

3. Proceedings raising same issues. If you are aware of any other appeal or original proceeding presently pending before this court, which raise the same legal issue(s) you intend to raise in this appeal, list the case name(s) and docket number(s) of those proceedings:

Respondent is not aware of any other appeal or original proceeding presently pending before this Court, which raise the same legal issues Appellant has raised in this appeal.

4. Procedural history. Briefly describe the procedural history of the case only if dissatisfied with the history set forth in the fast track statement (provide citations for every assertion of fact to the appendix or record, if any, or to the transcript or rough draft transcript):

Respondent, James W. Vahey (“Jim”), filed his Complaint for Divorce on December 13, 2018. I AA 1-7. The parties have three (3) minor children the issue of their marriage: Hannah, born March 19, 2009 (twelve (12) years old), Matthew, born June 26, 2010 (eleven (11) years old), and Selena, born April 4, 2014 (seven (7) years old). The Honorable Judge T. Arthur Ritchie, Jr., held an evidentiary hearing on custody issues, including Appellant’s, Minh Nguyet Luong (“Minh”), request to relocate to California with the minor children, on August 8, September 5, and September 11, 2019. I AA 23. Judge Ritchie entered the Findings of Fact, Conclusions of Law, Decision and Order on the custody issues on September 20, 2019. I AA 22-54.

...

Judge Ritchie held an evidentiary hearing on the financial issues on August 13, 2020 and September 4, 2020. On January 4, 2021, this case was administratively reassigned to Department U, the Honorable Judge Dawn Throne. Nevertheless, Judge Ritchie signed and entered the Findings of Fact, Conclusions of Law, and Decree of Divorce (“Decree of Divorce”) on March 26, 2021 given he had conducted the evidentiary hearing. Therein, Judge Ritchie divided the children’s 529 accounts pursuant to the evidence admitted at trial.

On September 27, 2021, Minh filed Defendant’s Motion to Correct Clerical Error in the Decree of Divorce Regarding the 529 Accounts, or in the Alternative, to Set Aside the Terms in the Decree of Divorce Regarding the Division of the 529 Accounts and for Attorney’s Fees and Costs (“Minh’s Motion”). II AA 321-34. On October 12, 2021, Jim filed his Opposition to Minh’s Motion; and Countermotion for Immediate Return of Hannah to Jim’s Custody, an Order that Hannah Immediately Participate in Therapy with Dr. Dee Pierce, an Order that Hannah Have a Forensic Psychiatric Evaluation, an Order Requiring the Parties to Participate in Co-Parenting Counseling with Dr. Bree Mullin, Sole Legal Custody, School Choice Determination, Return of Children’s Passports, and Attorneys’ Fees and Costs (“Jim’s Opposition and Countermotion”). II AA 335-76. On October 17, 2021, Minh filed her Reply to Jim’s Opposition and Countermotion. II AA 405-59.

The District Court (Judge Throne) held a hearing on Minh's Motion on October 18, 2021. The District Court found that the Decree of Divorce was entered March 26, 2021, the Decree of Divorce was clear on the division of the 529 accounts and there was no clerical error, and there was no authorization or order allowing Minh to conduct further discovery or investigation on the 529 accounts. III AA 482. The District Court further found that there was a trial on the merits of the division of the 529 accounts and both parties had adequate time to conduct discovery on all financial issues before trial. III AA 482. The District Court found that there was no excuse for Minh to wait until September 25, 2021, a year later, to have a forensic analysis completed. III AA 482. The District Court also found that there is no mistake, inadvertence, surprise, or excusable neglect and Minh's NRCP 60(b) Motion should be denied. III AA 482. The District Court found that given the funds in the 529 account do not belong to the parties, but are for the educational expenses of the children, both parties have enforceable fiduciary duties to the children regarding the funds in these accounts and the very small difference that Minh alleges needs to be modified demonstrates Minh's Motion was vexatious and frivolous. III AA 482.

Based on the foregoing, the District Court denied Minh's Motion requesting that the division of the 529 accounts be modified and awarded Jim attorneys' fees pursuant to EDCR 7.60(b). III AA 482. The District Court also ordered Minh to

provide Hannah's and Selena's passports to Jim and for Minh to retain Matthew's passport. III AA 521-22. Notice of Entry of the Order from October 18, 2021 Hearing was entered November 9, 2021. Minh appeals the District Court's order denying her request to modify the division of the 529 accounts and the order regarding the division of the children's passports.

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 or record, if any, or to the transcript or rough draft transcript):¹

At the evidentiary hearing on August 13, 2020 and September 4, 2020, the Judge Ritchie heard testimony regarding each party's contributions to the children's 529 plans, reviewed the evidence admitted in support of each party's argument, and made specific and clear findings and orders that Minh shall receive 75% and Jim shall receive 25% of the 529 accounts, which shall be held for the benefit of the children.

