

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDREW WARREN,

Appellant,

v.

AIMEE JUNG AHYANG,

Respondent.

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Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court No.: 82909

CHILD CUSTODY FAST TRACK STATEMENT

1. Name of Party filing this fast statement:

Appellant, Andrew Warren

**2. Name, law firm, address, and telephone number of attorney 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; docket: D-19-590407

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

Honorable Judge Rhonda Forsberg

5. Length of trial or evidentiary hearing.

2 half days.

6. Written order or judgment appealed from:

Order From March 18, 2021 Hearing entered on May 3, 2021.

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

May 4, 2021.

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 date of filing:

N/A

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

N/A

9. Date notice of appeal was filed:

May 7, 2021

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:

NRAP 4(a)

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

NRAP 3A(b)(1)

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:

None.

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:

None.

14. Procedural history. Briefly describe the procedural history of the case:

On May 30, 2019, Andrew filed a Complaint for Custody and requested primary physical custody. 1 JA000001-4.

On June 14, 2019, Aimee filed an Answer and Counterclaim. 1 JA000005-9.

Aimee requested joint physical custody as long as the Andrew's treating physicians state that he is not a danger to the child and he continues to follow the directives of his physicians. 1 JA000005-7.

Moreover, she claimed that if Andrew's physicians do not state that he is not a danger around the child or if Andrew is not following his physician's directives,

then she shall be awarded Primary Physical Custody of the minor child premised upon Andrew's emotional instability. 1 JA000007.

On July 31, 2019, Aimee filed a Motion for Temporary Primary Physical Custody and on August 15, 2019, Andrew filed an Opposition and Countermotion for Primary Physical Custody, Random Drug Testing and an Outsourced Evaluation. 1 JA000014-29; 1 JA000040-54; 1 JA000055-88.

On November 19, 2019, the Court held a hearing on the parties' motions, and set a trial. 1JA000186-187.

On February 4, 2020, the parties attended the first trial day during which the court admitted into evidence Andrew's exhibits 1, 2, 3 and 6 and Aimee's exhibit "A." 2 JA000284-514; 2 JA000285.

On February 18, 2020, the parties attended the final trial day. 3 JA000629-744.

On March 4, 2020, the Court entered its decision. 3 JA000745-749.

On June 9 and 10 2020, the Court entered two Stipulations and Orders Regarding Holiday and Vacation Plan that only counsel signed. 4 JA000752-758; 4 JA000759-765.

On June 11, 2020, a Notice of Entry of Stipulation and Order Regarding Holiday and Vacation Plan was entered referencing the June 10th Stipulation and Order. 4 JA000766-774.

On July 19, 2020, a Findings of Facts and Conclusions of Law (“FFCL”) was entered. 4 JA000775-788

On July 20, 2020, a Notice of Finding of Facts and Conclusions of Law was entered. 4 JA000789-804.

On August 3, 2020, Andrew filed a Motion for New Trial and Reconsideration. 4 JA000805-820; 4 JA000883.

On August 17, 2020, Aimee opposed Andrew’s Motion and on August 24, 2020, Andrew replied to Aimee’s Opposition. 4 JA000822-846.

On March 18, 2021, the court heard the parties’ Motions. 4 JA000886-891.

On May 3, 2021, the Order from March 18, 2021, Hearing was entered and on May 4, 2021, the Notice of Entry of Order was filed. 4 JA000894-896; 4 JA000897-903.

This appeal follows. 4 JA000904-905.

15. Statement of facts. Briefly set forth the facts material to the issues on appeal:

1. Parties’ Background

Appellant, Andrew Warren (“Andrew”) and Respondent, Aimee Yang (“Aimee”) were in a romantic relationship but have never been married. 1 JA000002.

They have one minor child, to wit: Roen Warren (“Roen”)¹, born February 13, 2017. 1 JA000002.

The parties separated on July 26, 2019. 1 JA000294.

Andrew has been a systems engineer at the Wynn since July 24, 2018 and earned \$96,900.00 per year. 1 JA000128-129.

2. Aimee’s drug abuse

Aimee has had a drug problem for years, including since Roen’s birth through July 2019. 2 JA000354-355.

On July 24, 2019, the parties were involved in an incident with Roen which resulted in the police being called and CPS being involved. 1 JA000046.

Andrew requested that Aimee undergo random drug testing and complete an outsourced substance abuse evaluation. 1 JA000049.

Andrew produced photos of Aimee’s pills found left throughout the house and text messages between Aimee and her brother wherein they discussed drugs. 1 JA000055-88, 1 JA000142.

However, because Aimee passed a random drug test that CPS administered and provided three clean tests taken on July 18, 2019, the Court found it was not concerned with Aimee’s drug issues. 1 JA000117; 1 JA000137-138.

