

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

WILLIAM DIMONACO,

*Appellant,*

vs.

ADRIANA FERRANDO,

*Respondent.*

No. 80576

Electronically Filed  
Oct 13 2021 02:44 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**APPELLANT WILLIAM DIMONACO'S  
CHILD CUSTODY FAST TRACK STATEMENT**

COMES NOW Appellant, WILLIAM DIMONACO (hereinafter "William"), by and through his attorneys of record, Matthew H. Friedman, Esq., and Christopher B. Phillips, Esq. of the law firm of Ford & Friedman and hereby submits this fast track statement pursuant to NRAP 3E.

**1. Name of the party filing this fast track statement:**

William DiMonaco

**2. Name, law firm, address, and telephone number of attorneys submitting this fast track statement:**

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**3. Judicial district, county, and district court docket number of lower court proceedings:**

Eighth Judicial District Court, Clark County.

Case No. D-16-539340-C.

**4. Name of judge issuing judgment or order appealed from:**

Honorable Charles J. Hoskin

**5. Length of trial or evidentiary hearing. If the order appealed from was entered following a trial or evidentiary hearing, then how many days did the trial or evidentiary hearing last?**

The matter never proceeded to trial despite the matter having been set for evidentiary proceedings in the district court.

**6. Written order or judgment appealed from:**

William appeals from the district court's Amended Order filed on January 6, 2020.

**7. Date that written notice of the appealed written judgment or order's entry was served:**

Notice of Entry of the Amended Order was served on January 6, 2020.

**8. If the time for filing the notice of appeal was tolled by the timely filing of a motion listed in NRAP 4(a)(4),**

**(a) specify the type of motion, and the date and method of service of the motion, and the date of filing:**

William's Motion for Trial pursuant to NRCP 59 and to Amend Judgment pursuant to NRCP 52 was filed and served on November 1, 2019.

**(b) date of entry of written order resolving tolling motion:**

The district court denied William's request for a trial but entered an Amended Order modifying its prior judgment on January 6, 2020.

**9. Date notice of appeal was filed:**

William's Notice of Appeal was filed on February 4, 2020.

**10. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a), NRS 155.190, or other:**

William's Notice of Appeal was timely filed pursuant to NRAP 4(a)(4).

**11. Specify the statute, rule or other authority, which grants this court jurisdiction to review the judgment or order appealed from:**

This Court is vested with jurisdiction to review the district court's judgment pursuant to NRAP 3A(b)(7), because the order challenged on appeal alters the custodial timeshare of a minor child.

**12. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which involve the same or some of the same parties to this appeal:**

There has been one prior appeal, to wit: *DiMonaco v. Ferrando*, Case No. 74696.

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**13. 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:**

William is unaware of any other appeals addressing the same or similar issues.

**14. Procedural history. Briefly describe the procedural history of the case (provide citations for every assertion of fact to the appendix or record, if any, or to the transcript or rough draft transcript).**

The dispute at bar began in the district court when Respondent, Adriana, filed a Motion to Allow Parental Afterschool Care (hereinafter the “After School Motion”) on August 28, 2019. (AA 12). William filed his Opposition and Countermotion for the child to Attend Champions Afterschool Learning Program on September 9, 2019, and Adriana filed her Reply and Opposition to William’s Countermotion on September 19, 2019. (AA 26, AA 49). The district court held a hearing on the parties’ competing motions on September 26, 2019. (AA 63). At the conclusion of the hearing, the district court took the matter under advisement and later issued a written decision that was entered on October 7, 2019. (AA 91-93, AA 99).

Following entry of the district court’s order (the “Initial Order”), William filed his Motion for a Trial and to Amend Judgment (collectively referred to as William’s

“Motion for Trial”) on November 1, 2019. (AA 102). Adriana filed her Opposition<sup>1</sup> to William’s Motion for Trial on November 20, 2019, and William filed his Reply to Adriana’s Opposition on December 13, 2019. (AA 121, AA 132). The district court held a hearing on William’s Motion for Trial on December 18, 2019. (AA 151). Thereafter, the district court took the matter under advisement (AA 178-79) and later issued an Amended Order that was entered on January 6, 2020. (AA 192). Following entry of the district court’s Amended Order, William filed his Notice of Appeal on February 4, 2020. (AA 206)

After noticing the instant appeal, William filed an Emergency Motion for Temporary Physical Custody and other related relief (hereinafter the “Emergency Motion”) pursuant to *Mack-Manley v. Manley*, 122 Nev. 849, 856, 138 P.3d 525, 530 (2006) and *Huneycutt v. Huneycutt*, 94 Nev. 79, 81, 575 P.2d 586 (1978). (AA 213). Adriana filed her Opposition to William’s Emergency Motion on September 29, 2020 (AA 250). Following a hearing on October 1, 2020, the district court certified its intent to set an evidentiary hearing on both parties’ competing custody claims and to reopen discovery. (AA 271; AA 324).