Evidence submitted at the evidentiary hearing demonstrated Minh herself took the position that Jim contributed 25% and Minh contributed 75% to the children's 529 accounts. Plaintiff's Trial Exhibit 2, which is an email dated May 29, 2019 from Neil

¹ In Minh's Statement of Facts in her Fast Track Statement, Minh makes several blatantly false and irrelevant claims accusing Jim of defrauding a lender. These false statements are not relevant to the current issues before the Court and Minh makes them solely to denigrate Jim. Such legal tactics are unethical and unprofessional.

Mullins, Minh's counsel at the time, and was admitted at trial. III AA 395-96. The email from Mr. Mullins states:

529 Accounts

Jim will get one-fourth of the 529 plans and Minh 3/4ths (according to contributions), and with provisions that neither will withdraw, except for college tuition and room and board without both parties approving by email. And each party would provide annual statements to the other. We disagree Jim should get half, as such is even contrary to the the [sic] PMA. But Jim should not mind, as we are protecting the children anyway.

III AA 395. In response to Mr. Mullins' email, Jim's counsel sent an email on May 31, 2019 stating Minh's position regarding the 529 accounts was acceptable to Jim, which was admitted into evidence as Plaintiff's Trial Exhibit 3. III AA 398. Thereafter, the parties discussed specifically identifying the exact amounts contributed by each party to the 529 accounts. On August 16, 2019, one year before trial, Mr. Mullins sent a letter to Jim's counsel stating:

Paragraph V, at Page 6, we are in agreement with placing an exact dollar amount to be transferred from the children's 529 accounts in accordance with our previous agreement. My client is in the process of obtaining the records from the plan administrator so we can calculate the exact figure to be transferred to a 529 account in Jim's name only.

Mr. Mullins' letter was entered into evidence as Plaintiff's Trial Exhibit 7. III AA 403-04. An entire year prior to the August 13 and September 4, 2020 evidentiary hearing, Minh was gathering documentation to prove the exact amounts contributed

by each party. In fact, at the evidentiary hearing, Minh admitted documents evidencing each party's contributions to the children's 529 accounts. Based on the evidence admitted at trial, Judge Ritchie found:

THE COURT FURTHER FINDS that the ratio of capital investment in the 529 accounts established by the parties for their children was approximately 25% by JIM and 75% by MINH and her family members. THE COURT FURTHER FINDS that the 529 accounts were established during the marriage for the intended, sole purpose of providing resources for the children's educations, and are held in MINH's name for the benefit of the children. THE COURT FINDS that it is not dividing the 529 accounts based on any contract purportedly entered into by the parties or pursuant to the parties' Premarital Agreement as it does not include any provision regarding 529 accounts. THE COURT FURTHER FINDS that MINH's claim that JIM's contribution to the 529 accounts was a gift to MINH as her separate property is not accepted by the Court. THE COURT FURTHER FINDS that it has discretion to apportion the 529 accounts, and dividing the 529 accounts pursuant to each party's capital contributions is an appropriate and logical way to divide the 529 accounts.

II AA 295-96. Based on the foregoing, Judge Ritchie ordered the children's 529 accounts to be divided into two separate accounts, with Minh having one account in her name for the benefit of the children and receiving 75% of the monies held in the 529 accounts, and with Jim having one account in his name for the benefit of the children and receiving 25% of the monies held in the 529 account. II AA 314.

A year following the evidentiary hearing, Minh hired Adam Udy, a financial consultant with Every Season Wealth Management, to complete an analysis of the parties' contributions because she was unhappy with Judge Ritchie's decision. Based

on this analysis, Minh claims she actually contributed 2.11% more than the Court found, and thus, the Court's prior findings and orders should be amended and she should be awarded 77.11% (rather than 75%) of the children's 529 accounts and Jim should be awarded 22.89% (rather than 25%).

6. Issues on appeal. State concisely your response to the principal issue(s) in this appeal:

a. *Division of the Children's 529 Accounts*

Minh had every opportunity to hire an expert, engage in discovery, and provide an analysis regarding the parties' contributions to the children's 529 accounts to the Court prior to the evidentiary hearing in 2020. Minh failed to do so, and her request to now modify the division of the 529 accounts based on a financial analysis she obtained a year after the evidentiary hearing should be denied. The evidence admitted at trial demonstrated that Minh contributed 75% of the monies to the children's 529 accounts and Jim contributed 25% of the monies to the children's 529 accounts.

b. *The Children's Passports*

The District Court is within its discretion to enter orders regarding the division of the children's passports. Minh had custody of all the children's passports. To ensure neither party could travel outside of the country with the children without the other parent's consent, the District Court fairly ordered that Jim shall have custody of Hannah's and Selena's passports and Minh shall have custody of Matthew's passport.