¹ He is referred to as “Rowan” on the transcripts.

Despite the text messages dating between late December 2018 and January 2019, the Court excused Aimee's obtaining drugs from her brother. 1 JA000142-143.

The court acknowledged it was not concerned even if Aimee used oxycodone and Vicodin because it did not know what the issues were then, and Aimee's explanation seemed fairly reasonable. 1 JA000143.

Andrew was willing to pay for random drug testing, but the Court still denied it. 1 JA000142-144.

Andrew expected Aimee to have a clean drug test in anticipation of litigation, but the Court dismissed that possibility. 1 JA000144-145.

At the November 19, 2019, hearing, Aimee brought up an incident with Roen wherein Andrew took him to the emergency room for a drug screening because a store drug test was positive for MDMA and MDT. 1 JA000167; 1 JA000170-174.

During the October 19 incident, Aimee took a drug test on attorney's advice. 1 JA000168. However, she waited 2 days to take it and filed 3 drug tests taken on October 21, 2021, three months later, just a month prior to the first trial date. 1 JA000206-214.

3. Andrew's mental health

Andrew has attention deficit disorder, but throughout this case Aimee has alleged he suffers paranoia. 1 JA000175; 1 JA00045. Aimee accused Andrew of

installing surveillance cameras in their home because of paranoia, but they discussed it and she knew he had ordered the cameras. 1 JA000045.

The Court disregarded that CPS had Andrew's medical records and did not find a problem with them. 1 JA000142-143. However, the Court was fixated on a single text message that Andrew sent implying he did not want to live anymore. 1 JA000143.

At the September 10, 2019, hearing, Andrew informed the court he was seeing a psychiatrist and an intern therapist once a week. 1 JA000150.

The Court noted it was not concerned with Andrew's ADD but with his paranoia level. 1 JA000175.

4. Andrew's medical records

The Court wanted Andrew to sign a HIPAA release form that covered all his medical records. 1 JA000151.

At the November 19, 2019, hearing Aimee's counsel did not have Andrew's medical records despite Andrew having signed a HIPAA release. 1 JA000166-167.

The court was concerned Andrew's medical records were not available yet. 1 JA000174-175.

At the calendar call, Andrew's counsel informed the Court that Andrew's medical provider had not yet released medical records, but there was no subpoena ever sent to that facility. 1 JA000218. She reminded the Court that Andrew signed

the HIPAA the day the court ordered it and send it to Aimee's attorney that day. 1 JA000218.

Aimee's counsel argued that he sent the HIPAA release to the doctor's office three times and called but they would not release records. 1 JA000219. However, he neither disputed not having sent a subpoena for the records nor mentioned a subpoena at all. 1 JA000219.

The court expressed discontentment but allowed the trial to go forward as follows:

THE COURT: We are set for trial, and we are moving forward on trial...there was a lot that could have been done. There could have been actions done against the doctor. There could have been all kinds of things. And we're set to go to trial, and I now hear that there's nothing – nothing has really happened moving forward as far as the records go, at least production wise...

MR. FRIEDMAN: We're ready to go.

THE COURT: You're ready to go? Okay. 1 JA000220.

5. Psychological Evaluation

Aimee's counsel represented to the Court that he submitted a letter to Andrew's doctor asking for a statement whether Andrew can have unsupervised visitation. 1 JA000167.

Moreover, he stated the provider replied in a letter stating that is not in his purview. 1 JA000167. Aimee requested a forensic evaluation of Andrew. 1 JA000167.

Despite not having filed a written Motion requesting an evaluation, the Court granted Aimee's request, but Andrew stated he did not have a problem with it. 1 JA000180.

The court ordered Aimee would pay for Andrew's mental health evaluation with Aimee's counsel names of 3 professionals to Andrew's attorney who would then select one from the list. 1 JA000180; 1 JA000186-187. However, Aimee did nothing to ensure the psychological evaluation was done. 1 JA000218.

6. Trial

The Court was presented evidence and heard testimony regarding Aimee's drug issues. 3 JA000527-535; JA000536-561; 3 JA000635-637; 2 JA000317-318.

Aimee testified that in early 2018 she was prescribed Tylenol-3 and hydrocodone when Roen was born. 3 JA000635-636. After Roen's birth, she started using hydrocodone towards the end of 2018 to treat menstrual cramps. 3 JA000635-636. She used hydrocodone over Tylenol because it was more than the Tylenol was doing. 3 JA000635-636. Aimee admitted she was self-medicating. 3 JA000637.

Andrew testified he took photos when he saw Roen playing with Aimee's purse and found a pill bottle with different types of pills in it. 2 JA000317-318.

Andrew also testified that Aimee was so lethargic that she would call her mom over on her day off because she needed additional rest. 2 JA000328. It seemed the

pills Aimee was taking affected her parenting abilities as she could not function while on the pills. 2 JA000328.

