
5 Tracy's proposal, therefore, directing the District Court to determine the
6 intentions of the parties may actually decrease the totality of litigation, as the
7 parties will know that their intentions will be honored by the Court (and therefore
8 it will be harder to "swindle" one side in settlement discussions).
9

10 Therefore, *Rivero* should be modified to grant the District Court the
11 discretion to determine which formula (as discussed above) to utilize based on
12 a finding of the parties' *intentions* when the custody designation and the actual
13 timeshare are in conflict.
14

15 In *Mizrachi*, the Court of Appeals ruled that an evidentiary hearing is
16 necessary to determine the parties' intentions. However, as with any other
17 Motion, *Rooney* and *Nance* should still apply. Therefore, if the allegations in the
18 moving papers make it clear what the parties' intentions were, or if the Court has
19 prior information which makes it clear what the parties' intentions were when
20 they entered the previous agreement (e.g., a formalized statement in the record,
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1 or in a written agreement or Order), no evidentiary hearings on that issue should
2 be required.
3

4 Where the intention of the parties is not apparent to the Court at the time
5 of the Motion, the Court should still determine first, if there was a change of
6 circumstances upon which to request modification. *If there is*, only then should
7 the evidentiary hearing occur, at which time the Court may determine the parties'
8 intentions and the proper burden to apply to the evidence presented.
9
10

11 Therefore, the holding in *Rivero* should be modified, to state that the
12 District Court should review settlement agreements wherein the schedule does
13 not comport with the label to determine the parties' intentions in making their
14 agreement and the appropriate burden of proof for resolving a modification
15 request.
16
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18

19 **C. The Court Reached the Right Result in This Matter**

20 Aaron would like this Court to believe that the *de facto* schedule had
21 changed in this matter, and therefore he had met his burden for modification. The
22 Court correctly found that was not the case. First, the Parenting Agreement
23 specifically noted that the parties intended to be "flexible and accommodating in
24 the practical application of the custodial timeshare." **JA V1:0052**. In fact,
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1 language supporting that principle is throughout the Parenting Agreement. **JA**
2 **V1:0051-0056, 0068.**

3
4 More importantly, the schedule articulated in the written Parenting
5 Agreement, and the schedule that the parties actually operated under, as
6 represented by Aaron, are substantially similar. Aaron, in his Motion contends
7 that Julian (who was 18 already at the time the Motion was filed and graduated
8 High School only a few weeks after the hearing on the matter) and Mirabella
9 were not spending time with Tracy. **JA V1:0146.** He further alleged that Etienne
10 only spent time with Tracy for a couple of hours each week and that he (Aaron)
11 was only spending two afternoons per week and every Friday - Saturday with the
12 other four (4) children. **JA V1:0146.** Contrary to what Aaron has represented to
13 this Court, Tracy did *not* agree that was an accurate representation of the
14 schedule. Rather, Tracy alleged that the schedule, as it related to Etienne, in the
15 Parenting Agreement had mostly been followed. **JA V1:0192.** Tracy did agree
16 with Aaron's representation as to the four younger children in her care, with
17 whom Aaron was exercising even *less* time than the Decree anticipated. **JA**
18 **V1:0193.** Tracy also pointed out deficiencies in Aaron's performance under the
19 terms of the Order, such as his ignoring the parties' Right of First Refusal and his

1 unwillingness to support and foster Tracy's relationships with Mirabella and
2 Etienne. **JA V1:0192-0194.**

3
4 As the analysis hereinabove in this brief supports, it is apparent from the
5 language in the extensive and complex Parenting Agreement, that the
6 comprehensive schedule should be considered joint physical custody. Further,
7 it is apparent that the parties never intended their timeshare to be static or rigidly
8 structured. In this specific case, the designation was clearly the intention, and the
9 schedule was simply a means of addressing the time each of their *seven* minor
10 children would, in theory, go back and forth between the parties' homes.
11

12
13 Given those facts, and the fact that the parties were operating very closely
14 to the schedule upon which they agreed in the parenting agreement, it is
15 absolutely reasonable that the Court found that there was no change in
16 circumstance. **JA V 2:0302.** In fact, during the hearing the Court stated:
17

18
19 This case is very fresh in my mind. The parties
20 carefully considered this extremely unusual case. And
21 they found that their unique arrangement was in the
22 best interests of the children. There has been no
23

24 ...

