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

3
4 AMANDA REED,
5 vs. Appellant,
6 DEVIN REED,
7 Respondent.

Case No. 83354
Electronically Filed
Jan 19 2022 02:28 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

8
9 **ERRATA TO APPELLANT'S CHILD CUSTODY FAST TRACK
STATEMENT**

10 PLEASE TAKE NOTICE that Appellant, Amanda Reed, by and through
11 her attorney of record, RACHEAL H. MASTEL, ESQ., of the KAINEN LAW
12 GROUP, PLLC, hereby submits an Errata to Appellant's Fast Track Statement
13 filed with this Court on January 10, 2022. After a review of the filed Fast Track
14 Statement, it came to the attention of undersigned counsel, that the *Summary of*
15 *the Argument*, had inadvertently been removed from the Fast Track Statement.
16 Attached hereto is a complete copy of the Amended Fast Track Statement.
17 Undersigned counsel requests that the attached Amended Fast Track Statement
18 replace the Fast Track Statement filed on January 10, 2022.

19 DATED this 19 day of January, 2022.

20
21 BY:


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CASE NO. 83354

11 **APPELLANT'S CHILD CUSTODY FAST TRACK STATEMENT**
12

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1. **Party filing Statement:** Amanda Reed

2. **Attorney submitting response:** Racheal Mastel, Esq., Kainen Law
Group, PLLC, 3303 Novat Street, Suite 200, Las Vegas Nevada, 89129. (702)
823-4900

3. **Proceedings raising same issues:** None. However, a prior appeal -
Reed v. Reed, Supreme Court case 83354 was filed July 2, 2019 and dismissed
by stipulation prior to the settlement conference or any briefing.

4. **Jurisdiction and Routing Statement:** This Court has jurisdiction
of this appeal under NRAP 3A(b)(1) and (8), as the Court's decision to vacate
the trial and modify custody without further evidentiary proceedings operated as
a "final order" regarding custody. The same is also a special order after the
purported final judgment, as the Decree had been entered and custody was being
addressed thereafter. This case is presumptively assigned to the Court of Appeals
pursuant to NRAP 17(b)(10). However, as this appeal will request either
clarification or modification of existing Nevada law, the same should be retained
by the Supreme Court, pursuant to NRAP 17(a)(12).

1 **5. Procedural history**

2 This case began in 2018, when Devin filed his Complaint for
3 Divorce on March 20th. APPX I:0001. Amanda filed her Answer and
4 Counterclaim on April, 10, 2018. APPX I:0009. A custody agreement was
5 reached and placed on the record on October 16, 2018. APPX I:0137-0139.
6
7 Thereafter, there remained several financial issues to be resolved. APPX I:0152;
8 I:0226-0227; II:0261-0266. In addition, there were near immediate Motions
9 related to further custody issues. APPX I:0145-0161.¹
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12
13 Custody concerns were still being addressed in 2019, despite the fact that
14 the divorce had not been finalized. The Motions requested changes to the
15 timeshare, among other things. APPX I:0145-0161; I:0223-0225; II:0250-0254;
16 II:0346-0378; II:0466-0489. The Court issued a Minute Order on April 8, 2019,
17 finding that a Custody Evaluation and a change of custody were sought, and
18 denying the requested relief. APPX II:0412-0413. That minute Order also gave
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24 ¹ Because of delays in any response from counsel, the Order from the hearing on
25 October 16, 2018, which resolved custody was not entered until four months
26 later, on February 27, 2019. APPX I:0150; II:0261-0266.

1 a discovery deadline and trial orders for addressing the financial issues. APPX
2 II:0413.

3
4 At the pretrial conference on June 11, 2019, the Court set a bench trial on
5 financial issues for September 12, 2019. APPX II:0433. After the June 11th
6 pretrial conference, Amanda filed a Notice of Appeal of the Court's denial of her
7 request for a custody evaluation. APPX II:0439-0441. However, on July 25,
8 2019, Amanda also filed a Motion to Modify Custody. APPX II:0466-0489. At
9 the hearing on August 27, 2019, the parties stipulated that Amanda would
10 dismiss the appeal and that Dr. John Paglini would perform a Custody
11 Evaluation. APPX III:0588-0589. A return hearing was set at a time after the
12 report was due to determine "if there is enough to proceed on a custody
13 modification." APPX III:0589; VI:1355. The parties then agreed to a senior judge
14 settlement conference for the financial issues. APPX III:0608. The Custody
15 Evaluation was received on January 27, 2020. APPX VI:1421-1422. The return
16 hearing was set for January 29, 2020, but the Court decided to set a future one
17 hour setting to address the evaluation. APPX III:0608.