Despite Andrew's testimony regarding the photos and text messages, the Court was still unclear as to what he was trying to prove. 2 JA000330-332.

The court also heard testimony regarding Andrew's ADD, when he was first diagnosed with it and the medication he took for it. JA000304-305.

Additionally, the Court heard testimony regarding circumstances under which Andrew did not have his medication. 2 JA000307-308.

More importantly, Andrew testified his adult ADD does not impede in any way his parenting of Roen when managed with medication. 2 JA000307.

The Court also heard testimony regarding Andrew not having paranoia or hallucinations. 2 JA000376-377.

Aimee did not present evidence that Andrew suffered from paranoia. 2 JA000285.

7. Decision

The Court awarded Aimee Primary Physical Custody of Roen. 4 JA000781.

The Court found there is no history of child abuse or neglect or domestic violence from either party, the level of conflict between the parties is relatively low and the child loves both parents. 4 JA000776-780.

The findings as to the parties' mental and physical health are as follows:

“THE COURT FINDS that 125C.0035(4)(f): the mental and physical health of the parents. The Court is very concerned as to this Factor. The Court finds that Mother used to have a drug issue, but she has fixed it. The Court is concerned that it was stated Father’s issue is ADD; however, his behavior shows some paranoid which is not really consistent with ADD. The Court is concerned about Father’s mental health. The Court finds that Mother has improved her situation. The Court was presented with multiple drug tests for Mother that were negative and that show Mother is not using any illegal drugs. Mother has that issue under control. The Court is concerned that Father does not have that under control; there is an incident concerning paranoia regarding the neighbors. There was a police incident where Father took the child upstairs and he said he took the child into the shower which is concerning to the Court. Father’s threats that he wants to die is extremely concerning. The court finds that Father’s behavior is in opposition to the fact that Father is able to maintain a job. The only testimony Father gave about his mental health is that he goes to the therapist, however, he did not provide any medical records. The position is that Father had to find an expert; however, that is not his burden. The Court is concerned that Father seems to know what special plates are on a vehicle. The Court finds that factor (f) favors Mother.”

4 JA000778.

8. Reconsideration and New Trial

The Court denied Andrew’s timely Motion for New Trial and Reconsideration despite Andrew having showed the medical records the court needed. 4 JA000894-896; 4 JA000832-877.

Andrew’s medical records stated the following:

- 1) Andrew consistently saw his doctor for management of his ADHD medication between 7/23/2018 and 1/22/2020 when the records end.
- 2) Andrew shows no concerns about suicide in EVERY VISIT.
- 3) Andrew is diagnosed with ADHD.
- 4) Andrew is consistently prescribed medication for his ADHD.
- 5) Andrew’s issues with ADHD affect his work.

- 6) Andrew is consistently noted as being cooperative, stable, well groomed, etc.
- 7) Andrew mentions in two visits that his girlfriend (Aimee) is using drugs.
- 8) Andrew mentions that his girlfriend (Aimee) accused him of being paranoid because he suspected Aimee was cheating and found out she was using drugs.

4 JA000839; 4 JA000847-877.

Andrew also argued against the findings about his text message to Aimee. 4 JA000840. Aimee did not present any evidence that Andrew had indeed attempted to commit suicide at any given time or showed more text messages that showed a continuous pattern of “wanting to die.” 4 JA000840. One text message, taken out of context and blown out of proportion was all that was entered into evidence on this issue and all there even exists. 4 JA000840.

Despite this and after reviewing Andrew’s medical records, the court found the concern remained regarding Andrew’s behavior and his testimony regarding his behavior. 4 JA000890. The court further found there is nothing that has swayed that there is a basis for granting a new trial or reconsideration. 4 JA000890. The court further found it still finds that it is in the child’s best interest as to the previous order. 4 JA000890.

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

- A. The Court erred in denying a new trial and in excluding Andrew’s medical records from evidence as that prevented Andrew from having a fair trial.

- B. The Court erred in not reconsidering its order granting Aimee primary physical custody because the Court failed to consider substantial evidence.
- C. The Court erred in not awarding joint physical custody because Mother did not meet her burden of proof to show that joint physical custody is not in the child's best interest.
- D. The Court erred in not awarding Father primary physical custody because the Evidence showed Aimee has a substance abuse problem.
- E. The Court erred in entering a stipulation for a holiday and vacation schedule when only counsel agreed to it.
- F. The Court erred in not requiring Mother to submit to a drug testing mechanism that does not allow for tampering when it found that she used to have a drug issue and there was evidence that she continued to have a drug problem.
- G. The Court erred in concluding that Father had mental health issues that would detrimentally impact his ability to parent his child when the evidence showed he only had attention deficit disorder.

