IN THE SUPREME COURT OF THE STATE OF NEVADA

JUSTIN MAURICE, Appellant, vs. SARAH MAURICE, Respondent.	Supreme Court No. 83009 District Court Case No. D-14-506883-D

CHILD CUSTODY FAST TRACK STATEMENT

1. Name of party filing this fast track response:

Justin Maurice, Appellant

2. Name, law firm, address, and telephone number of attorney submitting this fast track response:

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3. Judicial district, county, and district court docket number of lower court proceedings:

Eighth Judicial District Court-Family Division
Clark County
District Court Case No. D-14-506883-D

4. Name of judge issuing judgment or order appealed from:

District Judge Bryce C. Duckworth

5. Length of trial or evidentiary hearing.

Not applicable; matter was decided without testimony.

6. Written order or judgment appealed from:

Order of November 21, 2020
Order of April 23, 2021 (Reconsideration)

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

April 26, 2021

8. If the time for filing the notice of appeal was tolled by the timely filing of a motion listed in NRAP 4(a)(4),
(a) specify the type of motion, and the date and method of service of the motion, and date of filing: N/A
(b) date of entry of written order resolving tolling motion: N/A

9. Date notice of appeal was filed:

May 26, 2021

10. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., N.R.A.P. 4(a), NRS 155.190, or other:

N.R.A.P. 4(a).

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

N.R.A.P. 3A(b)(7) and NRS 2.090

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

None

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

None

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

The Parties were divorced by Stipulated Decree on 09/30/2015 (I ROA: 1:1). There were no subsequent motions addressing the custodial determination contained therein until Appellant, Justin Maurice ("Justin") filed his Motion to Modify the Current Custodial Arrangement, Modify Child Support, Modify Child Tax Deduction, for an Award of Attorney's Fees, and related relief on September 17, 2020—almost five (5) years later (II ROA 342-356). Respondent, Sarah Maurice ("Sarah") filed an Opposition thereto (II ROA 370-390), and Justin filed his Reply (II ROA391-416).

That motion was decided by the Honorable Bryce C. Duckworth on October 27, 2020, *without* the Oral Argument requested by both parties (II ROA 342, 370). Two orders, mirroring each other except for the dates on pages 3 of the respective documents, were filed; one on 11/18/2020 and the other on 11/21/2020 (III ROA 541-43, 544-47)[1]. Justin filed a motion for reconsideration on 12/07/2020 (III ROA

[1] Both prepared by Sarah's counsel and submitted without opposing counsel's signature.

554-598). Sarah filed an opposition on 1/06/2021(III ROA 600-624), and Justin filed his reply thereto on 1/08/2021 (III ROA 636-679).

On 01/13/2021, Justin's motion for reconsideration was heard. (IV ROA 685-86). The resulting order, denying Justin's motion for reconsideration was filed on 04/23/2021 (IV ROA 701-712)[2]. A Notice of Appeal was then filed by Justin on 05/06/2021 (IV ROA 727-728).

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

Sarah filed her complaint for divorce on 12/11/2014 (I ROA 1-6). In recognition of the parties' work schedules and the young ages of the parties' children, the district court made an initial, temporary, custodial determination on February 10, 2015 (I ROA 216-217). Following that decision, the parties agreed upon a custodial schedule and a Stipulated Decree of Divorce ("Decree") was thereafter entered[3] (II ROA: 254-266). Pursuant to the Decree, Sarah was designated the primary physical custodian of the two minor children the issue of the marriage, namely Savannah Maurice ("Savannah"), born April 27, 2007, and Emma Maurice ("Emma"), born February 12, 2014, subject to Justin's visitation of every other weekend from Friday after school/daycare, or 3:00 p.m. if school is not in session, to Sunday at 6:00 p.m.[4] (II ROA 257). The minor children were eight (8) and one

[2] Also submitted without signature of Maurice's counsel.
[3] Filed on 09/30/2015.
[4] The Decree also provided for a holiday/vacation schedule.

(1) years of age, respectively, at the time of the Divorce (I ROA 1, II ROA 255). Savannah is now fourteen (14) and Emma now seven (7) years of age. (Id.)

