IN THE SUPREME COURT OF THE STATE OF NEVADA

NECHOLE GARCIA,

Appellant,

v.

EVGENY SHAPIRO,

Respondent.

Case No.: 83992-COA

CHILD CUSTODY FAST TRACK STATEMENT

1. Name of Party filing this fast statement:

Nechole Garcia, Appellant

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
In and for the County of Clark
District Court No.: D-20-612006-C

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

Judge Matthew Harter

5. Length of trial or evidentiary hearing.

Two (2) full days

6. Written order or judgment appealed from:

Decision and Order entered on December 15, 2021

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

December 16, 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:

December 29, 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)(1)

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) and 3A(b)(7)

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:

N/A

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

This appeal arises from the final order following an evidentiary hearing in initial child custody proceedings regarding a single minor child with special needs. The parties were never married. The District Court's final order determined physical custody, a timeshare schedule, a holiday and vacation schedule, legal custody, child support, and tax deduction.

On August 7, 2020, Respondent Evgeny Shapiro ("Eugene") filed a Complaint for Custody. 1JA000001-000005. On August 7, 2020, Eugene also filed a Motion for Custody, Child Support and Other Related Relief seeking joint legal custody, joint physical custody an award of child support, attorney's fees and costs, and other related relief. 1JA000016-000025. On August 14, 2020, Appellant Nechole Garcia ("Nechole") filed an Answer and Counterclaim. 1JA000036-000044. On August 18, 2020, Nechole also filed an Opposition to Eugene's Motion and a Countermotion for Immediate Return of Child; for Primary Physical Custody; Child Support and Child Support Arrears; for Eugene to Share in Medical Costs for Child; for Attorney's Fees and All Other Related Relief. 1JA000045-000061. On August 26, 2020, Eugene filed a reply in which he continued to request a week on/week off schedule. 1JA000062-000074.

On September 17, 2020, the parties appeared before the Court for a hearing concerning Eugene's motion and Nechole's opposition and countermotion. The court ordered the parties to: (1) select a custody evaluation provider; (2) implemented a temporary custodial timeshare arrangement following a week one/week two schedule; (3) that the receiving parent shall provide transportation for the child; (4) for the parties to enroll in Our Family Wizard; and (5) that the outsourced provider may obtain copies of the parties' OFW communications. 1JA000207-000209.

On October 29, 2020, the parties filed a Stipulation and Order, where the parties agreed to a custody evaluation conducted by Kathleen Bergquist, PhD, MSW, LCSW. 1JA000199-000201. On December 15, 2020, Dr. Bergquist informed the Court that she would need at least 2-3 months to complete the 1JA000228.

On December 21, 2020, the court issued a Decision and Order that directed the parties to follow a standard Default Holiday Schedule. 1JA000235; 1JA000221-000226. The court also denied Eugene's Ex Parte's application for a 2020 Holiday Visitation. 1JA000221. On December 21, 2020, Nechole filed a Motion asking for Reconsideration of the Order Regarding Holiday Visitation Time on Order Shortening Time. 1JA000232-000240. On December 28, 2020, Eugene filed an Opposition to Nechole's Motion for Reconsideration, and Countermotion to Extend Custodial Time, *et al.* 1JA000244-2JA00253. The Court then issued a minute order specifying that the Default Holiday Schedule shall apply to Eugene only from 7:00 a.m. to 7:00 p.m. on the days designated as "Dad's days." 1JA000241-000243.

On March 16, 2021, the court held a status check and motion hearing for Dr. Bergquist's custody evaluation report. 2JA00032. As a result of the hearing, the Court issued the following temporary orders: (1) that the minor child is not left alone

with Eugene's other son; (2) Eugene was awarded overnight visitation; and (3) a calendar call was scheduled. 2JA000320-000322.

The court ordered a settlement conference for July 13, 2021. 2JA000325. However, the parties were unable to reach an agreement through the settlement conference. 2A000370-000378.

On July 19, 2021, after the settlement conference, Eugene filed a Motion for Sanctions, Attorney's Fees and Costs and Other Related Relief. 2A000370-000378. Confidential details of the settlement conference were included in Eugene's Motion. 2A000370-000378. On July 20, 2021, Nechole filed an Opposition and Countermotion for Plaintiff's Motion to Be Strick; for Attorney's Fees and Costs; and for Related Relief. 2JA000379-000395.

After two Calendar Call appearances, On October 14, 2021, *and only one (1) day* before the Evidentiary Hearing, Eugene's counsel requested a continuance based on the time he needed for expert witness testimony. 3JA000540. The court continued the Evidentiary Hearing to November 3, 2021, and November 5, 2021. 3JA000540.

