IN THE SUPREME COURT OF THE STATE OF NEVADA

William Shawn Wallace,

Appellant,

vs.

Ammie Ann Wallace,

Respondent.

Supreme Court Case No: **83591**
District Court Case No: **D-20-613567-Z**

CHILD CUSTODY FAST TRACK STATEMENT

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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 all 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 Shann D. Winesett, Esq.

The Cooley Law Firm: Shelley Booth Cooley, Esq.

Kainen Law Group: Rachel H. Mastel, Esq.

Kelleher & Kelleher, LLC: John T. Kelleher, Esq.

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

DATED this 29th day of December 21021.

PECOS LAW GROUP

/s/ Shann Winesett

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CHILD CUSTODY FAST TRACK STATEMENT

1. FILING PARTY:

Appellant William Shawn Wallace ("William").

2. COUNSEL FOR WILLIAM:

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3. APPEALED FROM:

Eighth Judicial District Court (Family Division), Clark County, Case No. D-20-613567-Z.

4. JUDGE ISSUING DECREE:

Honorable Vincent Ochoa.

5. LENGTH OF HEARING:

Twenty minutes and three seconds.

6. WRITTEN JUDGMENT APPEALED FROM:

Findings of Fact, Conclusions of Law, and Order.

7. DATE OF SERVICE OF NOTICE OF ENTRY:

September 16, 2021.

8. DATE OF TOLLING MOTION:

None.

9. DATE OF NOTICE OF APPEAL:

October 1, 2021.

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

NRAP 4(a).

11. RULE GRANTING THIS COURT JURISDICTION TO REVIEW:

NRAP 3A(b)(1).

12. PENDING AND PRIOR APPELLATE PROCEEINGS:

None.

13. PROCEEDINGS RAISING SAME ISSUES:

None.

14. PROCEDURAL HISTORY:

The Decree of Divorce (the "Decree") in this matter was entered on September 10, 2020. JA027. Approximately nine months later, on June 18, 2021, William filed his Motion to Modify Decree of Divorce (the "Custody Motion"). JA063. On August 12, 2021, the district court held a twenty minute hearing on the Custody Motion. JA267-283. The district court made no findings, nor did it issue an oral ruling on the record. Instead, the district court took the matter under advisement an concluded the hearing. JA283. Approximately an hour later, the district court issued a minute order summarily denying the Custody Motion without any factual findings or analysis supporting its decision. JA286.

The district court instructed Ammie's attorney to draft the order with "detailed findings including the facts of the case and an analysis of the relevant law." JA286. Ammie's attorney did as instructed, and, on September 9, 2021, Findings of Fact, Conclusions of Law, and Order denying William's Custody Motion were entered. JA251.

15. STATEMENT OF FACTS:

The parties, Ammie Ann Wallace ("Ammie") and William married on October 10, 2009, in Las Vegas. JA64. There are three minor children of their marriage: William, Jr., Miller, and Quinn who, at the time of the lower court proceedings, were ages 10, 9, and 6 respectively. JA64.

For his part, William is and always has been an active father. JA64, 65, 149. When the children were young, William was the parent who bathed them nearly every night and played music with them. JA64-65. He taught all three of the children to read, write, swim, ride a bike, play baseball, basketball, and roller skate. JA65. When the children were sick at school, William was the parent the children would ask the nurse to call. JA65.

In the summer of 2017, William stayed home with the children full time for a couple of months until he began a new job in August 2017 with Alterra Home Loans. JA148, 161-62. During this time, the family resided in the home of William's mother who was on an extended honeymoon. JA148.

During 2017, William and Ammie decided to end their marriage. JA64, 148. William moved into a rental home on September 25, 2017. JA148. Ammie stayed with William for a short time until her new home was ready for occupancy. JA146. Even after the separation, the parties cooperated in taking care of and sharing time with the children. JA64. The parties did not adhere to a set schedule, and the children frequently spent time in both parents' homes. JA64. The parents cooperated in watching the children when their individual schedules or commitments required them to be away from the children. JA64. William, however, was the parent who primarily picked the children up from school and helped them with their homework. JA148. William also coached their baseball teams, took them to their practices and attended their extracurricular activities with them. JA148, 164-202.

