

1 derived from res judicata principles, which prevent
2 dissatisfied parties from filing repetitive serial motions
3 until they obtain their desired results.

4 Also, it states, in making the determination of
5 whether a custody modification is in the child's best
6 interests, the Court must consider and articulate specific
7 findings regarding the non-exhaustive list of best interest
8 factors set forth by statute. And in making this
9 determination, a Court must consider amongst the factors
10 whether either parent or any other person seeking custody has
11 engaged in an act of domestic violence against the child, a
12 parent of the child, or any other person residing with the
13 child.

14 Indeed, the Castle Court emphasized that Courts must
15 hear all information regarding domestic violence in order to
16 determine the child's best interest, and noted that our
17 legislature recognized the threat domestic violence poses to a
18 child's safety and well being, and created a rebuttable
19 presumption to this end, that awarding a parent physical
20 custody is not in the child's best interest if that parent has
21 engaged in acts of domestic violence.

22 However, in the Reed case, I would like to point
23 out, the parties stipulated not once but twice to joint
24 physical custody because they did so -- let's see -- there was

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Elizabeth A. Brown
Clerk of Supreme Court

1 a stipulated order after the parties -- after the parties'
2 hearing on October 16th of 2018, that the parties would share
3 joint legal and joint physical custody. That order was
4 entered February 27th of 2019. And then again, the parties
5 stipulated.

6 It's in the language of the decree of divorce that
7 was entered April 6th of 2020, that the parties are
8 stipulating again to joint physical custody. And there is a
9 statute, and I can't remember which statute it is, it's one of
10 the first ones in 125(C), I believe, that states that joint
11 physical custody is presumed to be in the best interests of
12 the children when the parties so agree. And the parties so
13 agreed in this case, in the Reed case, twice.

14 So -- also, there's some additional language that I
15 wanted to bring into the record. It -- it's in a footnote --
16 footnote number 7 on page 159 of the Nevada reports for the
17 Nance case. It states that the Castle Court recognized that
18 even in the changed circumstances context, previously
19 litigated instances of domestic violence may need to be
20 reviewed if additional acts occur. But it's my understanding
21 that that is not the case in the Reed case that's before the
22 Court today.

23 Okay. And the Court -- the Nance Court also said on
24 page 160, even in the context of opposing a motion to modify

1 custody, a party generally cannot relitigate prior instances
2 of domestic violence the Court has previously addressed and
3 decided. So -- and then further again, on page 161 of the
4 Nevada reports, it explains that in that case, the Nance case
5 the Mom intended to offer evidence of domestic violence to
6 oppose a modification request, and therefore to show
7 modification was not in the child's best interests. But as
8 the record -- and -- and the record did not show that she
9 sought to relitigate the evidence.

10 In the Reed case, this case before the Court, it
11 appears that the mom is seeking to relitigate the case of all
12 of the evidence that existed prior to entry of the decree of
13 divorce, and that's further corroborated by -- or I should say
14 further supported by the fact that she filed her motion to
15 modify custody just two days later, and seeking to hold Dad in
16 contempt of violating the behavior order. But the way I
17 understand her motion when I read it, it doesn't allege any
18 additional acts that occurred between April the 6th of 2020,
19 the date of entry of the decree of divorce, and two days
20 later, when she filed her motion.

21 All of the evidence she seeks to rely on, according
22 to the motion, was based on events that were known to her
23 previously, and -- including Dr. Paglini's report, which Mom
24 admitted in her motion she received on January the 27th of

1 2020.

2 So I found it interesting, as well, that the Nance
3 case was a case involving Judge Gentile, and in that case it
4 reversed and remanded her because she had ordered that
5 evidence of domestic violence could be excluded in her
6 decision for -- regarding Dad's motion in limine trying --
7 seeking to exclude prior acts of domestic violence. That
8 might have made her even a little bit gun shy in this Reed
9 case, in excluding the evidence.

10 But I think that Judge Gentile didn't consider the
11 issue of res judicata in this Reed case, because those -- all
12 of those prior issues, even though the Court's allowed to
13 consider them and look at them in making its decision, the --
14 the Court can't relitigate events that have occurred prior to
15 -- prior to the decree of divorce on the basis of res
16 judicata. Because if the Court were allowed to do so, the
17 Court would never be able to move forward in making decisions
18 on instances that happen in the present and in the future.
19 The Court would constantly be spending all of its time and
20 judicial resources relitigating things that people are unhappy
21 about in the past.