17. Legal argument, including authorities:

A. The Court Erred in Denying a New Trial and in Excluding Andrew's Medical Records from Evidence as that prevented him from having a Fair Trial.

Pursuant to NRCP 59(a)(1)(A) [t]he court may, on motion, grant a new trial on all or some of the issues, and to any party, if there was irregularity in the proceedings of the court...or any abuse of discretion by which either party was prevented from having a fair trial and the moving party's substantial rights are materially affected.

The decision to grant or deny a motion for new trial under NRCP 59 rests within the sound discretion of the trial court.²

Here, irregularity in the proceedings or abuse of discretion prevented Andrew from having a fair trial because the Court based its decision upon allegations regarding his mental health from a person with no personal knowledge on the issue. Yet, it excluded his mental health records from evidence despite Andrew providing a HIPAA release to Aimee to obtain the same records. All this materially affected Andrew's substantial rights because the court awarded Aimee Primary Physical Custody of Roen based on the mental and physical health of the parents factor.

Also, Andrew was subject to accident or surprise that ordinary prudence could not have guarded against. Andrew provided Aimee's counsel with a HIPAA release and then also obtained those same records himself. Ordinary prudence could not have guarded against his surprise at Aimee objecting to the admission of his mental

² *Southern Pac. Transp. Co. v. Fitzgerald*, 94 Nev. 241, 577 P.2d 1234 (1978).

health records when they were the only evidence on the issue beyond his own testimony.

1. Aimee failed to pay for a psychological evaluation

Under NRCP 35(a)(1) [t]he court where the action is pending may order a party whose mental or physical condition – including blood group – is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner...Further, under NRCP 35(a)(2)(A), [t]he order may be made only on motion for good cause and on notice to all parties and the person to be examined.

Here, Aimee's counsel showed up at a hearing and argued an oral motion for a psychological evaluation. Aimee did not file a Motion showing good cause for a psychological evaluation and did not give Andrew notice per NRCP 35. Nevertheless, Andrew cooperated in the proceedings and agreed to submit to a psychological evaluation. The court then ordered Aimee to submit 3 names of professionals to Andrew's counsel who would then pick 1 and Aimee would pay for the evaluation. However, Aimee did nothing. Therefore, she did not present an expert witness report or testimony in support of her paranoia and emotional instability allegations against Andrew.

2. Aimee failed to obtain Andrew's medical records

Pursuant to NRCP 26(a) any party who has complied with Rule 16.1(a)(1), 16.2 or 16.205 may obtain discovery by any means permitted by these rules at any

time after the filing of a joint case conference report, or not sooner than 14 days after a party has filed a separate case conference report, or upon order by the court or discovery commissioner.

Pursuant to NRCP 45(a)(3), an attorney may issue and sign a subpoena if the attorney is authorized to practice in the issuing court. Also, under NRCP 45(a)(1)(C) a subpoena may command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises as well as attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena.

Here, the court expressed multiple times concerns with Andrew's mental health, specifically, with the alleged paranoia and undoubtedly wanted Andrew's medical records. The court ordered Andrew to sign a HIPAA release and he did the same day then his counsel returned the HIPAA release to Aimee's attorney. However, Aimee did not properly request the records, so it was as if she did nothing.

Upon inquiry, Andrew's counsel informed the Court that Andrew's medical provider had not yet released medical records, but there was no subpoena ever sent to that facility.

Aimee's attorney argued that he sent the HIPAA release to the doctor's office three times and called but they would not release records. However, he neither disputed not having sent a subpoena for the records nor mentioned a subpoena at all.

3. The court allowed a trial without key evidence

At the calendar call the court expressed discontentment for not having medical records but allowed the trial to go forward.

At trial, the court relied solely on the parties' testimony yet disregarded that Andrew testified more than once that he does not hallucinate or suffer paranoia. More importantly, because Aimee failed to obtain his medical records and pay for a psychological evaluation, Andrew attempted to introduce medical records that supported his testimony, and showed he is not paranoid or suicidal.

When Andrew offered the medical records as evidence, the Court declined because opposing counsel had not reviewed them and absent a stipulation, the Court would not allow them. Aimee did not stipulate to admit the records that day. The Court then indicated the medical records would be discussed at the next trial day. However, on the second trial day, the medical records were not discussed or admitted.

Aimee submitted nothing but a text message evidencing alleged emotional instability, and that is what the court put weight on.

Despite not having reviewed Andrew's medical records, an expert witness report or having heard expert testimony, the mental and physical health of the parents was the controlling factor in the Court's decision. The Court found Andrew's behavior shows some paranoid which is not really consistent with ADD and he does not have his issues under control.

Andrew's medical records provided answers to the Court about Andrew's mental health, yet the court excluded them from evidence. Because of this irregularity, Andrew's substantial rights were materially affected as he was prevented from having a fair trial.