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19 The settlement conference was held after the report was received, but
20 before a hearing on the same was conducted. APPX III:0623. Minutes were
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1 entered from the senior judge settlement conference which noted that there were
2 pending custody proceedings and the settlement agreement would not impact that
3 pending proceeding. APPX III:0623. The remaining financial issues were
4 resolved and the parties divorced. APPX III:0623-0624. The Decree of Divorce
5 was entered on April 6, 2020. APPX III:0632.
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7
8 On April 8, 2020, Amanda filed a Motion to adopt the recommendations
9 of the custody evaluation. APPX III:0705. On April 20, 2020, Devin opposed the
10 Motion. APPX IV:0772. A hearing was held on May 13, 2020. APPX IV:0845.
11 A Minute Order decision was issued later that same day that provided temporary
12 orders and set an evidentiary hearing. APPX IV:0837-0840. The Minute Order
13 was amended on May 26, 2020, to correct an error in requiring the parties to
14 attend a parenting class they both had already taken. APPX IV:0847-0851.
15 Pursuant to the Court's permission, Devin filed a Motion requesting primary
16 physical custody and to have the children attend the school for which he was
17 zoned on July 2, 2020. APPX IV:0924-0949. The trial was set for October 22,
18 2020. APPX IV:0975-0976. The Court set the Motion to be heard at the trial.
19 APPX V:0996-0997. Before the time of trial, Amanda filed a Motion for the
20 same to be conducted in person, partially because of the need to present video
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1 evidence APPX V:1078-1089. The parties thereafter stipulated to continue to the
2 trial to ensure they would be able to conduct the same in person. APPX V:1116-
3 1118. Although the Stipulation was entered on October 1, 2020, the Court denied
4 a continuance absent a stipulation on November 18, 2020, and directed that the
5 trial would be conducted by Bluejeans. APPX V:1119-1120.
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7
8 In January 2021, prior to the trial being conducted, the case was reassigned
9 administratively to Judge Shell Mercer and the trial was reset. APPX V:1132-
10 1133. However, on the day of the trial, Judge Mercer vacated the same, finding
11 that *McMonigle v. McMonigle*, 110 Nev. 1407, 887 P.2d 742 (1994), prevented
12 her from conducting a trial on a custody evaluation and facts which predated the
13 entry of the Decree of Divorce. APPX VI:1411; VI:1413; VI:1417-1423. On
14 March 17, 2021, Amanda filed a Motion for Reconsideration. APPX V:1175.
15 Devin opposed the same and countered to modify the timeshare and for other
16 custodial orders. After several status checks, the Court denied the Motion for
17 Reconsideration and Devin's request to modify the children's school. APPX
18 VI:1311. However, despite the denials, the Court entered a final decision,
19 modifying the timeshare and adding vacation time to the parties' schedule
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1 without conducting an evidentiary hearing. APPX VI:1311-1312. This appeal
2 followed.

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4 **6. Statement of Facts**

5 The parties in this matter have two minor children, Abigail (age
6 eight (8)) and Shawn (age six (6)). APPX I:0010. There were concerns expressed
7 early on in the case regarding domestic violence committed by Devin, as well as
8 drug addiction. APPX I:0023-0024. Initially the Court granted the parties joint
9 legal and joint physical custody on a temporary basis. APPX I:0129-0135. At the
10 hearing on October 16, 2018, the parties stipulated to continuing that timeshare
11 as a final agreement. APPX I:0137-0139. The parties also negotiated a partial
12 agreement in mediation, as to holidays, which was adopted as part of the
13 resolution. APPX I:0137-0139.