On September 17, 2020, Justin filed his Motion to Modify the Current Custodial Arrangement, Modify Child Support, Modify Child Tax Deduction, for an Award of Attorney's Fees, and related relief (II ROA 342-356). Among the ***reasons*** constituting a significant change affecting the welfare of the children and warranting modification, were:

(1) the significant change in Justin's employment and corresponding work schedule, from the Monday through Friday schedule at Yesco, LLC., where Justin began work at 5:00 a.m. each day (I ROA 9:28-10:1-2), to Justin working from home, Monday thru Thursday, 8:00 a.m. to 4:00 p.m. (*see* II ROA 344:14-16, 396:18-20);

(2) the change in Sarah's work schedule, her unavailability for the children (II ROA 344: 18-19), and that Sarah is not able to take and pick up the girls from school (II ROA 396:22-397:1-2);

(3) Justin's availability as caregiver in lieu of third parties (*see* II ROA 344:19-21, 347:13-15, 397:3-4);

(4) the temporary custodial modification where Justin cared for, and helped the children with schooling, *each* day (*see* II ROA 344, 345: 3-4);

(5) a modification was in the best interests of the children (*see* II ROA 344, 16-17, 346-351);

(6) the passage of more than five (5) years since the initial custodial determination (*see* II ROA 347:8-10) and now both children were attending school (*Id.*);

(7) Justin has remarried and the subject children have developed close relationships with their step-siblings (II ROA 398:6-8); and

(8) that both children have conveyed their preference of wanting to spend more time with Justin (*see* II ROA 347:21-22).

The initial motion was decided by the Honorable Bryce C. Duckworth on October 27, 2020, *without* the Oral Argument requested by both parties, and summarily denied. (II ROA 342, 370). Justin filed a motion for reconsideration on 12/07/2020 (III ROA 554-598), Sarah filed an opposition on 1/06/2021(III ROA 600-624), and Justin filed his reply thereto on 1/08/2021 (III ROA 636-679). On 01/13/2021, Justin's motion for reconsideration was heard (IV ROA 685-86), and for the first time, oral argument allowed.

At that time, the district court was further informed that:

(1) "[Justin's] schedule right now compared to what his schedule before was at the time when the parties were divorced, Sarah and him kind of have the reverse schedule" (IV ROA:748:1-3);

(2) "[t]he circumstances have changed dramatically since when the initial decree went into place…" (IV ROA: 748:13-14);

(3) The schedule at the time of the parties' divorce didn't promote a joint physical schedule (IV ROA: 748:16-20). Currently, Maurice only works four days a week and is available for the children (IV ROA: 748: 8-13);

(4) Maurice wasn't available before and is now only spending 48 hours a month with his children (IV ROA: 749:1-2);

(5) Further noted the passage of almost six years of time[5] (IV ROA: 748:20-21);

(6) "He's asking for more time with the children. I mean, it's to benefit, not just him, but to benefit the children. It's in the children's best interest." (IV ROA: 749:2-5);

(7) Further noted that since the beginning of the [COVID] pandemic, the parties basically shared a 50/50 schedule (IV ROA:749:13-20). Justin wanted to memorialize the shared custodial schedule; in return, Sarah wanted to discontinue it—and did (IV ROA: 749:18-20);

(8) "the time that [Sarah] spent and the time that [Justin] spent with the children has changed" (IV ROA: 751:6-8); and

(9) Justin would like an Evidentiary Hearing to prove the bases provided (IV ROA: 750:3-4).

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[5] Notably, the Court recognized the passage of more than five years and seemingly looked for a way to expand Maurice's time, absent judicial directive, through mediation. (IV ROA:753: 2-14) Sarah, through counsel, immediately and curtly rejected the invitation (IV ROA:753:15); Maurice, through counsel, expressed a desire (IV ROA:753:16-17). Sarah's refusal prevented that from taking place.

Court inferred that was the "same information" contained in the initial motion to modify (IV ROA: 750:11-15). The Court acknowledged one of the factors raised by Justin was a change of his work schedule (IV ROA: 759:14-15), acknowledged other *issues*, but only referenced one of those other "issues", to wit, that the eldest child "has expressed a preference" (IV ROA:759), but committed judicial error when it declared that a child's preference could *not* be recognized or considered, as a basis or factor, when determining whether there has been a substantial change (IV ROA: 759:14-21).