While in its findings denying the motion for a new trial, the District Court indicated it had reviewed Andrew's medical records and had taken them into account in maintaining primary physical custody to Aimee, there were no findings indicating any actual review of the records or indicating how the records that simply show that Andrew has ADHD could support a decision that was based on conflicting unsupported testimony that Andrew had mental health issues.

Therefore, the Court erred in not granting a new trial and in not allowing the medical records into evidence at trial. As such, the court's order should be reversed and remanded for a new trial.

B. The Court Erred in not Reconsidering its Order Granting Aimee Primary Physical Custody Because the Court failed to Consider Substantial Evidence.

"A party seeking reconsideration and/or rehearing of a ruling (other than an order that may be addressed by motion pursuant to NRCP 50(b), 52(b), 59, or 60), must file a motion for such relief not later than 14 days after service of notice of entry of order."³

³ EDCR 5.513(a).

The Nevada Supreme Court has long held that “a court may, for sufficient cause shown, amend, correct, resettle, modify, or vacate, as the case may be, an order previously made and entered on motion in the progress in the cause or proceeding.”⁴ Indeed, the Nevada Supreme Court stated as follows: “[U]nless and until an order is appealed, the District Court retains jurisdiction to reconsider the matter.”⁵

The granting of a motion for reconsideration is a discretionary decision.⁶ Two cases provide district courts with guidance in exercising this discretion. In the first of these cases, the Nevada Supreme Court held that “[o]nly in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted.”⁷ The second case provides that “[a] District Court may consider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous.”⁸ The United States Supreme Court has defined the clearly erroneous standard as follows: “A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”⁹

⁴ *Trail v. Faretto*, 91 Nev. 401, 536 P.2d 1026 (1975).

⁵ *Gibbs v. Giles*, 97 Nev. 243, 607 P.2d 118 (1980),

⁶ *Harvey’s Wagon Wheel, Inc. v. MacSween*, 96 Nev. 215, 606 P.2d 447 (1980).

⁷ *Moore v. City of Las Vegas*, 92 Nev. 402, 551 P.2d 244 (1976),

⁸ *Masonry Contractors v. Jolley, Urga & Worth*, 113 Nev. 737, 941 P.2d 487 (1997).

⁹ *United States v. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542 (1948).

Additionally, the court may not enter a default judgment regarding child custody because child custody must only be determined based on the best interests of the child.¹⁰

Here, the trial decision was clearly erroneous as the Court failed to consider the substantial evidence presented and legal analysis for this type of matter. Specifically, the Court did not consider Andrew's medical records, despite that the Court voiced its concerns multiple times about his health and issued Orders consistent with those concerns such as ordering that Aimee pay for his mental health evaluation. Aimee did not follow those Orders which was the reason Andrew did not submit to an evaluation.

By excluding Andrew's mental health records and relying on baseless allegations with no evidence from Aimee, the Court did not make a decision based upon the best interests of the child, but made a decision based upon exclusion of relevant evidence that went to the exact issue that was the deciding factor in this case.

Therefore, the court erred in not reconsidering its Orders in awarding Aimee primary physical custody of Roen, so its Orders should be reversed and remanded.

C. The Court Erred in not Awarding Joint Physical Custody Because Mother did not Meet her Burden of Proof to Show that Joint Physical Custody was not in the Child's Best Interest.

¹⁰ *Blanco v. Blanco*, 129 Nev. Adv. Op. 77 (Oct. 31, 2013).

Regarding custody of children, it is Nevada's State policy:

1. To ensure that minor children have frequent associations and a continuing relationship with both parents after the parents have ended their relationship, become separated or dissolved their marriage;
2. To encourage such parents to share the rights and responsibilities of child rearing; and
3. To establish that such parents have an equivalent duty to provide their minor children with necessary maintenance, health care, education and financial support.¹¹

Because of this policy, parents have joint physical custody, until otherwise ordered by the court.¹²

The sole consideration of the court is the best interest of the children. If it appears to the court that joint physical custody would be in the best interest of the children, the court may grant physical custody to the parties jointly.¹³

To determine the best interest of the children, the Court must analyze the specific "best interest" factors, among other things.¹⁴ The following factors are relevant for the Court's consideration.

¹¹ NRS 125C.001. As used in this subsection, "equivalent" must not be construed to mean that both parents are responsible for providing the same amount of financial support to their children. *Id.*

¹² NRS 125C.0015.

¹³ NRS 125C.0035(1).

¹⁴ NRS 125C.0035(4).

