

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
MAY 31 2021 08:52 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

ANTHONY JACOB MONAHAN,

Appellant,

CASE NO. 82031

v.

AMANDA KAITLYN HOGAN, fka
AMANDA KAITLYN KING,,

Respondent.

CHILD CUSTODY FAST TRACK RESPONSE

Respondent, Amanda Hogan ("Mother"), by and through counsel, Roderic A. Carucci, Esq. and the law firm of Carucci and Associates, submits her Fast Track Response as set forth herein.

1. Name of party filing this fast track response:

Amanda Hogan ("Mother").

2. Name, law firm, address, and telephone number of attorney or proper person respondent submitting this fat track response:

Roderic A. Carucci, Esq. (#4233) and Kelly A. VandeBurgt, Esq. (#13270), Carucci and Associates, 702 Plumas Street, Reno, Nevada 89509; 775-323-0400; rod@nvlitigators.com; kelly@nvlitigators.com

3. Proceedings raising same issues. Unaware of similar or related cases.

1 **4 and 5. Procedural history and statement of facts.**

2 **Failure to Produce Transcript.** Appellant has failed to provide respondent with
3 the entire transcript of the September 15, 2020, hearing despite demand; this was only
4 a three hour hearing with the parties testifying and argument to the Court. Appellant
5 filed a "Request for Transcript of Proceedings" in the district court on December 31,
6 2020, stating in relevant part:

7 3. **Transcript for the entire hearing is being requested.**

8 Respondent has filed a motion with the Supreme Court to compel production of the
9 entire transcript of the proceeding from which Father, Monahan, appeals. This transcript
10 is necessary for the proper adjudication of this appeal. Appellant's conduct is
11 sanctionable and warrants the dismissal of this appeal.

12
13 **Procedural History and Statement of Facts.**

14 The parties were never married. The parties have one minor child the issue of their
15 relationship: Malakai Jaco Monahan, born July 18, 2012. Nevada is the home state and
16 habitual residence of the minor child. This case has been ongoing since 2015. The case
17 started as a paternity / custody action filed by Father, Anthony Monahan. Father is now
18 on his fourth attorney.

19 A. A temporary order awarding Wife primary physical custody of the minor
20 child based upon a finding of Husband's domestic violence and alcohol abuse was
21 entered on July 24, 2015 (Res. App. RA0001-RA0008). A stipulation regarding custody,
22 support and visitation was entered on October 26, 2015 (Res. App. RA0009 - RA0014),
23 awarding the parties joint legal and joint physical custody as both parties were residing
24 in Yerington, Lyon County, at that time.

25 B. Thereafter, Mother, Amanda Hogan, married Brandon Hogan on August 28,
26 2018. At that time, Brandon Hogan was a United States Navy Lieutenant and Top Gun
27 flight instructor stationed at the Fallon Naval Air Station. Brandon Hogan has since been
28 reassigned to the Naval Air Station in Virginia Beach, Virginia, and he has been

1 promoted to the rank of Lieutenant Commander (Res. App. RA0062 - RA0064). The
2 Hogans relocated to Virginia with permission of the Court in approximately September,
3 2020 (Appellant's App. AM017 - AM024).

4 C. Mother filed a motion to modify the October 26, 2015 joint physical custody
5 order based upon a change in the status quo on August 29, 2018 (Res. App. RA0015 -
6 RA023).

7 D. A custodial order was entered on March 1, 2019, awarding Mother primary
8 physical custody and permission to relocate with the child to Fallon, Nevada (Appel-
9 lant's App. AM001 - AM010) where Brandon Hogan was stationed at the time. While
10 this Order awarded Mother primary physical custody, this was not a final order, because
11 the Court directed the parties to meet and confer to attempt to reach agreement on a
12 visitation schedule. If an agreement could not be reached, the parties were directed to
13 contact the court and set a date for further hearing regarding visitation only (Appellant's
14 App. AM009). The parties were unable to reach agreement. Prior to setting a further
15 hearing to determine visitation, Father filed a Notice of Appeal to the Nevada Supreme
16 Court on March 29, 2019 (Res. App. RA0024 - RA0025).

17 E. Mother filed a motion to dismiss Father's appeal of the custodial order as
18 it was not a "final order" (Res. App. RA0026 - RA0049). Mother's motion to dismiss
19 was granted as being meritorious (Res. App. RA0050 - RA0052).