7. Legal argument, including authorities:

a. *The District Court Did Not Abuse Its Discretion by Denying Minh's NRCP 60(a) and (b) Motion*

NRCP 60(a) allows the district court to “correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record.” A clerical error is “a mistake in writing or copying” that cannot “be attributed to the exercise of judicial consideration or discretion.” *Marble v. Wright (In re Humbolt River Sys.)*, 77 Nev. 244, 248, 362 P.2d 265, 267 (1961). This Court reviews a district court’s denial of an NRCP 60(a) motion for abuse of discretion.

NRCP 60(a) is not applicable to this matter as there was no clerical mistake or mistake arising from oversight or omission. Judge Ritchie considered all evidence admitted at trial and found that the ratio of capital investment in the 529 accounts established by the parties for their children was approximately 25% by JIM and 75% by MINH and her family members, and divided the accounts accordingly. II AA 295-96. Judge Throne correctly determined that Minh failed to demonstrate how Judge Ritchie’s order was the result of a clerical mistake and not attributable to the exercise of his judicial consideration and discretion, and properly denied Minh’s request to modify Judge Ritchie’s orders pursuant to NRCP 60(a).

...

NRCP 60(b) allows the district court to relieve a party of an order or judgment on the basis of “mistake, inadvertence, surprise, or excusable neglect” or “newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b).” “Motions under NRCP 60(b) are within the sound discretion of the district court, and this Court will not disturb the district court’s decision absent an abuse of discretion.” *Carlson v. Carlson*, 108 Nev. 358, 361, 832 P.2d 380, 382 (1992) (citing *Heard v. Fisher’s & Cobb Sales & Distrib., Inc.*, 88 Nev. 566, 568, 502 P.2d 104, 105 (1972)). The purpose of NRCP 60(b) is to redress injustices that result from excusable neglect or an opposing party’s wrongs. *Id.* at 361-62, 832 P.2d at 382.

The presence of the following factors indicates that the requirements of this rule have been satisfied: (1) a prompt application to remove the judgment; (2) an absence of an intent to delay the proceedings; (3) a lack of knowledge of the procedural requirements on the part of the moving party; and (4) good faith. *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982). A showing of a meritorious defense to the action is also required. *Deros v. Stern*, 87 Nev. 148, 152, 483 P.2d 648, 650 (1971). Finally, the district court must consider the state’s underlying basic policy of deciding a case on the merits whenever possible. *Kahn v. Orme*, 108 Nev. 510, 835 P.2d 790, 793 (1992).

Stoecklein v. Johnson Elec., Inc., 849 P.2d 305, 109 Nev. 268 (Nev. 1993)

NRCP 60(b)(1) does not apply to this matter because there has been no mistake, inadvertence, surprise, or excusable neglect. Minh was represented by counsel at the evidentiary hearing, knew of the discovery and expert deadlines, and chose not hire

an expert until a year after the evidentiary hearing. Thus, Minh did not promptly apply to have the Decree set aside as required in *Yochum*, nor did she demonstrate to the District Court that she had a lack of knowledge of the procedural requirements.

The District Court found that there was a trial on the merits of the division of the 529 accounts and both parties had adequate time to conduct discovery on all financial issues before trial. III AA 482. The District Court found that there was no excuse for Minh to wait a year to have a forensic analysis completed. III AA 482. The District Court also found that there is no mistake, inadvertence, surprise, or excusable neglect and Minh's NRCP 60(b) Motion should be denied. III AA 482. Accordingly, the District Court did not abuse its discretion in denying Minh's NRCP 60(b) Motion. III AA 482.

b. *The District Court Did Not Abuse Its Discretion in Dividing the Children's Passports Between the Parties*

Pursuant to NRS 125C.0045(1), the District Court may make any order for the custody, care, education, maintenance, and support of a minor child as appears in his or her best interest. Here, the District Court did not abuse its discretion in determining the parents were equally entitled to the children's passports and ordering that they be divided between the parties to ensure neither party could leave the country with all three (3) children without the consent of the other parent.

VERIFICATION

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 response has been prepared in a proportionally spaced typeface using WordPerfect X5 in 14 point Times New Roman type style.

2. I further certify that this fast track response complies with the page- or type-volume limitations of NRAP 3E(e)(2) because it does not exceed 11 pages.

3. Finally, I recognize that under NRAP 3E I am responsible for timely filing a fast track response and that the Supreme Court of Nevada may impose sanctions for failing to timely file a fast track response. I therefore certify that the information provided in this fast track response is true and complete to the best of my knowledge, information, and belief.

DATED this 14th day of June, 2022.

THE DICKERSON KARACSONYI
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CERTIFICATE OF SERVICE

I certify that I am an employee of THE DICKERSON KARACSONYI LAW GROUP, and that on this 14th day of June, 2022, I filed a true and correct copy of the foregoing RESPONDENT'S RESPONSE TO APPELLANT'S FAST TRACK STATEMENT, with the Clerk of the Court through the Court's eFlex electronic filing system and notice will be sent electronically by the Court to the following:

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