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Respondent.

))))))))))

No. 82031

CHILD CUSTODY FAST TRACK STATEMENT

- Half day evidentiary hearing.

1 6. Written order or judgment appealed from:

2 Written Order

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

4 October 8, 2020

5
6 8. If the time for filing the notice of appeal was tolled by the timely filing of a motion listed
7 in NRAP 4(a)(4),

8 N/A

9 9. Date notice of appeal was filed:

10 October 28, 2020

11 10. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP
12 4(a), NRS 155.190, or other:

13 NRAP 4(a)(1)

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

16 NRAP 3A(b)(1)

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

20 Prior proceeding, Monahan vs. Hogan, Supreme Court Case 82031

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

24 None

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

28 Anthony Jacob Monahan ("Father") and Amanda Hogan ("Mother") were never married.

1 They have one minor child in common, to wit: Malakai Jacob Monahan dob: July 18, 2012. The
2 Parties in this matter agreed to joint legal and joint physical custody of their minor child through a
3 Stipulation and Order filed on 10/26/2015. [Appendix AM001] On 8/29/2018 Mother filed a
4 Motion to Modify Custody seeking primary physical custody of Jacob based upon Status Quo and
5 asserted that she had Jacob more of the time than Father. During this period, Mother had moved
6 from Yerington, Nevada to Fallon, Nevada. Father at this time was working in Winnemucca and
7 spent much of his time there. Mother' Motion was opposed by Father. The Court set a hearing on
8 12/27/2018. [Appendix AM001 Lines 20-21]
9

10
11 After the December 27, 2018 hearing, the Court concluded that Mother had de facto
12 primary custody of the child [Appendix AM005 Lines 1-2] based upon her having the child 73%
13 of the time for the nine months prior to her filing her Motion. [Appendix AM012 Lines 4-6] The
14 Court further directed counsel for the parties to submit briefs on two issues[Appendix AM012
15 Lines 11-17]:
16

17 (1) the applicability of the removal statute as the parties live slightly over an hour apart (65
18 miles); and

19 (2) argument regarding when a change in circumstance becomes applicable.

20 On March 1, 2019, the Court entered its Custodial Order finding that The de facto custody
21 agreement is in the best interests of the Child. [Appendix, AM005 Lines 1-2] Further, in the
22 March 1, 2019 Order the Court analyzed the custodial factors set forth in NRS125C.0035 and
23 found that a balancing of the factors favored Mother.
24

25 The March 1, 2019 Order did not set a defined visitation plan and the Court Ordered the
26 parties to meet and confer regarding a visitation plan. However, on April 4, 2019, Father filed an
27 appeal to the March 1, 2019 Order, which was dismissed by the Supreme court because it was not
28

1 a final Order.

2 Mother thereafter requested a hearing in writing and the Court set a hearing on November
3 8, 2019. At the November 8, 2019 hearing the court incorporated its March 1, 2019 Order and
4 granted Father 10 days of visitation a month with the Parties minor child. [Appendix AM014
5 Lines 5-6]
6

7 On June 9, 2020, Mother filed a Motion to Relocate from Fallon, Nevada to Virginia.
8 Father filed an Opposition to the Motion and the court set a hearing for September 15, 2020. The
9 court held a half day hearing on the relocation issue. At the end of the hearing, the Court granted
10 Mother's request to relocate to Virginia. [Appendix AM017 – AM024]
11

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

15 During closing arguments at the September 15, 2020 relocation hearing, Father's Counsel
16 argued under NRS 125C.0035(4) that it was not in the best interest of the minor child to relocate
17 to Virginia. [Appendix, AM036 Lines 2-24 and AM 037 Lines 1-14):
18

