IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM EUGENE DIMONICO, Appellant, vs. ADRIANA DAVINA FERRANDO, Respondent.	No. 80576 District Court No. D-16-539340-C

CHILD CUSTODY FAST TRACK RESPONSE

1. **Name of party filing this fast track response:**

   Adriana Davina Ferrando

2. **Name, law firm, address, and telephone number of attorney or proper person respondent submitting this fast track response:**

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3. **Proceedings raising same issues:**

   Counsel is unaware of any such proceedings.

4. **Procedural history:**

Respondent offers the following additional procedural history to provide context to the issues appeal.

The underlying action commenced on September 8, 2016, upon the filing of Will's Complaint for Custody. AA0001-AA0004. After filing competing custody

motions, the parties initially appeared before the Court on November 29, 2016, and Adriana was awarded temporary primary physical custody of Grayson. RA0001-RA0024;RA0025-RA0047;RA0048-RA0050;RA0051-RA0059. At the subsequent March 13, 2017, hearing the Court scheduled a trial to resolve custody issues. RA0071-RA0073;RA0075-RA0081. Prior to the time of that trial – on June 12, 2017 – the parties' stipulated to a Partial Parenting Agreement which resolved a majority of the custody issues before the Court. RA0092-RA0100. On June 21, 2017, the district court conducted a trial to resolve the remaining issues between the parties. RA0113-RA0114. At that time, the district court implemented the custodial timeshare schedule followed by the parties which is set forth in their Decree of Custody dated November 9, 2017. RA0115-RA0130. Upon entry of the parties' custodial schedule, William filed a Notice of Appeal on December 6, 2017, challenging the Court's child support orders. RA0150-RA0152. Supreme Court case 74696 proceeded until resolved by a Stipulation and Order on July 18, 2018. RA0153-RA0157.

Subsequent to the resolution of the parties' appeal, a dispute arose between the parties regarding Grayson's school enrollment and Adriana filed a motion on July 23, 2019 to confirm Grayson's enrollment at Somerset Academy. RA0158-RA0182. Will objected to and opposed Grayson's enrollment. RA0183-RA0214. The school enrollment issue was heard by the Court on August 1, 2019. RA0215-

RA0216. With Will unable to obtain a zone variance that would allow Grayson's enrollment at the school of his choice, the district court confirmed Grayson's enrollment at Somerset Academy at that hearing. RA0215-RA0216.

That background gave rise to the procedural background described by Will in his Fast Track Brief and the dispute presently at issue in Will's appeal.

5. Statement of Facts:

The parties to this action were never married and have one child together, to wit: Grayson Ashton DiMonaco-Ferrando ("Grayson") born August 12, 2014. RA0026. At the time of Grayson's birth, the parties lived apart and Adriana served as his primary caregiver. RA0026-RA0027. Prior to the filing of Will's Complaint for Custody in September of 2016, Will had only visited with Grayson on a handful of occasions as he was deployed to Afghanistan and largely unavailable upon his return. RA0027. The longest visit Will had ever exercised prior to that time with Grayson was approximately forty (40) minutes in duration. RA0027. Adriana was, and remains to this day, a stay-at-home mother.

The parties were able to arrive at a partial parenting agreement and had even agreed to share joint legal and joint physical custody of Grayson but needed the court's assistance to resolve the custodial timeshare schedule. RA0092-RA0100. One of Adriana's main concerns was who would care for Grayson when Will was working or otherwise unavailable. RA0051. As she was home and personally

available to provide this care, she requested a right of first refusal. RA0051. Will objected to this request, making the same arguments presented in the instant appeal regarding his perceived right to unilaterally dictate Grayson's care on his days (Will's "parental autonomy" argument) and his desire to avoid any further exchanges with Adriana. RA0052-RA0053.