In March of 2020, the COVID-19 pandemic hit, and the children were sent home to finish the school year at home. JA65. William's employer permitted him to work from home, and the children began home-schooling with him. JA65. William rented a home near Ammie for the convenience of everyone. JA175. The parties began exercising a 2/3/2 timeshare, and, by August 2020, the parties worked out a custody schedule where the children were typically with Ammie from Sunday at bedtime until Tuesday after school (around 3:30 p.m.). JA66. Then the children would be with William from Tuesday evening until Thursday

at bedtime. JA66. The parties alternated every Friday and weekend. JA66. If one party had the children for the weekend, the other party would have them for Friday. JA66.

During the summer of 2020, Ammie visited Texas to be with her mother who was diagnosed with breast cancer, and William had the children for two months. JA65, 150. Sometime after her return from Texas, Ammie told William that she and her new boyfriend were going to get married. JA65. The introduction of the new boyfriend changed the family dynamic and caused stress in the children's interaction with their mother. JA65. Nonetheless, the parties continued to observe the foregoing schedule (which Ammie herself describes as "flexible") from August 2020 into April 2021. JA147, 121.

Given Ammie's stated desire to marry, the parties formalized their divorce through a Joint Petition in September of 2020. JA1-20. Ammie was represented by an attorney; William was not. JA18. The Decree of Divorce entered on September 20, 2020, provided that William would have the children from 3:00 p.m. through 6:30 p.m. on weekdays and alternating weekends. JA47. Since the parties had always worked together to make sure the children spent time with both parents (JA149), William reasonably thought the language in the Decree of Divorce meant it would be his responsibility to pick the children up from school and help with their schoolwork and extracurricular activities each day. JA149

This provision made sense because William had fulfilled these duties for years. JA149.

William did not, however, understand that the Decree would operate as a restriction on the time that he otherwise would be able to spend with the children. JA67, 149. In as much as William was already sharing half the time with the children, William had no reason to believe that the Decree prevented the parties from sharing the children as they always had been. JA149. Indeed, the parties did not adhere to such a schedule before the Decree was entered, nor did they adhere to it after the Decree was entered. JA68, 148, 149, 152. The entry of the Decree did nothing to change the parties *de facto* time share. JA66.

William would never have signed the Decree had he understood the Decree to mean he would only have overnights with the children every other weekend. JA149. For her own part, Ammie assured William that, notwithstanding the entry of the Decree, everything would continue as it had been. JA67. ***For six months, everything did continue as it had been***. JA66.

In April of 2021, six months after the entry of the Decree, Amy began insisting that William could only have the children every other weekend and that the parties were going to begin following the Decree in the "most minute detail." JA68. Despite having an amicable arrangement regarding the children for three years after their separation, and for six months after the divorce decree was

entered, Ammie demanded that William adhere strictly to the terms of the Decree. JA68.

When the children began begging William to fight for more time with them and were crying nearly every evening he was forced to take them back to Ammie at 6:30 p.m. in accordance with the strictures of the Decree, William advised Ammie that he would be seeking a modification of the custody agreement. JA68. William felt advising Ammie of his intentions was the right thing to do because he did not want Ammie to feel blind-sided by legal action. JA68. This proved to be a mistake, however, as Ammie became even more insistent on denying William time he had previously enjoyed with the children. JA68. William ultimately filed his Motion to Modify the Decree of Divorce on June 18, 2021. JA63.

On August 12, 2021, the district court held a 20 minute hearing on William's motion. JA269 and 283. The district court did not rule on William's motion during the hearing nor did the district court place any findings on the record. Instead, the district court took the matter under advisement. JA283.

About an hour after the hearing, the district court issued a minute order from chambers in which it summarily denied William's motion. JA286. The district court's minutes contained no findings or explanation whatsoever as to why the court ruled as it did. JA286. Instead, the court ordered Ammie's

attorney to prepare its order with instructions that the order "contain detailed findings including the facts of the case and an analysis of the relevant law." JA286. To William's knowledge, Ammie's attorney did as instructed and prepared the order. There is nothing in the record showing that William's attorney was copied on the order that Aimee's attorney drafted for the district court, nor is William aware that the district court did anything other than adopt verbatim what Aimee's attorney submitted to it.

16. ISSUES ON APPEAL:

A. The district court abused its discretion in delegating the preparation of the order summarily denying William's Custody Motion without providing the parties with any findings or other indicia as to the basis of its decision.

