

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRADLEY JOHN BELLISARIO,

Appellant,

v.

EMILY BELLISARIO,

Respondent.

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Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court No.: 84128

CHILD CUSTODY FAST TRACK STATEMENT

1. Name of Party filing this fast statement:

Bradley John Bellisario

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

Amy A. Porray, Esq.
Nevada Bar Number 9596
McFarling Law Group
6230 W. Desert Inn Road
Las Vegas, NV 89146
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**3. Judicial district, county, and district court docket number of lower court
proceedings:**

Eighth Judicial District Court
In and for the County of Clark
District Court No.: D-20-605263-D

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

Judge Marry Perry

5. Length of trial or evidentiary hearing.

One day.

6. Written order or judgment appealed from:

Findings of Fact, Conclusions of Law, and Decree of Divorce.

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

December 23, 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:

January 20, 2022.

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:

N/A

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:

Diamond Hall v. Justin Martin, # 83979.

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

Respondent, Emily Bellisario filed a Complaint for Divorce on March 5, 2020. 1AA1-7. She also filed a motion seeking temporary orders, including child and spousal support and supervised visitation for Brad. 1AA8-41. Appellant, Bradley (Brad) John Bellisario filed an Answer and Counterclaim and opposed Emily's motion. 1AA143-49. Bradley filed a financial disclosure form in April 2020. 2AA260-67. At the Case Management Conference on July 30, 2020, the district

court entered temporary orders. 2AA315-20. The case was set for trial on January 25, 2021. *Id.* Emily filed a notice of discovery dispute conference on December 16, 2020. 3AA553-55.

In December 2020, the then-sitting judge retired, and Emily filed an untimely peremptory challenge of the new judge on January 11, 2021. 3AA582-83. The case was administrative reassigned to a different department. 3AA827-39. Brad moved to strike the peremptory challenge, which Emily opposed. 3AA587-95. A different sitting judge denied Emily's peremptory challenge and reassigned the case back to the original court. 3AA827-32.

At the January 25, 2021, status check, Brad was incarcerated and was not present. 4AA856-63. The court proceeded forward with the hearing without him and extended a temporary protection order. *Id.*; 9AA2166-69. On February 5, 2021, Emily filed a motion to extend a protection order, join Brad's business to the action, declare Brad a vexatious litigant, modify custody, modify Brad's visitation, order a mental health evaluation, contempt, reduce child and spousal support arrears to judgment, and for attorney's fees. 3AA888-4AA1021. Brad filed an updated financial disclosure form. 4AA1034-40. Brad moved to strike Emily's motion. 4AA1205-71. Brad also moved to disqualify Judge Perry. 5AA1272-1443, 6AA1538-41. Emily opposed the motion. 6AA1704-30. The court denied his motion, returning the case back to Judge Perry. 8AA1817-33.

Emily again filed her motion to extend protection order, join Brad's business as a party, declare him a vexatious litigant, among other things. 8AA1834-1949. Emily also moved to compel discovery 5AA1047-1153, which Brad opposed. 9AA2054-66. The court adopted the discovery commissioner's report and recommendation granting Emily's motion. 9AA2142-49, 2151-61.

On April 6, 2021, the court extended a temporary protection order against domestic violence until May 10, 2022, or until Brad's criminal case was completed. 9AA2166-69. Brad was ordered to continue with supervised visitation. 9AA2170-74.

The parties engaged in heavily contested litigation and discovery. *See, generally*, 9AA2175-13AA3137. Emily again moved for Brad to be declared a vexatious litigant on June 2, 2021. 13AA3138-50. The court took Emily's motion under advisement, ultimately granting her motion on July 12, 2021. 14AA3255-65; 14AA3278-3300. The court's order declaring Brad a vexatious litigant was entered on July 12, 2021. 14AA3278-3300.

In September 2021, the district court finally set the trial for December 20, 2021, and the trial scheduling order with discovery dates and deadlines was entered on September 20, 2021. 14AA3385-3394.

The parties' trial was held on December 20, 2021. 14AA3457-3459; 19AA4618-4862. Brad was incarcerated in the Clark County Detention Center

(CCDC) at the time and was not transported for trial. 19AA4621-22. The court conducted the trial without him being there. *Id.* at 4614-4862. The court entered its Findings of Fact, Conclusions of Law, and Decree of Divorce (Decree) on December 23, 2021. 20AA4866-4932. Brad filed his Notice of Appeal on January 20, 2022. 20AA4933-35.

