IN THE SUPREME COURT OF THE STATE OF NEVADA

DESMON BRANDES,

Appellant,

vs.

LACEY PICTUM,

Respondent.

Supreme Court Case No: **83399**
District Court Case No. **D-10-440022-C**

CHILD CUSTODY FAST TRACK STATEMENT

1. FILING PARTY: Appellant Desmon Brandes

2. COUNSEL FOR FILING PARTY:

Bruce I. Shapiro, Esq. and Jack W. Fleeman, Esq. of Pecos Law Group, 8925 South Pecos Road, Suite 14A, Henderson, Nevada 89074, (702) 388-1851.

3. JUDICIAL DISTRICT, COUNTY, AND DISTRICT COURT DOCKET NUMBER OF LOWER COURT PROCEEDINGS:

Eighth Judicial District Court (Family Division), Clark County, Case No. D-10-440022-C.

4. NAME OF JUDGE ISSUING JUDGMENT OR ORDER APPEALED FROM:

Honorable Charles Hoskin

5. LENGTH OF EVIDENTIARY HEARING:

One-half day.

6. WRITTEN JUDGMENT APPEALED FROM:

Findings of Fact, Conclusions of Law and Order.

7. DATE OF SERVICE OF NOTICE OF ENTRY OF JUDGMENT:

June 7, 2021.

8. DATE OF ANY TOLLING MOTION(S):

June 18, 2021 (*denied* July 22, 2021).

9. NOTICE OF APPEAL FILING DATE:

August 17, 2021.

10. RULE GOVERNING THE TIME LIMIT FOR FILING THE NOTICE OF APPEAL:

NRAP 4(a)(1).

11. RULE GRANTING THIS COURT JURISDICTION TO REVIEW THE JUDGMENT:

NRAP 3A(b)(1) and NRAP 3A(b)(7).

12. PENDING AND PRIOR PROCEEDINGS IN THIS COURT:

There have been no prior proceedings before this Court.

13. PROCEEDINGS RAISING SAME ISSUES:

Not applicable.

14. PROCEDURAL HISTORY:

This case involves a post-divorce child custody proceeding. Appellant filed to modify custody – initially to joint physical custody and then to primary physical custody. After several hearings and discovery, the district court conducted an evidentiary hearing on June 1, 2021. After taking the matter under advisement, the court issued its *Findings of Fact, Conclusions of Law and Order* on June 7, 2021.

15. STATEMENT OF FACTS:

Appellant **Desmon Brandes** ("Desmon") and Respondent **Lacey Pictum** ("Lacey") were never married, but have one minor child in common: *Paige Jolie Brandes*, born April 5, 2007 ("Paige"). *See* Appellant's Appendix ("AA") 34.

In 2011, during the parties' initial custody proceedings, Desmon sought primary physical custody of Paige because of Lacey's continuing drug addiction and emotional issues. I AA 34. The district court granted Desmon temporary primary physical custody and ordered Lacey to take a drug test. I AA 04.

As the initial proceedings progressed, Lacey appeared to gain, and maintain, her sobriety. I AA 34. Accordingly, Desmon, who mistakenly believed that one parent was required to be awarded primary physical custody, agreed via the parties' July 5, 2011 Stipulation and Order, that Lacey would have primary physical custody of Paige. I AA 14, 34-35. Desmon further agreed to, and was granted, visitation "every two (2) days on weekdays and every other weekend." I AA 14.

Within a couple of months of the entry of the 2011 Stipulation and Order, Lacey relapsed and went to an in-patient rehabilitation center. I AA 35, 151, II AA 258-59. The parties agreed that based on Lacey's drug addiction, it would be best for Paige to live primarily with Desmon. II AA 259.

After she completed her 45-day in-patient drug treatment program, Lacey continued to abuse drugs. II AA 261. Based on Lacey's continued drug use, the parties agreed that Lacey's parents would supervise her visitations with Paige. I AA 83, 252. Lacey had only supervised visitation with Paige between late 2011 and August 2015. II AA 252-53. Lacey's specific supervised visitation schedule was every other weekend, except for summers, when the schedule would alternate to Desmon having Paige every weekend. II AA 253.