22 So I -- this Court is going to, on the basis of all
23 of those reasons, the Court is going to exclude any evidence
24 of any acts that occurred prior to the entry of the decree on

1 April the 6th of 2020, for the purpose of seeking a
2 modification of child custody in this case. So I don't know
3 what you're left with to litigate. I don't know if you all
4 want to talk about that again, and try and consider
5 settlement, or if you have any evidence to go forward on after
6 the Court's made that decision? I --

7 MR. NAIMI: Well, I --

8 MS. CRAMER: Your Honor, I have a -- I have a
9 question about the issue I brought up previously. Based on
10 the Defendant's pretrial memo, it appears that she is
11 expanding beyond the pleadings -- beyond the relief requested
12 in her initial motion. And so she has expanded her request
13 for relief to include things that were never properly brought
14 before the Court. And so I'm wondering what your take is on
15 that, as well, because from her filing in April of 2020 to the
16 pretrial memo that was filed in February, she's tacked on,
17 like I said, everything and the kitchen sink.

18 THE COURT: What are you talking about --

19 MS. CRAMER: So --

20 THE COURT: -- Ms. Cramer, specifically. I'm
21 looking at --

22 MS. CRAMER: Well --

23 THE COURT: -- her pretrial memo.

24 MS. CRAMER: -- there's -- there's -- like Mr. Naimi

1 was saying, like the children are neglected because the child
2 came to school -- or well, she never went to school, because
3 they -- they weren't having school. But she had gum in her
4 hair. So they're saying that's neglect. They're saying that
5 Dad logged into the -- the school -- the child's remote
6 learning a few minutes late. So they're saying that Dad
7 doesn't give the kids showers. They're saying all these
8 things in the pretrial memo that they didn't bring up in their
9 filing.

10 THE COURT: Well --

11 MS. CRAMER: And so I --

12 THE COURT: Well, I think -- I think -- I mean, if
13 -- if all of those events happened after the April 6th entry
14 -- of -- of 2020 entry of the decree of divorce, then they can
15 use that as a basis for modification. I'm not sure that those
16 things are sufficient to meet the Rooney standard. However, I
17 have to agree with Mr. Naimi that we're past the Rooney
18 standard, because the Court already previously decided that
19 there was adequate cause in which to conduct an evidentiary
20 hearing.

21 I disagree with the reason that she reached that
22 standard of -- because I'm -- I don't see that this Court has
23 the ability, the authority to relitigate the issue of custody
24 for reasons of events that have happened prior to entry of the

1 decree of divorce. So I mean, I don't know when those events
2 that they're raising -- I mean, if that's what they're going
3 to try and go forward on, they certainly can. I think it
4 significantly limits their -- I mean, I've already indicated
5 that I don't -- I don't -- I don't know that that alone would
6 -- would -- would -- would meet the Rooney standard if I were
7 making the decision. But there might be additional stuff that
8 I'm unaware of. So I don't know.

9 But I think --

10 MS. CRAMER: And that's what --

11 THE COURT: -- I'll -- I'll hear -- I'll hear from
12 you, I'll hear from Mr. Naimi, and I think that maybe you all
13 might want to go off the record and have another conversation
14 about where we go from here. But go ahead, Ms. Cramer.

15 MS. CRAMER: Thank you, Your Honor. My point was
16 that none of those -- these items were included in the
17 original filing in April. The original filing was all focused
18 on this allegation of domestic violence and Dr. Paglini's
19 report. But in that time since then, there haven't been any
20 -- any intervening motions. They've just now wanted to hang
21 all of these allegations of gum in the hair and logging into
22 school late, they want to hang this all on that motion from
23 April, 2020.

24 But they weren't properly noticed is what I'm

1 saying. They weren't in that motion, they've happened since
2 then, and they haven't filed any subsequent motions. So
3 basically, none of it is properly before the Court.