Nechole's witnesses were not available for the newly scheduled dates. 3JA000559. The parties were unable to stipulate that the witnesses would be called out of order. 3JA000559-000560. As such, on October 15, 2021, Nechole filed an Emergency Motion for Witness Accommodation, or Alternatively, to Continue Trial on an Order Shortening Time. 3JA000557-000571. On October 21, 2021, Eugene

filed a Motion for Witness Accommodation. 3JA000574-000577. On October 28, 2021, the court granted the motions by way of Minute Order. 3JA000578. The court ordered both parties witnesses to be accommodated by the Court. 3JA000578. The court also limited the Evidentiary Hearing to six (6) hours for each side. 3JA000578.

On November 3, 2021, after over a year of litigation, the first day of trial occurred— in person. 15JA003686-004027. On day one, the court heard testimony from Dr. Daniel Pickar, Eugene, Nechole, and Heather Tauchen, the Clinical Director for Firefly Behavioral. 15JA003686-003687.

On November 4, 2021, the next day, the parties had a hearing via videoconference. 17JA004028. During the hearing, the court discussed what counsel should be focusing on for the remainder of the evidentiary hearing. 17JA004031; 17JA004035. The court also instructed the parties to provide three (3) years of tax returns to calculate child support. 17JA004028; 17JA004030-004032.

The evidentiary hearing to determine Ava's best interest lasted two days (November 3 & November 5, 2021). 17JA004029-004037; 17JA004038-18JA004344. The court held a telephonic hearing with the attorneys after the first day of trial. 17JA004029-004037. During the call, the court clarified the scope of evidence for the second day of trial should focus on "determining what schedule is going to be in this child's best interest." 17JA004031. And the court branded child

support a "sub issue" that would require each party to submit three years of tax returns. 17JA004032.

Summarizing the court's actions as not as "hands on" during the first day of trial to ensure the court is not "going sideways or we're not dealing with relevant stuff", the court announced to the parties that the court's role would change on day two. 17JA004032-004035. Although on day one of the trial, a medical expert gave evidence for an appropriate parenting plan for a child with special needs, the court instructed the parties that evidence for day two should focus on "the logistics, the logistics." 17JA004033.

The court next instructed the parties to talk about issues such as work schedules, geographics, other kids involved, and to submit what each party thinks theirs is the best plan. 17JA004033. The court did express that it would consider other factors relevant to the best interest of the child besides what is required in Nevada. 17JA004034. But then again, the court indicated to the parties that evidence from day one was not relevant when it cautioned the parties not to "edge into areas that have nothing to do with the actual – what's at issue which is the parenting schedule and child support". 17JA004034. Since the parties already agreed to join physical custody, the court clarified that the evidence for day two needed to focus on "It's what's in the best interest of the child as far as the *logistics* regarding scheduling." 17JA004035.

On November 5, 2021, the trial resumed. 17JA004038-18JA004344. The court heard additional testimony from Eugene and Nechole. 17JA004038-004039. The court also heard testimony from Amber Harris, the Developmental Specialist from Therapy Management Group, Marnie Lancz from Therapy Manager Group, Dr Mario Gaspar from the Ackerman Autism Center, and Dr. Leslie Carter. 17JA004039.

Because the Court had required the Parties to only reference fifteen OurFamilyWizard communications in their closing briefs, Defendant did not offer her Exhibit into evidence which consisted of the Parties' entire history of OurFamilyWizard communications. 16JA003813. The Court entered the Court's Exhibit 2 which consisted of all OurFamilyWizard communications[1].

On November 5, 2021, at the conclusion of evidence, Judge Harter took the matter under advisement, instructing the parties to submit closing briefs. 18JA004336-004337. Each party filed two (2) closing briefs to address the issues that concerned the court. 19JA004681-004690; 19JA004691-004695; 19JA004696-004705 ; 19JA004706-004715.

Nechole requested that the final order for timeshare be the same as the temporary orders that the Parties had exercised throughout the case, which was:

[1] The Court's Exhibit 2 is not included in the Appendix because Appellant's counsel has been unable to obtain a copy of the exhibit from the court and neither district court counsel was provided a copy of the exhibit. *See* 16JA003813. Pursuant to NRAP 30(d), Appellant will file a motion requesting that the District Court be directed to provide a copy of Exhibit 2 to this Court. *See also* NRAP 10(b)(2).

Week 1: Eugene Sunday 7am to Tuesday 7pm

Week 2: Eugene Monday 7am to Wednesday 7pm

On December 15, 2021, the court issued a written Decision and Order. 19JA004716-20JA004728.