Lacey moved out of her parents' home in August 2015, and initially claimed that she has been "drug free since that time." I AA 52, II AA 253. Lacey walked back that statement at trial, however, admitting that she consumes marijuana as well as alcohol. II AA 267. Lacey then maintained that what she actually meant was that she had not used "opiates" since 2015.[1] II AA 267.

When Lacey moved out of her parents' home in or about August 2015, and with the understanding that Lacey would remain sober, the parties agreed that

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[1] Lacey's child, Resse, was born addicted to opiates in January 2015. II AA 262.

Lacey's visitations, which would remain every other weekend in addition to time during the summer, would no longer need to be supervised. II AA 253.

Desmon believed that Lacey had remained sober until approximately December 2020, when he was informed that Lacey was moving slowly, slurring her speech, and having trouble maintaining her lane while driving with Paige in her care. I AA 90-91. Desmon then later he learned, via a production to a discovery subpoena, that in 2018 Lacey had been fired from her last employer under circumstances that indicated drug abuse. II AA 263-64. In 2018, Lacey's employer twice found her unresponsive at her work desk. II AA 263-64. On at least one of those occasions, Lacey was blue and pale with a weak pulse, and was unresponsive for eight minutes. II AA 263.

Lacey claimed that these incidents in 2018 were related to her gallbladder and appendix and had anything to do with opiates. II AA 265. Despite this explanation, Lacey testified that against her doctor's advice, she refused to have her appendix removed. II AA 265. Lacey also acknowledged that she refused to sign a HIPAA release to allow Desmon to obtain her medical records, which would have shown the true nature of her medical emergencies in 2018. II AA 266.

Not yet aware of the troubling work incidents in 2018, and having no reason to believe that Lacey was using drugs again, in November 2020, Desmon filed a motion to modify custody to joint physical custody. I AA 33. Desmon filed his

motion because a child support case had been filed against him alleging that he owed arrears dating back to 2011. I AA 34. Desmon also wanted the *de facto* joint physical custody arrangement, that had existed since August 2020, to be reflected in a court order. II AA 238.

Lacey did not open the child support case in 2020; rather it was opened by the District Attorney when Lacey started receiving cash benefits through welfare. II AA 273. Nevertheless, Lacey failed to tell the District Attorney that Desmon had Paige in his primary care for almost the entirety of the time since 2011, that they had been exercising *de facto* joint physical custody since August 2020, and that she had agreed that he did not need to pay her child support when he took *de facto* custody in late 2011. II AA 272-73.

In December 2020, just a month after Desmon requested joint physical custody, Paige told her sister that Lacey appeared to be abusing drugs. I AA 90-91, 117, II AA 242-46. According to Paige, Lacey was driving slowly, swerving, and Paige was worried they would get into a car accident. I AA 244. Afraid of her mom's condition, Paige told Lacey that she wanted to live with Desmon primarily, and Lacey agreed that she could do so. II AA 238, 242-46, 260-61. Desmon then modified his request with the court and requested that he be granted primary physical custody. I AA 81-92.

On June 1, 2021, the court held the evidentiary hearing on custody. By that time, Paige had been in Desmon's primary care, by agreement of the parties, for approximately five months. I AA 179, II AA 260, 292.

At the close of evidence, and after hearing closing arguments, the district court took the matter under advisement. II AA 302. On June 6, 2021, the district court issued its *Findings of Fact, Conclusions of Law and Order* (hereinafter the "Order"). I AA 169-89.