Following entry of the district court’s Order After October 1, 2020 Hearing, (AA 318), William filed a Motion for Remand before this Court in accordance with

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<sup>1</sup> Throughout the district court proceedings, the parties consistently filed competing motions and countermotions for awards of attorney’s fees and costs. As the district court did not award fees or costs to either party, references to the parties claims for attorney’s fees/costs are omitted from this fast track statement, though he same is reflected in the accompanying appendix.

the procedures set forth in *Huneycutt*, cited *supra*. (AA 327). On December 10, 2020, this Court issued a Limited Order Remand. (AA 349).

Following this Court's remand to the district court, but prior to the district court conducting any further proceedings, the case was administratively reassigned from Judge Hoskin to Judge Almase following the November 2020 judicial elections. Upon reassignment to Judge Almase, Adriana filed a peremptory challenge on January 15, 2021. (AA 352). In turn, the district court clerk reassigned the case to Judge Amy Mastin. (AA 356). As a result of the department reassignments, the evidentiary proceeding initially set by Judge Hoskin was rescheduled to July 14, 2021. (AA 358; AA 364).

However, on July 13, 2021, the afternoon before trial, the district court (Judge Mastin) issued a minute order vacating trial. (AA 370). In response, William filed a Motion for Reconsideration on July 28, 2021. Adriana filed her Opposition to William's Motion for Reconsideration on August 12, 2021, and William filed his Reply to Adriana's Opposition on August 19, 2021. Following a hearing on August 31, 2021, the district court denied William's Motion for Reconsideration. (AA 424).<sup>2</sup>

Following the district court's denial of William's Motion for Reconsideration, William filed an updated Status Report with this Court on September 10, 2021. (AA 425). In turn, this Court issued its order reinstating briefing. (AA 430). Thereafter, William requested, and this Court approved, a seven (7) day telephone extension of

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<sup>2</sup> A copy of the minutes from the August 31, 2021 hearing is included in place of the Order After August 31, 2021 Hearing as the same has not yet been entered as of the time of filing this fast track statement.

the deadline for filing the foregoing fast track statement. (AA 431). See NRAP 3E(f)(2). Accordingly, this fast track statement is timely filed as it is now due on or before October 13, 2021. *Id.*

**15. Statement of facts. Briefly set forth the facts material to the issues on appeal (provide citations for every assertion of fact to the appendix or record, if any, or to the transcript or rough draft transcript).**

William and Adriana were never married, but they share one minor child born the issue of their relationship, to wit: Grayson Ashton DiMonaco-Ferrando (hereinafter “Grayson” or “the child”), born August 12, 2014, currently age seven (7). (AA 1).

On August 28, 2019, Adriana filed her After School Motion seeking orders compelling the minor child to remain in her care during portions of William’s custodial school days. (AA 13). In turn, William opposed the After School Motion and argued that Adriana’s requested relief would unnecessarily increase conflict between the parties by exponentially increasing the number of in-person custodial exchanges. (AA 34). Additionally, William argued that Adriana’s requested relief was contrary to the child’s best interest because it would blur the lines of custodial authority, inhibit familial cohesion in the DiMonaco household, and severely confuse Grayson. (*Id.*). In turn, William proposed that the minor child attend an accredited afterschool learning program during his custodial time while he completed his workday. (AA 38-39).

A hearing was held regarding Adriana's After School Motion and William's Opposition and Countermotion on September 26, 2019. (AA 63). At no time during the September 26, 2019 hearing was sworn testimony taken, nor was any evidence introduced into the record other than the declarations of the parties and the exhibits attached to William's Countermotion. (AA 63-93). Following the hearing, the district court took the matter under advisement in order to prepare a written decision on whether the child would attend an afterschool learning program, or whether Adriana would be designated as the after school care giver on William's custodial days. (AA 91-93).