The district court further noted the concerns with Justin's due process rights to a fair and meaningful hearing and that his fundamental rights were not recognized and accommodated (IV ROA:762:24-7631-5), the denial of the opportunity to be heard (IV ROA:763:5-7), and rather than address and/or consider them, as well as the considerable facts establishing a substantial change affecting the welfare of the children, the district court incredulously declared it "***simply focused on one factor***", denied argument, [denied] an evidentiary hearing because a change in work schedule(s) was insufficient to modify custody (IV ROA: 763:8-12), and denied Justin's motion to reconsider.

Justin submits the standard(s) imposed by the district court, coupled with the corresponding rulings, constituted judicial error, abuse of discretion, and necessitate a remand from this Court with appropriate guidance.

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

1. Whether the district court erred refusing to recognize a change in a party's work schedule constitutes, individually or collectively with other changes, a substantial change of circumstances needed for modification of custody or visitation?

2. Whether the district court abused its discretion by not setting an Evidentiary Hearing on Justin's Motion to Modify Custody when Adequate Cause for a hearing had been sufficiently alleged and established in the underlying pleadings?

3. Whether the standard for modification of visitation should be different than that for modification of custody?

4. Whether the district court abused its discretion by awarding attorney's fees?

17. Legal argument, including authorities:

STANDARD OF REVIEW

A district court's order regarding custody and/or visitation is reviewed for an abuse of discretion. *Rivero v. Rivero*, 125. Nev. 410, 428, 216 P.3d 213, 226 (2009) (citing *Wallace v. Wallace*, 112 Nev. 1015, 922 P.2d 541 (1996); *see also Rico v. Rodriguez*, 121 Nev. 695, 701, 120 P.3d 812, 816 (2005). District courts have broad

discretion in child related matters, but substantial evidence must support the district court's findings. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241-42 (2007). Also, this Court must be satisfied that the district court's determination in child related matters was made for the appropriate reasons. *Rico*, 121 Nev. At 701, 120 P.3d at 816; see also *Sims v. Sims*, 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993).

While custody decisions are reviewed for abuse of discretion, questions of law are reviewed de novo. *Waldman v. Maini*, 124 Nev. 1121, 1128, 195 P.3d 850, 855 (2008). Thus, purely legal issues, including whether the appropriate legal standard was applied, are reviewed de novo. *See Rennets v. Rennets*, 127 Nev. 564, 257 P.3d 396, 399 (2011).

ARGUMENT

A. The Court Erred Refusing To Recognize A Change In A Party's Work Schedule, Either Individually or Cumulatively With Other Alleged Changes, As Constituting A Substantial Change Of Circumstances Needed For Modification Of Custody Or Visitation.

Long recognized by courts and our legislature, there are many good reasons why a parenting plan may need to be changed—some changes may be minor, others major, but all for the best interests of the subject child(ren)[6]. As the children get older, for example, their needs, interests, and activities change. As each of the parents moves on with his or her separate life, new partners, new jobs, or new homes

[6] Even "minor" changes may often make a world of difference to a child and/or parent seeking the modification.

can all mean that the parenting plan needs to be changed. These factors, and countless others, is why family court is entrusted with continuing jurisdiction over child custodial matters.[7]

In *Ellis v. Carucci*, this Court ruled "[a] modification of primary physical custody or visitation is warranted only when: (1) there has been a substantial change in circumstances affecting the welfare of the child; and (2) the modification would serve the child's best interest." 123 Nev. at 153. This Court has expanded the requirement of changed circumstances to modifications of visitation as well[8].

In *Rivero v. Rivero,* 125 Nev. 410, 216 P.3d 213 (2009), the Nevada Supreme Court specifically recognized that the "parents' work schedules" are an inherent variation of joint physical custody. 125 Nev. 424-425. Notably, in this case, the district court considered the parties' work schedules when it made its initial custodial determination—yet simply determined that such a factor is immaterial as it pertains to any modification thereto.

Although never specifically decided by this Court, other courts have held a modification in a party's work schedule as being an appropriate consideration to

[7] *See e.g.*, NRS §125A.315; NRS §125C.0045(1)(b).
[8] *See Rennels v. Rennels*, 127 Nev. 564, 257 P.3d 396 (2011); *Martin v. Martin*, 120 Nev. 342, 90 P.3d 981 (2004); *Davis v. Ewalefo*, 131 Nev. 445, 352 P.3d 1139 (2015); *Gordon v. Geiger*, 133 Nev. 542, 402 P.3d 671 (2017).

determine the requisite change contemplated for the modification of a custodial schedule by other courts[9].