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

Brad and Emily Bellisario had been married five-and-one-half years when Emily filed for divorce. 1AA1. They have three children together: two boys, ages seven and five, and a four-year old daughter. *Id.* at 2. The parties' relationship had become tumultuous, and Emily sought primary physical custody of the children with Brad having supervised visitation. 1AA2. Emily immediately moved the court for the same, as well as an alcohol/psychological evaluation of Brad and to obtain a new temporary protection order (TPO) against him.¹ 1AA8-43, 123. In her motion, she described what she witnessed as Brad's mental health and substance abuse issues. *Id.* at 12-16. She also attached exhibits and discussed Brad's pending domestic violence (DV) criminal cases arising from allegations of DV against her and a related DUI charge. *Id.*

¹ The TPO is T-19-200404-T, issued in September 2019. 1AA123. This TPO was obtained September 25, 2019, but was dissolved by the parties in January 2020. *Id.*

In opposing the motion, Brad submitted a supplemental case report filed in a CPS case, showing that CPS “would like to move forward with unsupervised visits with the children and [Brad] as no signs of safety threats are identified.” 1AA163. Brad also provided his financial information, showing that for the period of January—April 2020, his business made \$34,000.00, or \$8,500.00 per month. 2AA260-67.

At the July 30, 2020, hearing, Emily and the district court were noticed that Brad had been arrested for domestic violence and a related DUI. 2AA315-16. Additionally, the court set Brad’s child support obligations based on an income of \$18,000.00, despite his financial disclosure form showing an average monthly income of \$8,500.00.² The court ordered that Brad could only have supervised visitation at a court-ordered location. 2AA316. Trial was set for January 25, 2021. 2AA325-26.

At the January 25, 2021, hearing, Brad was in custody for alleged DV against Emily that occurred on June 11, 2020. 4AA862. He was not transported for the hearing and was not present. 4AA859-63. The d court held the hearing without him. *Id.* The court asked if Brad’s counsel was still on the case or had withdrawn and

² Brad filed an updated financial disclosure form in February 2021. 5AA1034-40. Brad was not working and had no income. *Id.* Regardless, his support obligations were never adjusted.

Emily's attorney let the court know that he had withdrawn. 4AA859-60. The court replied, "Good." *Id.* at 860. The court proceeded with the substance of the hearing with Emily's attorney making all representations without Brad's presence. *Id.* at 859-63.

Emily asked that the TPO be extended until May 2022. 4AA862. The court said,

Yeah, that . . . Please ask for that, let's get this back in front of me. . . . hopefully [he] can get out of jail, but he definitely needs to dry out first. So maybe they'll hold – hang on to him a little bit longer, but I don't see that happening. But, you know, let's – yeah, get that [order shortening time for the TPO] up there and we'll just take care of everything between now and . . . we'll do it quickly.

4AA863. Emily alleged that Brad had violated the TPO by being arrested. *Id.* at 862. However, the court had wrongfully extended the dismissed TPO. 9AA2179. Bradley had not violated the TPO. *Id.* The written order from the July 30, 2020, hearing, extending a TPO in a different case, T-20-206639-T, was not filed until almost one year after the hearing, on April 22, 2021. 10AA2433-40. Additionally, there was no finding regarding a new TPO being extended. 4AA859-63. Yet, on April 6, 2021, a TPO in case T-20-206639-T was extended because of the January 25, 2021. 9AA2166-69.

Brad learned that Emily's attorney had a close relationship with Judge Perry, and he sought to disqualify Judge Perry, based on Emily's counsel's close personal

relationship with her. 6AA1272-1443; 7AA1538-1541, 7AA1662-70, 8AA1756-97. Emily's attorney opposed, as did Judge Perry, but did not disclose their personal relationship or address Brad's representations regarding the same. 7AA1549, 1704-30. Brad's request was denied. 8AA1824-33.

At an April 2021 court hearing, the court acknowledged that Brad had open and underlying criminal cases. 9AA2187-88. If he was found not guilty, it would revisit its rulings. *Id.* But, it would not ask him any questions in defense of extending the TPO because of the pending criminal case(s). *Id.* Emily had previously notified the court that Brad had four active criminal cases involving underlying acts of DV between the parties. 4AA905.

Emily also sought to have Brad declared a vexatious litigant. 4AA888-931. Emily, first noting that Brad was a lawyer, cited five civil cases that Brad had filed against persons connected with the divorce litigation, but did not give disposition for any of the other cases or provide any details or court rulings. 4AA905. Emily did not base her request for the vexatious litigant order on Bradley's filings in the divorce case. 4AA888-931. Emily and Brad engaged in mutually contentious litigation in the divorce case, filing an approximately equal amount of litigation. The district court took Emily's motion under submission, and ultimately found Brad a vexatious litigant. 14AA3255-56.