20 F. A further hearing before the District Court was held on November 8, 2019,
21 at which time the parties reached a stipulated agreement regarding visitation. The
22 stipulation was placed upon the record and the parties were duly canvassed. A final
23 order was entered on November 20, 2019 (App. App. AM011 - AM016). Father did not
24 appeal the final custodial and visitation order. At the time the parties conferred with the
25 Judge and reached their stipulation, it was clearly stated and understood that Brandon
26 Hogan would be receiving orders reassigning him within the year (Appellant's App.
27 AM002 and AM038). Monahan knew this and could have objected; he did not.

28 G. Brandon Hogan received initial orders reassigning him to the United States

1 Naval Base in Virginia Beach, Virginia in May, 2020 (Res. App. RA0062 - RA0064).
2 Mother immediately notified Father of her pending relocation. Father refused consent
3 to relocate (Res. App. RA0066 - RA0068).

4 H. Mother filed a motion with the Court seeking permission to relocate on June
5 9, 2020 (Res. App. RA0053 - RA0072). A hearing was held on September 15, 2020.
6 Mother was granted permission to relocate with the minor child and the Hogans promptly
7 departed for Virginia. A final order was entered on October 5, 2020 (App. App. AM017
8 - AM024).

9 I. Father filed a notice of appeal of the District Court's relocation order on
10 October 28, 2020 (Res. App. RA0073 - RA0086). Father never appealed the final
11 custodial order. In the present appeal, Father objects to the Court allowing Mother to
12 relocate to Virginia Beach, Virginia with her Husband.

13
14 **6. Issues on Appeal.**

15 A. Appellant, Monahan, argues that all relocation hearings require a new
16 evidentiary hearing and a new determination of primary physical custody pursuant to
17 NRS 125C.0035. Such a result would eliminate any distinction between the two
18 legislatively enacted relocation statutes: NRS 125C.006 and NRS 125C.0065. One
19 statute, NRS 125C.006, defines the procedure to be followed by the Court when primary
20 custody has already been established; the other statute requires an award of primary
21 physical custody prior to addressing relocation. Monahan's requested approach would
22 make the two clearly worded statutes indistinguishable. Monahan's suggested result
23 would require a new determination of primary physical custody in every relocation case.

24
25 **7. Legal argument.**

26 The Nevada Supreme Court in *Potter v. Potter*, 121 Nev. 613, 119 P.3d 1246
27 (2005) drew a distinction between relocation cases depending upon whether the parents
28 shared joint physical custody or one parent had primary physical custody. A parent

1 seeking to relocate who had joint custody, must first seek an award of primary custody,
2 then permission to relocate. *Id.* at 618, 119 P.3d at 1249. In this case Mother already
3 had primary physical custody. Mother's only burden was to comply with the require-
4 ments of the relocation statute in effect at the time she sought permission to relocate to
5 Virginia.

6 The Nevada Legislature responded to the *Potter* court by enacting two separate
7 and distinct removal statutes, NRS 125C.006 ("when primary custody established") and
8 NRS 125C.0065 ("when joint physical custody established"). The sole difference
9 between the two is section (1)(b). NRS 125C.0065 requires the relocating parent to
10 proceed as follows:

11 (b) If the non-relocating parent refuses to give that consent,
12 petition the court for primary physical custody for the purpose
relocating.

13 By contrast, NRS 125C.006, applicable when primary physical custody has been
14 established, states:

15 (b) If the noncustodial parent refuses to give that consent,
16 petition the court for permission to relocate with the child.

17 NRS 125C.007 sets forth the applicable test for permission to relocate once
18 primary custody has been established, which is the same in all cases, because one must
19 have primary custody in order to seek permission to relocate.

20 Appellant, Monahan's statutorily and legally incorrect argument to this Court is
21 that the district court must hold a new evidentiary hearing to determine primary physical
22 custody in all relocation cases, invoking the statutory custodial factors set forth in NRS
23 125C.0035(4). NRS 125C.0035(1) clearly states:

24 1. ***In any action for determining physical custody of a***
25 ***minor child***, the sole consideration of the court is the best
interest of the child.

26 As Mother has primary physical custody, her request to the Court for permission
27 to relocate is not an "action for determining physical custody of a minor child."

28 When the language of a statute is clear and unambiguous, its

1 apparent intent must be given effect.