On October 7, 2019, the district court entered its order on the After School Motion and William's Countermotion (hereinafter the "Initial Order") and held that the minor child was to be cared for by Adriana "rather than any third-party care-giver" on William's custodial school days. (AA 100). Notably, the district court's Initial Order does not contain a single evidence based finding or a best interest analysis. (AA 99-101).

In addition to the lack of findings and best interest analysis, the district court also misconstrued William's request to allow Grayson to attend an accredited afterschool learning program with the notion that William was asking for Grayson to spend the after school hours at an ordinary daycare. (AA 100). The district court went on to further conclude that its order that allowing Adriana to care for Grayson during

the after school hours on William's custodial days "...shall not be considered as a basis to modify custody." (*Id.*).

Based upon the district court not having taken any evidence at the time of the September 26, 2019 hearing, together with the district court's failure to conduct a best interest analysis, William filed his Motion for Trial pursuant to NRCP 59 and to amend the district court's Initial Order pursuant to NRCP 52. (AA 102). Following a hearing on William's Motion for Trial, the district court issued an Amended Order. (AA 194). However, the Amended Order suffers from the same defects as the Initial Order.

More specifically, the district court once again never received evidence. (AA 151-179). Instead, the district court summarily found that the award of the after school hours of William's custodial time to Adriana does not constitute a modification or any change in the parties' custodial rights. (AA 196). The district court further found that despite awarding William's after school parenting time to Adriana, "...[n]o permanent increase in visitation, or reduction in any custodial time was ordered..." (*Id.*).

The district court went on to further hold that the district court only "...gave direction as to after school care after considering the best interests of the child, not a modification of visitation or custody." (AA 196-97). The district court also held that "...spending time with a fit parent, rather than an after school program is in the best interests of the child." (AA 197).

In support of its decision that spending time with a fit parent is *per se* in the best interest of the child, the district court relied upon NRS 125C.001 for the proposition that the absence of any reference to third party care givers within the text of the statute conclusively establishes that a fit parent caring for a child is always be preferred over any third party care giver. (AA 198).

In further support of its Amended Order, the district court went on to hold that the after school program proposed by William “...appear[ed] to be an afterschool daycare.” (AA 199). More to the point, the district court concluded that the best interest of the child favored Adriana providing after school care because the child’s attendance at an after school program was counter to maintaining frequent associations between Adriana and the child. (AA 200). The district court furthered its analysis by finding that William’s position lacked merit because William was before the district court “...demand[ing] to control his ‘time’ with the child...” (AA 201). The district court also concluded that William’s arguments lacked merit because he “...apparently fail[ed] to see any good in the child spending any additional time with [Adriana].” (*Id.*).

Notably absent from the district court’s analysis is how Grayson could have benefitted from additional educational instruction at an accredited after school learning program, or that additional time spent with school age children could have furthered Grayson’s physical, emotional, and social development. Stated differently, the district court never considered the best interest factors through a lens in favor of William’s

requested relief. Instead, the district court used its Amended Order to retroactively apply the best interest factors set forth in NRS 125C.0035 to support its Initial Order in favor of Adriana.

Regardless, the district court concluded that the after school time share dispute would be resolved as follows:

**Only on Plaintiff's custodial school days, from afterschool until Plaintiff is able to pick up the child after work, the child shall be cared for by Defendant, over any third-party care-giver.**

If a similar situation arises during Defendant's custodial time, as Plaintiff is also a fit parent, it is the Court's intention that he **also be given preference** over any third-party care-giver.

(AA 203) (emphasis added).

Notably, the district court says it considered the best interest of Grayson. However, the best interest analysis, which was based upon the admission of zero testimony or evidence, was limited to the district court's comparison of Grayson spending afterschool time with Adriana or attending what the district court mistakenly classified as a "daycare." No consideration was given to how Grayson's attendance at William's requested after school learning program could have also met the best interest of the child. Moreover, the district court was also dismissive of the how additional custodial exchanges and more frequent interactions between the parties would have been counter to the child's best interest. Instead, the district court summarily conceded that its decision would result in more frequent interactions between the parties, but that

the level of conflict between the parties does not supersede the district court's other considerations. (AA 201). Based upon the district court's short sighted analysis, and the lack of evidence to support the district court's Amended Order, this appeal followed.