The Decision and Order contained orders not on appeal for Joint Legal Custody and Joint Physical Custody based upon the agreement of the Parties; for the Court's default holiday and vacation plan with minor adjustments; for parenting classes and the OurFamilyWizard system for communications; for Appellant to provide health insurance for the minor child; for unreimbursed medical expenses to be split equally using the 30/30 rule; denying Respondent's request for child support arrears; and for Appellant to claim the minor child on her taxes each year. 19JA004716-20JA004728.

The Decision and Order contained orders appealed herein for Appellant to pay child support in the amount of $882.67 per month starting 1/1/2022. 19JA004722; 19JA004723. It did not contain any order addressing Appellant's request for child support arrears.

Finally, it provided for the following child custody timeshare:

Weeks 1 & 3 and any 5th weeks:
Monday-Tuesday: Eugene picks up Ava at 7am on Monday
Wednesday-Thursday: Nechole picks up Ava at 7am on Wednesday
Friday-Saturday-Sunday: Eugene picks up Ava at 7am on Friday

Weeks 2 & 4:

Monday-Tuesday: Nechole picks up Ava at 7am on Monday

Wednesday-Thursday: Eugene picks up Ava at 7am on Wednesday

Friday-Saturday-Sunday: Nechole picks up Ava at 7am on Friday.19JA004720.

The Decision and Order required the parties to attend mediation prior to filing any motions to modify the custody arrangement. 19JA004724. It further directed the Parties to email a letter to chambers within the next 14 days if the Court failed to address any other outstanding issues. 19JA004724. Finally, it provided that if either party was seeking attorney's fees/costs, they were to submit a timely motion compliant with NRCP 54(d). 19JA004724.

The Decision and Order noted that after the first day if trial, it had a teleconference with both counsel and on the call noted that their time would be best spent focusing on the unresolved issues (timeshare, child support).19JA004716. It continues to state that, "to no avail, the second day of trial proceeded similar to the first day – each party *unnecessarily* attacking each other, experts, and bolstering themselves. 19JA004716. In fact, this continued on through the Closing Briefs." 19JA004716.

The Decision and Order begins its findings on Custody/Visitation Schedule by stating that that the district court must consider the best interest of the child and it has "vast discretionary powers" to do so, citing to *Prins v. Prins*, 88 Nev. 261,

263, 496 P.2d 165, 166 (1972) and *Hern v. Erhardt*, 113 Nev. 1330, 948 P.2d 1195 (1997). 19JA004716. It then proceeds to remind the parties, "that the burden of proof in domestic relations cases *is the preponderance of the evidence standard (i.e.*, proof by 50.00001%), which is a far lower legal standard than Defendant uses as a prosecutor." JA004717. The findings continue on to note that the level of conflict between the parties has been high to date with no further findings or conclusions regarding conflict, how it affects the child, or how this finding affected the decision on timeshare. 19JA004717.

The Decision and Order also held that the parents' ability to cooperate is low as the level of conflict is high, but that there was insufficient evidence that ultimately the parties did not meet the specialized needs of Ava. 19JA004718. There were no findings relating to all of the evidence that Appellant had been the one meeting the needs of the minor child with little cooperation from Respondent. 19JA004718.

The Decision and Order then held that there was no evidence submitted on the mental and physical health of the parents by Appellant and that Respondent obtained notes from Appellant's treating therapist (which were sealed by the court), concluding there is insufficient proof either party's mental or physical health affected their ability to parent the minor child. 19JA004718.

Despite several experts and treating providers testifying about the special needs of this minor child, there are only a few sentences of findings regarding the physical, developmental, and emotional needs of the child. 19JA004718. Judge Harter finds that a custody evaluation was ordered, and the recommendation was for joint physical custody with Appellant receiving more time (i.e., 55/45 or 60/40). 19JA004718. He then states that Respondent's expert testified that he had never seen a custody evaluation recommending percentages of time. 19JA004718. The findings also state that the minor child has Autism Spectrum Disorder (ASD), mild to moderate and this diagnosis was confirmed by Dr. Gaspar. 19JA004718. The District Court further found that the parties enrolled the minor child in a myriad of services (e.g. Firefly Behavioral for ABA therapy) and that Appellant testified she had recently noticed some issues with the child's gait. 19JA004719.

The Decision and Order continues to find that there "was not sufficient evidence submitted that would insinuate the child had a better or worse relationship with either parent." JA004719.