2 *Potter v. Potter*, 121 Nev. 613, 616, 119 P.3d 1246, 1248 (2005)

3 If the Court were to adopt Monahan's reasoning then all removal hearings would require
4 a new custodial determination, thus eliminating any distinction between the two
5 relocation statutes. In Monahan's line of conjecture, all relocation cases would require
6 a trial regarding primary physical custody, prior to granting permission to relocate, and
7 require specific findings of fact regarding all 12 of the custodial factors set forth in NRS
8 125C.0035(4). Had the Legislature intended such a result it would not have created two
9 distinct statutes, imposing different burdens, and the Legislature would have specifically
10 incorporated language in NRS 125C.006, that any relocation where the relocating parent
11 already had primary custody requires a new custodial hearing and findings of fact
12 pursuant to NRS 125C.0035(4). The Legislature has declined to do so.

13 Mother met her burden of proof regarding all of the relocation factors set forth in
14 NRS 125C.007. Mother demonstrated a sensible good faith reason for the move and she
15 provided proof of all of the *Schwartz* factors as evidenced by the district court's order.
16 See *Schwartz v. Schwartz*, 107 Nev. 378, 382-83, 812 P.2d 1268, 1271-72 (1991);
17 *Druckman v. Ruscitti*, 130 Nev. 468, 327 P.3d 511 (2014). NRS 125C.007 states in
18 relevant part:

19 1. In every instance of a petition for permission to
20 relocate with a child that **is filed pursuant to NRS 125C.006**
21 **or 125C.0065**, the relocating parent must demonstrate to the
22 court that:

23 (a) There exists a sensible, good-faith reason for the
24 move, and the move is not intended to deprive the
25 non-relocating parent of his or her parenting time;

26 (b) The best interests of the child are served by
27 allowing the relocating parent to relocate with the child;
28 and

 (c) The child and the relocating parent will benefit
from an actual advantage as a result of the relocation.

 2. If a relocating parent demonstrates to the court
the provisions set forth in subsection 1, the court must then
weigh the following factors and the impact of each on the

1 child, the relocating parent and the non-relocating parent,
2 including, without limitation, the extent to which the compelling
3 interests of the child, the relocating parent and the
4 non-relocating parent are accommodated:

5 (a) The extent to which the relocation is likely to
6 improve the quality of life for the child and the relocat-
7 ing parent;

8 (b) Whether the motives of the relocating parent are
9 honorable and not designed to frustrate or defeat any
10 visitation rights accorded to the non-relocating parent;

11 (c) Whether the relocating parent will comply with
12 any substitute visitation orders issued by the court if
13 permission to relocate is granted;

14 (d) Whether the motives of the non-relocating parent
15 are honorable in resisting the petition for permission to
16 relocate or to what extent any opposition to the petition
17 for permission to relocate is intended to secure a
18 financial advantage in the form of ongoing support
19 obligations or otherwise;

20 (e) Whether there will be a realistic opportunity for
21 the non-relocating parent to maintain a visitation
22 schedule that will adequately foster and preserve the
23 parental relationship between the child and the
24 non-relocating parent if permission to relocate is
25 granted; and

26 (f) Any other factor necessary to assist the court in
27 determining whether to grant permission to relocate.

28 3. A parent who desires to relocate with a child
pursuant to NRS 125C.006 or 125C.0065 has the burden of
proving that relocating with the child is in the best interest of
the child.

NRS 125C.007(1) consolidates the relocation factors ("that is filed pursuant to
NRS 125C.006 or 125C.0065") because primary custody must have already been
obtained by the parent seeking to relocate with the child, or a hearing would not be
necessary. The "best interest of the child" is always tantamount in all matters involving
a child. However, had the Legislature intended that a new custodial hearing be held in
every relocation case, it would have clearly stated that an evidentiary hearing needs to
be held and specific findings of fact must be entered pursuant to the mandates set forth
in NRS 125C.0035 for an award of primary physical custody. The Legislature did not

1 do so. Had the Legislature intended such a result, there would have been no need to have
2 two different relocation statutes, and primary custody would have to be litigated in each
3 case. The relocation statutes are clear on their face and not subject to the interpretation
4 requested by Monahan.

5 The District Court's Order of March 1, 2019, awarding Mother primary physical
6 custody made specific findings of fact regarding the 12 custodial factors enunciated in
7 NRS 125C.0035. The Court, and Father, were on notice at that time that Brandon
8 Hogan, a Top Gun flight instructor, would be reassigned to a new duty assignment in the
9 next year. Mother had primary physical custody when she requested permission to
10 relocate and she proceeded as required by NRS 125C.006. The Court made the required
11 findings of fact and conclusions of law in granting Mother's motion to relocate to
12 Virginia. Father, by this appeal, is requesting that the Nevada Supreme Court rewrite the
13 relocation statutes and require that every parent seeking to relocate submit to, and
14 participate in, a new custodial hearing to grant the relocating parent primary physical
15 custody a second time after another full evidentiary hearing.