In this case, the district court improperly focused on just one factor (the change of the parties' work schedules)[10], and in so doing, erred with its ruling "it did not find a change in Dad's work schedule being enough basis to modify custody and child support obligation pursuant to *Ellis vs. Carucci*[11]" (III ROA 540, 542:23-25, IV ROA 545).

In *Silva v. Silva,* 136 P.3d 371 (Idaho Ct. App. 2006), the final case the district court cited, reveals that ***a parent's work schedule is relevant*** to a custody determination if it affects the well-being of the children. The specific ruling in Silva was:

> **[*A] parent's work schedule may be one factor among many*** that can assist a magistrate court ***in tailoring a custody order that will best promote the welfare of the children*.** (emphasis provided).

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[9] *See Ritter v. Ritter*, 873 N.W.2d 899 (ND 2016) ("[a] parent's work schedule may be an appropriate consideration in determining whether a prima facie case for modification has been established.") *Knicely v. Knicely,* 2008 Neb. App. LEXIS 64 ("Where the issue concerns visitation, a significant change in a party's work schedule may well constitute a material change in circumstances sufficient to reopen the extent of visitation.") citing *Grange v. Grange*, 725 N.W.2d 853 (2006); *Housley v. Holmund*, 836 N.W.2d 152 (Iowa App. 2013) (holding a change in party's work schedule constituted a material and substantial change in circumstances concerning visitation.); *Martin v. Scharbor*, 233 S.W.3d 689 (Ark. App. 2006) (the work schedule of the parties is a factor to take into consideration when determining reasonable visitation); *Stern v. Stern*, 826 S.E.2d 490 (N.C.App 2019) (dismissing father's motion to modify custody was improper based upon change in father's work schedule and availability for child);

[10] Addressed in greater detail, Section B, *infra*.

[11] 123 Nev. 145, 161 P.3d 239 (2007).

Indeed, in 2012 the Idaho Supreme Court affirmed the determination expressed by their appellate court in *Silva* that work schedules of the parties **is** a relevant factor in modification of custodial orders. *Markwood v. Markwood,* 152 Idaho 756, 274 P.3d 1271 (2012).

Further, to adhere to the unilateral, self-imposed injunction prohibiting the consideration of the parties' work schedules would require this Court to ignore all matters that occur *because* of the parties' work schedules, even those affecting a child's well-being. Ignoring, or refusing to consider such events that affect a child, under a misguided belief that a court cannot modify custody or visitation because of changed work schedules, would generate absurd results.

Consider *Bird v. Bird,* 313 Wis. 2d 832, 756 N.W.2d 810 (2008), the court ruled that "increased availability constituted a substantial change in circumstances…" Moreover, the court in *Timmerman v. Timmerman,* 139 S.W.3d 230 (2004) stated "the substantial change in one of the parties' [work] schedule constituted a change in circumstances."[12] Clearly a change in the work schedules of the parties is a factor the district court ***must*** consider. To rule and act otherwise is an abuse of discretion. The creation and utilization of such an erroneous standard constitutes judicial error.

[12] *See also Housley v. Holmlund,* 836 N.W.2d 152 (2013); *J.T.H. v. H.H.*, 135 A.3d 651 (2015*); Rebecca L. v. Martin,* (2013 Alas. LEXIS 25) (where the court found the child reaching the age of five sufficient to modify custody).

Notably, the district court acknowledged one of Justin's other substantial changes was the eldest child "has expressed a preference"[13] (IVROA:759) (in reality, Justin stated both children have expressed the preference to spend more time with him), but also improperly rejected that factor as being one that could (individually or collectively) constitute the requisite change of circumstances. (IV ROA: 759:14-21). Of course, the preference of a child can properly be considered *both* in determining whether there has been a substantial change *and* when determining a child's best interest. NRS 125C.0035. Rejecting both changes in work schedules and children's' preferences constituted judicial error[14].

Lastly, the district court also applied the incorrect standard when ruling upon Justin's motion for reconsideration—improperly applying the *Ellis* standard (IV ROA 758:8-13) instead of following the established precedent of this Court as provided and detailed by Justin concerning a motion for reconsideration[15].