The Order contained numerous findings of fact, including the following, which are relevant for this appeal:

> 1. Beginning in late 2011 or early 2012, just months after the order was entered, Desmon began exercising *de facto* primary custody.[2]
>
> 2. Lacey had confirmed that "since 2011, she has not exercised primary physical custody."[3] Lacey further "confirmed that, following rehab, she left the child primarily with Desmon."[4]
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> 3. For the eight years between early 2012 and March 2020, Desmon had primary custody and Lacey had visitation every other weekend.[5]

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2 I AA 172.

3 I AA 174.

4 I AA 175.

5 I AA 173-74.

> 4. From March 2020 through December 2021, the parties shared joint physical custody.[6]
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> 5. From January 2021 through May 2021, Desmon had virtually sole custody.[7] This occurred after "Lacey agreed that the child could remain primarily with Desmon."[8]

After setting forth its findings of fact, the district court provided its conclusions of law. I AA 176-87. In its conclusions of law, the district court stated that a modification of child custody from the previous award of primary physical to Lacey, was appropriate. I AA 177-85.

First, the district court found that the "ongoing and continuing maintaining of *de facto* primary custody to the 'non-custodial' parent for such a substantial period of satisfies a substantial change of circumstances affecting the child. Thus, Desmon meets the first prong under *Ellis*." I AA 181. Second, the district court determined that Desmon had successfully met his burden to show a modification was in Paige's best interests. I AA 185.

The district court supported its conclusion that Desmon had proven Paige's best interests required a modification of custody, issuing specific findings under the

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6 I AA 174.

7 I AA 171.

8 I AA 174.

statutory best interests factors found in NRS 125C.0035(4). I AA 182-85. The district court found the following best interests factors in "favor of Desmon":

> (a) The wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his or her physical custody. I AA 182.
>
> (f) The mental and physical health of the parents. I AA 183.
>
> (i) The ability of the child to maintain a relationship with any sibling. I AA 184.

As to all other best interests factors, the court determined that they were either neutral or that no evidence had been presented. I AA 181-185.

In spite of determining that Desmon had three best interests factors in his favor, including a determination that Lacey's "demonstrated addiction issues" had a negative impact on Paige, the court nevertheless decided to grant the parties joint physical custody. I AA 185. The court then set forth a joint physical custody schedule, as follows:[9]

> Week One: Desmon shall have custodial time with the child from Wednesday through Friday.
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> Week Two: Desmon shall have custodial time with the child from Thursday through Sunday.
>
> The balance of the custodial time shall be exercised by Lacey.

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[9] I AA 189.

The above custodial schedule does not include any specific exchange times, nor does it account for the undisputed fact that at no time in the prior ten years did Lacey have Paige during the school week. I AA 194. It also does not consider that at trial, Lacey only requested weekend time with Paige – reflecting the fact that she never had time during the school week. II AA 298-99. In fact, when the district court specifically asked Lacey at the end of the evidentiary hearing, "What are you asking for?" Lacey said she wanted every weekend from Friday to Sunday or Friday to Monday. II AA 298. Later, when pressed by the court, she said that she would even take every other weekend if Desmon wants some weekend time too. II AA 299. It was only after the court continued to press that Lacey finally relented and said she wanted "half and half" custody. II AA 299.

Following the issuance of the court's Order, Desmon filed a motion to alter, amend, and clarify the court's findings. I AA 190-97. In his motion, Desmon pointed out that the despite the findings that he had been the primary custodian for nearly ten years; that he had always had Lacey during the school week; and Lacey had only asked for weekend time, the court appeared to have granted him less than 50% of the time with Lacey.[10] I AA 194. Desmon also argued that the decision

[10] The exact percentage of time could not be determined because the court did not include any specific exchange times. Desmon asked that the court provide specific exchanged times if the court was going to deny his motion to amend. I AA 196.

granting joint physical custody did not correspond to the court's findings that specific best interests factors favored him, while none favored Lacey. I AA 195.

The court denied Desmon's motion to alter, amend, and clarify without any analysis or explanation, stating only that "there is no basis to amend its findings or make additional findings . . . ." I AA 209. This appeal then followed.