**16. Issues on appeal. State concisely the principal issue(s) in this appeal.**

Based upon the extensive proceedings below, William identifies six (6) issues on appeal, to wit:

- (1) Whether the district court erred when it held that a change in after school time share did not constitute a change in physical custody?
- (2) Whether the district court erred by not holding an evidentiary hearing prior to modifying the afterschool time share?
- (3) Whether the district court's award of *sua sponte* relief in the form of allowing Adriana to care for the child over any third party violated William's right to procedural due process?
- (4) Whether the district court's award in favor of Adriana was supported by an improper evidentiary burden on William?
- (5) Whether the district court's Amended Order contains sufficient findings supported by admissible evidence to support the resulting change in custodial time share?

(6) Whether the district court's Amended Order in favor of Adriana caring for the minor child over any third party constitutes an equal protection violation under the 14<sup>th</sup> Amendment?

**17. Legal argument, including authorities:**

**A. The district court erred when it held that a change in after school time share did not constitute a change in physical custody.**

In *Rivero v. Rivero*, 125 Nev. 410, 430, 216 P.3d 213, 227 (2009), this Court explained that a modification of a joint physical custody arrangement is appropriate only if the requested change is in the child's best interest.

Here, Adriana's After School Motion sought an order allowing her to care for Grayson on William's custodial days from the time Grayson was dismissed from school until such time as William could retrieve the child at the conclusion of his workday. (AA 13). Thus, it is undisputed that Adriana's requested relief impacted the parties' then existing custodial time share. As a result, the district court was required to find that any such modification was in the best interest of the child.

Unfortunately, the district court never engaged with William's Opposition wherein he argued that Adriana's requested relief would unnecessarily increase conflict between the parties by exponentially increasing the number of in-person custodial exchanges. (AA 34). The district court also gave short shrift to William's argument that Adriana's requested relief was contrary to the child's best interest because it would blur the lines of custodial authority, inhibit familial cohesion in the DiMonaco household, and severely confuse Grayson. (*Id.*). As an alternative,

William proposed that the minor child attend an accredited afterschool learning program during his custodial time. (AA 38-39)

Nonetheless, and despite the parties offering competing best interest claims, the district court concluded – without any findings or evidentiary support – that Adriana caring for the child during William’s custodial time “...shall not be considered as a basis to modify custody.” (AA 100). This holding is a plain error of law. In fact, this Court has previously opined that any change in visitation is a custody determination that is subject to a best interest analysis. See *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996) (holding that any court decision regarding visitation is a custody determination). See also NRS 125C.0035.

With regards to the required best interest analysis, William notes that the district court’s Amended Order does contain an analysis under NRS 125C.0035. (AA 186-89). However, the district court’s best interest analysis is insufficient as a matter of law because the district court utilized the best interest factors to support its decision without *first* establishing by admissible evidence that such a change in after school timeshare would be in the best interest of the minor child.

On these facts, the district court was required to determine that the requested change in custodial time share, regardless of the fact that the custodial time at issue was only a few hours on certain days per week, was in the child’s best interest. Here the district court initially failed to consider a best interest analysis at all, and then upon issuing its Amended Order to include a recitation of the statutory best interest

factors, based its amended decision on speculation and conjecture rather than any admissible evidence.<sup>3</sup>

Accordingly, the district court's Amended Order undeniably made custodial orders without any evidence to support its haphazard best interest analysis; and despite the district court's efforts to say otherwise, the district court is a government actor, and it absolutely made decisions affecting William's custodial rights. As such, the district court's Amended Order contains errors of law, and the same should be reversed.

**B. The district court erred by not holding an evidentiary hearing prior to modifying the afterschool time share.**

In *Rooney*, this Court explained that it is within the district court's discretion to *deny* a motion to modify custody without holding a hearing when the moving party fails to show adequate cause for holding a hearing. *Rooney v. Rooney*, 109 Nev. 540, 543, 853 P.2d 123, 124-25 (1993) (citing *Pridgeon v. Superior Court*, 134 Ariz. 177, 655 P.2d 1 (1982)). However, it is equally important to note too that the *Rooney* decision and its progeny *do not* say that the district court has the discretion to *grant* a motion to modify custody without conducting a hearing to establish that the requested change is in the child's best interest. *Rooney* only address the district court's ability to deny a motion when a moving party fails to show adequate cause for further proceedings. *Rooney* does not permit the district court to deny a hearing

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<sup>3</sup> The insufficiency of the district court's best interest analysis is discussed in more detail below at part 17(E).

as a means of deciding an issue without making specific findings supported by substantial evidence.<sup>4</sup>

Here, the district court never conducted a separate evidentiary hearing, nor did the district court accept evidence at the September 26, 2019 or December 18, 2019 hearings. This lack of any evidentiary proceeding led the district court to issuing its Initial Order without adequate evidence based findings or a best interest analysis. (AA 99-101). Worse yet, the lack of evidentiary proceedings also led the district court to misconstrue William's request to allow Grayson to attend an accredited afterschool learning program with the notion that William was asking for Grayson to spend the after school hours at a garden variety daycare. (AA 100).