14
15 Almost immediately after that agreement was entered, there were
16 violations by Devin of the Behavior Order, which the Court put in place after
17 dissolving Amanda's Temporary Protective Order ("TPO"). APPX I:0145-
18 0161. There were also nearly immediate issues pertaining to Child Protective
19 Services ("CPS") involvement with Devin and his withdrawal of consent for
20 Abigail to attend therapy. APPX I:0199-0222. In response, the CPS records were
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1 sought, the Court Ordered that Abigail was to remain in therapy, and Devin was
2 ordered to get a full drug screen. APPX II:0275-0279.

3
4 Additional custody Motions, with allegations of medical neglect by Devin,
5 safety issues, and claims by both parties regarding continued parental conflict,
6 were filed within months thereafter. APPX I:0145-0161; I:0223-0225; II:0250-
7 0254; II:0346-0378; II:0466-0489. On April 8, 2019, the Court denied Amanda's
8 request for a custody evaluation and a trial on a change of custody and set
9 deadlines for discovery and pre-trial conferences to move the financial issues
10 forward. APPX II:0412-0413. Amanda filed an additional Motion to modify
11 custody, due to new concerning events related to the children, on July 25, 2019.
12 APPX II:0466-0489. The parties then stipulated to the Custody Evaluation, and
13 the Court set further proceedings, for after the report was finalized, to determine
14 if an evidentiary hearing on custody was warranted. APPX III:0588-0589.
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16
17 Subsequently, the parties resolved the financial issues at a senior judge
18 conference, with the exception of the pending custody litigation, which was
19 specifically excluded in both the minutes from the conference and the Decree
20 itself. APPX III:0623; III:0634. Two days later, Amanda filed a Motion to adopt
21 the recommendations in the evaluation. APPX III:0705. The evaluation made
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1 several recommendations related to custody, although it did not make a
2 recommendation related to physical custody, because Dr. Paglini was uncertain
3 as to whether the Court could utilize the pre-existing domestic violence. APPX
4 III:0710. Amanda's Motion also addressed further violations of the existing
5 Orders, including ones that post-dated the settlement conference. APPX III:0711-
6 0722. Devin opposed the Motion and a hearing was held on May 13, 2020.
7 APPX IV:0845. The Court issued a Minute Order, entering temporary custody
8 orders (modifying custody to grant Amanda temporary primary physical and sole
9 legal custody) and setting an evidentiary hearing. APPX IV:0837-0840.

14 Devin thereafter filed his own Motion requesting primary physical
15 custody, claiming that Amanda was a "pathogenic" parent, and that she had acted
16 with poor judgment in dating a man, and allowing him around the children, who
17 they later found out had been molesting Abby. APPX IV:0924-0949. The Court
18 set Devin's countermotion for the trial. APPX V:0996-0997. However, before the
19 trial could be conducted, the case was administratively reassigned to Judge Shell
20 Mercer. APPX V:1130-1131.

25 On the day of the trial, Judge Mercer vacated the same, finding that
26 *McMonigle* prevented her from conducting a trial on a custody evaluation and

1 facts which predated the entry of the Decree of Divorce. APPX VI:1411;
2 VI:1413; VI:1417-1423. Judge Mercer did allow the parties to set a status check
3 to see if there were any "post divorce" facts on which they wanted to proceed
4 with modifying custody. APPX VI:1424-1425; VI:1428; VI:1435. Judge Mercer
5 then denied Amanda's Motion for Reconsideration, despite the fact that, at the
6 initial hearing on the same, on April 30, 2021, she acknowledged the provision
7 directing further litigation on custody issues; but did not believe the same to be
8 effective. APPX VII:1442. *See Also* APPX VII:1517-1518. Judge Mercer then
9 denied Devin's request to modify the school the children attended at a status
10 check in June 2021. APPX V:1311. The Court also initially ordered that the
11 custody orders "stand." APPX VI:1268; VI:1278. Thereafter, the Court entered
12 a final decision, modifying the timeshare and adding vacation time to the parties'
13 schedule without conducting an evidentiary hearing. APPX V:1311-1312.