B. The district court abused its discretion in refusing to hold an evidentiary hearing on William's Custody Motion.

17. LEGAL ARGUMENT:

A. <u>Standard of Review</u>

This court reviews child custody and child support orders for an abuse of discretion.[1] While "[m]atters of custody and support of minor children rest in the

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[1] *Lewis v. Lewis*, 132 Nev. 453, 458 (Nev. 2016).

sound discretion of the trial court,"[2] substantial evidence must support the court's findings, which is "evidence that a reasonable person may accept as adequate to sustain a judgment."[3] "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."[4] This court must also be satisfied that the district court's determination was made for the appropriate reasons.[5]

B. Summary of Argument

The parties were separated for three years before they divorced. The stipulated decree awarded primary physical custody to the mother. Notwithstanding the custody labels in the decree, the parties had been sharing joint physical custody of the children on an equal basis before the divorce and six months therafter. Then, the mother suddenly demanded that the parties adhere to the strictures of the decree. The father filed a motion to modify custody, which the district court summarily denied, without making any pronouncement on the record of its findings or the basis upon which it denied the father's motion. Instead, the district court instructed the mother's attorney to prepare its order that

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2 *Wallace v. Wallace*, 112 Nev. 1015, 1019 (1996).

3 *Ellis v, Carucci*, 123 Nev. 145, 149 (2007).

4 *Davis v. Ewalefo*, 131 Nev. 445, 450 (2015).

5 *Sims v. Sims*, 109 Nev. 1146, 1148 (1993).

contained "detailed findings including the facts of the case and an analysis of the relevant law."

The district court's wholesale delegation to a litigant of its task to find facts and conclude law in this matter was an abandonment of the duty and trust that the public has placed in our judicial system. In so cavalierly disposing of the case below, the district court ignored that the father had shared joint physical custody for the year preceding his motion to modify. Further, the district court applied the wrong standard in adjudicating the custody issues before it. Had the court properly applied the best interest standard under *Truax v. Truax*[6], the district court would have found adequate cause to proceed with an evidentiary hearing on the father's motion. In failing to provide the parties with any indicia of its independent analysis of the issues and in failing to conduct an evidentiary hearing on the best interest of the children, the district court committed reversible error.

C. Because the district court made no record of its own findings, this court cannot satisfy itself that the district court made its determination for the appropriate reasons.

It bears repeating that this court owes no deference to findings "so conclusory they may mask legal error,"[7] and this court must be satisfied that the

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6 110 Nev. 437, 439 (1994)

7 *Davis v. Ewalefo*, 131 Nev. 445, 450 (2015).

district court's determination was made for the appropriate reasons.[8] Based upon the record in this case, there is no way for this court to know why the district court itself summarily denied William's motion as the district court provided no findings or other comments supporting its decision. The district court left it to Ammie's attorney to provide it with an analysis. The findings set forth in the order entered on September 9, 2021, were not the district court's findings, only "findings" created by Ammie's attorney.

The hearing on William's motion lasted a grand total of 20 minutes and three seconds during which the district court spoke, by William's count, no more than two hundred words. JA269-283. At no time did the district court make any finding during the hearing, nor did it indicate to the parties how it would rule. Instead, the district court told the parties that it would "try to get a decision out in the next seven days." JA 283.

The next judicial act the district court took was to issue a minute order in which it stated that William's motion to modify was denied and that Ammie's countermotion for fees was granted. JA 286. The minute order also contained the following instructions:

> Ms. Wallace's attorney, … shall prepare the order. The Order shall contain detailed findings including the facts of the case and an analysis of the relevant law. The portion of

[8] *Sims v. Sims,* 109 Nev. 1146, 1148 (1993).

> the order awarding attorney's fees shall include a discussion of the applicable statute, which party is the prevailing party, and why the actions may be considered vexatious or without merit. The specific amount of attorney's fees shall be left blank.

William acknowledges the long standing practice of district courts delegating the clerical task of preparing orders for the courts' review and signature. William does not object to this practice *per se*.[9] The problem here is that the district court gave the parties no indication whatsoever as to why it denied William's motion. Here the district court did not merely delegate a clerical task to Aimee's attorney; the district court delegated the substantively judicial task of finding facts and "analyzing the relevant law." JA286. Notably, with regard to the attorney's fees portion of the order, the district court asked Ammie to include facts in the order which the district court had not even heard. JA286.