In sum, in making any custodial determination/modification, the court is required to act in the child's best interests by considering *all* relevant factors. Thus,

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[13] While the Court noted a dispute existed as to the child's preference, that concern would properly be addressed after an evidentiary hearing and whether the movant met his burden of proof.

[14] Another curious inquiry pertains to the Court's "hypothetical" and corresponding belief that any modification must necessarily be "permanent" as opposed to temporary, (IV ROA: 754:12-14) and interchanging temporary with permanent, and unemployment[14] with change of work schedules. (IV ROA: 754-58, 760-61).

[15] See *Masonry and Tile Contractors Ass 'n of S. Nev. v. Jolley, Urga &Wirth, Ltd.*, 13 Nev. 737,741, 941 P.2d 486, 489 (1997); III ROA 560-565.

in the instant action, the change of work schedules was a factor that, even standing alone, could easily establish a prima facie case and adequate cause for an evidentiary hearing. When considered in conjunction with the children's preferences and the balance of the other changes alleged to have transpired since the initial custodial order, detailed in further detail *supra*[16], and in Section B, *infra*, there is no doubt Justin established adequate cause for an evidentiary hearing because "if true, they could lead to a modification of custody/visitation, and they were not merely cumulative or impeaching. *Rooney v. Rooney*, 109 Nev. 540, 542-43, 853 P.2d 122, 124-25 (1993).

B. The District Court Erred By Not Hearing Appellant's Motion To Modify Custody After Adequate Cause Had Been Sufficiently Pled.

Wrongfully limiting its consideration to just one of the many substantial changes that have taken place since the Decree, the district court abused its discretion finding the absence of adequate cause to set the matter for an evidentiary hearing.

Citing *Rooney*[17], the district court determined there was not "a sufficient showing" to set further proceedings. *Rooney*, however, holds it is an abuse of discretion to deny a motion to modify custody/visitation without holding an evidentiary hearing if the moving party establishes adequate cause for a modification of custody by presenting a prima facie case for modification. "To constitute a prima

[16] *See* Statement of Facts, pp 5-7, above.
[17] 109 Nev. 540, 853 P.2d 123 (1993).

facie case it must be shown that: (1) the facts alleged in the affidavits are relevant to the grounds for modification; and (2) the evidence is not merely cumulative or impeaching." *Id.* at 543, 853 P.2d at 125. Once adequate cause has been shown "***the district court does not have the discretion to deny the modification motion without holding a hearing.***" *Id* at 542, 853 at 124 (emphasis provided). Thus, adequate cause is established once a prima facie case has been set forth. *Id.*

In *Ellis*, this Court established modification of custody as warranted when (1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the modification would serve the child's best interest. Of notable importance, the Court in *Ellis* also ruled that a "modification of custody may serve a child's best interest even if the modification does not substantially enhance the child's welfare." 123 Nev. at 152.

As confirmed herein, Justin alleged the following facts:

- the significant change in Justin's employment and corresponding work schedule (*see* II ROA 344:14-16, 396:18-20, IV ROA:748:1-3);
- the change in Sarah's work schedule, her unavailability for the children (II ROA 344: 18-19), and that Sarah is not able to take and pick up the girls from school (II ROA 396:22-397:1-2);
- Justin's availability as caregiver in lieu of third parties (*see* II ROA 344:19-21, 347:13-15, 397:3-4);
- the custodial modification where Justin cared for, and helped the children with schooling, *each* day (*see* II ROA 344, 345: 3-4, IV ROA:749:13-20);
- modification was in the best interests of the children (*see* II ROA 344, 16-17, 346-351);
- the passage of more than five (5) years since the initial custodial determination (*see* II ROA 347:8-10, IV ROA: 748:20-21) and now both children were attending school (*Id.*);

- Justin has remarried and the subject children have developed close relationships with their step-siblings (II ROA 398:6-8); and
- that both children have conveyed their preference of wanting to spend more time with Justin (*see* II ROA 347:21-22).

Supplemental facts and details were also provided to the district court at the hearing of Justin's motion for reconsideration[18]. Rather than considering them, and the effect they each had individually, *let alone cumulatively*, the district court simply ignored them all and focused solely on Justin's work schedule—which the district court determined to be "insufficient", and refused to set an evidentiary hearing as requested[19]. Doing so constituted judicial error.

