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Elizabeth A. Brown
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IN THE SUPREME COURT OF THE STATE OF NEVADA

AMANDA REED, Appellant, vs. DEVIN REED, Respondent.	Nev. Sup. Ct. No.: 83354 **CHILD CUSTODY FAST TRACK RESPONSE**

1. **NAME OF THE PARTY FILING THIS FAST TRACK STATEMENT:**

   Respondent, Devin Reed

2. **NAME, LAW FIRM, ADDRESS, AND TELEPHONE NUMBER OF ATTORNEY SUBMITTING THIS FAST TRACK STATEMENT:**

   Alex Ghibaudo, Esq., Nev. Bar No. 10592
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   Las Vegas, Nevada 89104
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3. **JUDICIAL DISTRICT, COUNTY, AND DISTRICT COURT DOCKET NUMBER OF LOWER COURT PROCEEDINGS:**

   Eighth Judicial District Court, Clark County, Nevada, Department U, District Court Case No. D-20-601936-D.

4. **PROCEDURAL HISTORY. BRIEFLY DESCRIBE THE PROCEDURAL HISTORY OF THE CASE ONLY IF DISSATISFIED WITH THE HISTORY SET FORTH IN THE FAST TRACK STATEMENT**:

   The procedural history Appellant describes is satisfactory.

5. **STATEMENT OF FACTS. BRIEFLY SET FORTH THE FACTS MATERIAL TO THE ISSUES ON APPEAL ONLY IF DISSATISFIED WITH THE STATEMENT SET FORTH IN THE FAST TRACK STATEMENT (PROVIDE CITATIONS FOR EVERY ASSERTION OF FACT TO THE APPENDIX, IF ANY, OR TO THE ROUGH DRAFT TRANSCRIPT**:

   The statement of facts Appellant describes is satisfactory.

6. **ISSUES ON APPEAL. STATE CONCISELY YOUR RESPONSE TO THE PRINCIPAL ISSUES IN THIS APEAL**:

a. The Court erred in finding that Nevada law prevented the Court from holding an evidentiary hearing on custody under the facts that predated the Decree and vacating the evidentiary hearing as a result.

The district court did not err or abuse its discretion because the decree of divorce at issue was in fact a final order.

b. The district court erred in modifying the parties custodial timeshare and vacation provisions without conducting a trial.

This is not the case. The district court denied Respondents countermotion in that respect.

c. The district court erred in bifurcating the parties' divorce.

The decree of divorce was a full and final settlement of all issues and a final order. Thus, the case was never bifurcated.

7. **LEGAL ARGUMENT, INCLUDING AUTHORITIES**:

A. **STANDARD ON REVIEW**

a. Child custody decisions are reviewed for an abuse of discretion.

This court reviews a child custody decision for an abuse of discretion. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007). In reviewing child custody determinations, this court will affirm the district court's determinations if they are supported by substantial evidence. *Id*. at 149, 161 P.3d at 242. Substantial evidence is that which a reasonable person may accept as adequate to sustain a

judgment. *Id*. When making a custody determination, the sole consideration is the best interest of the child. NRS 125C.0035(1); *Davis v. Ewalefo*, 131 Nev. 445, 451, 352 P.3d 1139, 1143 (2015). Further, This Court presumes the district court properly exercised its discretion in determining the child's best interest. *Flynn v. Flynn*, 120 Nev. 436, 440, 92 P.3d 1224, 1226-27 (2004). In addition, "[t]his court conducts a de novo review of the district court's conclusions of law." Id.; see also, *SIIS v. United Exposition Services Co.*, 109 Nev. 28, 30, 846 P.2d 294, 295 (1993).

B. The district court did not err or abuse its discretion in vacating the trial.

In an effort to circumvent the *McMonigle* and *Castle* doctrines, Appellant advances the novel argument that the decree of divorce at issue is an interlocutory order. A curious argument indeed since, if that were the case, this Court would lack jurisdiction to entertain this interlocutory appeal under NRAP 3A(b) et seq., which does not grant this Court to consider such appeals. In fact, a final order, i.e., the decree of divorce at issue, was entered on April 6, 2020. That decree disposed of all the issues presented in the case:

1. *Physical and legal custody*
2. *Timeshare*
3. *Holidays*
4. *A mutual behavior order*
5. *Transportation of the children*
6. *Communications*
7. *Child support*

8. Arrears
9. Health insurance
10. Medical arrears
11. Income taxes
12. Distribution of assets and debts
13. Retention of married name
14. Attorney's fees; and
15. Statutory notices

In other words, every issue to be adjudicated in any divorce proceedings, including a statement that the parties are incompatible in marriage, are addressed in the parties' decree of divorce. This Court has previously declared that "a final judgment is one that disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs." *Lee v. GNLV Corp.*, 116 Nev. 424, 426 (Nev. 2000). In that case, the Court further stated that:

> "[t]his court determines the finality of an order or judgment by looking to what the order or judgment actually does, not what it is called." We thus found labels to be inconclusive when determining finality; instead, we recognized that this court has consistently determined the finality of an order or judgment by what it substantively accomplished.

