

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

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Elizabeth A. Brown  
Clerk of Supreme Court

**CHRISTINA CALDERON F/K/A  
CHRISTINA CALDERON STIPP,**

**Appellant,**

VS

**MITCHELL STIPP,**

**Respondent.**

Supreme Court Case No. 81888

District Court Case: D-08-389203-Z

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**RESPONSE TO FAST TRACK STATEMENT**

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<sup>1</sup> Radford Smith, Esq., serves as co-counsel to Respondent in this matter.

## DISCLOSURE STATEMENT

### 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 judges of this Court may evaluate possible disqualification or recusal:

Mitchell Stipp  
Radford Smith  
Mia Stipp  
Ethan Stipp  
Amy Stipp  
Mitchell Stipp, Jr.

DATED this 29th day of October, 2021.

LAW OFFICE OF MITCHELL STIPP

*/s/ Mitchell Stipp*

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**I. Name of Party Filing this Fast Track Response.**

Mitchell Stipp.

**II. Name, Law Firm, Address, and Telephone Number of Attorney or Proper Person Respondent Submitting this Fast Track Response.**

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**III. Proceedings Raising Same Issues.**

None.

**IV. Procedural History.**

Appellant fails to set forth a detailed procedural history of the case. While not material to the resolution of this appeal, the parties' stipulated decree of

divorce granted the parties' joint physical and legal custody over their minor children, Mia and Ethan Stipp.

## **V. Statement of Facts.**

Appellant fails to set forth a detailed statement of facts. The statement provided by Appellant is additional procedural history. With respect to items which Appellant claims are facts, Respondent answers as follows:

A. Appellant's statement about Respondent "withholding the parties' minor children, cutting off all contact between [Appellant] and the minor children[]" is not supported by any citation to the record as required by NRAP 3C(e)(1)(C). Respondent disputes this allegation.

B. Appellant's statement about Respondent "unilaterally [deciding] to ignore the week on/week off custody schedule prior to seeking judicial intervention[]" is similarly not supported by any citation to the record as required by NRAP 3C(e)(1)(C). Respondent disputes this allegation.

C. Respondent filed his motion on August 26, 2019. Appellant's Appendix (AA000019-40) does not contain a true, accurate, or complete copy of the filing and incorrectly contends that the matter came before the district court on August 23, 2019.

D. The district court did not issue an order to show cause. The order included in Appellant's Appendix (AA000367-368) expressly provides as follows: "That the hearing on Plaintiff's Motion will be heard at the scheduled date and time without issuing the Order to Show Cause[".]” Id.

## **VI. Issues on Appeal.**

Appellant identifies only two (2) issues. The first issue asks whether the district court erred by making a finding of domestic violence “without the required findings.” From a review of the Fast Track Statement, it appears Appellant's contention is that the district court after an evidentiary hearing conducted on January 23, 2020, March 5, 2020, and August 27, 2020 did not indicate whether its finding of domestic violence by Appellant was supported by clear and convincing evidence. As briefed below, clear and convincing evidence is not required.

With respect to the second issue, Appellant raises the issue of prejudice, which she claims occurred as a result of the district court purportedly failing to enforce the prior custody order. Appellant appears to challenge the decision by the district court not to hold Respondent in contempt. As briefed below, the failure to find Respondent in contempt is not appealable.

## VII. Legal Argument.

**A. The District Court is not required to make a finding of domestic violence by clear and convincing evidence unless it applies the rebuttable presumption set forth in NRS 125C.0035(5).**

The district court may modify or vacate child custody orders at any time. See NRS 125C.0045. When considering whether to modify physical custody, the court must determine what type of physical custody arrangement exists between the parties. The court must look at the actual physical custody timeshare the parties are exercising to determine what custody arrangement is in effect. Rivero v. Rivero, 125 Nev. 410, 430, 216 P.3d 213, 227 (2009). Different tests apply to modify custody depending on the current custody arrangement. Joint physical custody may be modified or terminated if it is in the best interest of the child. NRS 125C.0045; Truax v. Truax, 110 Nev. 473, 874 P.2d 10 (1994). Primary physical custody may be modified only when “(1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the modification would serve the child's best interest.” Ellis v. Carucci, 123 Nev. 145, 153, 161 P.3d 239, 244 (2007). Here, there is no dispute that the parties’ physical custody

relationship was joint, and the applicable standard is the best interest of the children.