The court found the following litigation at issue: (A) Brad was denied TPOs he attempted to obtain against Emily, but she was successful in getting hers and he had pending criminal matters; (B) A-20-812996-C, a civil case Brad filed against Emily, which was open with no disposition; (C) A-20-815348-C, a civil case Brad filed against the children's therapist, where the therapist was successful following *arbitration*; (D) a civil case Brad filed against another of the children's therapists, which Brad had not yet served the summons and complaint, and time to serve had passed; (E) A-20-825505-C, a civil case Brad filed against Emily's current and former attorneys and Emily's father for various actions, where again, Brad did not serve the summons and complaint, and time to serve had passed; (F) A-20-825505-C (listed twice, but described differently), civil case against Emily's attorney, dismissed on motion to dismiss because of attorney-client litigation privilege, judgment against Brad for attorney's fees; and (G) A-21-830901-C, civil suit against Emily, her attorneys, and the review journal, where Brad did not serve the summons and complaint, and the time had passed to do so. 14AA3279-80. The court found that only one case had been brought to an end. *Id.* at 3280. The district court discussed Brad's behavior during the divorce, stating "Bradley persistently seeks to blame others for his own failure to act." 14AA3282. It talked of his supervised visits with the children "due to his own behavior". *Id.* at 3281.

The court ordered that: (1) he could not file any further separate lawsuits against individuals related to the matter; (2) if he wanted to file any new cases related to the individuals—in *any* jurisdiction, he must retain counsel to assess the veracity of the claim and then seek permission from the court; (3) he must email any motion he wanted to file in the case to the law clerk, who would have the court review to determine if the court was satisfied with the contents of the motion; and (4) before filing a notice of appeal, he must submit the notice of appeal for judicial review, with a “brief reasoning” of what is being appealed, within 10 days of the notice of entry. The court would review to determine whether the appeal was permissible under NRAP 3(A). If the court was satisfied, then Bradley would receive an email granting him permission to appeal. 14AA3285-86.

At the September 16, 2021, hearing the court told the parties that they “need to start moving this case along. . . [It was] supposed to have these things closed out, you know, when no kids are involved, within 12 months, when kids are involved, within six months.” 14AA3355. The trial was set for December 20, 2021. *Id.* at 3357.

At the trial, Brad was incarcerated and not present. 19AA4625. The court said that it had checked with judges who had more experience than it did, and they “said that it does not go against his due process rights . . . to continue with the trial.” 19AA4625. It claimed that Brad’s “delaying tactics” allowed them to go forward.

Id. That was only the second trial setting—the first being January 25, 2021, which was vacated because the previous judge retired.

The trial consisted of Emily’s testimony, brought out through leading questions from her attorney. 19-20AA4618-4862. There was no gatekeeper over evidence, and Emily admitted almost 124 exhibits, containing inflammatory hearsay and inadmissible, irrelevant information. 14AA3477-19AA4614-17. Brad’s pending pre-trial DV case(s) were extensively testified about, including who his criminal defense attorney was. 19AA4633.

Following trial, the district court found that, under NRS 125C.0035(5), Brad committed “many acts of domestic violence”. 20AA4872. It discussed the facts of Brad’s pending criminal case and found against him. 20AA4874. Regarding domestic violence, it found clear and convincing evidence that Brad committed multiple acts of violence, occurring on many separate occasions. 20AA4876-79. Further, the court also found, “as it relates to the best interest – there are criminal charges pending against the Defendant. The Defendant was in custody [at the time of trial], wherein [the court] was advised that the CCDC was not transporting individuals, nor was it being permitted for video conference or telephone conference.” 20AA4880.

Emily was awarded sole legal custody and primary physical custody of the children. 20AA4886. Brad was not entitled to visitation until his “criminal cases

[were] complete” when he would then have four hours of supervised visitation at Family First. 20AA4886. However, Family First was allowed to listen to all of his conversation with the children and if they did not like it, they could immediately terminate his visitation. *Id.* Brad’s spousal and child support arrears were reduced to judgment, and the court imputed income. *Id.* at 20AA4866-97. The court made an unequal distribution of the assets and awarded Emily spousal support. The court also awarded Emily attorney’s fees from the entire case. *Id.*

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

- A. Did the district court violate Brad’s due process rights by conducting his trial without him?
- B. Did the district court violate Brad’s constitutional rights by not continuing his trial until after resolution of his criminal cases?
- C. Did the district court err when it declared Brad a vexatious litigant?
- D. Did the district court err in its orders regarding child issues?
- E. Did the district court err in its orders regarding divorce and financial issues?
- F. Did the district court violate Brad’s due process rights when it extended the TPO from the January 25, 2021, hearing when Brad was not there?
- G. Did the district court err by awarding attorney’s fees to Emily for the entire case without making any findings?