Yet, notably absent from the district court's analysis is how Grayson could have benefitted from additional educational instruction at an accredited after school learning program, or that the additional time with school age children could have furthered Grayson's physical, emotional, and social development. Stated differently, the district court never considered the best interest factors through a lens in favor of William's requested relief. Instead, the district court retroactively applied the best interest factors set forth in NRS 125C.0035 to support its Initial Order in favor of Adriana. (AA 200-03). However, the Amended Order suffers from the same defects as the Initial Order.

More specifically, the district court once again never received evidence. (AA 151-79). Instead, the district court summarily found that the award of the after school

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<sup>4</sup> The necessity of specific findings and substantial evidence is discussed below in part 17(E)

hours of William's custodial time to Adriana does not constitute a modification or any change in the parties' custodial rights. (AA 196). The district court further found that despite awarding William's after school parenting time to Adriana, "...[n]o permanent increase in visitation, or reduction in any custodial time was ordered..." (*Id.*). These holdings are factually and legally incorrect.

As a factual matter, the district court *increased* Adriana's weekly visitation with Grayson while simultaneously *decreasing* William's weekly custodial time share; and as a matter of law, the district court's order constitutes a custody determination because any order that affects visitation is considered a custody determination. See *Wallace*, cited *supra*.

Furthermore, the district court also awarded *sua sponte* relief by further ordering that Adriana's right to provide after school care for the child during William's custodial time was to the exclusion of any other third party. (AA 203). Notably, the district court concluded that the best interest of the child favored Adriana providing after school care because the child's attendance at an after school program was counter to maintaining frequent associations between Adriana and the child. (AA 200).

On this point, the district court concluded that frequent association between mom and child would always be in the child's best interest, even though William had presented a *prima facie* showing of how the child could have also benefitted from attendance at an accredited after school program. Rather than taking evidence and weighing the multiple options to make an evidence based determination, the district court merely concluded that Adriana's assertions were more meritorious and

ruled in favor of mom without any regard for what the evidence might have shown had the matter been allowed to proceed to trial.

Accordingly, the district court's failure to make an evidence based determination of the child's best interest constitutes plain error as a matter of law, and the district court's Amended Order should be reversed.

**C. The district court's award of *sua sponte* relief in the form of allowing Adriana to care for the child over any third party violated William's right to procedural due process.**

In addition to the errors explained above, the district court's decision to grant *sua sponte* relief to Adriana also constitutes a violation of William's right to procedural due process.

With regards to procedural due process, it is established law in Nevada that notice must be given before a party's substantial rights are affected. See *Wiese v. Granta*, 110 Nev. 1410, 1412, 887 P.2d 744, 745 (1994). Here, Adriana's After School Motion only sought an order compelling the minor child to remain in her care during the after school hours on William's custodial school days. (AA 13). In turn, William filed his Opposition arguing that an accredited after school learning program would be best for the child. (AA 38-39). As plead, the parties were on notice that a dispute existed as to whether it would be in Grayson' best interest to spend his after school hours on William's custodial days in Adriana's care or if he should attend the accredited after school learning program suggested by William. Notwithstanding the scope of the parties' briefing, the district court went far beyond

the issue of “Adriana versus after school program,” and instead, fashioned a holding that promoted Adriana above any third party. (AA 203).

Note here that Adriana’s newly acquired permission to provide after school care is to the exclusion of all other qualified caregivers, i.e., grandmother, grandfather, aunt, uncle, step-parent, teacher, tutor, coach, or any other trustworthy adult that William might nominate to provide care for Grayson during his custodial time. Note too that there was never any notice that, even if the district court found the after school program sought by William to not be in the best interest of Grayson, that William’s right to nominate any other trustworthy adult to care for Grayson was in jeopardy of being taken away or modified by the district court. All that William knew to be at issue was whether Grayson would be permitted to attend the after school learning program.