Here, what the entry of the decree actually accomplished is the parties' divorce, and all issues pertaining to the marriage were addressed in the divorce decree. Hence, it is a final order. It should be noted that, as in the case cited supra, in *Rivero v. Rivero*, this Court held that the "parties may enter into custody agreements and create their own custody terms and definitions. The courts may enforce such agreements as contracts. However, once the parties move the court

to modify the custody agreement, the court must use the terms and definitions under Nevada law." *125 Nev. Adv. Op. No. 34, 46915 (2009)*, 216 P.3d 213, 3-4 (Nev. 2009).

Here, Appellant moved to modify custody. Hence, Nevada law applies, not any novel provision the parties agreed to in negotiating the agreement. And, this decree was indeed negotiated. The parties agreed to a provision that makes little sense and qualifies as terrible public policy[1] in addition to unintelligible gibberish. That provision states: *The parties acknowledge that there is currently a requesting (sic) pending by Defendant to modify custody. Nothing in this Decree shall act as a waiver of Defendant's right to pursue said request.*[2] Page 3, line 14 of DOD. In other words, the provision restates the law – nothing in the decree prohibited Appellant from filing a motion to modify custody after entry of said decree of divorce.

[1] Imagine the avalanche of litigation that would ensue if, with a simple statement as the one at issue, lawyers and litigants that maintain temporary orders ad infinitum.

[2] A review of the register of actions in this matter indicates that there was no pending motion to modify or otherwise change custody prior to the entry of the decree. The motion to modify custody and adopt Paglini's recommendations was actually in Appellant's possession for just over two (2) months before the decree was entered and noticed. See…ROA. Furthermore, as the district court noted, the language is vague, ambiguous, and subject to multiple interpretations. It is illogical that Plaintiff would agree to continue litigating child custody in the same contract that the parties agree to fully and completely resolve all pending custody issues. Moreover, when a contract is ambiguous, it will be construed against the drafter, i.e. Defendant herein. *Williams v. Waldman*, 108 Nev. 466, 836 P.2d 614, 619 (1992).

However, once that motion is filed, Nevada law applies, not whatever terms the parties and their lawyers cooked up. That is, Appellant must demonstrate that it is in the child's best interest to modify custody and only facts after a final order is entered may be considered, with the exception of acts of domestic violence the Court was either not aware of or was not aware of the extent of the same. Here, Appellant argues, in an effort to avoid the *McMonigle* and *Castle* doctrines, that the district court was neither aware of the domestic violence allegations or the extent of the same. This is simply not true. Dr. Paglini's report was the centerpiece of the May 13th, 2020 hearing conducted by Judge Gentile.

Not only was it Dr. Paglini's report that was discussed, but a litany of other instances of alleged violence, hostility and neglect alleged by Appellant. See page 7, 17-19. In addition, by her own admission, Appellant had the report in her possession since January 27th, 2020, as did, presumably, the district court. Thus, to now allege that all parties were ignorant of what was Appellant's chief complaint, which was relayed to Judge Gentile incessantly, is, at best, disingenuous.

Despite that, Appellant now makes the misleading claim that the Court did not know the extent of the domestic violence she alleged throughout the litigation, ad nauseum. Indeed, the theme of the divorce was that Respondent was violent and abusive, and that allegation was advanced in nearly every motion and at every hearing.

It should be noted that though Dr. Paglini's report is referenced repeatedly and forms the centerpiece of Appellant's contention that there is cause to adopt Paglini's recommendations, that report is missing from the Appellant's appendix.[3] It must be presumed, therefore, that the missing report supports Judge Mercer's refusal to move forward with Appellant's request, which is the subject of this appeal. *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (When an appellant fails to include necessary documentation in the [appellate] record, we necessarily presume that the missing portion supports the district court's decision."). All that the Court is left with to consider, therefore, are arguments of counsel with respect to Paglini's report and its veracity. ""Arguments of counsel [, however,] are not evidence and do not establish the facts of the case,"" *Nev. Ass'n Servs., Inc. v. Eighth Judicial Dist. Court of State*, 338 P.3d 1250, 1255 (Nev. 2014).