The matter came before Judge Duckworth at the June 21, 2017, hearing. After careful consideration of the parties' arguments, the court ultimately determined that a "hybrid" approach would be best for Grayson, with Adriana permitted to care for Grayson after school on Wednesdays (Will's custodial day) while he was working and unavailable. AA0052. While Judge Duckworth did acknowledge the potential harm to a child that could arise from additional exchanges while parties are in conflict, the court had far greater concerns regarding Will's "parental autonomy" arguments. Specifically, the court was very troubled that Will viewed Grayson as "a piece of property" that he was allowed to control, instead of a young child with needs and emotions which must be taken into account. AA0052. This was an "issue of control" for Will, not focused on Grayson's best interests. AA0052. The court continued to specifically express concerns about Will's belief that he "get[s] to kick that toy just as [he] wants to" during his time, concluding that "when we start treating the child as a possession – 'this is mine, this is my toy, and if I want the toy to be in daycare' – that's where it becomes [a

problem]. AA0052-AA0053. Considering what was best for Grayson, the court rejected Will's argument that he was permitted to unilaterally dictate the child's care on his custodial days and entered orders permitting Grayson to remain in Adriana's home after school on Will's custodial Wednesdays. RA0115-RA0130. Subsequent to the entry of the Decree of Divorce, Adriana actually served as Grayson's afterschool caregiver on the *majority* of Will's days from June 21, 2017, without issue. AA0014. As indicated, such after school care allowed Adriana to supervise Grayson's homework and allowed Grayson to spend time with his stepbrother after school. AA0014.

In March of 2018, Will became upset about his child support orders and he began to limit Adriana's additional after school time with Grayson. Following the school enrollment dispute in August of 2019, Grayson was scheduled to attend school right down the street from Adriana's home along with his stepbrother. AA0014. The new school enrollment was expected to make it easier for the boys to come home from school and do their homework together under parental supervision. AA0014. Unfortunately, Will advised that he was considering the use of a third-party (who was openly hostile to Adriana) to care for Grayson in lieu of continuing to let her care for Grayson after school on his days. AA0014-AA0015. Upon Adriana's objection to this hostile third-party caring for Grayson, Will announced that he would be enrolling Grayson in afterschool care at his new school

and would be using a third-party caregiver on his days. AA0015. Again, Will was not considering what was best for the parties' young son when making these care decisions. Instead, he was using his "parental autonomy" to deny Adriana her usual after school time with Grayson in retaliation, no matter what detrimental impact this would have on their son.

With Adriana believing that Grayson's best interests would be better served by allowing him to remain in the care of a parent, and in the company of his brother, rather than being placed in a school aftercare program, Adriana filed her Motion to Allow Parental Afterschool Care on August 28, 2019. AA0012-AA0024. Will subsequently filed his Opposition on September 9, 2021, and Adriana filed her Reply on September 19, 2021. AA0026-AA0048;AA0049-AA0062.

The parties initially appeared before Judge Hoskin on September 26, 2019. At that hearing, counsel for both parties made lengthy arguments and presented offers of proof in support of the parties' positions. AA0063-AA0096. At the conclusion of such arguments, Judge Hoskin indicated that he intended to make a decision upon the parties' respective motions after he reviewed Judge Duckworth's prior determinations. AA:0090-AA0093. Relevant to the arguments on appeal, the court clearly and specifically indicated at that hearing that it intended to decide the issue based upon the submissions of the parties, and *no objection was lodged by Will or his counsel* to the court rendering a decision based upon the papers. Id.

After reviewing the video from the parties' trial, Judge Hoskin made specific findings and rendered a decision on October 7, 2019. AA0099-AA0101. Pursuant to that decision, Adriana was allowed to provide after school care for Grayson while Will worked. AA0099-AA0101. In that order, the court determined that Grayson's best interests were better served by continuing to remain in the care of a parent after school, than being left in an afterschool daycare setting. AA0099-AA0101.

On November 1, 2019, Will filed a Motion for a Trial, to Amend Judgment and for Related Relief. AA0102-AA120. Adriana opposed Will's motion on November 20, 2016, and Will filed his Reply on December 13, 2019. AA0121-AA0130;AA0132-AA0150.