16 Father's appeal is novel, clever, but not well grounded in fact or law. The two
17 relocation statutes, when read in conjunction with the holding of *Potter*, make it clear
18 that primary custody must first be established, then a relocation motion may proceed.
19 This is why the Legislature enacted two nearly identical statutes to address this issue.
20 Monahan now seeks to have this Court obliterate the difference between the two statutes
21 as there would be no practical difference between NRS 125C.006 and NRS 125C.0065
22 if a new primary physical custodial hearing were required for any relocation motion.

23 The District Court clearly understood the difference as evidenced by the limited
24 transcript provided by appellant (page and line references are to the limited transcript
25 provided by appellant):

26 Trans 12:23 - 13:5

27 Mr. Carucci: Your Honor, I have to object. This is not
28 a custody change motion, there is not a custody change motion
pending. And Mr. Bushur is going through the custodial
factors and it's irrelevant to this situation.

1 The Court: Well, it's a new argument, I haven't heard it
2 before.

3 Trans 13:23 - 15:3

4 The Court: In terms of the best interests of the child, this is
5 a difficult one. Again, in terms of the best interests, it's an
6 interesting argument. I haven't had it before as to the factors
7 in 035(4) applying, but again, I see your consternation, Mr.
8 Carucci, as to it's not a custody modification. . . .

9 But in terms of going through the factors in 4, the Court had
10 previously done that in a previous, and I don't see the reloca-
11 tion as affecting the ultimate determination as to whether or
12 not mom can relocate under 007.

13 Mr. Carucci: You did mention, in your original order in
14 November, no in March, you made mention of the fact that she
15 was going to relocate.

16 The Court: No, I understood that, but I didn't have a reloca-
17 tion motion before me. . . . So I didn't decide the issue. I
18 understood that the relocation would come up, . . . **but again,**
19 **I don't see the best interests factors changing the relocation**
20 **analysis, having considered A through L.** [Emphasis added]

21 The district court considered the application, or non application, of the custodial
22 factors to the removal statutes at the time of the relocation hearing and determined that
23 they had no impact on the relocation decision. The Court stated that it had made a prior
24 custodial determination which considered the custodial factors set forth in NRS
25 125C.0035. At the prior custodial hearing, the Court stated that it was aware that
26 relocation would be an issue to be determined in the future.

27 Appellant's arguments are without merit and seek to eliminate the clear distinction
28 between the two relocation statutes. The Legislature, by enacting two different
relocation statutes clearly did not intend that a new, evidentiary hearing be required to
determine custody, when the relocating parent already had an order establishing primary
physical custody.

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VERIFICATION

1
2 1. I hereby certify that this fast track response complies with the formatting
3 requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the
4 type style requirements of NRAP 32(a)(6) because this fast track response has been
5 prepared in a proportionally spaced typeface using WordPerfect 2020 in 14 point font
6 size and Times New Roman type face.

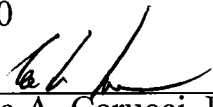
7 2. I further certify that this fast track response complies with the page volume
8 limitation of NRAP 3E(e)(2) because it does not exceed 11 pages.

9 3. Finally, I recognize that under NRAP 3E I am responsible for timely filing
10 a fast track response and that the Supreme Court of Nevada may impose sanctions for
11 failing to timely file a fast track response. I therefore certify that the information
12 provided in this fast track response is true and complete to the best of my knowledge,
13 information, and belief.

14 DATED: March 31, 2021

15 Carucci and Associates
16 702 Plumas Street
17 Reno, Nevada 89509
18 775-323-0400

19 By:


20 Roderic A. Carucci, Esq. (#4233)
21 Kelly A. VandeBurgt, Esq. (#13270)
22 Attorneys for Amanda Hogan
23
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27
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and NRAP 25, I certify that I am an employee of Carucci and Associates and on March 31, 2021, I served a true and correct copy of:

Child Custody Fast Track Response

by:

_____ Placing an original or true copy thereof in a sealed envelope, postage prepaid for collection and mailing in the United States Mail at Reno, Nevada

_____ Personal Delivery

_____ Facsimile to the following number: _____

_____ Reno Carson Messenger Service

_____ Certified Mail, Return Receipt Requested

 X E-Flex filing system

 X Electronic mail addressed to: nik@lawlaub.com

addressed to:

Nicholus C. Palmer, Esq.
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Reno, Nevada 89502


Bryttanie McNeff
Carucci and Associates