The Decision and Order then proceeds to a section entitled, Analysis. 19JA004719. It provides, "As noted above, the issue at hand is truly *not* as complex as the case was presented." 19JA004719. After detailing the parties' same work schedules, it states, "Defendant's foremost reasoning in her Closing Brief about Plaintiff's proposed schedule is it will require 1-2 more exchanges which

may exacerbate the parties' conflict. 19JA004719. Fact is it gives Plaintiff 1 less day over a 2-week period and he never has Ava on any Saturdays. This is not about giving either party the schedule they desire, it is about what is in Ava's best interest. 19JA004719. This Court has indicated from the day it took the bench it does not automatically 'rubber stamp' the outsourced evaluator's recommendations. 19JA004719. This is one of those cases. 19JA004719. After going through the trial and the underlying record, this Court cannot find why the current schedule is better for Ava than the standard 2-2-3 schedule. 19JA004719. This is not about attaining 50/50 for each parent. 19JA004720. This is also not about child support as Defendant would be obligated under a 60/40 schedule. 19JA004720. It was simply not proven to this Court with sufficient evidence that the current schedule or any 55/44 or 60/40 schedule was in Ava's best interest. 19JA004720. Although these are one of the most divergent set of parents this Court has had an in depth trial on, they are both good parents actively seeking what is best for Ava. 19JA004720. As the parties have identical workday schedules, each party should share Friday, Saturday, and Sunday weekends with Ava. 19JA004720. Further, a 2-2-3 schedule allows for Plaintiff's other children to bond with Ava on the limited 4 days per month they are with him… For these reasons and the factors above, this Court CONCLUDES that it would be in the best interest

of the child that the better choice of the 2 proposed options is the 2-2-3 schedule". 19JA004720.

The Decision and Order section IV entitled Child Support provides, "As in most cases, this is a sensitive and highly contested subject. 19JA004721. Plaintiff alleged early on in the case this was why Defendant wanted primary physical custody-to avoid having to pay child support. 19JA004721. Defendant submitted a Closing Brief just on child support. 19JA004721. In it she admits, '[Plaintiff's] income on the other hand is extremely difficult to discern.' 19JA004721. If Defendant believes that Plaintiff is being fraudulent with his taxes, she can feel free to report him for investigation to the Internal Revenue Service and/or the District Attorney's Office, Family Support Division." 19JA004721. Even though not submitted by either party, Judge Harter requested both parties submit their tax returns. 19JA004721. They were admitted into evidence. 19JA004721 The child support order calculation used the Parties' 2020 tax return income. 19JA004721. The Decision and Order provides, "Defendant testified she has dated Plaintiff since 2013. 19JA004722. Surely, if he were willfully underemployed, this Court would expect she would have presented far more viable evidence.19JA004722. Deposits into Plaintiff's bank accounts does *not* automatically equate to free and clear income and this Court cannot speculate… This Court CANNOT FIND that

Defendant has proven with sufficient evidence Plaintiff is willfully underemployed without good cause." 19JA004722.

Even though Defendant requested child support arrears for the period of time that the minor child was born until when the Parties separated and the temporary order for joint physical custody, the Decision and Order does not mention the request. 19JA004722. It provides, "Plaintiff requests almost $14,000.00 in child support arrears from Defendant; Defendant did not request any arrears[2]." 19JA004722. It highlights that the physical custodian "***may"*** recover a "*reasonable portion"* of the cost of care, support, education and maintenance up to four years, "Thus, an award of child support arrears is *discretionary*, it is *limited* to the physical custodian and is *limited* to a 'reasonable portion'. Plaintiff alleged Defendant would not give him joint physical custody and that is why he ended up filing this action. This Court in using its best discretion given the evidence submitted cannot determine that Plaintiff should be awarded any child support arrears. Thus, Plaintiff's request for child support arrears is DENIED." 19JA004722-4723.

[2] It is possible this is a typographical error confusing Plaintiff and Defendant.

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

a. Background Facts

Respondent Evgeny Shapiro ("Eugene") and Appellant Nechole Garcia ("Nechole") share a single minor child: Ava Garcia-Shapiro, born September 26, 2018 ("Ava"). 1JA000001; 16JA003773.

Eugene and Nechole's relationship started nearly ten years ago, when the two met in 2013 on an online dating website. 2JA000304. They began dating for about a year, broke up, and resumed dating again in April 2017 until their separation just prior to the beginning of this litigation. 2JA000304. During this entire time period, Eugene and Nechole only lived together for about two weeks in 2014. 2JA000308; 16JA003774. Eugene wanted to move in with Nechole, but she had concerns with him. 1JA000066; 16JA003994. These concerns were mostly about Eugene placing his needs before Nechole's or Ava's. 2JA000317; 6JA003994. Eugene also expected Nechole to financially support him. 16JA003994.

In 2019, Eugene and Nechole began to have strains on their relationship, specifically because Eugene refused to put in place baby proofing mechanisms at his home because his parents were complaining about it. 1JA000048. According to

Nechole, this was a turning point that showed that Eugene cared about his and his parent's concerns over the concerns of his daughter. 16JA003994.