On December 18, 2019, the court conducted a hearing on Will's motion. AA0151-AA0029. After hearing lengthy argument, the court rejected Will's argument that a full evidentiary hearing had to be conducted, but did agree to amend its prior decision to provide more insight into the court's decision-making process. Id. On January 6, 2020, the district court entered its final Amended Order resolving the issue which is presently being appealed by Will. AA0180-AA0193.

In its January 6, 2020, Amended Order, the district court outlined the evidence considered, specifically set forth the basis for its decision, explained its rationale, and specifically laid out an analysis as to why its orders were in the best interests of Grayson. AA0180-AA0193. As set forth by the district court, its orders

did not alter the parties' custodial rights and responsibilities, and merely determined that Grayson would be better served by Adriana serving as a childcare provider rather than a third-party while Will was working and unavailable to care for Grayson himself. AA0197.

The district court's decision was based upon the public policies set forth in NRS 125C.001 which favor children being in the care of parents. AA0198. The court rejected Will's argument that the afterschool childcare selection issue presented constituted a custody modification. AA0197. To the contrary, the court viewed the issue as a joint legal custody depute between the parties regarding the selection of afterschool childcare providers. AA0199. In performing a detailed best interest analysis, it is clear that the Court's decision was largely shaped by the arguments and testimony provided by Will in his moving papers which advocated minimizing Adriana's contact with Grayson. AA0199-AA203. Specifically, the court determined that Will's statements evidenced an unwillingness to allow Grayson frequent associations with Adriana, his actions were contributing to the conflict between the parties and evidenced a failure on Will's part to appropriately recognize the needs of Grayson. AA0199-AA0203.

6. Issues on appeal:

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 14th Amendment?

7. Legal argument, including authorities:

Child custody matters rest in the district court's sound discretion. Wallace v. Wallace, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). This Court will not disturb the district court's decision absent a finding that the district court abused its discretion. Sims v. Sims, 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993). In evaluating a district court's custody order, this Court must be satisfied that the district court's decision was made for appropriate reasons and that the court's factual determinations are supported by substantial evidence. Rico v. Rodriguez, 121 Nev. 695, 701, 120 P.3d 812, 216 (2005).

A. The district court's modification of the parties' timeshare clearly did not constitute a change in physical custody.

Will argues that Adriana's after school care of Grayson constitutes a change of custody. In Rivero v. Rivero, 125 Nev. 410, 430, 216 P.3d 213, 227 (2009), this Court recognized primary physical custody as a timeshare in which a parent has more than 60% of a child's custodial time, and joint physical custody as a timeshare in which both parents have more than 40% a child's custodial time, and set forth the requisite burdens that are applicable when a parent is seeking to modify either type of custodial timeshare.

In the case at hand, Rivero is not applicable as neither parent was seeking a change to the joint physical custody designation that they have shared since the entry of their Parenting Plan. To the contrary, the parties' dispute centered over who would provide care for the child after school for a few hours – a legal custody dispute regarding what would be in Grayson's best interest. With Adriana's right to watch Grayson during Will's custodial time only applying to time periods in which Will is working, and in no way impacting Will's time with Grayson or the parties' custodial designations, it is difficult to understand how Will's argument that the court has interfered with his custodial time has merit.

Will next argues that the district court gave "short shrift" to his arguments regarding the potential for additional conflict, blurred "the lines of parental authority," and inhibited his family cohesion. To the contrary – the district court fully considered, and rejected, these arguments, repeatedly finding that Will's

actions were increasing parental conflict, were attempts to "control" Grayson and Adriana, and expressing concern about Will's lack of focus on what was actually best for Grayson. *See* AA0100-AA0203. The district court appeared to view Will's arguments just as Judge Duckworth did in the past -- as an "issue of control" for Will. AA0052-AA0053.