19 MR. BUSHUR: Staying with subsection B, when you look at the best interests, it's under
20 125C.0035 subsection 4, and it goes A through L, there's only a few best interests standards that
21 really need to be brought up. The first one is C: Which parent is more likely to allow the child to
22 have frequent association and continue in a relationship with the noncustodial parent. This is kind
23 of a minor issue in this particular case at this particular time, but my client did testify that since the
24 last custody change when he was given ten days a month and Miss Hogan was given
25 approximately 20 days a month, that there weren't -- any accommodations that were made where
26 my client would have a little bit of extra time here or there had to be made up, or for the most part
had to be made up. So even while still in this general area, Miss Hogan hasn't gone above and
beyond to involve my client with the child's life any more than she absolutely had to, and there's
no reason to expect that it will change if she moves 3,000 miles across the country. Subsection D,
the level of conflict between the parents.

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

1
2 THE COURT: Well, it's the -- it's a new argument, I haven't heard it before. But, they do
3 use the same phrase as interests, and they do define best interests in 125C.0035(4). So, I'll listen to
4 it.

5 MR. BUSHUR: And, Your Honor, and subsection 3 of 125C.007 also requires that the
6 Court find that Mr. Carucci met his burden to prove that relocation with the child is in
7 the child's best interests. That's simply why I'm going with these standards. I'll try to condense
8 them into just this one.

9 THE COURT: No, go ahead, you're fine.

10 The District Court allowed Father's counsel to argue the best interest factors in his closing
11 arguments. However, during the oral ruling the Court stated as follows [Appendix, AM037 Lines
12 23-24 and AM038 Lines 1-10):

13 THE COURT: In terms of the best interests of the child, this is a difficult one. Again, in
14 terms of the best interests, it's an interesting argument. I haven't had it before as to the factors in
15 035(4) applying, but again, I see your consternation, Mr. Carucci, as to it's not a custody
16 modification. But at the same time, the legislature does utilize a definition of best interests of what
17 factors the Court's going to look at. But in terms of going through the factors in 4, the Court had
previously done that in a previous, and I don't see the relocation as affecting the ultimate
determination as to whether or not mom can relocate under 007."

18 MR. CARUCCI: You did mention, in your original order in November -- no, in March,
19 you made mention of the fact that she was going to relocate.

20 THE COURT: No, I understood that, but I didn't have a relocation motion before me.

21 MR. CARUCCI: No.

22 THE COURT: So, I didn't decide the issue. I understood that the relocation would come
23 up, that's the problem with this case, procedurally. I don't think it was a secret that mom was
24 seeking to get primary because it made her life easier when it got to the relocation. Certainly under
25 the old Schwartz, Potter, I'm not clear under 007, but under the old case law, if mom has primary,
26 it's less of a hill to climb. Not clear to me under 007, but again, I don't see the best interests factors
27 changing the relocation analysis, having considered A through L.

28 The District Court, when it states above, "But in terms of going through the factors in 4,
the Court had previously done that in a previous,..." it is alluding to its "best interest" findings in

1 the March 1, 2019 Order [AM001- AM009] This fact is strengthened by the Court's September
2 15, 2020 written order, [AM019, Lines 11-17] which states:

3 "The Court finds it is in the minor child's best interest to relocate with Mother
4 to Virginia. The Court previously considered the best interest factors in its'
5 November 20, 2019 Order which granted Mother primary physical custody of
6 the minor child, and the relocation does not modify any prior best interest
7 factor findings. Mother's future move based upon her Husband's reassignment
8 was contemplated at the time of the last custodial order."