- (a) The wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his or her physical custody.
- (b) Any nomination by a parent or a guardian for the child.
- (c) Which parent is more likely to allow the children to have frequent associations and a continuing relationship with the noncustodial parent.
- (d) The level of conflict between the parents.
- (e) The ability of the parents to cooperate to meet the needs of the children.
- (f) The mental and physical health of the parents.
- (g) The physical, developmental and emotional needs of the children.
- (h) The nature of the relationship of the children with each parent.
- (i) The ability of the children to maintain a relationship with any sibling.
- (j) Any history of parental abuse or neglect of the children or a sibling of the children.
- (k) Whether either parent or any other person seeking custody has engaged in an act of domestic violence against the children, a parent of the children or any other person residing with the children.
- (l) Whether either parent or any other person seeking custody has committed any act of abduction against the children or any other child.

Here, factor (f), the mental and physical health of the parents was the deciding factor in granting Aimee primary physical custody. However, Aimee failed to meet her burden to show that Andrew is an unfit parent or that he is a danger to Roen.

In her Counterclaim, Aimee requested **joint physical custody** as long as the Andrew's treating physicians state that he is not a danger to the child and he continues to follow the directives of his physicians. (emphasis added.) Andrew's treating physician's records were submitted to the Court and showed that he is not a danger to the child. As such, it was error for the District Court to not grant Aimee's request for joint physical custody on the pleadings.

Moreover, she alleged that if Andrew's physicians do not state that he is not a danger around the child or if Andrew is not following his physician's directives, then she shall be awarded Primary Physical Custody of the minor child premised upon Andrew's emotional instability.

The record shows she did not amend her Counterclaim to only request primary physical custody. She made specific requests with specific parameters yet did not follow through with what needed to be done to prove that Andrew was not a danger to the child or that he was following his physician's directives.

The Court acknowledged in its decision that calling an expert was not Andrew's burden, therefore one can only conclude that Aimee failed to meet her burden. The Court's decision rests on Aimee's allegations without personal knowledge and a few text messages that she did not even disclose properly during discovery, yet the court allowed them into evidence.

Aimee did not present evidence sufficient for the Court to not award joint physical custody to Andrew, especially under those parameters that she herself set forth in her Counterclaim. On the other hand, Andrew's evidence supported a joint physical custody award at least. Aimee was given a HIPAA release but did not request records properly or requested them and chose not to include them as proposed exhibits due to them being beneficial to Andrew. She then objected to the records being admitted into evidence once Andrew took them to court.

Therefore, the Court erred in not awarding joint physical custody and the court's orders should be reversed and remanded.

D. The Court Erred in not Awarding Andrew Primary Physical Custody Because the Evidence Showed Aimee has a Substance Abuse problem.

Pursuant to NRS 125C.0015, if a court has not made a determination regarding custody, each parent has joint physical custody until otherwise ordered. When a court is making a determination of physical custody, “there is a preference that joint physical custody would be in the best interest” if:

- (a) The parents have agreed to an award of joint physical custody or so agree in open court at a hearing for the purpose of determining the physical custody of the minor child; or
- (b) A parent has demonstrated, or has attempted to demonstrate but has had his or her efforts frustrated by the other parent, an intent to establish a meaningful relationship with the minor child.¹⁵

However, an award of joint physical custody is presumed not to be in the best interest if:

- (a) The court determines by substantial evidence that a parent is unable to adequately care for a minor child for at least 146 days of the year;
- (b) ...
- (c) Except as otherwise provided in subsection 6 of NRS 125C.0035 or NRS 125C.210, there has been a determination by the court after an evidentiary hearing and finding by clear and convincing evidence that a parent has engaged in one or more acts of domestic violence against the child, a parent of the child or any other person

¹⁵ NRS 125C.0025.

residing with the child. The presumption created by this paragraph is a rebuttable presumption.¹⁶

Pursuant to NRS 125C.0035, to further determine the best interest of the child, the Court must analyze the specific “best interest” factors, among other things.¹⁷ The following factors are relevant for the Court’s consideration.

- (b) The wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his or her physical custody.
- (b) Any nomination by a parent or a guardian for the child.
- (c) Which parent is more likely to allow the children to have frequent associations and a continuing relationship with the noncustodial parent.
- (d) The level of conflict between the parents.
- (e) The ability of the parents to cooperate to meet the needs of the children.
- (f) The mental and physical health of the parents.
- (g) The physical, developmental and emotional needs of the children.
- (h) The nature of the relationship of the children with each parent.
- (ii) The ability of the children to maintain a relationship with any sibling.
- (j) Any history of parental abuse or neglect of the children or a sibling of the children.
- (k) Whether either parent or any other person seeking custody has engaged in an act of domestic violence against the children, a parent of the children or any other person residing with the children.
- (l) Whether either parent or any other person seeking custody has committed any act of abduction against the children or any other child.

Here, the record shows that prior to separation both parents cared for Roen and there are no findings that Andrew is not able to care for the minor child for at least 146 days of the year. As for domestic violence findings, the Court found there

¹⁶ NRS 125C.003.