Next Will argues that any change in visitation is a custody determination that is subject to a best interest analysis in accordance with Wallace v. Wallace, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). While undersigned counsel generally agrees that all custody determinations much consider the best interests of a child pursuant to NRS 125C.0045, it disagrees that the district court did not fully consider the best interests of Grayson and did not fully consider all of the evidence presented by the parties prior to rendering it decision.

B. The district court should not be required to conduct a full evidentiary hearing prior to rendering custody decisions.

Next, Will argues that the district court does not have the power to grant any motion involving custody without first conducting a full evidentiary hearing based upon this Court's holding in Rooney. As set forth above, Rooney does not directly apply to this matter as neither party was seeking a modification to the custodial timeshare designation or more than 60% of the time with Grayson.

Further, Will had no issue or objection to the matter being decided upon the papers (and without an evidentiary hearing) until he received the adverse decision

on October 7, 2019. At the parties' September 26, 2019, hearing the court clearly indicated to counsel that it intended to render a decision based upon the papers submitted by counsel, and Will clearly acquiesced to the matter being summarily decided without a full evidentiary hearing. AA0090-AA0093. As specifically stated in the district court's decision, Will did not object to the court rendering a decision based upon the parties' papers at the parties' December 18, 2019, hearing. AA0195:10-13. This Court has recognized the doctrine of "invited error," which precludes a party from alleging deficiencies in the record when their act has caused such deficiencies. Pearson v. Pearson, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994). Instead, the "party will not be heard to complain on an appeal of errors which he himself induced or provoked the court or the opposite party to commit," and said doctrine is sufficient when the "party who on appeal complains of error has contributed to it," including a failure to act. Id. It is believed that the doctrine of invited error should bar Will's present complaints.

Will's argument that a full evidentiary hearing must take place before a motion involving custody is granted (even if it does not involve a modification of the parties' physical custody designation), would place an impossible and unnecessary burden upon the limited judicial resources of the Family Court. Requiring a full evidentiary hearing to decide minor timeshare modifications and joint legal custody disputes between parties (even when a party could not prevail

based upon their legal arguments), would serve to delay decisions involving children that need to be timely made by the court, would allow parties to delay decisions by filing frivolous motions, and would cause the entire family court to a grind to a halt to the detriment of children.

Will's argument further ignores the fact that sworn affidavits and declarations do constitute evidence and is contrary to NRCP 56 which specifically allows the district court to summarily render decisions after reviewing the non-moving parties' claims in their most favorable light and when there exists no material dispute of fact that would support their arguments. Will's argument further flies in the face of EDCR 5.521 which specifically authorizes the district court to enter a dispositional order or render a decision based upon motions.

To the extent that Will vaguely alleges that additional evidence and arguments could have been presented at trial that could have swayed the district court, it was Will's obligation to present such arguments and information to the Court before trial. In response to Will's attempts to raise new arguments on appeal that he argues could have been presented to the district court at trial and swayed its decision, this Court has consistently held that "[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." Britz, 87 Nev. At 447, 488 P.2d at 915; *See also* Parks v. Garrison, 57 Nev. 480, 67 P.2d 314 (1937). To raise an issue not

questioned before the trial court, or raise objections not made until a brief is filed with this Court, is considered a point made for the first time before appellate court and should be deemed waived. Parks, 57 Nev. at 480, 67 P.2d at 314-315.

Adriana requests that this Court determine that requiring the district court to conduct an evidentiary hearing in every case involving a custody issue – even after reviewing a family law litigant's papers in their most favorable light and determining that there is no basis for their claim or defense – would be impractical, would needlessly delay the resolution of custody issues, would encourage frivolous litigation, and would directly undermine the public policies set forth in NRS 18.010.

C. Contrary to Will's argument, the district court's decision to prioritize parental care over third party care was not *sua sponte*.