4 THE COURT: Okay. And I -- I --

5 MS. CRAMER: So if they wanted --

6 THE COURT: -- I dis -- I disagree with you if --
7 and -- and I thought that I just said that, because I think
8 you haven't said anything in addition to what you said before,
9 unless I misunderstood you. But I don't think that every time
10 they -- during the period of discovery and between the filing
11 of a motion and the evidentiary hearing, I don't think they're
12 obligated to tell you each and every point of evidence that
13 they're going to present at the time of the evidentiary
14 hearing. I don't think they have to file a motion before the
15 Court for every -- every instance of evidence. I don't think
16 that they've done anything wrong by not filing a motion
17 between then and now because there was gum in the hair. I
18 think that's just something that they can bring up at an
19 evidentiary hearing when the time comes.

20 However, the Court's --

21 MS. CRAMER: The --

22 THE COURT: -- the -- I mean, I don't know when the
23 gum in the hair occurred, I don't know about the brushing of
24 the teeth, I don't know about the other things that -- that

1 Mom is left with to present with the Court today. I only -- I
2 only am going to hear evidence of things that happened since
3 April 6th of 2020. So I think they --

4 MS. CRAMER: Well, I --

5 THE COURT: -- need to regroup and decide what
6 they're going to present.

7 MS. CRAMER: Well, I agree, Your Honor. But my --

8 MR. NAIMI: I -- I think the way you concluded there
9 a moment ago, Your Honor, that's accurate. I -- I don't see
10 how at, you know, basically 11:00 on the day of an evidentiary
11 hearing, Court -- Court has reached its decision that we can
12 proceed forward on this day have -- already having had a plan
13 of action.

14 What I would recommend to the Court, if the Court is
15 so inclined, that we are given a reasonable period of time. I
16 don't know what that looks like, I'm -- I am thinking a couple
17 of weeks, to reassess, confer with Opposing Counsel, and if
18 need be, reset the matter for the evidentiary hearing at some
19 time down the line if, you know, the Plaintiff -- excuse me,
20 the Defendant decides she wants to continue forward, as
21 instructed by the Court. Moving forward today is -- is quite
22 frankly, almost impossible, based on the instructions given by
23 the Court a moment ago. I -- I would like to have Your
24 Honor's response.

1 THE COURT: I -- I do -- I do agree that you need an
2 opportunity to regroup, and that's why I said that we could go
3 off the record and allow you some regrouping. But if you
4 require more time to regroup than can just be, you know,
5 handled here and then proceed today, then I'm fine with that.
6 Ms. Cramer, your thoughts?

7 MS. CRAMER: That's fine, Your Honor. I -- I do
8 believe that the Defendant is trying to shoehorn additional
9 issues before the Court, and if --

10 THE COURT: Well --

11 MS. CRAMER: -- that's what they want to do, then I
12 would like permission from the Court to brief that, do
13 additional briefing --

14 THE COURT: Well --

15 MS. CRAMER: -- because those -- those matters are
16 not properly before the Court. This was a narrowly construed
17 request for relief, and she -- now she's shoehorning, like,
18 everything.

19 THE COURT: Well, I --

20 MS. CRAMER: And so I would like -- I would like
21 permission, if we're going to regroup and come back weeks from
22 now, then I would like permission from the Court to file
23 additional briefs.

24 THE COURT: Okay. I think that that's appropriate.

1 I think that -- I think that if they plan to go forward, they
2 are going to have to look at their evidence very closely, and
3 figure out, you know, what they're left with for purposes of
4 this motion. So yeah, they --

5 MR. NAIMI: Perhaps I can make a recommendation to
6 Your Honor?

7 THE COURT: Yes, please, Mr. Naimi. Yes.

8 MR. NAIMI: Perhaps we could set a status check for
9 two or three weeks from now, whatever --

10 THE COURT: Okay.

11 MR. NAIMI: -- whatever the Court has available.

12 THE COURT: Okay.

13 MR. NAIMI: And then --

14 MS. CRAMER: I have no objection to that.

15 MR. NAIMI: -- (indiscernible) --

16 MS. CRAMER: I think --

17 MR. NAIMI: -- how things have proceeded, we can
18 determine at that time whether briefs are necessary or -- or
19 what -- what -- what we need to do.

20 THE COURT: Well, as far as the briefs that I'm --
21 I'm thinking of, I don't know if they're the same as
22 Ms. Cramer, but what I'm thinking of is an amended pretrial
23 memo, if you decide to go forward with an evidentiary hearing
24 after today, I think at a minimum amended pretrial memoranda

1 is -- are -- are in order.