One of the most troubling aspects of their relationship began to reveal itself in early 2020, when Eugene told Nechole that his own son had reported to him that he was molested. 2JA000313. Shockingly, Eugene told Nechole that he was adamant *did not* want to go to the police and report it! 2JA000299 Along these lines, in June 2020, Eugene was watching Ava while Nechole was at work, and he texted her that a sippy cup fell on her wrist. JA003427 When she came home from work, Ava was crying hysterically. 2JA000311. Ava's wrist was swollen and Eugene did not do anything proactively to try and resolve this problem. 14JA003427-3428. Meanwhile, Nechole took time off from work to take Ava to the doctor. 14JA003427. Luckily, her wrist turned out to be okay. 14JA003430. Throughout this whole process, Eugene did not act like a concerned parent. 14JA003428.

Prior to filing his Complaint in September 2020, Eugene was not actively involved in Ava's life. 1JA000047. The parties never resided together. From Ava's birth until the date of the filed complaint, Eugene never even requested an overnight with Ava. 1JA000047. Eugene has always had some contact with Ava, both parties knew and accepted that Nechole would be the parent the child lived

with, and Eugene never showed any interest in being an interested party. 1JA000047.

When Eugene actually exercised his visitation, he would spend the majority of the time at Nechole's home, because his house was too small. 1JA000047. His home is roughly 1000 square feet, filled with musical equipment and a 3-D printer. 1JA000047. Eugene's elderly parents also live with him in this small home. 1JA000048. Eugene's mother sleeps in the living room and his father sleeps in one bedroom and Eugene sleeps in the other room. 1JA000048. As if this was not crowded enough, Eugene also has two adolescent sons who visit him every other weekend. 1JA000048 When his children visit, they all sleep in the same bedroom as Eugene. 1JA000048 There is absolutely no room for Ava in this current living arrangement. 1JA000048. It is a mystery to Nechole as to how Eugene has suddenly found space in his home for Ava. 1JA000048.

When Nechole ended their relationship in July 2020, she continued to allow Eugene to have visitation in her home due to his living situation. 1JA000049. It should be noted that Eugene never requested visitation in his home during time, not even overnight visitation. 1JA000049.

At the end of July 2020, Eugene informed Nechole that he was going to pursue joint physical custody of Ava. 1JA000049. When Nechole asked about the lack of any financial help he has given her, he responded by saying: "I paid you

more than what she cost." 1JA000049. Nechole told Eugene that she hoped the two of them could come up with an agreement without court intervention. 1JA000049. However, Eugene never met with Nechole about any proposed visitation schedule prior to the filing of his motion and complaint. 1JA000049.

Throughout the proceedings, pursuant to the temporary orders, the Parties exercised the following timeshare with Ava.

Week 1: Eugene Sunday 7am to Tuesday 7pm

Week 2: Eugene Monday 7am to Wednesday 7pm

At trial, Eugene testified that this schedule was unfair to him. 19JA004691.

b. Conflict Between the Parties

On August 2, 2020, Nechole told Eugene that he could no longer use her home for his visits with Ava due to his hostility towards Nechole. 1JA000049. She did not do this to limit his visitation, she just wanted him to fully baby proof his home and obtain proper sleeping arrangements at his own home. 1JA000049. After this interaction, Eugene wanted to have visitation with Ava during the day on Tuesday and Thursday. 1JA000049. Nechole wanted to ensure that Eugene's home was babyproofed, but he refused to allow her to examine his home. 1JA000049. It wasn't until Nechole practically begged Eugene to verify that his home was safe did she allow him to have visitation with Ava. 1JA000050. It's important to note that Eugene only requested two days of visitation, with no overnights. 1JA000050.

After Eugene was allowed visitation with Ava, on August 11, 2020, he picked up Ava for his daytime visit at his home, and expressly told Nechole that she would be able to pick her up at his home at the end of her workday. 1JA000050. However, Eugene informed Nechole later that afternoon that he was going to keep her for two weeks to make up the time he lost. 1JA000050. This is especially upsetting considering that Ava was still breastfeeding at this time. 1JA000050. Nechole did not get Ava back until August 24, 2020. 1JA000050; 1JA000067.

Prior to this incident, Eugene had no real parent-child relationship with Ava. 1JA000051. Nechole was the primary caregiver who put Ava to sleep every night, got her up every day, changed her diapers, fed her, made doctor's appointments, etc. 1JA000051. Eugene was never interested in providing full-time care for his daughter prior to August 11, 2020. Eugene clearly believes that since he changed his mind about caring for his daughter, that this somehow erases his lack of involvement in Ava's life prior to this sudden change. 1JA000051.