20 **7. Issues**

- 21
- 22 A. The Court erred in finding that there Nevada law prevented the
23 Court from holding an evidentiary hearing on custody under the
24 facts that predated the Decree and vacating the evidentiary hearing
25 as a result.
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1 B. The Court erred in modifying the parties custodial timeshare and
2 vacation provisions without conducting an evidentiary hearing.
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4 C. The Court erred in bifurcating the parties' divorce.
5

6 **8. Argument**

7 **Summary of the Argument**

8 The District Court bifurcated the divorce to address further custody
9 issues. Both the minutes from the parties' settlement conference, and the Decree
10 itself, reflected the fact that there was pending custody litigation and that
11 litigation would continue after the Decree was entered. That litigation included
12 a trial on custody issues. As such the Decree itself was an interlocutory Decree,
13 and it was proper for the Court to hold the trial and take evidence which post-
14 dated the Parenting Agreement (entered in 2018) but pre-dated the Decree
15 (entered in 2020). Ultimately, the case should not have been bifurcated in such
16 a way as to allow for the Decree to be entered before custody was resolved.
17 While bifurcation of the trials was appropriate, entry of the Decree was not.
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23 Further, because the Court failed to hold a trial, the modification of
24 the parties' timeshare and the addition of vacation privilege was improper. The
25 parties disagreed as to what modification of the timeshare was appropriate and
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1 the propriety of adding a vacation provision (as well as whether the same was left
2 out intentionally). Evidence not taken by the Court. In fact, before making the
3 modifications, the Court cautioned Devin's counsel that if she continued to make
4 arguments in support of her position, the Court would need to set an evidentiary
5 hearing. It is clear that the Court was aware there was no evidence before it to
6 support its Orders.
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10 **Standard of Review**

11
12 The district court has "broad discretion concerning child custody
13 matters." *Rooney v. Rooney*, 109 Nev. 540, 853 P.2d 123, 124 (1993), citing NRS
14 125.510 (repealed), *Culbertson v. Culbertson*, 91 Nev. 230, 533 P.2d 768 (1975),
15 *Paine v. Paine*, 71 Nev. 262, 287 P.2d 716 (1955). This court will not disturb
16 such determinations absent a clear abuse of discretion. *Ellis v. Carucci*, 123 Nev.
17 145, 149, 161 P.3d 239, 241 (2007). Abuse of discretion occurs when the
18 decision is "arbitrary or capricious or if it exceeds the bounds of law or reason."
19 *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). Further,
20 deference is not owed to legal error. *Davis v. Ewalefo*, 131 Nev. 445, 450, 352
21 P.3d 1139, 1142-11143 (2015).
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1 "A district court has the discretion to deny a motion to modify custody
2 without holding a hearing unless the moving party demonstrates 'adequate cause'
3 for holding a hearing." *Rooney*, 109 Nev. at 542-543. "'Adequate cause' arises
4 where the moving party presents a prima facie case for modification. To
5 constitute a prima facie case it must be shown that: (1) the facts alleged in the
6 affidavits are relevant to the grounds for modification; and (2) the evidence is not
7 nearly cumulative or impeaching." *Id.* at 543.

11 **A. The Court Erred When it Found That Nevada Law Prevented it from**
12 **Considering the Pre-decree Facts for Modification of Custody and**
13 **Vacating the Trial on That Basis.**
14

15
16 The parties in this case finalized custody by agreement in 2018,
17 substantially before resolving the divorce itself. Not long thereafter, and while
18 the divorce was still pending, additional custody issues arose, including issues
19 which made it apparent that the previously un-litigated domestic violence issues
20 were relevant and important. Because of discovery issues and continuing custody
21 litigation, the parties did not address property and support issues until 2020.
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25 By 2019, the district court was understandably concerned with the length
26 of time the divorce itself had been pending. Under Nevada Law, community

1 property does not end until the Decree of Divorce is entered. *McClintock v.*
2 *McClintock*, 122 Nev. 842, 138 P.3d 513, 516 (2006). Custody, on the other
3 hand, is always modifiable. NRS 125C.0045. This Court has found that Decrees
4 of Divorce require that community property be contemporaneously addressed,
5 but has permitted district courts to conduct separate trials and bifurcate cases.
6
7 *Gojack v. Second Judicial Dist. Ct.*, 95 Nev. 443, 445, 596 P.2d 237, 238-239
8 (1979). As such the district court directed that the community property to be
9 resolved, so that the Divorce could be finalized. APPX VI:1356-1357; VI:1361.
10 The Court specifically held open the matter of custody, to determine, after a
11 custody evaluation was completed whether there was ample evidence for holding
12 an evidentiary hearing on modifying the original parenting agreement. APPX
13 VI:1356-1357.