17. Legal argument, including authorities:

A. The district court violated Brad’s due process rights by conducting his custody and divorce trial without him.

This Court reviews constitutional challenges de novo. *Mesi v. Mesi*, ___ Nev. ___, ___, 478 P.3d 366, 369 (2020), *quoting Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007).

The due process clause of the Fourteenth Amendment requires that a person be heard before they are deprived of an interest. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Due process is satisfied when the opportunity to be heard is “at a meaningful time and in a meaningful manner.” *Id.*, *quoting Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Due process is flexible. It takes time, place, and circumstances into consideration, tailoring its procedural protections to the particular situation’s needs. *Mathews*, 424 U.S. at 334.

At issue are the denial of Brad’s fundamental liberty interest in the care, custody, and control of his children and his due process rights to a fundamentally fair disposition of the marital estate.

Child custody

“[T]he interest of parents in the care, custody, and control of their children-is perhaps the oldest of the fundamental liberty interests”. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Under NRS 126.036(1), “The liberty interest of a parent in the care,

custody and management of the parent’s child is a fundamental right.” Accordingly, child custody matters must be decided on their merits. *Blanco v. Blanco*, 129 Nev. 723, 730, 311 P.3d 1170, 1175 (2013); *see also Price v. Dunn*, 106 Nev. 100, 105, 787 P.2d 785, 788 (1990) (discussing that, while Nevada’s underlying policy favors deciding cases on their merits, this concern is far greater in family cases).

This Court has held that child custody cases may not be resolved by default. *Blanco v. Blanco*, 129 Nev. at 731, 311 P.3d at 1175; *see also Ogawa v. Ogawa*, 125 Nev. 660, 673, 221 P.3d 699, 707-08 (2009). This is because statutory and constitutional directives govern child custody and support determinations, which involve the child’s best interest and other relevant considerations. *Blanco*, 129 Nev. at 731, 311 P.3d at 1175; *Ogawa*, 125 Nev. at 673, 221 P.3d at 707-08. Courts may never use change of custody to punish parental misconduct, “such as refusal to obey lawful court orders, because the child’s best interest is paramount in such custody decisions.” *Id.* at 731, 311 P.3d at 1175.

Brad’s fundamental liberty interest in the care, custody, and control of his children is paramount. The court denied him any right to be heard regarding the custody of his children in a meaningful time and a meaningful manner. The district court knew where Brad was—he was incarcerated at CCDC. On that particular day, CCDC was not transporting inmates nor was it allowing remote or telephonic court appearances. The court knew that Brad’s inability to appear for trial was because of

CCDC's restriction that day. Brad did not refuse to come to court. However, the court stated that it had talked with other judges who said that it could proceed without Brad and blamed Brad for trial delay. This was the second trial setting—and the first was vacated because of a judicial retirement. There was no delay. The court punished Brad for what it perceived as his “refusal to obey lawful court orders” during the case by conducting the custody trial in his absence and making a final custody determination without him having the ability to present a case. The court denied Brad due process, and it substantially prejudiced his fundamental rights. It was far from harmless. Accordingly, the court’s decision must be reversed, and this case remanded for a new trial in front a new court judge who has not already expressed an extreme personal dislike for Brad.

Marital estate—community assets and debts

When disposing of the marital estate, the district court must make an equal distribution of the community of the estate. NRS 125.150(1)(b). The district court may make an unequal disposition if it finds a compelling reason to do so and sets forth in writing the reasons justifying the unequal distribution. *Id.* When the district court does not hear the case on the merits and makes anything other than an equal distribution of the community, it abuses its discretion. *Ogawa v. Ogawa*, 125 Nev. 660, 673, 221 P.3d 699, 707-08 (2009).