When Eugene and Nechole found out about Ava's diagnosis, Eugene would not accept the diagnosis. 17JAVol.004111. Eugene even disagreed with having Ava assessed because he felt "she had been dragged to too many assessments." 17JA004112. As a result of Ava's diagnosis, she has grown accustomed to only certain types of food. 3JAVol.000646. On top of this, Ava also has severe food

allergies. 2JA000309; 17JA004003. During Eugene's testimony, he merely described Ava as being "a picky eater." 16JA003847.

As soon as the litigation began, Eugene's behavior changed dramatically. 16JA003998. After this incident, Nechole changed the locks on her home, and when she told Eugene this, he became extremely hostile and disagreeable. 15JA003508; 16JA003998. Nechole did not want him to go in and out of her house as he pleased, which is reasonable. 15JA003508. At doctor's appointments he would openly disagree with Nechole or disparage Nechole at every chance he could. 16JA003998.

Thankfully, most of the conflict between the parties is in writing. 19JA004683. Specifically, Eugene referred to Nechole as uncooperative, impossible to get along with, unwilling to compromise, a bully, a liar, and a person who lacks integrity. 16JA003791; 19JA004683. Eugene also told the Court that Nechole "treated him like a slave when they were together." 16JA003883; 19JA004683. Eugene was also behaving this way towards Nechole's mother, who he referred to as old, depressed, diabetic, and overweight without any evidence. 19JA004683. All of these arguments appear to only be about arguing with Nechole rather than raising concerns over Ava's best interests. 19JA004683.

On the other hand, Nechole tries her best to avoid any conflict with Eugene. 19JA004683. Nechole recognizes that Eugene always has to have the last word in

any conversation, so she often completely ends the conversation rather than continuing a conversation that would lead to more arguing. 19JA004683. In Our Family Wizard messages, Eugene often criticizes Nechole for her parenting by telling her that "she continues to perpetuate untruths" because Nechole expressed a concern for Ava's speech and well-being. 19JA004683; 5JA001064. Ava notices this conflict between her parents, but she does not act out. 19JA004683. Rather, she just shuts down and gets quiet whenever there is conflict around her. 19JA004683. The conflict between Nechole and Eugene is extremely high. 19JA004683.

The Parties mainly use OurFamilyWizard to communicate. 19JA004683. Numerous messages show Eugene's continued name calling, aggressive tone and argumentative nature. 19JA004683.[3]

There was significant evidence of Eugene's conflict and failure to coparent. 19JA004684.

c. Ava's Special Needs

As a result of Nechole determining there was something wrong and setting up assessments, Ava was diagnosed with Autism Spectrum Disorder Level 1 with

[3] As noted above, the Court's Exhibit 2 is not included in the Appendix because Appellant's counsel has been unable to obtain a copy of the exhibit from the court and neither district court counsel was provided a copy of the exhibit. *See* 16JA003813. Pursuant to NRAP 30(d), Appellant will file a motion requesting that the District Court be directed to provide a copy of Exhibit 2 to this Court. *See also* NRAP 10(b)(2).

speech delay. 3JA000614; 19JA004685. She is considered a child with special needs. 15JA003692. Ava's special needs are different from that of a typical child. 15JA003279-003730. Nechole noticed her needs long before Ava was diagnosed with Autism Spectrum Disorder ("ASD"). 17JA004047-004048. Nechole advocated for Ava to obtain early intervention services. 17JA004048. Until a formal diagnosis, Eugene denied that Ava had any special needs. 17JA004049. He attributed her speech delays to the fact that she was bilingual. 17JA004201; 19JA004685.

Ava is only three years old and recently started school at Dooley Elementary School. 17JA004045. Specifically, Dooley has an early intervention program that helps with children who have similar issues as Ava. 17JA004045. She has struggled for the first few days at this new program, specifically with social communication. 16JA004000. She protests with Nechole and Eugene every time she is dropped off. 17JA004046. But, even with these minor struggles, she seems to be adjusting and doing well in this new environment. 16JA004000. As part of this program, Ava receives 30 minutes of speech therapy per week and 30 minutes of occupational therapy per week. 16JA004000.

Ava's communication skills are still somewhat lacking. 17JA004001. She struggles with functional communication skills, such as making requests, communicating what she wants, telling someone she wants them to stop, asking for help, etc. 17JA004001. Yet, Ava has no real physical limitations. 17JA004001.

Ava's reading and memorization skills for a child her age are outstanding. 17JA004001. She can read and memorize at a normal level to someone her age and her math and counting skills are normal too. 17JA004001.