Another reason why the district court's reliance on "changed circumstances" was misapplied, was because of the very question raised in *Ellis*, wherein the Court questioned whether a party seeking modification of child custody must satisfy the "changed circumstances" prong when the original arrangement was based on an agreement of the parties. *Id* at 151. In this case, the Decree was a stipulated one, as was the custodial schedule set forth therein. Ellis would suggest that in the absence of a judicial determination of custody there would be no need to satisfy the "changed circumstances" prong at all.

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[18] *See* Statement of Facts, *supra*, pp. 6-7.

[19] Absent allegations of abuse and neglect, or immediate risk of physical harm, (to which modifications are not limited to) it is submitted no other facts could be alleged, or difficult to imagine what other facts could be alleged, that the district court *would* deem "sufficient" to set an evidentiary hearing to determine just what is in the best interests of the subject child(ren).

Regardless, in *Arcella v. Arcella*, 133 Nev. 868, 407 P.3d 341 (2017) the Nevada Supreme Court confirmed that a movant *must only allege sufficient facts* that are relevant to the relief requested and that the evidence is not merely cumulative or impeaching for an evidentiary hearing to be set. Review of those considerable facts alleged by Justin, confirm they were ***all*** relevant to the grounds for modification, and were not merely cumulative or impeaching, thereby warranting, indeed mandating, the setting of an evidentiary hearing. Thus, the determination Justin did not allege a prima facie case, and thereby did not allege adequate cause for an evidentiary hearing, was an abuse of discretion and constituted judicial error.[20]

C. The Court Should Distinguish The Standard For Modification Of Custody And Modification Of Visitation.

There is no question the needs of a child, and what is in a child's best interests, not only change, but also range from the minor to the major. With that in mind, modifications that identify and address those needs, would likewise vary. Because courts have the discretion to rule based upon the facts and the best interests of a child, it is possible that a motion to modify custody may result in a modification of the parenting time but not result in an actual modification of custody. That determination should appropriately vest with the district court, but the standards should likewise differ.

[20] Justin also alleged it was in the best interests of the children to modify the custodial schedule—addressing the best interest factors set forth in NRS 125C.0035 in the process, but the district court's disposition of the matter never considered that.

Unfortunately, although this specific issue has not yet been ruled upon by the Nevada Supreme Court, the importance of such standards has been recognized and ruled upon by many other courts, and it would prove to be invaluable if this Court would provide appropriate guidance to district courts though this appeal.

On that point, some courts have recognized that a change of circumstance rule ***does not*** apply when changing visitation or parenting time as opposed to custody.[21] Other courts confirm a less demanding standard when modifying visitation than when modifying custody.

Iowa courts, for example, apply a less demanding burden when a parent is seeking to change only a visitation provision in a decree[22]. In *Salmon*, the court noted a party must establish a material change when seeking to modify custody, but

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[21] See *In re Marriage of Lucio,* 161 Cal.App.4th 1068 (2008) (affirming the changed circumstance rule does not apply to a modification request seeking a change in the parenting or visitation schedule); *Chalmers v. Hirschkop*, 213 Cal. App. 4th 289 (2013); *Jane J. v. Superior Court*, 237 Cal. App. 4th 894, 188 Cal. Rptr. 3d 432 (2015); *Cox v. Cox*, 1989 Minn.App.LEXIS 147 (holding visitation rights may be modified whenever it is in the child's best interests).

[22] *In re Marriage of Brown*, 778 N.W.2d 47, 51-52 (Iowa Ct. App. 2009) (holding visitation cases require a less extensive change in circumstances); *In re Marriage of Salmon*, 519 N.W.2d 94, 95-96 (Iowa Ct. App. 1994); *Housley v. Holmund*, 836 N.W.2d 152 (2013)("The burden to change a visitation provision in a decree is substantially less than to modify custody"); *In re Marriage of Flick*, 2021 Iowa App. LEXIS 461(In general, a much less extensive change in circumstances must be shown to modify a parenting-time schedule than the change in circumstances required to change physical care); *see also Harris v. Tarvin*, 439 S.W.2d 653 (1969) (Arkansas Supreme Court rejected argument that visitation cannot be modified unless there is a sufficient change in circumstances).

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noted a "much less extensive change in circumstances is generally required in visitation cases." 519 N.W.2d at 95-6.