Finally, Pursuant to EDCR 2.23(c) and 5.501(b), the district court can consider a motion and issue a decision on the papers at any time without a hearing. After considering the papers and pleadings that led to the evidentiary hearing Appellant now complains was improperly dismissed, the district court correctly concluded that McMonigle applied and Castle did not. The district court was

[3] The Court should take note that the appendix provided by Appellant is hardly of use and has delayed these proceedings by their length and extraordinary disorganization.

authorized to take such action by local rule. This Court should, therefore, disregard Appellant's argument entirely and affirm the district court's decision.

C. The district court did not modify the visitation schedule rendering this issue moot.

Matters of custody and support of minor children rest in the sound discretion of the trial court. *Culbertson v. Culbertson*, 91 Nev. 230, 233, 533 P.2d 768, 770 (1975). A court decision regarding visitation is a "custody determination." NRS 125A.040(2). It is presumed that a trial court has properly exercised its discretion in determining a child's best interest. *Wallace v. Wallace*, 112 Nev. 1015, 1019 (Nev. 1996)

The *Wallace* case is a case that is not entirely clear with regard to the need for evidentiary hearings when the change in visitation is of minor impact. In discussing the case, the Court specifically noted that:

> We conclude that the district court's judgment in regard to visitation was precipitous and must be reversed. The court characterized the case before it as basically a dispute over whether Drake should spend Wednesday nights with his father **but then went well beyond that contested dispute and ordered visitation of much greater impact**. The court had little or no factual basis to determine that the visitation ordered was in Drake's best interest, and Tracy had no notice that the court would be considering visitation requiring Drake to travel thousands of miles and therefore had no opportunity to present vidence on that issue.

Wallace v. Wallace, 112 Nev. 1015, 1020 (Nev. 1996) (Emphasis added). It would be reasonable to conclude, by the highlighted portion of this Court's comment, that

it was the impact of the visitation schedule and lack of notice that led to this Court's conclusion that an evidentiary hearing is warranted.

However, in this case, there was notice. Respondent's countermotion requested a change in visitation, so the Appellant had notice that that was an issue that would be addressed. Indeed, Appellant in fact replied to that countermotion. The Change in visitation actually did not occur. The Court ordered as follows with regard to visitation: CUSTODY STANDS. This, therefore, is a non-issue. That being said, it is an interesting question whether the extent of the impact and change in visitation could, in some cases, trigger an evidentiary hearing and in other cases not necessitate the same.

D. The argument in section C supra applies here: there was no bifurcation because the matter was negotiated and led to a final order.

Here, there is nothing in the record that suggests that the trial was bifurcated. The same analysis advanced in section A above applies here: there was a final order and the language relied upon to suggest the matter was bifurcated does not have any force or effect, in part because it is vague and ambiguous, and mostly because the order is final. No bifurcation occurred because there was no trial. The matter was settled and the language justifying Appellant's position has no force or effect in any manner. As such, this Court should disregard this argument.

E. **PRESERVATION OF ISSUES. STATE CONCISELY YOUR RESPONSE TO APPELLANT'S POSITION CONCERNING PRESERVATION OF ISSUES ON APPEAL:**

This is not directly applicable to the present case. Respondent requests leave to supplement this response should Stephanie seek to argue issues not preserved for appeal.

DATED this 11th day of February, 2022.

/s/ Alex Ghibaudo
ALEX B. GHIBAUDO, Nevada Bar No. 10592
ALEX B. GHIBAUDO, PC
Attorney for Respondent

CERTIFICATE OF COMPLIANCE

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: This fast track response has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013, in fourteen (14) point Times New Roman font.
2. I further certify that this fast track response complies with the page-or type-volume

   limitations of NRAP 3C(h)(2) because it is proportionately spaced, has a typeface of 14 points or more and contains 2556 words.

3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track response is true and complete to the best of knowledge, information and belief.

DATED this 11th day of February, 2022.

/s/ Alex Ghibaudo
ALEX B. GHIBAUDO, Nevada Bar No. 10592
ALEX B. GHIBAUDO, PC
Attorney for Respondent

CERTIFICATE OF MAILING

I certify that on the 11th day of February, 2022, I served a copy of this FAST TRACK RESPONSE upon Respondent through the Supreme Court's efiling system to:

RACHEAL MASTEL, ESQ.
KAINEN LAW GROUP, PLLC
service@kainenlawgroup.com

ATTORNEYS FOR RESPONDENT Devin Reed

Dated this 11th Day of February, 2022.

/s/ Alex Ghibaudo, Esq.

Alex B. Ghibaudo, PC