Next, Will argues that the district court violated Will's procedural due process rights by granting relief to Adriana that was not requested in her motion. Specifically, Will argues that he was not placed on notice that Adriana was seeking to have her rights prioritized over all other third party after school caregivers.

The Court's attention is respectfully directed to Adriana's specific request to prioritize her care over third-party caregivers in her moving papers. AA0018:4-9; AA0051:20-52. Further, such a decision appears to have been made in direct response to Will seeking unfettered authority to "deploy afterschool care as he deems appropriate". AA0040:10-13. Will was clearly on notice of the exact relief

requested by Adriana (and his own request for full control of such care decisions) as clearly reflected in the record of this case.

D. Will's Argument Regarding the Parties' Evidentiary Burdens is Misguided.

Contrary to the argument being raised on appeal, both parties clearly faced burdens of proof in advocating their positions before the Court. As stated above, both parties were seeking a resolution of after school childcare issues. As such, the parties would, technically, have each faced offsetting burdens of proof with Will having the burden of proving that it was in Grayson's best interest to provide him with unfettered discretion to "deploy afterschool care as he deems appropriate" on his custodial days, and Adriana having the burden of demonstrating that it was in Grayson's best interest to care for Grayson over third parties while Will was working.

Within that dispute, however, the parties have joint legal custody which allows them to have equal decision-making power regarding their children. Rivero v. Rivero, 216 P. 3d 213, 125 Nev. 410 (2009). This Court has clearly stated, that when parents with joint legal custody are unable to agree upon a decision regarding their children they must seek the intervention of the Court and appear "on an equal footing to have the court decide what is in the best interest of the child." Id. Under the holding of Rivero, both parents should have (and clearly did have) the burden of demonstrating that their positions best served Grayson's interests.

With the parties' having reached an impasse regarding what was best for Grayson in relation to afterschool care, the matter was properly brought before the district court for resolution by Adriana and the Court's order indicates that the merits of the parties' claims were decided on an equal footing as required under Rivero. With Will's argument that he should have the unfettered right to select childcare providers during his custodial time flying directly in the face of basic concepts of joint legal custody and being inconsistent with Nevada law, the Court determined that his advocated position did not serve the best interests of Grayson.

Will appears to argue that the Court should have ruled in his favor based upon the volume of evidence submitted by him. In evaluating Will's arguments, it is important for this Court to understand that the after-school program referred to by Will is not actually called "Champions Afterschool Learning Program" in the promotional exhibit presented to the district court which Will has omitted from his Appendix. *See* NRAP 28(a)(10)(A). The court clearly weighed the impact of such evidence, and Will's representations of it, in determining that "[t]he information concerning [Will's] proposed after-school care is not persuasive as it appears to be an afterschool day-care." AA0100:7-10;AA0185:10-13. It is believed that a district court was correct in not just considering the volume of the evidence presented as, in determining the best interests of children, the plain language of NRS 125C.0035(4) appears to require the Court to individually weigh and

scrutinize evidence presented while making a decision. In considering evidence, a district court clearly has the power to disregard evidence and determine credibility as well and is clearly not bound to accept evidence presented as true.

The district court's Amended Order clearly shows that it appropriately weighed the evidence before it in the context of Nevada law, made credibility determinations, and conducted a best-interest analysis under NRS 125C.0035(4). In that analysis, the district court viewed Will's positions as inconsistent with his obligation to foster a relationship with Adriana in accordance with 125C.0035(4)(c), expressed concerns regarding the role Will's inaccurate statements regarding "lines of custodial authority" and confusion to Grayson were playing in the parties' ongoing conflict in the context of 125C.0035(4)(d), and expressed concerns regarding Will's ability to cooperate with Adriana to meet the needs of Grayson – based upon Will's inability to see any benefit to Grayson spending more time in her care and desire to eliminate Adriana's ability to make decisions regarding Grayson – in the context of 125C.0035(4)(e) and (g). *See* AA0199-AA203. In pursuit of his appeal, Will fails to understand that the arguments that he made, the testimony that he presented in his sworn statements, and the positions that he took, were contrary to Nevada law and were not consistent with Grayson's best interests.