14 Amanda will address the propriety of the Court bifurcating custody herein
15 below. For the purposes of discussing the Court's error in failing to hold the
16 evidentiary hearing and consider the pre-Decree events, the fact that the Court
17 bifurcated the divorce is an accepted fact.

18 Custody may be modified at any time. NRS 125C.0045. However, prior
19 to modifying custody, the district court must hold an evidentiary hearing and

1 make specific findings of fact. *See Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213,
2 226 (2009), *Arcella v. Arcella*, 133 Nev. Ad. Op. 104, 407 P.3d 341 (Nev. 2017).
3
4 Generally, the evidence presented to the district court must post date the last
5 Custody Order. *McMonigle*, 110 Nev. at 1408. However, exceptions exist,
6
7 specifically to address domestic violence. *See Castle v. Simmons*, 120 Nev. 98,
8 86 P.3d 1042 (2004).
9

10 In *Castle*, this Court specifically found that "the doctrine of res
11 judicata...should not be used to preclude parties from introducing evidence of
12 domestic violence that was unknown to a party *or to the court* when the prior
13 custody determination was made." *Id* at 1047 (emphasis added). Therefore a
14 party is permitted to "introduce evidence of domestic violence if the moving
15 party *or the court* was unaware of the existence *or extent* of the conduct when the
16 court rendered its prior custody decision." *Id* (emphasis added).
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20 While it bears noting that at the beginning of the case (in 2018), Amanda
21 had filed for a TPO which was initially addressed by a Hearing Master and not
22 the District Court Judge, alleging certain acts of domestic violence, no
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1 evidentiary proceeding was held on those allegations.² Evidence which has not
2 been put through examination is nothing more than an offer of proof. "An offer
3 of proof obviously is not a proper substitute for the tender of evidence which has
4 never been presented and ruled upon." *Southern Pac. Transp. Co., v. Fitzgerald*,
5 94 Nev. 245, 579 P.2d 1251, 1252 (1978). *See also Rooney*, 853 P.2d at 125,
6 noting that allegations in affidavits and points and authorities are the basis to
7 decide whether or not to *set* an evidentiary hearing. *See also Moser v. Moser*, 108
8 Nev. 572, 836 P.2d 63 (1992).
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13 It is not disputed that the Court had never taken evidence on the issues of
14 domestic violence. Further, prior incidents of domestic violence may be
15 considered where new incidents occur, so long as there are also new incidents on
16 which to litigate. *Nance v. Ferraro*, 134 Nev. 153, 418 P.3d 679 (Nev.App.
17 2018). The record is replete with incidents which post date the 2018 parenting
18 agreement, as well as allegations related to other care and custody concerns
19 which post date that agreement. Were the Decree of Divorce to have been
20 completed around the same time as the parenting agreement, there would be no
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25 ² The District Court acknowledged the TPO, but did not take evidence. The TPO
26 was not extended a Behavior Order was issued. APPX I:0129-0135.

1 question that those later incidents would be appropriate consideration for the
2 court.
3

4 Further, it may be tempting to argue that Amanda's stipulation to the
5 original parenting plan created a presumption that, despite the prior acts of
6 domestic violence, Amanda believed the custody agreement was in the minor
7 children's best interests. However, such an agreement creates, at best, a rebuttable
8 presumption. NRS 125C.002, "when a court is making a determination regarding
9 the legal custody of a child, there is a presumption, affecting the burden of
10 proof..." NRS 125C.0025, "when a court is making a determination regarding the
11 physical custody of a child, there is a preference..." Therefore, even if this Court,
12 or the district court believed that Amanda's agreement obviated her argument that
13 domestic violence she had been aware of justified a change in custody, the same
14 required the district court to take evidence and determine if Amanda had (1)
15 rebutted the preference/presumption, or (2) if sufficient other evidence supported
16 a finding in the children's best interests to modify in spite of that preference.
17 Since the district court did not conduct an evidentiary hearing, and since there
18 were allegations sufficient to meet the *Rooney* standard which *post-dated* the
19 parenting agreement, this argument is nothing more than a red herring.
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1 What makes this particular case complicated (as well as similar cases, of
2 which there are several at any given time), is the nature of how divorce cases
3 with custody issues are resolved. Custody matters are generally decided
4 separately from, and prior to, property and financial matters. Like this case, that
5 occasionally means that custody issues may be "resolved" more than a year
6 before a Decree of Divorce is prepared. The legislature clearly anticipated that
7 because of the potential issues related to time, custody matters may need to be
8 revised prior to entry of the Decree itself - despite a so-called "final agreement."³
9
10 See NRS 125C.0045.