¹⁷ NRS 1250.0035(4).

is no history of domestic violence. Also, the court found the child loves both parents and the conflict between the parents is relatively low.

In this case the court had two parents requesting primary physical custody. Aimee requested primary physical custody based on allegations of emotional instability and paranoia against Andrew and Andrew requested it based on Aimee's drug problem. Thus, the mental and physical health of the parents was the deciding factor.

Under this factor the court found Aimee's drug problem was fixed despite having evidence that showed she was obtaining narcotics from her brother and leaving drug paraphernalia all over the house where the child could find it. Also, Aimee testified she was using narcotics to treat cramps and Andrew attempted to help her fix her issues.

Andrew testified how lethargic Aimee was, which could have prevented her from properly caring for Roen as she had to call her mother over when she was off just so she could get more rest. None of this mattered because Aimee passed a drug test CPS administered at the beginning of the case and provided a few more clean tests voluntarily that were not supported by expert testimony. Thus, the court found this factor was in Aimee's favor.

As for Andrew, under this factor, the court was concerned with an incident concerning paranoia regarding neighbors and a police incident where the child was

not harmed, and no one was arrested. Also, the court misconstrued a text message as a threat that Andrew wants to die. Had the court not excluded the medical records from evidence, it would have seen that Andrew is not suicidal.

The Court found that the only testimony Andrew gave was that he goes to the therapist but did not provide medical records. However, that is incorrect as the record shows he testified in detail about his ADD diagnosis, his medications and how he takes them, as well as seeing a psychiatrist, not just a therapist.

He also testified as to how he is not prevented from properly parenting Roen despite his ADD. Interestingly enough the Court's findings show that there is a crux when the court finds that Father's behavior is in opposition to the fact that Father is able to maintain a job, and not just a job, but a position as a systems engineer. To say that Andrew does not have his mental health issue under control is erroneous.

Moreover, to say that he did not provide medical records is incorrect because Andrew did provide them as soon as he obtained them at trial, but Aimee objected to them, and the court excluded them from evidence. However, the court made no findings to that effect.

Lastly, the court acknowledged it was Aimee's burden to call an expert on Andrew's mental health issue, but then goes on to say basically that Andrew should have known better.

Because the court had evidence showing Aimee had a drug issue, the Court erred in not awarding Andrew primary physical custody of Roen. Therefore, the court's orders should be reversed and remanded.

E. The Court Erred in Entering a Stipulation for a Holiday and Vacation Schedule when Only Counsel Agreed to it.

No agreement or stipulation between the parties or their attorneys will be effective unless the same shall, by consent, be entered in the minutes in the form of an order, or unless the same is in writing subscribed by the party against whom the same shall be alleged, or by the party's attorney.¹⁸

On June 9 and 10 2020, the Court entered two Stipulations and Orders Regarding Holiday and Vacation Plan that only counsel signed.

On June 11, 2020, a Notice of Entry of Stipulation and Order Regarding Holiday and Vacation Plan was entered referencing the June 10th Stipulation and Order.

Andrew did not consent to the Stipulation and Order and the Court should not have entered it without the parties' signatures. Therefore, the Court erred in entering a Stipulation and Order for a Holiday and Vacation Schedule and it should be reversed.

F. The Court Erred in not Requiring Mother to Submit to a Drug Testing Mechanism that does not Allow for Tempering when it Found

¹⁸ EDCR 7.50

that that She used to have a Drug Issue and Failed to Confirm it was still not an Ongoing Problem.

Pursuant to NRS 125C.0045, in any action for determining the custody of a minor child, the court may, except as otherwise provided in this section and NRS 125C.0601 to 125C.0693, inclusive, and chapter 130 of NRS:

(a) During the pendency of the action, at the final hearing or at any time thereafter during the minority of the child, make such an order for the custody, care, education, maintenance and support of the minor child as appears in his or her best interest.

Here, Andrew requested an order for Aimee to submit to random drug testing and a substance abuse evaluation, and offered to pay for it, as it was in the child's best interest. However, the court denied Andrew's request because Aimee passed a drug test CPS administered and provided three clean tests she took voluntarily on July 18, 2019.

Despite the clean tests, Andrew insisted on the random drug testing, but the court was not concerned about Aimee's drug issues, and he expected Aimee to clean up in anticipation of litigation.

The court had evidence that Aimee had a drug problem for years, including since Roen's birth through July 2019, including photos, text messages and Aimee's testimony admitting to getting pain medication from her brother.

While Aimee presented a clean test after the October 19 incident, she took the test 2 days after the incident.

Because the court was presented evidence and facts to warrant drug testing, the Court erred in not confirming Aimee had an ongoing problem and ensuring that proper testing was done.