E. The Court's Decision Contains Sufficient Findings Based Upon the Evidence Presented.

Will next argues that the district court's decision is not supported by sufficient findings.

As indicated in its Amended Order, the district court rendered it findings based upon the evidence presented by the parties. Specifically, the district court considered Adriana's declarations, Will's verifications, and all of the exhibits provided by Will in support of his preferred childcare option. AA0181-AA0182. Further, the Court appropriately expressed concerns about Will's failure to provide an appropriate declaration in support of his initial opposition and the accuracy of his statements. AA0181:25-27.

While Will argues that the district court's findings do not contain any "citation to any testimony or exhibits", the findings of the court do clearly reference statements and testimony presented by the parties in their moving papers, do reference the exhibits presented by the parties, and do clearly lay out the reasoning behind its decision. AA0194-AA203. Pursuant to such findings, the court found the positions to be taken by Will to be contrary to Grayson's best interests, to Nevada law, and the statements made and adopted by Will to be problematic within the context of a statutory best interest analysis. AA0199-AA203

As indicated in the court's decision, the court viewed Will's statements as being inconsistent with his obligation to foster a relationship between Grayson and Adriana, expressed concerns regarding the role Will's inaccurate statements and

positions were playing in the parties' ongoing conflict, expressed concerns regarding Will's ability to cooperate with Adriana to meet the needs of Grayson based upon his inability to see any benefit to Grayson spending more time in her care, and desire to eliminate Adriana's ability to make joint decisions regarding Grayson. AA0199-AA203

Based upon the district court's comments and findings, it was clearly not persuaded that Will's selected afterschool program provided benefits beyond those that Grayson would receive in the care of Adriana, despite the significant evidence presented.

F. Will's Equal Protection Argument Appears to Misconstrue the District Court's Orders

In its decision the District Court stated 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. AA0189.

In making such statements, the district court resolved the present dispute between the parties, and clearly attempted to provide guidance how it would resolve similar disputes in the future in the event that Adriana's schedule similarly prevents her from caring for Grayson during periods in which Will is available.

The Court's attempts to provide clarity regarding the application of its rulings on potential future disputes that could arise (but have not yet arisen) are being misinterpreted and misconstrued by Will as being unequal when the Court was clearly providing assurances that the parties *would* be treated equal going forward into the future if Adriana's schedule precludes her from caring for Grayson while Will is available.

With the Court specifically assuring the parties that the underlying basis for its decision would have equal applicability to both parties, it is difficult to understand the basis for Will's equal protection argument.

CONCLUSION

For the reasons set forth herein, Adriana respectfully requests that this Court deny Will's requests for appellate relief and affirm and uphold the district court's orders as entered.

Respectfully submitted on this 10th day of November, 2021, by:

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certify that this 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 brief has been prepared in a proportionally spaced typeface using Microsoft Word and a size 14 Times Regular font.

Undersigned counsel further certifies that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 4,794 words.

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 10th day of November, 2021, by:

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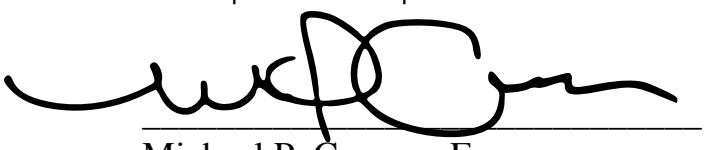

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IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM DIMONACO,
Appellant,
vs.
ADRIANA FERRANDO,
Respondent.

SUPREME COURT NO.: 80576

DISTRICT COURT CASE NO.: D-16-539340-C

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d)(1), I, hereby certify that Adriana Ferrando's Child Custody Fast Track Response and Respondent's Appendix was served on November 10, 2021, by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada, to the following addresses. Counsel was further served via email at the addresses specified below:

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