9 However, the statement above that, "The court previously considered the best interest
10 factors in its' November 20, 2019 Order..." is not necessarily true. The Court had analyzed the
11 best interest factors in its March 1, 2019 order. By the time the Court made the above statement in
12 September 15, 2020 Order, the best interests analysis was over one and a half years old and was
13 completely stale. NRS 125C.007 (2) makes it clear that the Court find that the "best interests of
14 the child are served by allowing the relocating parent to relocate with the child." The Court did not
15 make that finding in this matter before it granted Mother's Motion to Relocate.
16

17 16. Issues on appeal. State concisely the principal issue(s) in this appeal:
18

19 The issue on appeal is that the Court failed to address the most recent best interest factors
20 as delineated in NRS 125C.0035(4)(a-k), which is required under NRS 125C.007(1)(b) during a
21 relocation matter. The District Court simply relied on a best interest analysis it had done over one
22 and a half years prior. The facts from that analysis would have been res judicata as of March 1,
23 2019.
24

25 17. Legal argument, including authorities:
26

27 NRS 125C.007(1)(b) states:

28 "In every instance of a petition for permission to relocate with a child that
is filed pursuant to NRS 125C.006 or 125C.0065, the relocating parent

1 must demonstrate to the court that:

2 (b) The best interests of the child are served by allowing the relocating
3 parent to relocate with the child;”

4 The best interest of the child is defined under NRS 125C.0035(4). The District Court in
5 this matter relied on a best interest analysis that was one and a half years old. When a Court is
6 ruling on a Motion to Relocate pursuant to NRS 125C.007(1)(b) it must find that it is in the best
7 interests of the child to relocate analyzing the best interest factors.

8
9 The best interest factors are not set-in time forever at one hearing. They are in fact fluid
10 and must be analyzed each time, independently from past analysis. Nevada has long recognized,
11 “that important facts relevant to the child’s best interest, if they existed at the time of the prior
12 custody determination, cannot be introduced at a later proceeding...” *Castle v. Simmons*, 120 Nev.
13 at 104, 86 P.3d at 1047 (2004). See also *McMonigle v. McMonigle* 110 Nev. 1407, 887 P.2d 742
14 (Nev, 1994) overturned on other grounds.

15
16 The District Court in this matter, by relying on its past analysis of the best interest factors
17 was in fact considering relevant facts that existed prior to the March 1, 2019 hearing. The District
18 Court should only have considered relevant facts regarding the best interest factors from March 1,
19 2019 through the September 15, 2020 relocation hearing date.

20
21 The Court erroneously relied on facts that were considered “res judicata” as of March 1, 2019
22 and should not have been considered in the September 15, 2020 hearing or Order. The court had to
23 find three things to allow Mother to relocate in this matter.

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

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

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

1 the relocation.

2 The District Court found that Mother proved both subsection (a) and (c) above but only
3 addressed subsection (b) by saying that the Court had previously reviewed the factors. Which is
4 actually true but the previous review was over one and a half years old. The District Court did not
5 address the recent best interest factors at the September 15, 2020 hearing or in its subsequent Order,
6 even though it is clear that the legislature mandated that the Court find the relocation serves the best
7 interest of the child.
8

9
10 The District Court decision to allow Mother to relocate, in its September 15, 2020 Order,
11 without addressing the best interest of the child should be reversed and remanded.

12 18. Issues of first impression or of public interest. Does this appeal present a substantial legal
13 issue of first impression in this jurisdiction or one affecting an important public interest:

14 No

15
16 Dated this 8th day of February, 2021.

17
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1 VERIFICATION

2 1. I hereby certify that this fast track statement complies with the formatting requirements
3 of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements
4 of NRAP 32(a)(6) because: This fast-track statement has been prepared in a proportionally spaced
5 typeface using Microsoft Word 2019 in 12 font size Times New Roman.
6

7 2. I further certify that this fast-track statement complies with the page- or type-volume
8 limitations of NRAP 3E(e)(2) because it does not exceed 10 pages.

9 3. Finally, I recognize that under NRAP 3E I am responsible for timely filing a fast-track
10 statement and that the Supreme Court of Nevada may impose sanctions for failing to timely file a
11 fast track statement, or failing to raise material issues or arguments in the fast track statement. I
12 therefore certify that the information provided in this fast-track statement is true and complete to
13 the best of my knowledge, information, and belief.
14

15
16 Dated this 8th day of February, 2021.
17

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