11
12
13 Further, this Court has addressed the impact of a "savings clause" relating
14 to custody, such as the one in this case, on a Decree. In *Ellet v. Ellet*, 94 Nev. 34,
15 573 P.2d 1179 (1978), this Court stated, "[a]n order or judgment which reserves
16 a question for future consideration and determination is interlocutory and is not
17 a final judgment." It is clear therefore, that the Decree of Divorce in this case is
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24 ³ Of course, no Custody Order is ever truly "final," as the Court maintains continued
25 jurisdiction to modify custody until the minor children turn 18. See NRS 125C.0045(1)(b);
26 *Mizrachi v. Mizrachi*, 132 Nev. 666, 385 P.3d 982, 986 (Nev.App. 2016).

1 interlocutory and therefore the custody orders therein are temporary, pending
2 further proceedings. *See Barry v. Linder*, 81 P.3d 537, 542 (2003).
3

4 As such, the custodial terms set forth in the Decree (reflecting the Order
5 from which a Motion to Modify was already pending), constituted an
6 interlocutory order, and the same does not implicate *McMonigle*. The Decree is
7 not a bar to hearing the facts on which the Motions to Modify were predicated,
8 as they clearing post-dated the "final" order, and the issues were held open for
9 consideration. The district court erred by refusing to hold the evidentiary hearing,
10 and by restricting the possible presentation of evidence regarding any
11 modification of custody to that evidence which existed only after entry of the
12 Decree itself.
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17 **B. The Court Erred in Modifying the Timeshare and Vacation Provision**
18
19 **Without an Evidentiary Hearing.**

20 "A court decision regarding visitation is a 'custody determination.'"
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22 *Wallace v. Wallace*, 112 Nev. 1015, 922 P.2d 541, 543 (1996). A visitation
23 schedule must be in the best interests of a child. *Id.* *See also* NRS
24 125C.010(1)(a). Whenever the Court modifies any aspect of custody, the court
25
26

1 must making findings related to the children's best interests. *Mizrachi*, 385 P.3d
2 at 986-987. *See also Miller v. Dussault*, 373 P.3d 943 (Table) (Nev. 2011).
3

4 Most of the cases which address modification of a timeshare, also involve
5 modifying the custodial designation as well, despite the fact that it is entirely
6 possible for the Court to modify the timeshare that exists without changing the
7 custodial definition. That specific scenario existed in the case of *Gordon v.*
8
9 *Geiger*, 133 Nev. Ad. Op. 69, 402 P.3d 671 (Nev. 2017). Therein, the mother
10 filed a motion for an Order to Show Cause on custody and support violations, as
11 well as to modify custody. The Court set an evidentiary hearing on the Order to
12 Show Cause. At the time of the Evidentiary Hearing, the Court further clarified
13 that the same was to hear from the father's probation officer regarding the
14 warrant for his arrest, which formed part of the basis for the request for the Order
15 to Show Cause. The Court specifically acknowledged the pending motion to
16 modify custody, but limited the trial to address the probation issues, which led
17 to a determination on the Motion for *legal* custody and child support issues.⁴ At
18 the close of the evidentiary hearing, the father's counsel made an oral request to
19 expand his visitation, although he had not previously made a request to modify
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⁴ The Court did allow the father to testify to financial matters.