William respectfully submits that justice in the district courts should not be dispensed in this manner. How can William, or any other litigant for that matter, have confidence in a judicial system when a court's order is drafted entirely by the opposing party and adopted verbatim by the court? At a very minimum, the district court should have provided its factual findings and outlined its legal analysis by way of its minute order or on the record in open court in a

[9] William would note, however, that the Supreme Court of Nevada and the Court of Appeals of Nevada have never, to William's knowledge, adopted this practice.

supplemental proceeding. *See Perlow v. Berg-Perlow*, 875 So. 2d 383, 390 (Fla. 2004) holding that "the better practice would be for the trial judge to make some pronouncements on the record of his or her findings and conclusions in order to give guidance for preparation of the proposed final judgment." Better yet, the district court should have drafted its own findings of fact, conclusions of law, and orders.

While William is unaware of any Nevada authority on this issue, opinions from other states are instructive. For example, in *Matheson v. Harris*, 572 P.2d 861 (Idaho 1977), the lower court took a slander of title action under advisement without comment at the conclusion of the hearing. Like the present case, the lower court in *Matheson* never entered a memorandum of its decision. Also like the present case, the only insight to the lower court's reasoning was found in one sentence of a letter which the trial court sent to the prevailing counsel: ". . . kindly prepare findings of fact and conclusions of law in support of the foregoing decision, together with judgment." *Id.* at 864.

In reversing the lower court's judgment, the *Matheson* court held that the lower court's wholesale delegation of writing its ruling to the prevailing party was "an abandonment of the duty and trust that has been placed in the judge by the (Rules of Civil Procedure.)" *Id*. at 865. The *Matheson* court further held that the lower court's failure to provide its own findings betrayed the primary purpose

of assisting in the adjudication of the lawsuit and, for that matter, an appeal. The *Matheson* court lamented that "[w]hen these findings get to the courts of appeals, they won't be worth the paper they are written on as far as assisting the court of appeals in determining why the judge decided the case." *Id.* at 865.

Again, William does not object to the practice of district courts asking the prevailing party to prepare a proposed order, nor does William object to the practice of the parties submitting competing orders to the courts for their review and consideration. However, the proposed orders from counsel "cannot substitute for a thoughtful and independent analysis of the facts, issues, and law by the trial judge." *Bishop v. Bishop*, 47 So. 3d 326, 328 (Fla. Dist. Ct. App. 2010) citing *Perlow v. Berg–Perlow*, 875 So.2d 383, 390 (Fla.2004). "Any judgment entered under circumstances that create an appearance that the judgment does not reflect the judge's independent decision-making" should be reversed. *Id.*

Put another way, "findings which fail to evidence a 'badge of personal analysis' by the trial judge must be subjected to stricter scrutiny by an appellate court." *Cormier v. Carty*, 408 N.E.2d 860, 863 (Mass. 1980). "The greater the extent to which the court's eventual decision reflects no independent work on its part, the more careful we are obliged to be in our review." *Id.* According to the Supreme Judicial Court of Massachusetts:

> We shall be more likely in a close case to disregard a finding, or remand for further findings where the judge has neither personally prepared the findings, nor "so reworked a submission by counsel that it is clear that the findings are the product of his independent judgment." (citations omitted).

Id. at 863.

As mentioned above, some appellate courts will reverse any judgment entered under circumstances that create an appearance that the judgment does not reflect the judge's independent decision-making:

> When the trial judge accepts verbatim a proposed final judgment submitted by one party without an opportunity for comments or objections by the other party, there is an appearance that the trial judge did not exercise his or her independent judgment in the case. This is especially true when the judge has made no findings or conclusions on the record that would form the basis for the party's proposed final judgment. ***This type of proceeding is fair to neither the parties involved in a particular case nor our judicial system***.

White v. Fort Myers Beach Fire Control Dist., 302 So. 3d 1064, 1075 (Fla. App. 2020) citing *Perlow, supra*, at 390 (emphasis added). In this regard, the Florida Courts have promulgated a number of factors to evaluate whether the trial court exercised its independent judgment:

> (1) the timing of the order; (2) the opportunity for the opposing party to object; (3) the extent to which the court made substantive changes to the proposed order; (4) the extent to which the court participated in the trial; (5) the presence of errors or omissions in the order; and (6) the presence or absence of oral findings on the record. *Id.* at 1075.