Stated differently, the district court’s Amended Order went beyond Adriana’s requested relief that she be permitted to provide after school care on William’s custodial days instead of having Grayson attend an afterschool learning program; and instead, the district court took it upon itself to award all of William’s after school parenting time to Adriana without any notice that William’s right or ability to allocate any or all of that time to any other responsible, trustworthy caretaker was in jeopardy of being awarded exclusively to Adriana.<sup>5</sup>

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<sup>5</sup> In furtherance of William’s argument regarding the district court’s error in failing to conduct evidentiary proceedings, see part 17(B) above, William also notes here that the lack of evidentiary proceedings necessarily prevented the district court from taking evidence or making evidence based findings to support the exclusion of all third party caregivers from providing after school care for Grayson on William’s custodial days. This is further discussed below in part 17(E).

Here, the district court’s decision to strip William of his right to make decisions regarding Grayson’s after school care on his custodial days without any notice that his right to make such decisions were at risk of being altered by the district court results in a deprivation of William’s constitutional right to procedural due process. See *Wiese*, 110 Nev. at 1412 (citing *Dagher v. Dagher*, 103 Nev. 26, 731 P.2d 1329 (1987) (noting that it was a procedural due process violation for the district court to enter an order modifying custody when the papers and pleadings leading up to the hearing only noticed a hearing on a motion for “modification of divorce”). Here, there was no notice that William’s right or ability to designate any or all of his after school custodial time to a care giver other than his requested after school learning program was at issue; and there was certainly no notice that Adriana was being considered as a superior (and permanent) caregiver during William’s custodial time over any other third party including William’s (and Grayson’s) other family members and relatives. The district court’s mere assertion that its Amended Order did not implicate custody does not make it so.

Thus, the district court’s decision to award Adriana the exclusive right to provide after school care on William’s custodial days without any notice to William that his right to nominate any other care giver was in jeopardy resulted in a deprivation of William’s constitutional right to procedural due process. Accordingly, the district court’s Amended Order should be reversed.

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**D. The district court's Amended Order in favor of Adriana is premised on the court having imposed an improper evidentiary burden on William.**

In its Amended Order, the district court concluded that William's arguments did not provide adequate cause to consider any further proceedings (AA 204) even though it was Adriana who had the burden of showing that her request to provide after school care during William's custodial time was in Grayson's best interest. See *Ellis v. Carucci*, 123 Nev. 145 (2007) at n. 14 (wherein this Court cited to multiple cases (citations omitted herein) recognizing that the moving party bears the burden of showing that any requested custodial change is in the best interest of the child). Notably, Adriana supported her After School Motion with only a declaration adopting the arguments of her counsel as evidence.<sup>6</sup> (AA 22). Conversely, William supported his Opposition and Countermotion with exhibits demonstrating the benefits of Grayson attending an accredited after school learning program. (AA 38; AA 181-182). Nevertheless, the district court found Adriana's arguments to be outcome determinative while simultaneously determining that William's actual evidence in the form of exhibits was unpersuasive. (AA 199). The fact of the matter is, William met his burden under *Rooney*, cited *supra* to establish adequate cause for an evidentiary hearing. Here, the district court was faced with competing arguments of both parties, and when considered on balance, the district court determined that

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<sup>6</sup> Although a declaration of a party is considered evidence, the arguments of counsel attested to in the declaration are not, because arguments of counsel are not evidence and do not establish the facts of the case. See *Nev. Ass'n Services v. Eighth Judicial District Court of Nev.*, 338 P.3d 1250, 1255-56 (2004) (citing *Jain v. McFarland*, 109 Nev. 465, 475-76, 851 P.2d 450, 457 (1993)).

Adriana was the prevailing party even though her Motion was based upon *less* evidence in terms of both quantity and substance than what was offered by William. Consequently, the district court improperly shifted the burden of proof by requiring William to prove that his requested after school care program was the better option rather than requiring Adriana to first prove that her request was in the best interest of Grayson.

Holding William to a higher evidentiary is particularly egregious considering that the district court expected him to not only disprove Adriana's allegations, but also to prove – without the benefit of an evidentiary hearing – that his request for Grayson to attend an after school learning program was the better option. This inequitable and improper burden shift is particularly problematic considering the procedural history of this case, to wit: the district court denied William request for a trial pursuant to NRCP 59. (AA 190). Then, despite the instant appeal, the district court certified its intent to conduct evidentiary proceedings on the parties' competing custody claims, which led to this Court issuing its Order of Limited Remand. (AA 349); and then, while on remand, the district court reversed course and refused to entertain any evidentiary proceedings whatsoever. (AA 424). As a result, the custodial timeshare dispute that gives rise to this appeal has been ongoing since September 2019 and William *still* has not been able to present facts and evidence at an evidentiary hearing.