1 custody. Just as Judge Mercer did in this case, the judge in *Gordon* denied the
2 Motion, but then *sua sponte* modified the timeshare and expanded the father's
3 time. The district court in *Gordon* based the order on an unrecorded child
4 interview and CPS reports. As Judge Mercer did, the district court in *Gordon*
5 denied the mother's request for reconsideration.
6

7
8 This Court, in considering the district court's order in *Gordon* found that
9 the district court had violated the mother's due process rights, as she had received
10 no notice that the father would be requesting an increase in visitation, and "she
11 was not afforded the opportunity to be heard and rebut the evidence upon which
12 the district court relied." *Id* at 674. This Court also noted that, "the district court's
13 findings are not supported by substantial evidence due to the fact that the court
14 relied upon the unrecorded child interviews and the unsubstantiated CPS report,
15 neither of which were admitted into evidence." *Id* at 675 (emphasis added).
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20 In this case, Judge Mercer's *sua sponte* decision had even less support
21 under Nevada Law. Although Judge Mercer ultimately concluded that her
22 modification of the schedule was in the minor children's best interest, because the
23 number of exchanges allowed for increased conflict, she stated very clearly at
24 multiple points that she was modifying the schedule because she "[didn't] like the
25
26

1 schedule." APPX VII:1536-1537. That is hardly an appropriate basis for
2 modification. Further, although she ultimately made a single "finding" (without
3 taking evidence or conducting a hearing), that arguably fell within NRS
4 125C.0035(4)(d) - the level of conflict between the parents - she did not address
5 any other factor in her decision. APPX VII:1537. The Court is required to
6 address each of the factors set forth in NRS 125C.0035(4), and any other relevant
7 factors in making a decision regarding a child's best interests. *Davis*, 352 P.3d at
8 1143-1144; *Nance*, 418 P.3d at 687.

13 Judge Mercer's addition of vacation time was similarly inappropriate under
14 Nevada law. Adding a provision which did not previously exist is absolutely a
15 substantial adjustment to the parties' rights and therefore clearly a modification.
16 *Mizrachi*, supra. Mother made allegations, in response to Judge Mercer's request
17 to understand why there was no vacation provision, that the exclusion was
18 intentional and negotiated. Under *Rooney*, supra, the Court had an obligation
19 therefore, to take evidence on that issue. Instead, Judge Mercer simply stated that
20 she "[thought] that both parties should be allowed to have vacation time" and
21 added the provision. APPX VII:1543-1546.

1 It is perhaps most distressing that Judge Mercer made repeated comments
2 that if Devin's counsel continued to offer evidence to justify his request to modify
3 the timeshare and add vacation time, she would be required to set an evidentiary
4 hearing. APPX VII:1536; VII:1542. It is completely apparent that Judge Mercer
5 understood that allegations in support of modifications to the timeshare and
6 custody provisions *required* an evidentiary hearing, and therefore she failed to
7 rely on evidence in making her *sua sponte* orders.
8

9
10 The Court is required to hold an evidentiary hearing prior to making
11 decisions to modify custody. *Rooney*, supra; *Arcella*, supra. The Court's *sua*
12 *sponte* Orders modifying the timeshare and adding a vacation provision to the
13 parties custodial arrangement was improper under Nevada Law. The Court's
14 orders violated Amanda's due process rights, and were decided both without
15 proper consideration of the best interest factors and without taking evidence. The
16 Court erred and the orders modifying the timeshare and adding a vacation
17 provision should be vacated, and the matter remanded for the Court to hold an
18 evidentiary hearing on the modification of the timeshare and any other provisions
19 which either party requests the court to add or modify.
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...

1 **C. The Court Erred in Bifurcating the Parties Divorce**

2 This Court has addressed the propriety of bifurcating divorce cases only
3
4 a handful of times. Bifurcation has been permitted of *trials* in divorce cases,
5
6 however, the Court noted that the Divorce Decree *must* contemporaneously
7 determine "property and related rights and responsibilities of the parties."
8
9 *Gojack*, 596 P.2d at 239. *See also Smith v. Smith*, 100 Nev. 610, 691 P.2d 428,
10 431 (1984); *Ellett*, *supra*. *Gojack* does not specifically address custody --
11 however the language presumably indicates the custody too must have a final
12 determination in a Divorce Decree. As *Gojack* notes, "a judgement of divorce
13 shall be a final decree...[and] shall fully and completely dissolve the marriage
14 contract as to the parties." *Id.* As set forth above, a Decree which leaves open
15 issues for future consideration is interlocutory and not final. *Gojack* warned
16 against the issues an interlocutory divorce decree could create, noting "such a
17 departure would lead to numerous problems inevitably flowing from an interim
18 divorce decree..." *Id.* Those problems are clearly highlighted in the issues
19 addressed in this appeal.
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25 While bifurcation of trials is permitted, that is not what happened in this
26 case, nor was it the district court's intent. Judge Gentile clearly stated that she