> "The rationale for this lower standard is found in the prevailing principle that the best interests of children are ordinarily fostered by a continuing association with the noncustodial parent." Id. at 96. A change in the physical care arrangement is custodial, therefore, the higher burden applies.

The North Dakota Supreme Court held in *Ritter v. Ritter*[23]:

> "[t]he standard for modification of visitation is similar to a modification of custody." (Citations omitted) Both standards require the movant to establish a material change of circumstances and that the modification is in the best interests of the child. (Citations omitted) However ***unlike changing of parenting time***, modification of primary residential responsibility requires the movant make a prima facie case before an evidentiary hearing (emphasis provided).

The Supreme Court of Missouri, in *Russell v. Russell*, 210 S.W.3d 191 (2007), held:

> This Court has stated that the change in circumstances necessary to modify a prior custody decree must be a "substantial" one. *Searcy v. Seedorff*, 8 S.W.3d 113, 117 (Mo. banc 1999). In contrast, to modify a previous order of visitation rights, a court must merely find that that the modification would serve the best interests of the child. (citation omitted); *Turley v. Turley*, 5 S.W.3d 162, 164 (Mo. banc 1999).

The *Russell* court further ruled "[t]he requirement that the change be substantial is no longer appropriate where simple shifts in parenting time are at issue."

In *Kathryne B.F. v. Michael B.*, 2014 Tenn. App. LEXIS 139, the court ruled that "the determination of whether a 'material change of circumstances" has occurred requires a different standard depending upon whether a parent is seeking

[23] 873 N.W.2d 899 (2016).

to modify custody (i.e., change the primary residential parent) or modify the residential parenting schedule[24]. In *Timmerman v. Timmerman*, 139 S.W.3d 230 (2004) (Because different standards apply depending on whether child custody or visitation is being modified, a court must necessarily determine which is being modified)

The primary concern in child physical custodial determinations is the stability of the child's environment and the avoidance of unwarranted and disruptive custody changes. The focus of parenting time, i.e. visitation, is to foster a strong relationship between the child(ren) and the non-custodial parent.[25] This is consistent with the stated policy of our State "ensure that minor children have frequent associations and a continuing relationship with both parents" after they are divorced. NRS §125C.001. Because courts have the discretion to rule based upon the facts and the best interests of the children it is possible that a motion to modify custody may result in a modification of the parenting time but not result in an actual modification of custody.

Because a district court is compelled to act in the best interests of the child, courts should be allowed, after an evidentiary hearing, to determine whether the changed circumstances and best interests of the child(ren) warrant a modification of "visitation" or a modification of "custody". Thus, a motion to modify may result in

[24] *See also*, *Pippin v. Pippin*, 277 S.W.3d 398, 406-07(Tenn. Ct. App. 2008).
[25] *See Lieberman v. Orr*, 319 Mich.App.68 (2017).

a modification of the prior time share arrangement without effectuating a change of custody. In those circumstances, since the court is simply adjusting the parenting schedule to meet the best interests of the children, there would be no need to establish a substantial change of circumstances that would otherwise be required to modify a judicial custodial order.

Under such circumstances if a district court refuses to set the matter for hearing because of the misplaced reliance or misplaced application of the applicable "changed circumstances" standard, the reality is the court fails to address the best interests of a child. The district court should exercise great caution when reliance on changed circumstances may result in the failure to address the best interest of the child.

It is obvious that the basis for Justin's underlying Motion to Modify was considerably more detailed and substantive than what was considered, represented, and relied upon by the district court. It is respectfully submitted that the eagerness that the district court demonstrated in disposing of motions has resulted in the issuance of an improper Decision that did not comply with applicable law[26].

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[26] Also of significance is the fact that the district court did not make any factual findings and the scant facts the district court did reference were erroneous. Our Supreme Court has stated that "[s]pecific factual findings are crucial to enforce or modify a custody order and for appellate review." *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009). Continuing, *Rivero* stated that "[t]he district court shall then apply the appropriate test for determining whether to modify the custody arrangement and make express findings supporting its determination." *Ibid*. In the case at bar the district court failed to comply with applicable law and make the

In the present case the district court did not consider the relevant factors in support of appellant's motion. The limited factual references made by the district court were incomplete and inaccurate. Naturally, the same factors are considered when granting or denying a motion to modify and thus appropriate findings must be made to support the court's decision whether it was the granting or denial of the motion. In this case the district court did not make any specific findings to support the erroneous conclusions of law rendered. Such omission, along with the fact the court incorrectly identified and relied on the factors cited in its Decision and Order, plainly constitutes an abuse of discretion and judicial error.