Ava's diet is extremely limited. 17JA004001. Along with her autism diagnosis comes a hesitancy to try new foods. 17JA004001-004002. When Ava first started treatment, she would only eat three to four foods. 17JA004002. Now it has expanded to more flavors of the same food she would already eat. 17JA004002. Ava's problems with her diet are not necessarily biological, rather, it is sensory in that the smell or texture of a food is what makes her hesitant to try new food. 17JA004002. But Ava does also have food allergies that include soy, peanuts, dairy, and eggs. 17JA004003. Because of these limitations, Ava's diet is limited. 17JA004003.

Ava's social interactions are also pretty limited. She is not interested in seeing new people. 17JA004005. She will sometimes begin to cry or get upset when other people are introduced in her life, including when she is with Nechole or Eugene. 17JA004005-004006. Ava will get so flustered that he will begin to kick and flail on the ground, like a tantrum. 17JA004006. At that point, Nechole usually backs away from Ava in order for her to relax and calm down. 17JA004006. Ava has also never injured herself during one of these episodes. 17JA004006.

Outside of the treatment Ava receives at Dooley, she also attends her primary therapy at Applied Behavioral Analysis Therapy with Firefly. 17JA004052 This is for 30 hours a week, six hours a day. 17JA004052. She has one shift for three hours in the afternoon and then a second shift in the late afternoon. 17JA004052. So, her weekday schedule is as follows: Monday through Thursday she attends Dooley from 8:00a.m. to 10:30am, during which she receives 30 minutes of speech therapy and 30 minutes of occupational therapy. 17JA004052. Then she attends Firefly therapy after Dooley, takes a break, then attends again during the late afternoon. 17JA004052.

During trial, Nechole's evidence highlighted that the Court should consider additional factors for special needs children as outlined by Dr. Pickar's Risk Assessment Model in addition to the best interest of the children factors required by statute. 19JA004687. These factors include, but are not limited to: (1) physical safety and supervision; (2) having a structure routine; (3) a parents' time availability at home with the child; (4) acceptance or denial of the child's condition; (5) a parent's openness to medical intervention; (6) co-parenting communication and communication about special educational needs; (7) a parent's steps taken to arrange for special educational services; (8) occupational therapy, physical therapy, or other special needed services; (9) the child's transitions between homes; (10) predictability of the child's schedule; and (11) having a parenting plan consistent

with the child's developmental level. 19JA004687-004689. While Nechole included an extensive analysis of factors for special needs children in her closing brief, the court below did not include any of the Pickar Risk Assessment Model into its decision and order. 19JA004685-004689; 20JA004716-004728.

Dr. Mario Jose Gaspar de Alba is a board-certified specialist of developmental behavioral pediatrics from the Kirk Kerkorian School of Medicine at the University of Nevada Las Vegas. 18JA004264. Dr. Gaspar focuses his practice on child developmental delays and concerns for various neural development issues in children. 18JA004265. Gaspar noted that in the last year alone, he assessed two-hundred and fifty (250) children for autism. 18JA004266. Dr. Gaspar provided evidence of Ava's score on the Children's Autism Rating Scale— placing her in the mild to moderate range. 3JA000645-000649; 18JA004273. Dr. Gaspar informed the court that he disagreed with Ava's delays in development being tied to Ava speaking two languages. 3JA000645-000649; 18JA004276; JA004279.

Doctor Pickar ("Dr. Pickar") is an expert in the field of child custody evaluations. 15JA003715. In only two years, he performed an estimated twenty-six (26) child custody evaluations. 15JA003716. And, during that time, he testified at least eight times as an expert. 15JA003716. He testified that he published about twenty articles focusing on custody evaluations, divorce, and special needs children. 15JA003716. His testimony has never been stricken by a court.15JA003716. Among

other organizations, Dr. Pickar's serves on the board of directors for the Association of Family and Conciliation Courts. 15JA003717. Nechole hired Dr. Pickar to perform a work product review of Dr. Bergquist's child custody evaluation. 15JA003720. Dr. Pickar also reviewed the deposition transcript of Dr. Bergquist, a developmental pediatric exam of Ava, and a Therapy Management Group report. 15JA003671-003684; 15JA003721.

Dr. Pickar, Nechole's expert, alerted the court that Dr. Bergquist's child custody evaluation did not consider a risk assessment for a special needs child with autistic spectrum disorder. 15JA003730. During his testimony, he stated concern, that Eugene did not seem to accept that Ava's diagnosis is important to her treatment and well-being while Nechole did. 15JA003730. He further explained that Eugene's "inattentiveness is a major risk factor for a parent to have with a child who may have an autistic spectrum disorder." 15JA003731. As an expert on evaluating children with special needs, Dr. Pickar explained how the "default model of a lot of courts" may not be appropriate for autistic spectrum disorder. 15JA003732. He further testified that a "risk assessment model" should be used in cases where a special needs child is involved so that courts consider the best interest of a special needs child as compared to the best interest of a typical child. 15JA003733.