1 wanted to "get these parties divorced," APPX VI:1361. This statement was made
2 during the hearing where it was determined that the Court would review Dr.
3 Paglini's report to determine if an evidentiary hearing to modify custody was
4 appropriate. The district court even made it clear that custody would not be
5 considered resolved in the Decree, and the savings clause in the minutes from the
6 settlement conference and in the Decree itself support that conclusion as well.
7 APPX III:0634. It is abundantly clear, that the Court bifurcated custody from the
8 divorce.
9

10 While the Court has not specifically addressed the propriety of bifurcating
11 custody, *Gojack* is still applicable. Where the parties are going through a divorce
12 it is important that all related issues (other than enforcement) need to be
13 addressed in the Decree, especially in light of the case law for modification and
14 the difference between temporary, interlocutory Orders and final Orders.
15

16 The district court erred when it bifurcated the divorce.
17

18 Amanda acknowledges that this may be a harmless error, as the same will
19 not be relevant, should this Court determine that the district court erred in failing
20 to (1) hold an evidentiary hearing on the modification of custody and (2) in
21 failing to consider the post-parenting agreement, but pre-decree, facts in its
22

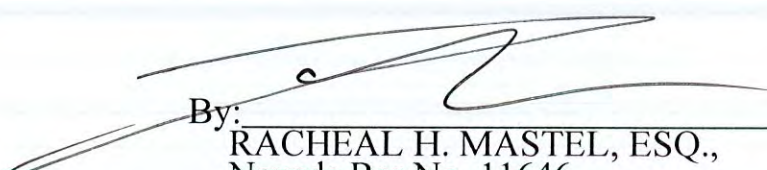
1 analysis. However, the error has complicated this process, and necessitated this
2 appeal, and therefore Amanda believes it is important for this Court to clarify that
3 bifurcation of custody from the divorce decree is improper and the Court erred
4 in doing so.
5

6
7 **9. Issues of First Impression**

8
9 There are no issues of first impression.

10 **10. Conclusion**

11
12 Based on the foregoing, Amanda requests that this Court find the
13 district court erred in its Order finding that an evidentiary hearing to modify
14 custody could not be based on facts which predated the interlocutory decree, in
15 modifying custody *sua sponte* without an evidentiary hearing, and in bifurcating
16 the divorce. Amanda requests this Court reverse and remand the matter to the
17 district court for an evidentiary hearing on custody and order that the district
18 court consider all evidence which post-dates the 2018 parenting agreement.
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21

22
23 By: 

24 RACHEAL H. MASTEL, ESQ.,
25 Nevada Bar No. 11646
26 Attorney for Respondent

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this fast track statement 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 this fast track response has been prepared in a proportionally spaced typeface using Word Perfect X5 in 14-point Times New Roman style;

2. I further certify that this fast track response complies with the page- or type-volume limitations of NRAP 3E(e)(2) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), because it is proportionately spaced, has a typeface of 14 points or more, and contains 5065 words;

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 therefor certify that the information provided in this fast track response is true and complete to the best of my knowledge, information and belief.

Dated this 19 day of January, 2022.

By: 

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CERTIFICATE OF SERVICE

I the undersigned hereby certify that I am an employee of the KAINEN LAW GROUP, PLLC, located at 3303 Novat Street, Suite 200, Las Vegas, Nevada 89129, and on the 19th day of January, 2022, I served a true and correct copy of the *Errata to Appellant's Child Custody Fast Track Statement* on all interested parties to this action as follows:

_____ Depositing in a sealed envelope placed for collection and mailing in the United States Mail, via 1st class, postage prepaid, at Las Vegas, Nevada, following ordinary business practices:

_____ Personal Delivery:

_____ Facsimile:.

_____ Overnight delivery via Federal Express or other postal carrier:

_____ Certified Mail with Return Receipt Requested:

☒ Electronically through the Court's ECF system:

Michancy Cramer

Alex Ghibaud

_____ Email:



An Employee at the Kainen Law Group, PLLC