The court made an unequal distribution of the community estate. Brad had no opportunity to present any evidence. Emily asked for an unequal distribution of the marital estate because of Brad’s “refusal to cooperate” and “the orders from the Court regarding his lack of cooperation when Judge Pomrenze was on the bench.” 20AA4834. The court obliged, leaving Brad with no assets and only substantial debt. 20AA4863-65. The court calculated out Brad’s interest in the residence, applying it to alleged spousal and child support arrears.³

As with the custody determination, the court violated Brad’s constitutional due process rights. The error was prejudicial and affected his substantial interests in a fair distribution of the community. This error was not harmless. This can only be remedied by reversing the district court’s decision and remanding this case for a new trial in front of a new district court judge.

B. The district court violated Brad’s due process rights by not continuing the trial until after his criminal case(s) were adjudicated.

³ Emily purchased the marital residence prior to the parties’ marrying. TT at 211. She agreed that Brad contributed to the mortgage payments after marriage, and she asked that his financial interest in the home be offset from the debts that he owed her. 19AA4828. The district court found that the mortgage payments since marriage were made with community funds—88 payments in all. 20AA4850. However, the district court did not conduct a *Malmquist v. Malmquist*, 106 Nev. 231, 792 P.3d 372 (1990) analysis to calculate the community interest. Instead, the district court calculated the total amount of the payments made since marriage and divided it in half. 20AA4850-51. This directly violates *Malmquist*, and as such, the district court abused its discretion when disposing of the marital estate, and its decision must be reversed.

1. Standard of review

When a party does not object in the district court, this Court reviews for plain error. *Nelson v. State*, 123 Nev. 534, 543, 170 P.3d 517, 524 (2007). Plain error is that which is “so unmistakable that it is apparent from a casual inspection of the record.” *Vega v. State*, 126 Nev. 332, 338, 236 P.3d 632, 636-37 (2010) (internal quotation marks and citations omitted). The party must show that the error was prejudicial, affecting their substantial rights. *Id.* at 338, 236 P.3d at 637. This Court reviews constitutional challenges de novo. *Mesi v. Mesi*, ___ Nev. ___, ___, 478 P.3d 366, 369 (2020), *quoting Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007). Brad did not specifically object to the family trial proceeding before judgment in his criminal cases, but the error is so unmistakable and prejudicial to Brad’s fundamental rights.

2. The district court violated Brad’s due process rights by not continuing his custody trial until after disposition of his criminal case(s).

The court heard Brad’s custody trial before conclusion of his criminal cases, and it made extensive findings under NRS 125C.0035(5) that there was clear and convincing evidence that Brad committed domestic violence against Emily and the children. 20AA4866-97. In doing so, it specifically referenced the underlying factual allegations of his criminal cases and that he was in CCDC when making its finding

of clear and convincing evidence of domestic violence. Thus, the court awarded Emily sole legal custody and primary physical custody, subject to Brad eventually receiving limited visitation.⁴ 20AA4886.

NRS 125C.0035 and Rebuttable Presumptions

Under NRS 125C.0035(k) and (5) Under NRS 125C.0035(k) and (5), the district court must consider acts of domestic violence against children, parents, or other persons residing with the children when making custodial best interest determinations. When the district court finds by clear and convincing evidence after an evidentiary hearing that a parent has engaged in domestic violence against the

⁴ The court also erred regarding Brad's visitation schedule. A custodial order must define a party's visitation rights with a minor child with "sufficient particularity", including specific times and "other terms of the right of visitation." NRS 125C.010(1)(a). "Sufficient particularity" is defined as "a statement of the rights in absolute terms and not by the use of the term 'reasonable' or other similar terms which is susceptible to different interpretations by the parties." *Id.* at (2). Parenting time must also be tied to the best interest factors in NRS 125C.0035(4). *Davis*, 131 Nev. at 452, 352 P.3d at 1143-44.

Brad's visitation time does not begin until "all of the criminal cases are resolved", with four hours of visitation unspecified as to days and days, and his visitation to be regulated by Family First with near absolute discretion. 20AA4886. Brad must first "request[]" visitation from the district court, with no other instructions regarding the procedure. Resolution of the criminal cases is not an absolute term and vests tremendous discretion in the district court to deny Brad visitation. There are no specific times, there are no specific terms, and all terms as susceptible to different interpretations by the parties. The district court has given Family First nearly unlimited discretion over Brad's visitation rights. Brad has no guidance with which to "request" visitation from the district court following "resolution" of his criminal cases. Accordingly, the district court abused its discretion in its custodial orders.

children or other parent, there is a rebuttable presumption that sole or joint physical custody with the offending parent is not in the children's best interest. NRS 125C.0035(5). A "rebuttable presumption[]" require[s] the party against whom the presumption applies to disprove the presumed fact." *Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 366, 184 P.3d 378 (2008). The opposing party rebuts the presumption by adducing evidence that tends to disprove the presumed fact. *Id.* Thus, a rebuttable presumption places an affirmative burden on an opposing party.