16. ISSUES ON APPEAL:

A. Whether the district court abused its discretion in awarding the parties' joint physical custody.

B. Whether the district court's joint physical custody schedule is in the child's best interests in light of the evidence and the district court's own findings.

17. LEGAL ARGUMENT, INCLUDING AUTHORITIES:

A. Standard of Review

This court reviews child custody orders for an abuse of discretion.[11] While "[m]atters of custody and support of minor children rest in the sound discretion of the trial court,"[12] substantial evidence must support the court's findings, which is

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[11] *Lewis v. Lewis*, 373 P.3d 878, 881 (2016) (citing *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007)).

[12] *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996) (citing *Culbertson v. Culbertson*, 91 Nev. 230, 233, 533 P.2d 768, 770 (1975)).

"evidence that a reasonable person may accept as adequate to sustain a judgment."[13] "Although this court reviews a district court's discretionary determinations deferentially, deference is not owed to legal error or to findings so conclusory they may mask legal error."[14] This court must also be satisfied that the district court's determination was made for the appropriate reasons.[15]

The granting or denial of an award of attorney's fees in divorce proceedings "lies within the sound discretion of the trial judge" and is also reviewed for an abuse of discretion.[16]

B. Summary of Argument

The court's order ignored (1) the historical custodial arrangement of Desmon having physical custody of Paige during the school week; (2) the explicit request by Lacey that she continue to have only weekend time; and (3) its own findings when granting joint physical custody to the parties.

C. The District Court's Custody Decision Was Not Supported By Substantial Evidence.

i. The Standard of Proof in All Domestic Relations Civil Matters Is the Preponderance Of the Evidence Standard, And Primary Physical

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13 *Ellis*, 123 Nev. at 149, 161 P.3d at 241-42 (citing *Williams v. Williams*, 120 Nev. 559, 566, 97 P.3d 1124, 1129 (2004)).

14 *Davis v. Ewalefo*, 131 Nev. Adv. Op. 45, 352 P.3d 1139, 1142 (2015).

15 *Sims v. Sims*, 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993).

16 *Sogge v. Sogge*, 94 Nev. 88, 89, 575 P.2d 590, 591 (1978).

Custody May Be Modified Upon A Showing of a Substantial Change Affecting the Welfare of the Child and Best Interests.

Unless specified by statute, the standard of proof in all domestic relations civil matters is the preponderance of the evidence standard.[17] Indeed, "[t]he law requires nothing to be conclusively proven … All that is generally required in civil actions is a preponderance of the evidence upon any issuable fact."[18] "Preponderance of the Evidence" has been defined as follows:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.[19]

"In any action for determining physical custody of a minor child, the sole consideration of the court is the best interest of the child."[20] In determining the best interest of a child, the court considers the factors set forth in NRS 125C.0035(4). In determining whether to modify an order granting primary physical custody, before analyzing the child's best interests.[21]

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17 *Mack v. Ashlock*, 112 Nev. 1062, 1066, 921 P.2d 1258, 1261 (1996).

18 *Silver Mining Co. v. Fall*, 6 Nev. 116, 123 (1870).

19 *Preponderance of the Evidence, Black's Law Dictionary* (11th ed. 2019).

20 NRS 125C.0035(1).

21 *Ellis*, 123 Nev. at 150, 242.

The district court below correctly determined that Desmon had satisfied both prongs of *Ellis* and that custody should be modified.[22] I AA 181-85. The district court erred, however, when it then failed to consider the evidence and its own findings in entering its joint physical custody order.

ii. The Evidence and Findings Support Do Not Support an Award of Joint Physical Custody.

The district court issued a finding that, in spite of the controlling custody order, Lacey had not exercised primary physical custody of Paige since 2011. I AA 174. The district court further found that in the eight years between early 2012 and March 2020, Desmon had primary custody and Lacey had visitation every other weekend. I AA 173-74. According to the district court, from March 2020 through December 2021, the parties had shared joint physical custody. I AA 174. Then from January 2021 through May 2021, the court determined, Desmon had Lacey all but a handful of occasions. I AA 171.