Analyzing the foregoing factors here, it is clear that the district court did not exercise its independent judgment when resolving this matter involving three minor children and their permanent custodial relationship with their father. First, there is nothing in the record to indicate that William had an opportunity to object to Ammie's proposed order. Second, it appears that Ammie filed her Memorandum of Fees and Costs (as the district court directed in its minute order) on September 8, 2021, at 5:21 p.m. JA232. It is assumed but not known that Ammie submitted the proposed order at the same time. The district court entered the order the next day on September 9, 2021. JA251. If Ammie submitted her proposed order to the district court that same day, then the district court had the proposed order for less than a day before it signed and entered it. This timing suggests that the court gave no independent thought to the contents of the order.

Third, William is unaware that the district court made any revisions to the order which Ammie's attorney submitted to it. To William's knowledge the only change the district court made to Ammie's order was to insert $7,500.00 as the amount it would award Ammie in attorney's fees. JA264. As can be seen from a cursory review of the transcript of the 20 minute hearing, the district court's participation in the hearing was minimal. JA267-284. Nowhere in the record did the district court provide any oral findings or iterate its analysis of the issues.

While William will address the district court's substantive errors in greater detail in Section D below, an analysis of the factors set forth in Florida's *White v. Fort Myers* shows the order in his case does not reflect the district court's independent decision-making. The order is, therefore, subject to reversal on that ground alone.

D. The district court abused its discretion when it failed to conduct an evidentiary hearing on William's request to modify custody.

The "district court must hold an evidentiary hearing on a request to modify custodial orders if the moving party demonstrates 'adequate cause.' " *Arcella v. Arcella*, 133 Nev. 868, 871 (2017) (quoting *Rooney v. Rooney*, 109 Nev. 540, 542 (1993)). To establish adequate cause, the movant must present a prima facie case that modification of custody is in the child's best interest by showing "(1) the facts alleged in the affidavits are relevant" to the custody modification, and "(2) the evidence is not merely cumulative or impeaching." *Rooney*, 109 Nev. at 543.

When addressing motions to modify, the type of physical custody arrangement is "particularly important" because it "determines the standard for modifying physical custody." *Rivero v. Rivero*, 125 Nev. 410, 422 (2009). "The court may modify ***joint*** physical custody if it is in the best interest of the child. (citations omitted) However, to modify a ***primary*** physical custody arrangement, the court must find that it is in the best interest of the child and that there has been

a substantial change in circumstances affecting the welfare of the child. (citations omitted).” *Id.* at 422 (emphasis added).

As such, when faced with a motion to modify, the district court must “calculate the time during which a party has physical custody of a child over one calendar year.” *Id.* at 427. “Calculating the timeshare over a one-year period allows the court to consider weekly arrangements as well as any deviations from those arrangements such as emergencies, holidays, and summer vacation.” *Id.* at 427. Calculating the timeshare over a one-year period also allows the court to consider whether the parties were following the written custody schedule at all.

1. *The district court should have used the best interest standard when analyzing the Custody Motion.*

The district court found that “according to the parties’ custody agreement in the Decree, Ammie had primary physical custody and William had visitation.” JA259. In and of itself, this finding is meaningless because “once parties move the court to modify an existing child custody agreement, the court must use the terms and definitions provided under Nevada law, and the parties' definitions no longer control.” *Bluestein v. Bluestein*, 131 Nev. 106, 111. What controls is the actual custodial schedule the parties adhered to during the previous year. *Rivero, supra.* at 410.

In the district court’s order as drafted by Ammie, the district court found that “reviewing the facts most favorable to William, the parties shared joint

physical custody from August 2020, through March 2021, and they have been following the timeshare in the Decree since April 2021." JA259. Then, without showing its work, the district court found that "calculating the time during which each party had physical custody of the children between August 2020 and August 2021, William had custody of the children approximately 30% of the parenting time and Ammie had custody of the children approximately 70% of the parenting time." JA259. Where the district court came up with these percentages is anyone's guess. The district court did not explain how it came to this conclusion on a record of disputed facts. Considering that the percentages came first from the pen of Ammie's attorney, William is not sure the district court itself knows where the percentages came from.

The district court's finding regarding the *de facto* time share is erroneous on a couple of levels. First, the one-year look back should have started, at the latest, in June 2021, when William filed his motion. Second, Ammie should not be given credit for the additional time she imposed upon William when she, for the first time, began restricting William to the terms of the Decree. *See for example*, *Druckman v. Ruscitti*, 130 Nev. 468, 475 (2014) holding that courts should not consider any factors which might enhance a parent's argument where such factors arose from parental misconduct.