The district court has broad discretion to determine child custody matters, and Nevada's appellate courts will not disturb the district court's custody determinations absent a clear abuse of discretion. See Ellis, 123 Nev. at 149, 161 P.3d at 241 (2007). However, substantial evidence must support the district court's determination; that is, the evidence must be such that a reasonable person could deem it adequate to support the decision. Rivero, 125 Nev. at 428, 216 P.3d at 226. Under NRS 125C.0035(1), the sole consideration of the district court is the best interest of the children. In determining the best interest of the children, the district court must consider and make specific findings concerning, among other things, the factors enumerated in NRS 125C.0035(4). Furthermore, the order must tie the children's best interest, as informed by "specific, relevant findings" on the best interest factors, "to the custody determination made." See Davis v. Ewalefo, 352 P.3d 1139, 1143 (2015) (explaining that determining a child's best interest is not achieved simply by processing the case through the factors that the statute identifies as potentially relevant to a child's best interest and announcing a ruling).

One of the factors set forth in NRS 125C.0035(4) asks whether either parent has committed an act of domestic violence. NRS 125C.0035(4)(k). Nevada law also provides that joint physical custody *is presumed* not to be in the best interest of the child *if the court* has determined by *clear and convincing evidence* that a parent has committed domestic violence against a child. NRS 125C.0035(5). The term “domestic violence” is defined in NRS 33.018. See NRS 125C.0035(10). *If the court applies the presumption in NRS 125C.0035(5)*, the court is required to set forth findings that support the determination that domestic violence occurred and that the custody order adequately protects the child who is the victim of domestic violence. See NRS 125C.0035(5)(a)-(b). Here, the district court is *not* bound by such requirements (including making findings by clear and convincing evidence) because the district court did not employ the presumption set forth in NRS 125C.0035(5). See Appellant’s Appendix (AA001988-002012, AA002004-002006).

NRS 125C.0035(4) requires only that each factor be "considered" (including domestic violence in (k)) without prioritizing how each must be weighed against the others. The Nevada Supreme Court has emphasized that no single factor



necessarily possesses any intrinsically greater weight than the others, and the Nevada Supreme Court has not ruled that every factor must be given exactly equal mathematical weight. Quite to the contrary, the Nevada Supreme Court has repeatedly held that the district court possesses "broad discretionary powers" on how to weigh each factor in any particular case. See Ellis, 123 Nev. at 149, 161 P.3d at 242. Moreover, there is no requirement that the district court simply count up the factors and go with the majority: a district court is free to find a majority of the factors to weigh toward one party, yet rule in favor of the other in the end, simply because it considered some factors more important than others under the facts at hand. See Davis, 131 Nev. at \_\_\_, 352 P.3d at 1143 (stating that a district court should not "simply process[] the case through the factors"). The standard of proof for establishing any fact is by a "preponderance of the evidence" (not clear and convincing evidence) Id. Here, the district court considered all of the statutory factors and decided the custody arrangement set forth in the decision on appeal was in the best interest of the children. Whether Appellant likes it or not, the district court's findings are entitled to significant deference. See Harrison v. Harrison, 132 Nev. \_\_\_, \_\_\_, 376 P.3d 173, 175 (2016) ("We also recognize broad discretionary powers for district courts when deciding child custody matters.").

Appellant concedes the occurrence of two (2) instances of domestic violence (May 2019 and August 2019) in her Fast Track Statement but complains that the district court failed to determine who was the primary aggressor or make findings regarding self-defense. However, Appellant fails to support why these additional determinations are relevant. If Appellant fails to provide sufficient citations to authority to support its contentions, then that argument cannot prevail. See State, Dep't of Mtr. Vehicles v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991); Smith v. Timm, 96 Nev. 197, 201, 606 P.2d 530, 532 (1980).

In its analysis of the factors set forth NRS 125C.0035(4), the district court found as follows:

The court concludes that Mitchell Stipp proved that Christina Calderon committed acts of domestic violence against Mia in May, 2019 and in August, 2019. Mia, Ethan, and Christina Calderon testified about these altercations. The children described screaming, yelling, hair pulling, pushing, and punching. Christina Calderon denied ever striking Mia, and minimized the physical altercations. The court weighed the evidence and concludes that the children's accounts were more credible. The May, 2019 and August, 2019 incidents were traumatic for both Mia and Ethan.

Domestic violence is always relevant to child custody. The weight that these two incidents are given is mitigated by the fact that Mia was an active participant in the physical altercations, that it is difficult to determine the identity of the

primary aggressor, and the relative severity of injuries from these incidents was minor.

On May 29, 2019, Mia was at her mother's home preparing to leave for a two day choir trip to Disneyland the next day. Mia testified that she had an argument with her mother over the thermostat. Mia had adjusted the thermostat without permission. Mia testified that her mother told her she was calling her teacher to tell her Mia was not going on the trip. Mia testified that she got mad and started pouring soap down a sink. An argument and a tug of war over Mia's phone followed. Mia testified that her mother tackled her and pulled her hair.