At the close of the evidentiary hearing, with the foregoing *de facto* custodial history in mind, the court asked Lacey directly what custodial timeshare she was asking for. Lacey responded that she wanted every weekend from Friday to Sunday, or Friday to Monday. II AA 298. This response made absolute sense because, as

[22] The court also analyzed the request for modification under *Truax v. Truax*, 110 Nev. 437, 438, 874 P.2d 10, 11 (1994).

noted, for almost the entirety of the ten years from 2011 through May 2021, Desmon had Paige during the school week. Lacey's time with Paige had always been on weekends or during the week during summers.

Nevertheless, and seemingly ignoring Lacey's response to what she wanted, the court pressed Lacey, asking her how Desmon would have weekend time under her requested weekend timeshare. II AA 209. Lacey's response to that was that she would do whatever the court ordered, and that possibly Desmon could have every other weekend. II AA 209.

It was only with the court's continued, unilateral pressing, that Lacey finally broke and said she was "willing and open to do 50/50." II AA 209. This was the only answer that appeared to satisfy the court because the pressing stopped at that point. II AA 209.

Having set forth its factual finding that Desmon had historically had *de facto* physical custody for the majority of the previous ten years, including the prior five months, and having heard Lacey's request, prior to the court's prodding, that she would like only weekend time, the court next analyzed the statutory best interests factors. In analyzing the factors, the court determined that *none* of them were in Lacey's favor. In contrast, the court found that three factors were in Desmon's favor.

The first factor the court found to be in Desmon's favor was the preference of a child of suitable age and capacity. I AA 182. The evidence supporting this finding

included Lacey's admission at trial that she was sure that Paige would rather be at Desmon's house on school days.[23] II AA 301.

The second best interests factor in Desmon's favor was related to the parents' mental health. Under this factor, the court found that Lacey had "demonstrated addiction issues." I AA 185. The evidence at trial support this. Lacey admitted to opioid addiction at least into 2015 when she gave birth to an addicted infant. II AA 262. Lacey further admitted that she still uses marijuana and alcohol, which she did not see as a problem in relation to her sobriety. II AA 267. Evidence was also admitted that Paige had witnessed Lacey, as recently as December 2020, appearing to be under the influence while operating a motor vehicle with Paige inside. I AA 90-91. That event, and Paige's resulting concern for her own well-being, led Paige to decide, and the parties to agree, that Paige would return to living primarily with Desmon in January 2021. II AA 238, 242-46, 260-61.

The third best interests factor found to be in Desmon's favor was Paige's sibling relationship in Desmon's home.

After making these best interests findings, as well as the determinations that Desmon had *de facto* historical primary physical custody, including almost every

[23] Except for a few short months when school was remote during the fall semester of 2020, Lacey had never had Paige during the school week. Paige, who was 14 years old at the time of the evidentiary hearing, had always lived with Dad on school days.

school day for the previous ten years, the court inexplicably ordered that the parties would have joint physical custody. The court specifically granted Lacey an alternating schedule Sunday through Tuesday, and Saturday one week, and Monday through Wednesday the following week.[24] I AA 189.

In other words, Lacey was granted joint physical custody and half of the school days even though the evidence showed, and the court had determined, that no best interests factors were in Lacey's favor; that she had almost never had Paige on school days; and she had requested weekends. This was an abuse of discretion because the court's own findings, as well as all of the evidence presented, is not adequate to support such a judgment.[25]

Further, while it is unclear, it appears that perhaps the court disregarded its best interests findings and based its award of joint physical custody on NRS 125C.003. This belief is supported in the court's statement that "neither party established that the other is incapable of adequately caring for the child for 146 days per year. As such, a modification of physical custody is appropriate on this record." I AA 185.

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[24] The court failed to include any exchange times, so the order is a bit ambiguous. This was pointed out in the motion to amend, but was not remedied.