In sum, the district court's refusal to conduct evidentiary proceedings resulted in an improper burden shift that has impermissibly held William to a higher

evidentiary burden than Adriana; and this is particularly unfair given that William's multiple requests for evidentiary proceedings have been denied.

Accordingly, the district court's refusal to conduct evidentiary proceedings has resulted in William being required to meet an impossible evidentiary burden given that his repeated requests for an evidentiary proceeding have been denied. Consequently, the district court's Amended Order contains multiple errors of law, and the same must be reversed.

**E. The district court's Amended Order does not contain sufficient findings based upon admissible evidence to support the resulting change in custodial time share.**

Separate and apart from the other multiple errors discussed above, the district court's Amended Order is also erroneous because it is not supported by adequate findings based upon substantial evidence. This Court has held that it is an abuse of discretion for a district court to make custodial orders without making findings based upon substantial evidence. See *Rivero*, 125 Nev. at 430.

On this point, it is axiomatic that the district court cannot have made findings based on substantial evidence because the district court has thus far, some two (2) years in the making, refused to conduct evidentiary proceedings. More to the point, neither the district court's Initial Order nor the Amended Order contains any citation to any testimony or exhibits. (AA 97-101; AA 192-205). Instead, the district court merely says that it reviewed all the information submitted to support its decision. (AA 182). Such a summary disposition is insufficient. The district court cannot

refuse to conduct evidentiary proceedings and then conclude as a matter of law that it has reached findings based upon substantial evidence.

Moreover, this Court has held that specific factual findings are crucial for appellate review. Without a detailed explanation of the reasons or bases for a district court's decision, meaningful appellate review is hampered, because without specific findings based upon the evidence, this Court is left to mere speculation. See *Boonsong Jitnan v. Oliver*, 127 Nev. 424, 433, 254 P.3d 623, 629 (2011).

Accordingly, it was reversible error for the district court to award all of William's after school parenting time to Adriana without making specific findings of fact based upon substantial evidence to support its decision. As such, the district court's Amend Order should be reversed.

**F. Whether the district court's Amended Order in favor of Adriana caring for the minor child over any third party constitutes an equal protection violation under the 14<sup>th</sup> Amendment?**

Finally, the district court's Amended Order constitutes reversible error because it creates a desperate outcome between the parties. The controlling question in an equal protection analysis is whether the statute effectuates dissimilar treatment of similarly situated persons. See *Nguyen v. Boynes*, 133 Nev. 229, 235, 396 P.3d 774, 780 (2017) (citing *Rico v. Rodriguez*, 121 Nev. 695, 703, 120 P.3d 812, 817 (2005)).

Here, the district court relied upon NRS 125C.001 for the proposition that the district court's analysis was supported by statute. The district court specifically relied upon the absence of any reference to third party caregivers providing care to

children. (AA 184). Based upon the absence of any statutory reference to third party caregivers, the district court ordered as follows:

**Only on Plaintiff's custodial school days, from afterschool until Plaintiff is able to pick up the child after work, the child shall be cared for by Defendant, over any third-party care-giver.**

If a similar situation arises during Defendant's custodial time, as Plaintiff is also a fit parent, it is the Court's intention that he **also be given preference** over any third-party care-giver.

(AA 189) (emphasis added).

Here, the district court applied NRS 125C.001 to support its order that Adriana *shall* provide after school care for Grayson on William's custodial days if William is working; but when applied in the reverse, the district court ordered that William should be given *preference* to care for Grayson in instances where Adriana is unavailable. There is a significant difference between mandating that William's after school custodial time *shall* be exercised by Adriana versus a requirement that William be given *preference*. If viewed with the metaphorical shoe on the other foot, William could face contempt proceedings in the district court if he elected to follow his preference and have Grayson attend an accredited after school program; yet, if Adriana is unavailable, all she has to do is show that it is not preferential to have William care for Grayson and she can designate any other third party caregiver.