2 MR. NAIMI: That's fine.

3 THE COURT: I have -- I -- I think that that's
4 appropriate. Ms. Cramer, but I'll let you change my mind if
5 -- or try to change my mind if you'd like.

6 MS. CRAMER: Well, I think -- I think we don't reach
7 the issue of pretrial memos if we look at the actual issues
8 being briefed, because -- and, Your Honor, I apologize,
9 because I may not be making myself clear, which is why I
10 wanted a chance to brief it. But I feel like because we're
11 looking at this as a custody case, but this is not an initial
12 custody case.

13 THE COURT: Right. It's modification.

14 MS. CRAMER: Judge Gentile -- right. And Judge
15 Gentile did it on the -- on a very strict, narrow basis, which
16 was Dr. Paglini's report. She didn't do it on the basis of
17 I'm just going to open discovery and you can do whatever you
18 want, and we're going to modify based on this, but we're
19 modifying everything, and everything gets shoe horned in.
20 That's not what her order was. Her order was discovery on the
21 DV, and it was modification based on DV allegations from the
22 Defendant and Dr. Paglini's report.

23 THE COURT: Okay.

24 MS. CRAMER: And so shoehorning in other grounds and

1 other bases for this, it -- frankly, it's not properly before
2 the Court. It's unconstitutional. My client has not been
3 given notice and opportunity --

4 THE COURT: Okay. I'm looking --

5 MS. CRAMER: -- because that's not what we were told
6 by Judge Gentile that this trial was going to be about.

7 THE COURT: Okay. I'm looking at Judge Gentile's
8 order that was entered on August 19 of 2020, and that was
9 resulting from the May 13th, 2020, hearing, when the judge
10 heard this -- Mom's motion initially for modification. And
11 she's talking about -- I -- I have to scan this, so forgive me
12 if I'm scanning it out loud, but I've got to process it one
13 way or the other.

14 So it says that the Court finds that Mom filed the
15 motion requesting the Court to adopt Dr. Paglini's
16 recommendations, to issue to show cause against him for
17 violating the mutual behavior order, for primary physical
18 custody, attorney's fees, and costs, finds that Dad filed a
19 countermotion seeking a protection order on behalf of the
20 children against the boyfriend, enter an order sealing the
21 parties' file, declaring Mom a vexatious litigant, sanctioning
22 Mom and her counsel, suspending child support obligation,
23 admonishing Mom regarding her failure to abide by -- I -- I
24 don't -- well, I -- I -- I see your point. I mean, it does

1 say those things there. But let me -- it doesn't -- I don't
2 think that that necessarily means that they can't talk about
3 anything else outside of that. But let me keep reading. Let
4 me keep reading.

5 MR. NAIMI: That's absolutely correct, Your Honor.
6 As everyone knows that practices law in the state of Nevada,
7 we are a notice pleading state. The notice requirement is
8 simply the basis that -- that we are seeking a modification of
9 custody. The factors that apply are when the evidence is
10 presented at the time of the evidentiary hearing.

11 If Ms. Cramer needs to conduct discovery to
12 determine what the facts of the case are in the analysis of
13 the best interests factors, she is -- she is open to do so.
14 That is why I'm recommending a two week period or three week
15 period to reassess, and then have a counter -- or excuse me, a
16 status check of some sort to determine whether we're moving
17 forward with the evidentiary hearing or not. It's possible --

18 MS. CRAMER: Okay. So --

19 MR. NAIMI: -- it's possible, after we reassess,
20 that this case goes away. I don't know. But until that time,
21 we -- we're going to spend the entire day on the record here
22 today pontificating back and forth with everybody's theory of
23 the case.

24 MS. CRAMER: Well, one of the issues with that is

1 notice pleadings is a term of art, and pleadings itself is a
2 term of art. Filings is what you're referring to, from April
3 of 2020. The pleadings actually consist of the complaint, the
4 answer, and then a reply to the counterclaim. Those are the
5 pleadings.

6 But in the filings, and that's where the notice --
7 notice pleading theory goes into, the filings in this case are
8 actually what we're referring to, and that's from April, 2020,
9 it's her motion. And her motion was modification based on
10 Dr. Paglini's report and her allegation of domestic violence.
11 It was not because Dad had let the kid go to sleep and she got
12 gum in her hair. That's not what's in her pleading.