D. The district court abused its discretion awarding attorney's fees following its abuse of discretion.

The district court appears to have taken offense to Justin's counsel filing a motion for reconsideration and addressing the manner in which the matter was handled. In response, the Court made a point, to state on the record, that "Mr. Hofland inadvertently wrongly assumed Department Q granted the same courtesy

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requisite findings as mandated by law. See also *Lewis v. Lewis*, 132 Nev. Adv. Rep. 46, 373 P.3d 878, 882 (2016) (a custodial determination without entering "specific factual findings as to each of the statutory best-interest-of-the-child factors" was an abuse of discretion); *Davis v. Ewalefo*, 131 Nev. Adv. Rep. 45, 352 P.3d 1139, 1143 (2015) (Court ruled that "[s]pecific findings and an adequate explanation of the reasons for the custody determination are crucial to enforce or modify a custody order and for appellate review (internal quotation marks omitted)). See also *Bird v. Bird,* 313 Wis. 2d 832, 756 N.W.2d 810 (2008) (holding that in setting a modified schedule the court shall consider the same factors that apply in initial placement decisions.); and *Timmerman v. Timmerman,* 139 S.W.3d 230 (2004) (the court must consider the statutory custodial factors in deciding whether modification of custody would serve the best interests of the child).

followed in other divisions of the Eighth Judicial District Court[27] and other courts where Mr. Hofland has appeared to trail hearings so all parties and counsel would be present at important hearings (IV ROA: 762:19-23).

Regardless, based upon the above, it is clear that Judge Duckworth committed judicial error and abused his discretion—to award attorney's fees under those/these circumstances would be patently unfair. Indeed, should Justin prevail on this appeal, Sarah was improperly recognized as the prevailing party and wrongfully "awarded" attorney's fees[28].

18. Issues of first impression or of public interest. Does this appeal present a substantial legal issue of first impression in this jurisdiction or one affecting an important public interest: Yes…X…No……If so, explain:

As noted above,

precedent.

19. Routing Statement: This appeal should be assigned to the Court of Appeals per N.R.A.P 17(b)(5) because it involves an issue of child custody.

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[27] It must be mentioned that despite this self-proclaimed independence and refusal to trail matters because of conflicts, Judge Duckworth apparently wants it to be known that he takes a back seat to no one, stating in response to being informed of Mr. Hofland's scheduling conflict: "apparently, the hearing before this Court was less of a priority than the hearing in front of another department downtown in a civil matter" (IV ROA:765:21-24). The statements were unwarranted and suggestive of bias.

[28] In accordance with Judge Duckworth's decision, Sarah submitted a Memorandum of Attorney's Fees on 3/26/2021; Justin's opposition thereto was filed on 4/2/2021, to date, the district court has not yet made a ruling on a specific amount (having more than six (6) months having lapsed). The decision of this Court should rule, should Justin prevail, that the award to Sarah is to be vacated.

DATED: September 7, 2021.

Respectfully Submitted,

/s/ Bradley Hofland

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VERIFICATION

1. I hereby certify that this fast track response 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**] This fast track response has been prepared in a proportionally spaced typeface using **Microsoft Word 2010 in Times New Roman 14 – point font**.

2. I further certify that this fast track response complies with the page– or type–volume limitations of NRAP 3E(e)(2) because it is:

[**X**] Proportionately spaced, has a typeface of 14 points or more, and contains 7227 words; or

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

DATED: September 7, 2021.

Respectfully Submitted,

/s/ Bradley Hofland

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Certificate of Service

I hereby certify that on this date, September 7, 2021, I filed and served a copy of the foregoing **CHILD CUSTODY FAST TRACK STATEMENT**, as follows:

X By filing it with the Supreme Court via eFlex.

Electronic notification will be sent to the following:

Reli Jacobson, Esq.

☐ By personally serving it upon him/her.

X By mailing it by first class mail with sufficient postage prepaid to the following address(es):

Jacobson Law Office, Ltd.
64 North Pecos Road, Suite 200
Henderson, NV 89074

/s/ Bradley Hofland
BRADLEY HOFLAND