But, even if Ammie is given credit for the few weeks between April 2021 and mid-June 2021, the district court does not tell us how it reached its conclusion that Ammie had 70% of the time. The court made no factual findings as to how the parties *actually* shared that time, and the district court certainly made no attempt to comply with the calculation requirements of the *Rivero* opinion:

> In calculating the time during which a party has physical custody of the child, the district court should look at the number of days during which a party provided supervision of the child, the child resided with the party, and during which the party made the day-to-day decisions regarding the child. The district court should not focus on, for example, the exact number of hours the child was in the care of the parent, whether the child was sleeping, or whether the child was in the care of a third-party caregiver or spent time with a friend or relative during the period of time in question.

Rivero, supra. at 427. Assuming that the parties adhered strictly to the decree and did not deviate from it for emergencies, holidays, and summer vacation or any other reason, William would have the children every afternoon Monday through Friday and every other weekend from Friday to Sunday evening. Depending on the month, therefore, William has the actual care and control of the children on 27 days out of 31 days (or 87% of the days). The children might not sleep in William's home on everyone of these days, but William does provide them with supervision and makes day-to-day decisions regarding them. Since *Rivero* instructs that the court should not focus on the exact number of hours the children are in the care of the parent, whether sleeping or in the care of a third

party, William's daily contact with the children arguably provided him with joint custody of the children under *Rivero* even after Ammie began to restrict William's time with the children in April 2021.

Additionally, the district court nowhere addresses the fact that William had ***sole*** physical custody of the children for two months in summer of 2020 while Ammie was tending to her ailing mother in Texas. JA150. As such, in declaring that Ammie had 70% of the time with the children in the previous year, the district court seems to entirely ignore *Rivero's* instruction to consider "any deviations" from the regular custody arrangement such as emergencies, holidays, and summer vacation." *Id.* at 427.

If the district court truly viewed the facts most favorable to William, the district court would have found that the parties shared joint physical custody long before the entry of the Decree and continued to share joint physical custody thereafter. If the district court truly viewed the facts most favorable to William, the district court also would have found that Ammie's sudden insistence upon the terms of the Decree was traumatizing for the children who were used to having much more time with their father than what Ammie was allowing them. JA150, 152.

Given the parties' *de facto* custody schedule, "adequate cause" certainly existed for the court to conduct an evidentiary hearing on William's Custody

Motion. Reviewing William's actual timeshare from March 2020 through April 2021, as well as the timeshare provided in the Decree, the district court's finding that "the parties' custody arrangement was one of primary physical custody" is clearly erroneous and results oriented.[10] JA259.

Since the parties shared joint physical custody during the year preceding the motion (except of course for the few weeks before filing when Ammie demanded that the parties start following the Decree), the district court should have applied the best interest standard to William's Custody Motion. The court should have acknowledged the fundamental policy consideration that "it is in the child's best interest to 'have frequent associations and a continuing relationship with both parents ... and [t]o encourage such parents to share the rights and responsibilities of child rearing.'" *Bluestein, supra.*, at 112. The district court should also have followed Nevada's preference for joint physical custody as set forth in NRS 125C.0025:

> When a court is making a determination regarding the physical custody of a child, there is a preference that joint physical custody would be in the best interest of a minor child if: . . . [a] parent has demonstrated . . . an intent to establish a meaningful relationship with the minor child.

[10] Considering that the district court's order was drafted by a party opponent, the results-oriented nature of the factual findings is not surprising.

There is no dispute that William has demonstrated an "intent to establish a meaningful relationship" with the children. William taught the children their basic life skills. JA64, 65, 149. At times, William has stayed home with the children full time, homeschooled them, and provided for their transportation. JA65, 148-9. He also coached their baseball teams, took them to their practices and attended their extracurricular activities. JA149. William has not only demonstrated an intent to establish, he has, in fact, established a meaningful relationship with the children. JA64-65. According to Nevada law, therefore, a preference exists for William to share joint physical custody of the children with Ammie.

And of course, the statutory best interest factors set forth in NRS 125C.0035(4(c) support an award of joint physical custody in this case as well. The three children are respectively 10, 9 and 6 years of age and enjoy their time with William. JA70. They have expressed a heartfelt desire to spend more time with their father than what Ammie is allowing them. NRS 125C.0035(4)(a). JA70. In the meantime, Ammie has been actively seeking to reduce the association the children have with William. NRS 125C.0035(4)(c). JA70. Ammie has repeatedly accused William of seeing the children on "her time" when the children were involved in extra-curricular activities for which William is their coach. JA70. When Ammie needed assistance, she asked William's parents (rather than

William) to watch the children then became enraged when she learned that William had seen the children at his parent's house during "her time" even though she was not physically present. JA70.