25 ...

1 change in circumstances that is even articulated other
2 than Julian's pending emancipation and that hasn't yet
3 taken place.

4 **JA V2:0284.**

5 The Court obviously reviewed the case and was well aware of the history
6 of the parties and their intentions at the time of the entry of the Parenting
7 Agreement. The District Court made its review pursuant to *Nance*, which had
8 been decided prior to the hearing on this matter. In this case, a further analysis
9 of the credibility of the parties' affidavits was unnecessary. The schedules, even
10 as alleged by Aaron in his Motion, were clearly very similar to those set forth in
11 the Parenting Agreement, and the differences were clearly anticipated by the
12 flexibility provisions the parties *intentionally* built into their agreement. The
13 doctrine of *res judicata* clearly prevented a finding that there had been a change
14 in circumstances. The District Court did not err in denying Aaron's Motion
15 without an evidentiary hearing. The decision of the District Court in this matter
16 should be affirmed.

17 ...

18 ...

19 ...

1 **Conclusion**

2
3 Based on the foregoing, Tracy respectfully proposes that the Court
4 clarify the process for determining a Motion to Modify Custody to be a two-step
5 process, to wit:
6

- 7 1) In either a joint physical custody or a primary physical custody
8 case, a party must show, by virtue of their affidavit(s) and offer(s)
9 of proof, that a change in circumstances has occurred. In cases
10 where the modification is clearly from primary physical custody,
11 the facts alleged must indicate that change of circumstances was
12 "substantial" as to the child.
13
14
15
16 2) If that adequate cause has been shown, the Court should hold an
17 evidentiary hearing on the modification. In cases where the parties
18 have joint physical custody, the evidence must thereafter show that:
19
20 a. there was, in fact, a change in circumstances, and
21
22 b. that the best interests of the child are better met by a different
23 timeshare.
24

25 In cases where one party has primary physical custody, the evidence
26 must show that:

- 1 a. the change in circumstances was substantial,
2
3 b. impacted the child, *and*
4
5 c. that the best interests of the child are better met by a different
6 timeshare.

7 The Court should also revise its holding in *Rivero*, to make it clear that
8 where an ambiguity exists between the custody label and timeshare, the District
9 Court should determine the intentions of the parties to decide whether the label
10 or the timeshare should control the burden for a modification of custody.
11

12
13 Further, the Court should clarify that, pursuant to *Rooney*, the District
14 Court may determine whether the threshold burden of a change in circumstances
15 has occurred and what the intentions of the parties were in making their
16 agreement, without a hearing, where the Court can make those findings based on
17 the court record of prior facts in evidence, or the affidavits and offers of proof
18 submitted to the Court regarding the Motion for modification.
19
20
21

22 Finally, Tracy requests that the judgement of the District Court be affirmed
23 on all issues.

24
25 By: 

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Nevada Bar No. 11646
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CERTIFICATE OF COMPLIANCE

1
2 1. I hereby certify that this fast track response complies with the
3 formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP
4 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this fast track
5 response has been prepared in a proportionally spaced typeface using Word
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9 type-volume limitations of NRAP 3E(e)(2) because, excluding the parts of the
10 brief exempted by NRAP 32(a)(7)(C), because it is proportionately spaced, has
11 a typeface of 14 points or more, and contains 4582 words;
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13 3. Finally, I hereby certify that I have read this appellate brief, and to the
14 best of my knowledge, information, and belief, it is not frivolous or interposed
15 for any improper purpose. I further certify that this brief complies with all
16 applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1),
17 which requires every assertion in the brief regarding matters in the record to be
18 supported by a reference to the page and volume number, if any, of the transcript
19 or appendix where the matter relied on is to be found. I understand that I may be
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1 subject to sanctions in the event that the accompanying brief is not in conformity
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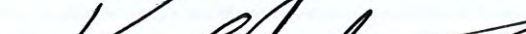
3 Dated this 23rd day of July, 2021.

4
5
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