The district court's desperate application of NRS 125C.001 is also highlighted by the fact that the district court, at least in part, is punishing William for having a job. Specifically, the district court held that, "[t]he restriction on Plaintiff's ability

to provide afterschool care was placed upon him by his employer, not this Court.” (AA 191). Here, the district court tries to take a hands-off approach by saying that no custodial rights were modified (AA 182), even though *Wallace* conclusively establishes that any change in visitation constitutes a custody determination.

Moreover, the district court overlooks the fact that William’s work schedule existed when the court awarded the parties’ joint legal and joint physical custody. Thus, William’s work schedule should have been immaterial to the district court’s resolution of the after school time share dispute. Nonetheless, the district court referenced William’s work schedule to try and avoid the fact that, at bottom, the district court is a government actor making decisions about William’s custodial timeshare. As such, William was entitled to not only procedural due process for all the reasons discussed herein, but he is also entitled to an equal application of the law.

In sum, William does not challenge the facial constitutionality of NRS 125C.001; rather, he challenges the district court’s unequal application of the statute in so far as it has resulted in a desperate outcome when applied to Adriana and William who were before the district court on equal footing as joint legal and joint physical custodians.

Accordingly, the district court’s application of NRS 125C.001 violates the United States and Nevada Constitutions’ equal protection clauses, and as a result, the district court’s Amended Order must be reversed.

**18. Issues of first impression or of public interest. Does this appeal present a substantial legal issue of first impression in this jurisdiction or one affecting an important public interest? Yes, or no? If so, explain:**

Upon review of the relevant and controlling case law as discussed in the legal argument section above, this appeal presents both an issue of first impression as well as issues of important public interest.

More specifically, the district court's Amended Order was premised in part on a finding that the legislative policy articulated in NRS 125C.001 provides that it is in the best interest of a child to be in the care of a fit parent over any third party, even when such third party care givers are designated by an otherwise fit, joint legal and joint physical custodial parent. This appeal provides this Court with an opportunity to provide clarification on the scope and application of NRS 125C.001 with regards to a parent's ability (or inability as construed by the district court) to designate third-party care givers as part of a parent's fundamental right of parentage.

Additionally, this appeal presents an issue of significant public importance, to wit: due process. As explained herein, this Court has consistently held that prior to modifying a custody award, a parent must be presented with a full and fair hearing wherein evidence may be submitted for the district court's consideration. Likewise, this Court has also held that due process requires that notice be given before a party's substantial rights are affected; and this Court has held that a district court's findings must be supported by substantial evidence. See *Rooney*, *Wiese*, and *Nguyen*, all cited *supra*.

Here, the district court never conducted evidentiary proceedings or allowed evidence or testimony to be presented. Moreover, William was never on notice that his right to designate an appropriate caregiver during his custodial time was at issue. Adriana's After School Motion only sought an order allowing her to care for Grayson after school in lieu of him attending an accredited afterschool program. Nevertheless, the district court's Amended Order resulted in the district court issuing *sua sponte* relief in the form of William no longer being able to designate *any third party* to care for the child on his custodial days. William was never on notice that his right to designate a third party care giver during his custodial time was at issue.

Thus, the proceedings below resulted in procedural due process violations that are not only of paramount importance to William but are also of great public importance given their constitutional significance. As such, this appeal addresses significant constitutional issues that warrant this appeal being retained by the Nevada Supreme Court rather than the Nevada Court of Appeals.

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For the foregoing reasons, the district court's Amended Order should be reversed.

Dated this 13<sup>th</sup> day of October, 2021.

**FORD & FRIEDMAN**

*/s/ Matthew H. Friedman*

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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 this fast track statement has been prepared in a proportionally spaced typeface using Microsoft Word 365 in fourteen (14) point Times New Roman font.

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 proportionally spaced, has a typeface of 14 points or more, and contains 7,194 words, not including the Certificate of Service. A fast track statement is acceptable if it contains no more than 7,267 words.

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.

[Remainder of this page left intentionally blank]

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 13<sup>th</sup> day of October, 2021.

**FORD & FRIEDMAN**

*/s/ Matthew H. Friedman*

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**CERTIFICATE OF ELECTRONIC SERVICE**

I the undersigned hereby certify that on the 13th day of October, 2021, I served the above and foregoing “**Appellant William DiMonaco’s Child Custody Fast Track Statement**” by serving the following registered users for service on the Court’s electronic filing and service program:

Michael P. Carman, Esq.  
*Attorney for Respondent*

*/s/ Kristi Faust*

\_\_\_\_\_  
An employee of Ford & Friedman, LLC