While the level of conflict between the parties has been manageable (NRS 125C.0035(4)(d)) and William has cooperated with Ammie to meet the needs of the children (NRS 125C.0035(4)(e)), Ammie's arbitrary demand that the parties adhere to the strictures of the decree has stressed the parties' otherwise cooperative relationship. JA71. Nonetheless, William has demonstrated a willingness to go to great effort to make sure the children participate in events they wish to, even at significant sacrifice to his time and work. JA71.

Both parties are in good physical and mental health. NRS 125C.0035(4)(f). JA71. William is physically capable of caring for the children on a joint basis, and the children's physical, developmental and emotional needs would be better served by such an arrangement. JA71. NRS 125C.0035(4)(g). As it currently stands, the children are unnecessarily shuttled between events on a tight timeframe. JA71. William is given only a few hours of time with the children on the weekdays, much of which is spent in sports activities, during which there is little time for any other family activity. JA71. Often the children are forced to do homework in the car in order to complete it during time they are with William. JA71. The custody

arrangement set forth in the decree is by its nature frenzied and causes the children undue stress and anxiety. JA71.

The children enjoy a strong healthy relationship with William, but the current custody schedule deprives the children of a deeper relationship with him. NRS 125C.0035(4)(h). JA71-72. Further, Ammie's frequent insistence that William is trying to see the children during "her time" (whether she is physically present or not) causes a significant amount of anxiety in the children. JA72.

A more routine joint custody arrangement will also promote the relationship between the children and each other because the time the children spend with William will not be dominated by shuttling the children to and from all of their activities in the limited window of time William has with the children. NRS 125C.0035(4)(i). JA72. This will allow the children certain "down time" in which to play games, associate with one another in a non-rushed way, and develop their relationships more fully. JA72

Notably there is no history of parental abuse or neglect, domestic violence or parental abduction. NRS 125C.0035(4)(j)(k) and (l). JA72.

Because William demonstrated adequate cause that a custody modification was in the children's best interests, the district court should have held a hearing on William's motion and ensured that its orders reflected the reality of what the children have experienced since their parent's separation in 2017.

2. *The district court erroneously applied the Ellis standard.*

The district court's order (drafted by Ammie) concludes that "the facts alleged in William's affidavit are not relevant to the grounds for modification as they do not satisfy both elements of *Ellis v. Carucci*, and the evidence is merely cumulative and impeaching." JA261. This conclusion is clearly erroneous.

Notably, the district court makes no attempt whatsoever to explain why William's evidence is merely "cumulative" or "impeaching." William's declarations demonstrate that the parties shared joint physical custody before and after the entry of the Decree. Nothing about this evidence is merely impeaching or cumulative. In his motion, William stated that the parties never adhered to a set custody schedule after their separation in 2017. JA64. Instead, the parties cooperated and shared custody of the children. JA64. After the COVID epidemic in March 2020 began, the parties shared time on a virtually equal basis before and after the entry of the Decree. JA65-66. This undisputedly flexible timeshare and cooperation between the parties did not end until sometime in April 2020, when Amy, for the first time, began to arbitrarily limit William's time with the children in accordance with the Decree. JA147.

The fact that William was undisputedly involved in the children's lives in all facets exercising significantly more time than set forth in the Decree does constitute a substantial change in circumstances because the Decree does not

speak the truth of the parties' custodial arrangement. Relegating William to the status of an after-school, safekey monitor from 3:30 p.m. to 6:30 p.m., Monday through Friday, is certainly not in the children's best interest when the children are used to spending significant time with William as a custodial parent. Even under the *Ellis* standard, therefore, William did, in fact, present a *prima facie* case under *Rooney* that modification of custody is in the children's best interest. The district court, therefore, should have set this matter for an evidentiary hearing on William's motion. Its failure to do so is reversible error.

18. ROUTING STATEMENT / ISSUES OF FIRST IMPRESSION.

While this appeal addresses custody issues and is presumptively assigned to the Court of Appeals per NRAP 17(b)(5), it does address an issue of public policy. Specifically, this appeal addresses the propriety of the district court's wholesale delegation of its duty to find facts and conclude law.

DATED this 29th day of December, 2021.

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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 6,209 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 29th day of December, 2021.

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