Due Process

The due process clause of the Fourteenth Amendment requires that a person be heard before they are deprived of an interest. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Due process is satisfied when the opportunity to be heard is "at a meaningful time and in a meaningful manner." *Id.*, quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Due process is flexible. It takes time, place, and circumstances into consideration, tailoring its procedural protections to the particular situation's needs. *Mathews*, 424 U.S. at 334. The four-part test is: (a) the private interest that is affected by the official action; (b) the risk of erroneous deprivation of the interest through the procedure used; (c) the probable value, if any, of additional or substitute procedural safeguards; and (d) the Government's interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

- a. Brad's interests in the care, custody, and control of his children and his Fifth Amendment rights are affected.

Fundamental liberty interest

“[T]he interest of parents in the care, custody, and control of their children-is perhaps the oldest of the fundamental liberty interests”. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Under NRS 126.036(1), “The liberty interest of a parent in the care, custody and management of the parent’s child is a fundamental right.” Accordingly, child custody matters must be decided on their merits. *Blanco v. Blanco*, 129 Nev. 723, 730, 311 P.3d 1170, 1175 (2013); *see also Price v. Dunn*, 106 Nev. 100, 105, 787 P.2d 785, 788 (1990) (discussing that, while Nevada’s underlying policy favors deciding cases on their merits, this concern is far greater in family cases).

Fifth Amendment

Under the Fifth Amendment, applicable to the states under the Fourteenth Amendment, a person cannot be compelled to testify against themselves in a criminal case. *See Spevack v. Klein*, 385 U.S. 511, 514 (1967). The United States Supreme Court interprets applicability of the Fifth Amendment to situations where the sanction for invocation of the Fifth Amendment privilege is “costly”. *Spevack*, 385 U.S. at 515, *quoting Griffin v. California*, 380 U.S. 609 (1965).

Thus, it applies in civil proceedings. *See Boyd v. United States*, 116 U.S. 616, 634-635 (1886) (applying it to the compulsory production of books and papers of

the owner of goods sought to be forfeited); *Schlowner v. Board of Higher Education*, 350 U.S. 551 (1956) (applying it to the Charter Provisions of the City of New York as relates to employees); *Spevack v. Klein*, 385 U.S. 511 (1967) (applying it to production of the financial records and testimony of a lawyer in discipline proceedings).

This Court concludes the same, allowing persons in civil proceedings, including domestic matters, to protect their interest against self-incrimination when giving any testimony. *Meyer v. Second Judicial Dist. Ct.*, 95 Nev. 176, 180, 591 P.2d 259, 262 (1979). In domestic matters, the district court must determine that a party who volunteers to testify must either waive the Fifth Amendment privilege or “accept the consequence that such testimony will be stricken from the record.” *Meyer v. Second Judicial Dist. Ct.*, 95 Nev. 176, 180-81, 591 P.2d 259, 262 (1979). A person cannot testify only to those facts that are favorable and then refuse to answer questions on cross-examination or otherwise based on Fifth Amendment grounds. *Meyer*, 95 Nev. at 181, 591 P.2d at 262-63, discussing *Christenson v. Christenson*, 162 N.W.2d 194 (Minn. 1968).

Brad’s private interests are two fundamentally important constitutional interests. His fundamental right to be a parent and his right to remain silent. The district court’s action near eviscerated both rights. The district court found, by clear and convincing evidence, that Brad committed domestic violence. However, Brad’s

criminal case(s), of which the district court relied extensively, and almost exclusively on, had not yet come to judgment. The district court also found that Brad was in jail at the time of the trial and held that fact against him to deprive him of custody of the parties' children. Accordingly, the district court's custodial findings and orders were necessarily predicated on criminal allegations for which Brad's only defense was to testify

- b. The risk of erroneous deprivation is guaranteed through the procedure used.

When the custody trial precedes the criminal case(s) and the best interest findings that a parent has committed domestic violence are predicated on the underlying allegations and/or circumstances in the criminal case, the erroneous deprivation of a parent's interest(s) is all but guaranteed. NRS 125C.0035(5)'s rebuttable presumption *requires* the opposing parent to disprove that sole or joint custody is not in the children's best interest by giving evidence in order for that parent to be back on custodial equal footing. Domestic violence allegations are often comprised of they-said-they-said evidence, and physical evidence or lay witnesses are nonexistent. Therefore, to disprove the same, the only evidence that an opposing parent may have is their own testimony. When the opposing parent's criminal case(s) has not been decided, the opposing parent must choose between presenting evidence to rebut the presumption (of which the majority will be the parent's own testimony),

or forfeiting the ability to rebut the presumption, resulting in the custodial loss of the parent's children. Thus, the opposing parent must choose between their Fifth Amendment right or their fundamental liberty interest in the care, custody, and control of their children. The procedure currently used—forcing the custody trial to proceed before adjudication of the criminal case—necessarily results in the erroneous deprivation of one of the party's constitutional rights.