[25] *Ellis*, 123 Nev. at 149, 161 P.3d at 241-42 (citing *Williams v. Williams*, 120 Nev. 559, 566, 97 P.3d 1124, 1129 (2004)).

Whether this statement forms the court's purported basis for awarding joint physical custody in contradiction to the factual findings and best interests analysis is unknown. It is unknown because the court does not provide any explanation as to why or how NRS 125C.003 applies to the facts in this case.

NRS 125C.003(1) states that a "court may award primary physical custody to a parent if the court determines that joint physical custody is not in the best interest of a child." NRS 125C.003(1) also provides that "[a]n award of joint physical custody is presumed not to be in the best interest of the child if: (a) The court determines by substantial evidence that a parent is unable to adequately care for a minor child for at least 146 days of the year; . . . ." In sum, there is a presumption that a parent should have primary physical custody if the other parent is unable to care for the child for what would amount to a joint physical custody timeshare.

Whether a presumption arises under NRS 125C.003 is irrelevant to the facts of this case. Neither parent argued that the other parent was unable to adequately care for the child for 146 days out of the year. And if either had, the only thing that could have resulted was a presumption *against* joint physical, not a presumption *in*

favor of joint physical, which is what it appears the court may have believed based upon its order.[26]

More importantly, even if a presumption *in favor* of joint physical did exist under NRS 125C.003, which it does not, the sole consideration for the court is the best interests of the child, which were in favor of Desmon. *See* NRS 125C.0035(1). Unfortunately, the court did not follow its own best interests determinations – or at the very least, it failed to set forth its rationale as to how the best interests factors, as analyzed, supported a finding that joint physical custody was in Paige's best interests.

Therefore, because the court erred in disregarding the evidence, its own factual findings, and its best interests determinations – as well as erring as to the law under NRS 125C.003 – Desmon respectfully requests that the court reverse the district court decision and remand for an award of primary physical custody, which is supported by the evidence already admitted, and the findings already made.[27]

. . .

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[26] This, if it is indeed what the court did, is an erroneous conclusion of law, which is reviewed *de novo* and is not entitled to deference. *See Kilgore v. Kilgore*, 135 Nev. 357, 360, 449 P.3d 843, 846 (2019) (citations omitted).

[27] If this Court reverses the decision below, the district court will need to revise its determinations of child support and child support arrears, as well as the income tax deductions related to the minor child. As such, Desmon requests that those issues be remanded to direct the district court to revise the orders to reflect an award of primary physical custody to Desmon.

18. ROUTING STATEMENT / ISSUES OF FIRST IMPRESSION.

This appeal is presumptively assigned to the Court of Appeals per NRAP 17(b)(5) because it involves an issue of family law.

DATED this 17th day of November, 2021.

PECOS LAW GROUP

/s/ Jack Fleeman

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VERIFICATION

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:

[**X**] This fast track statement has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14 point Times New Roman type style; or

[ ] This fast track statement has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

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

[**X**] Proportionately spaced, has a typeface of 14 points or more, and contains 4,192 words. This word count excludes this Verification and the NRAP 26.1 Disclosure as provided in NRAP 32(a)(7)(C); or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains 7,267 words or 693 lines of text: or

[ ] Does not exceed 16 pages.

3. Finally, I recognize that under NRAP 3E I am responsible for timely filing a fast track statement and that the Supreme Court of Nevada may impose

sanctions for failing to timely file a fast track statement, or failing to raise material issues or arguments in the fast track statement. I therefore certify that the information provided in this fast track statement is true and complete to the best of my knowledge, information, and belief.

DATED this 17th day November, 2021.

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: None.

2. Names of law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

Pecos Law Group: Bruce I. Shapiro, Esq. and Jack W. Fleeman, Esq.

Kelleher & Kelleher: John T. Kelleher, Esq.

3. If litigant is using a pseudonym, the litigant's true name: None.

DATED this 17th day of November 2021.

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