13 MR. NAIMI: Okay. (Indiscernible) fair enough.

14 However --

15 MS. CRAMER: And in fact --

16 MR. NAIMI: -- (indiscernible) --

17 THE COURT: Wait. Mr. Naimi? Mr. Naimi.

18 Mr. Naimi. Let her finish, please.

19 MR. NAIMI: Sorry, Your Honor.

20 THE COURT: You may proceed, Ms. Cramer.

21 MS. CRAMER: Thank you, Your Honor. Nothing in the
22 Defendant's filings suggests that this matter is going to be
23 allegations of child abuse, allegations of neglect, all of
24 these allegations that have been crammed into the pretrial

1 memo. And it -- it's not a matter for notice pleading.
2 Notice pleading applies to the actual pleadings. We're
3 talking about a specific motion, and a specific order
4 resulting from that motion, which opened discovery on DV. It
5 didn't open discovery on everything, and it did not indicate
6 that this was an open barn door, everything can just come in.
7 That's not what was in the order, and that was not what was in
8 the Defendant's motion.

9 MR. NAIMI: That's actually incorrect, Your Honor.
10 I -- in fact it is -- it says in the order applicable, fourth
11 to last, before everybody signed off, it is further ordered
12 that discovery is open for the purposes of addressing the
13 custody issues raised in each parties' papers, as well as
14 child support, and related thereto. It's open.

15 MS. CRAMER: With regard to what is in the papers,
16 not what is in the known universe of information.

17 MR. NAIMI: Yeah. The motion even says the basic
18 needs of the minor children are not met during Dad's custodial
19 time. It's pled --

20 THE COURT: Okay.

21 MR. NAIMI: -- in the motion.

22 THE COURT: Okay. I'm ready -- I'm ready to rule.
23 I'm also looking at the order, Judge Gentile's order that was
24 entered on August 19, 2020. It -- it states that -- let's

1 see, on page 4, it's further ordered that if the Court
2 conducts and evidentiary hearing, and either party is unable
3 to prove what is being alleged, and the matter proceeds in bad
4 faith after discovery is conducted, then an award of
5 attorney's fees may be granted to the prevailing party.

6 I don't see any harm in allowing a couple of weeks
7 for the parties to regroup and see what they're left with,
8 based on the Court's rulings today, and -- and I agree with
9 Mr. Naimi. I mean, they may come back and say, you know what,
10 we're deciding not to proceed based on all the information we
11 received this morning, and then we'll decide where we go from
12 here. I think that they filed -- you may be right,
13 Ms. Cramer, but I think we just need some time to regroup. So
14 I'm going to allow us to come back for a status check in two
15 weeks -- two weeks, Mr. Naimi?

16 MR. NAIMI: I -- I said at minimum. I actually
17 prefer three, if you wouldn't mind.

18 THE COURT: I think three would be fine. We'll come
19 back in three weeks and see whether or not we're going to
20 proceed further. So we'll get that date.

21 THE CLERK: March 16th at 11:00 a.m.

22 THE COURT: March 16th, at 11:00 a.m.

23 MR. NAIMI: Thank you, Your Honor.

24 THE COURT: We need an order. Ms. Cramer, would you

1 prepare the order for today, and pass it to Mr. Naimi within
2 seven days? And he'll have --

3 MS. CRAMER: Yes, Your Honor.

4 THE COURT: -- he'll have --

5 MS. CRAMER: I will.

6 THE COURT: -- he'll have seven days to respond.

7 Okay. Thank --

8 MS. CRAMER: Okay.

9 THE COURT: -- thank you, everybody. We'll see you
10 in --

11 MR. NAIMI: Thank you, Your Honor.

12 THE COURT: -- on March 16th.

13 MS. CRAMER: You too, Your Honor.

14 THE COURT: Thank you. Bye-bye.

15

16 (PROCEEDINGS CONCLUDED AT 10:57:29)

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18 * * * * *

19 ATTEST: I do hereby certify that I have truly and
20 correctly transcribed the digital proceedings in the
21 above-entitled case to the best of my ability.

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23

24

/s/ Nita Painter
Nita Painter