- c. The substitute procedural safeguard of continuing the custody trial until after judgment in the criminal case has a constitutionally significant probable value.

The substitute procedural safeguard the district courts should employ is to continue a custody trial until disposition of a criminal case. In doing so, the opposing parent no longer must choose between two fundamentally important constitutional rights. If the criminal case is dismissed or the parent found not guilty, the opposing parent is no longer in jeopardy of losing their children based on unfounded accusations they would be forced to concede to preserve Fifth Amendment rights or defend against to protect their parental liberty interests—waiving their Fifth Amendment rights.

- d. The procedural safeguard of continuing the custody trial until after judgment is reached in the criminal

case involves little to no fiscal or administrative burden on the Government.

The district court stated that Brad's case must proceed to trial because it had to hear it within 12 months. It cited no rule, statute, or made any other finding. There is no fiscal or administrative burden on the Government to stay the custody trial until adjudication in an underlying criminal case. A multitude of litigation occurs in a family case, and as a fiscal and policy matter, parties are encouraged to resolve cases. Criminal matters typically move faster. No fiscal or administrative impact can ever outweigh a person's right to be heard or Nevada's public policy that child custody cases are heard on the merits. The district court's decision should be reversed and remanded for a new trial, in front of a new district court judge, to occur following adjudication of Brad's criminal cases.

C. The district court erred in finding Brad a vexatious litigant.

This court reviews the district court's decision for an abuse of discretion. *Jones v. Eighth Judicial Dist. Ct.*, 130 Nev. Adv. Rep. 493, 500, 330 P.3d 475, 480 (2014).

"Nevada has long recognized the importance of maintaining direct access to its state courts." *Jordan v. State ex rel. DMV & Pub. Safety*, 121 Nev. 44, 55, 110 P.3d 30, 39 (2005), *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008). Before the trial court may declare a party

a vexatious litigant, it must conduct a four-factor analysis to balance the party's interest in access to the court versus the restriction on court access. *Id.* at 60, 110 P.3d at 42. It must: (1) give notice; (2) list the cases and documents or explain the reasons that led it to conclude that a restrictive order was needed; (3) “make substantive findings as to the frivolous or harassing nature of the litigant’s actions; and (4) the order “must be narrowly drawn to address the specific problem encountered.” *Id.* at 60-61, 110 P.3d at 43. The trial court cannot consider filings in other courts that have not been deemed frivolous or vexatious or otherwise resolved. *Id.* at 61, 110 P.3d at 43. The trial court must “rely only on observations obtained from cases to which [they] are assigned, and on actual rulings in other cases.” *Id.* And the order *shall never* apply to any other courts than that in which the trial court sits—i.e. a judge in the Eighth Judicial District Court *cannot* preclude a party from filing an action in any court except the Eighth Judicial District Court. *Id.* at 66, 110 P.3d at 46. Any order precluding filing in another court is beyond the trial court’s jurisdiction. *Id.*

The vexatious litigant order relied on civil actions that had not been adjudicated vexatious or frivolous. Only two had been resolved—one on a motion to dismiss because of a legal privilege and one at arbitration. Neither of those are vexatious or frivolous. The remaining had not been adjudicated. The district court relied on cases to which it was not actually assigned. Also, its order precluded Brad

from filing actions in any jurisdiction, including filing any appeal. It was not narrowly tailored. Accordingly, the district court abused its discretion and its order must be stricken.

D. The district court abused its discretion when making various orders regarding child issues.

The district court has “broad discretionary powers” to determine child custody matters. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007). This Court reviews the district court’s custody decisions for an abuse of discretion. *Romano v. Romano*, 138 Nev. Adv. Rep. 1, ___ P.3d ___ (2022).

Following the trial, the district court made numerous, incorrect orders regarding child issues. The district court abused its discretion when making the following orders, as will be discussed in turn below.