G. The Court Erred in Concluding that Andrew had Mental Health Issues that would Detrimentially Impact his Ability to Parent Roen when the Evidence Showed He Only had Attention Deficit Disorder.

Pursuant to NRS 125C.0015, if a court has not made a determination regarding custody, each parent has joint physical custody until otherwise ordered. When a court is making a determination of physical custody, “there is a preference that joint physical custody would be in the best interest” if:

- (c) The parents have agreed to an award of joint physical custody or so agree in open court at a hearing for the purpose of determining the physical custody of the minor child; or
- (d) A parent has demonstrated, or has attempted to demonstrate but has had his or her efforts frustrated by the other parent, an intent to establish a meaningful relationship with the minor child.¹⁹

However, an award of joint physical custody is presumed not to be in the best interest if:

- (d) The court determines by substantial evidence that a parent is unable to adequately care for a minor child for at least 146 days of the year;
- (e) ...
- (f) Except as otherwise provided in subsection 6 of NRS 125C.0035 or NRS 125C.210, there has been a determination by the court after an evidentiary hearing and finding by clear and convincing

¹⁹ NRS 125C.0025.

evidence that a parent has engaged in one or more acts of domestic violence against the child, a parent of the child or any other person residing with the child. The presumption created by this paragraph is a rebuttable presumption.²⁰

Pursuant to NRS 125C.0035, to further determine the best interest of the child, the Court must analyze the specific “best interest” factors, among other things.²¹ The following factors are relevant for the Court’s consideration.

- (c) The wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his or her physical custody.
- (b) Any nomination by a parent or a guardian for the child.
- (c) Which parent is more likely to allow the children to have frequent associations and a continuing relationship with the noncustodial parent.
- (d) The level of conflict between the parents.
- (e) The ability of the parents to cooperate to meet the needs of the children.
- (f) The mental and physical health of the parents.
- (g) The physical, developmental and emotional needs of the children.
- (h) The nature of the relationship of the children with each parent.
- (iii) The ability of the children to maintain a relationship with any sibling.
- (j) Any history of parental abuse or neglect of the children or a sibling of the children.
- (k) Whether either parent or any other person seeking custody has engaged in an act of domestic violence against the children, a parent of the children or any other person residing with the children.
- (l) Whether either parent or any other person seeking custody has committed any act of abduction against the children or any other child.

Here, factor (f), the mental and physical health of the parents was the deciding factor in granting Aimee primary physical custody, yet the evidence showed Andrew

²⁰ NRS 125C.003.

²¹ NRS 1250.0035(4).

has only been diagnosed with ADD. The court noted it was not concerned with Andrew's ADD, but gave weight to Aimee's allegations of paranoia.

First, Aimee accused Andrew of installing surveillance cameras in their home because of paranoia, but they discussed it and she knew he had ordered the cameras. At trial Andrew denied installing cameras because of his neighbors.

Andrew testified regarding his ADD and denied having paranoia and hallucinating.

More importantly, Andrew confirmed his adult ADD does not impede in any way, shape or form his parenting of Roen when managed with medication. Both parties testified to have cared for Roen in the absence of the other. Also, the court was presented with many photos of Andrew and Roen spending quality time together despite Andrew's ADD. The record does not show evidence to the contrary.

Therefore, based on this, the court erred in concluding that Andrew had mental issues that would detrimentally impact his ability to parent Roen when the evidence only showed he had ADD. As such, he requests the court's orders awarding primary physical custody to Aimee be reversed and remanded.

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 ☐ No ☒ . If so, explain:

19. Routing Statement:

This case should be assigned to the Court of Appeals per NRAP 17(b)(5) because it involves a family law issue.

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–Office 365 Business in font type Times New Roman size 14.

2. I further certify that this fast track statement 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 either:

☒ Proportionately spaced, has a typeface of 14 points or more and contains 7,108 words; or

☐ Monospaced, has 10.5 or fewer characters per inch, and contains ____ words or ____ lines of text; or

☐ Does not exceed 30 pages.

3. Finally, I recognize that under NRAP 3E I am responsible for timely filing a fast track statement and that the Supreme Court of Nevada may impose sanctions for failing to timely file a fast track statement, or failing to raise material issues or arguments in the fast track statement. I therefore certify that the information

provided in this fast track statement is true and complete to the best of my knowledge, information, and belief.

DATED this 22nd day of October, 2021.

McFARLING LAW GROUP

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CERTIFICATE OF SERVICE

I, an employee of McFarling Law Group, hereby certify that on the 22nd day of October, 2021, I served a true and correct copy of this Child Custody Fast Track Statement as follows:

☒ via the Supreme Court's electronic filing and service system (eFlex):

Alicia Exley, Esq
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/s/ Alex Aguilar
Alex Aguilar