Ethan testified that he heard and saw the physical altercation between Mia and his mother, which he said included them hitting each other with closed fists. Mia locked herself in her room and called her father. Mitchell Stipp and his wife came and picked Mia up, and Mia went on the choir trip to Disneyland the next day.

Mia stayed at her father's home for a short time after the May, 2019 incident. The parties resumed the week to week custody schedule until August, 2019. On August 13, 2019, Mia was at her mother's home and on her phone with her boyfriend. Mia testified that her mother told her to hang up and go to bed because it was a school night. When she did not get off the phone, Mia testified that a loud argument started with her mother getting in her face. Mia testified that she pushed her mother away. Mia described a physical fight in the hallway with scratching, hair pulling, and pushing. Mia testified that she barricaded herself in her room and called her father. Ethan testified that he was present in the home on August 13, 2019, and testified that he heard yelling and cursing, and saw his mother on top of his sister on Mia's bed, and described both hitting each other.

The August 13, 2019 incident was the catalyst for the refusal of the children to follow the week to week custody schedule and the filing of the custody motions.

See Appellant's Appendix (AA001988-002012, AA002004-002006). Appellant does not challenge the district court's findings with respect to NRS 125C.0035(4)(k) (or any of the other factors in NRS 125C.0035(4)). To make this point clearer, on the issue of domestic violence, Appellant fails to cite to any portion of the record (noting in footnote 21 the lack of any citation).

The Nevada Supreme Court presumes that the decision is supported by evidence and will only consider arguments which specifically state how the evidence was not sufficient. Young v. Nevada Title Co., 103 Nev. 436, 440 (Nev. 1987) (citing Rosina v. Trowbridge, 20 Nev. 105, 116, 17 P. 751, 756 (1888)). "It should not be expected that we will comb the record in such a situation, [where the record is voluminous,] to ascertain if the evidence sustains the finding." Id. (quoting Paterson v. Condos, 55 Nev. 134, 145, 28 P.2d 499, 501-502 (1934)). While the district court did not apply the presumption in NRS 125C.0035(5), it does not mean there was not substantial evidence (or even clear and convincing evidence) to support the findings made with respect to NRS 125C.0035(4)

including Subsection (k). Accordingly, Appellant has failed to meet her burden on appeal.

**B. The failure to find Appellant in Contempt is not appealable.**

Nevada's appellate courts only have jurisdiction when an appeal is authorized by statute or court rule. See NRAP 3A(b); Taylor Constr. Co. v. Hilton Hotels Corp., 100 Nev. 207, 209, 678 P.2d 1152, 1153 (1984). The district court's order on appeal did not hold Respondent in contempt for failing physically to force the children to follow the prior custody order. An order denying a motion to hold a party in contempt is not appealable. See Pengilly v. Rancho Santa Fe Homeowners Ass'n, 116 Nev. 646, 649, 5 P.3d 569, 571 (2000) (recognizing that a contempt order is not appealable). Here, the district court did not issue an order to show cause. Appellant's Appendix (AA000367-368). In any event, assuming Respondent violated the prior custody order, the Nevada Supreme Court has made it clear that a district court may not use changes of custody as a sword to punish parental misconduct; disobedience of court orders is punishable in other ways." Lewis v. Lewis, 373 P.3d 878, 882 (Nev. 2016) (citing Sims v. Sims, 109 Nev. 1146, 1149, 865 P.2d 328, 330 (1993)).

### **VIII. Conclusion.**

For the reasons set forth above, Appellant's appeal should be denied.

DATED this 29th day of October, 2021.

LAW OFFICE OF MITCHELL STIPP

*/s/ Mitchell Stipp*

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## CERTIFICATE OF COMPLIANCE AND VERIFICATION

1. The Fast Track Response has been prepared in a proportionally spaced typeface using Microsoft Word, Version 16.11.1, in 14 point, Times New Roman.
2. The Fast Track Response does not exceed 4,845 words in accordance with NRAP 3E(e)(2).
3. I hereby certify that I have read the Fast Track Response, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Fast Track complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 3E. I understand that I may be subject to sanctions in the event that the Fast Track Response is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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*/s/ Mitchell Stipp*

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## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 29th day of October, 2021, I filed the foregoing **FAST TRACK RESPONSE**, using the court's electronic filing system.

Notice of the filing of the **FAST TRACK RESPONSE** was made upon acceptance by the Nevada Supreme Court to the following:

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By: */s/ Mitchell Stipp*

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An employee of Law Office of Mitchell Stipp