1. The district court erred when it imputed income to Brad for purposes of the child support calculation.

Under NAC 425.125, the district court may impute income to a party who is unemployed or underemployed without good cause for purposes of calculating the party’s child support obligation. However, before the district court may impute income, it must first take evidence and find that the obligor is underemployed or unemployed without good cause. NAC 425.125(1). If the district court finds as such, it may impute income. When imputing income, the district court *must* consider and

make express findings of the factors in NAC 425.125(2). That is mandatory and not permissive.

There was no evidence taken to impute Brad's income. Brad's law license was suspended and Emily believed Brad could be a law clerk, but she also believed law clerks make \$150,000.00 per year. 19AA4830-32. Emily asked the district court to use its best judgment to impute an income to Brad. *Id.* The district court found, based on no evidence, that Brad could work as a seasoned paralegal making \$35 per hour—or \$72,800.00 per year—and imputed the same to Brad. 19AA4839; 20AA4866-4897. There were no required statutory findings under NAC 425. 125(1) or (2). Accordingly, the district court abused its discretion when imputing income to Brad for all child issues and spousal support. Its decision must be reversed for a new trial in front of a new judge.

Child support

Based on Brad's imputed income, his child support was set at \$1,569.00 per month.⁵ 20AA4855. As discussed, the district court abused its direction by not making the mandatory findings before it was permitted to impute income. Accordingly, Brad's child support obligation must be reversed.

⁵ Brad's initial temporary child and spousal support order was for child support of \$2,560.00 per month and spousal support of \$1,000.00 per month, beginning on July 30, 2020. The order for temporary support was not filed until January 24, 2021. At the time the order was entered, Brad's bar license had been suspended.

Spousal support

The district court can award spousal support only after considering NRS 125.150(9)'s factors. The statute is mandatory and not permissive.

The district court did not consider any factors when awarding Emily spousal support. It imputed income to Brad and set Emily's spousal support at \$1 per month until he was no longer incarcerated. 20AA4856; 20AA4866-97. Thereafter her support was set at \$500.00 per month, modifiable based on his earning abilities. *Id.* The district court set the term of spousal support at seven years "primarily because [it was] pretty sure [Brad was] going to everything he can not to pay it. So [it was] going to make him go the full seven." TT at 239. Thus, the district court abused its discretion, and its decision ordered spousal support must be reversed for new trial in front of a new judge.

E. The district court violated Brad's due process rights when it extended the TPO from the January 25, 2021, hearing when Brad was not there.

The district court stated that it would not make any findings regarding extending the TPO during the January 25, 2021, hearing where Brad was not present. However, without any notice or opportunity to be heard, it filed an order extending the TPO for another year on April 6, 2021. Brad's due process rights were violated. Accordingly, the district court's decision must be reversed.

F. The district court erred by awarding attorney's fees to Emily for the entire case without making any findings.

District courts have discretion to award attorney's fees and costs, but they must identify the legal basis for the award. *Haley v. Dist. Ct.*, 128 Nev. 171, 178, 273 P.3d 855, 860 (2012).

The court awarded Emily attorney's fees from the beginning of the case through trial. 20AA4856, 4866-97. Its only finding was "Attorney's fees. That the Plaintiff is awarded attorney's fees and costs." 20AA4856. Because the district court did not identify any legal basis for awarding Emily her attorney's fees and costs for the entire case, the district court abused its discretion, and its decision 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 ☒ No ☐ . If so, explain:

Whether a custody trial must be stayed until after a criminal case adjudication, where the underlying allegations in the criminal case are at issue in the custody case and/or under NRS 125C.0035, to protect a parent's constitutional rights is an issue of first impression.

19. Routing Statement:

This appeal is presumptively assigned to the Court of Appeals per NRAP 17(b)(5), because it involves an issue of family law. Appellant respectfully submits, however, that the Supreme Court retain this case pursuant to NRAP 17(a)(14), because the principal issue is a question of statewide public importance and there are no published decisions of the Court of Appeals or Supreme Court on whether a custody trial should be stayed until after a criminal case adjudication, where the underlying allegations in the criminal case are at issue generally in the custody case and/or under NRS 125C.0035, to protect a parent's constitutional rights.

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

7267 words; or

☐ Monospaced, has 10.5 or fewer characters per inch, and contains ____ words

or ____ lines of text; or

☐ Does not exceed ____ 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 6th day of April, 2022.

McFARLING LAW GROUP

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CERTIFICATE OF SERVICE

I, an employee of McFarling Law Group, hereby certify that on the 6th day of April, 2022, 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):

Amanda Roberts, Esq.
Emily Bellisario

/s/ Crystal Beville
Crystal Beville