Heather Tauchen is a clinical director at Firefly, where the minor child attends ABA Therapy. 16JA003972. Heather is a board-certified behavior analyst that

oversees cases for the Registered Behavior Technician's ("RBT"). 16JA003972. She supervises services to Ava and provides parent training to both parties. 16JA003972; 16JA003977. Heather spends about thirty-two (32) hours a week with Ava and her parents. 16JA003977-003978. For her part, she described how interrupting Ava's repetitive behavior can cause a "meltdown" or "more tantruming." 16JA003974.

She also noted that among Ava's deficits— as compared to a neurotypical child— is not "being able to be flexible when changes in her routine happen". 16JA003976.

Dr. Leslie Carter, is a licensed psychologist. 17JA004138. She currently runs a parenting support group. 17JA004138-004139. Dr. Carter has worked with autistic children since 2002. 17JA004138. To prepare for her testimony, Dr. Carter read multiple documents including Ava's therapy plan, her pediatric evaluation, the Bergquist report, TMG's early intervention evaluation, Dr. Pickar's report, and the Firefly evaluation. 17JA004139-004140.

As a court appointed neutral expert, Dr. Bergquist prepared a thirty-three (33) page custody evaluation to assist the court to determine Ava's best interest. 2JA000287-000319. In the report, Dr. Bergquist refused to recommend a 50/50 joint custody schedule. 2JA000318. Dr. Bergquist noted that Eugene is "blindly" uncritical of his own behavior and tends to minimize the negative impact that his behavior has on himself and others. 2JA000304. Dr. Bergquist also noted that there

may be an increased risk of harm to Ava, given Eugene's lack of understanding of Ava's supervisory needs. 2JA000312. Dr. Bergquist further noted that Nechole appears to be the more likely parent to ensure Ava's physical, developmental, and emotional needs are met. 2JA000317 Overall, Dr. Bergquist felt that Nechole was much better positioned to provide for Ava's needs and interests. 2JA000318.

d. Eugene's Income

Eugene is a college professor employed by the College of Southern Nevada ("CSN") and Nevada State College ("NSC"). 2JA000336; 16JA003798. He teaches music. 16JA003798. He also earns up to one-hundred dollars ($100) an hour performing side gigs. 19JA004693; 18JA004300. He also earns additional income through a temporary employment agency playing music at the Venetian. 18JA004302. Eugene also informed the court that he has a fifth source of income from teaching at Guitar Center. 18JA004305-004306. And he sometimes teaches classes through City of Henderson programs. 18JA004306-004307.

Eugene's income fluctuates. 18JA004311. He estimated his pay as a professor ($2132 per month)[4] changes based on the number of classes that he teaches. 18JA004298-004299. His income from his other employment varies as well. 18JA004291-4300; JA004311.

[4] Eugene testified that his weekly pay from CSN is $346 and $187 from NSC. 18JA004298-00. He also noted that he needed to correct his deposition testimony about his pay because he originally testified that he made $436 a week. 1JAVol.3 261.

The Court asked both parties to provide their tax information for the past three years. 19JA004691; 19JA004721. Nechole obliged, in its Decision and Order, the Court contributed an annual gross income of $113,599.00, with a gross monthly income of $9,466.58 for Nechole. 19JA004722. Eugene, on the other hand, provided inconsistent testimony regarding his wages and employment. 19JA004691. He filed four financial disclosure forms, all of them make his gross monthly range from $1,770.00 to $3,042.65. 1JA000006-000015; 2JA000336-000343; 2JA000467-000482; 3JA000541-000556; 19JA004691-004692.

From month to month, Eugene deposits various amounts of money into his bank accounts. 19JA004693-004694. There are even large deposits of ten-thousand dollars ($10,000) or more four times over the course of a year. 19JA004693-004694. Eugene's reported income (FDF and Tax Returns) differs from the deposits into his bank accounts. 19JA004691-004692.

In 2020, the year that was used for income for child support calculations, even though Eugene's tax return showed an annual income of $23,645.00, Eugene deposited $93,398.03 into his bank accounts. 19JA004513-004599; 19JA004692; 19JA004721. A large amount of these deposits were cash or Paypal transactions. 18JA004346-4361. 19JA004548-004599; 19JA004694. Eugene did not sufficiently explain these deposits as being anything other than income. 18JA004293-004295;

004299-004303; 004309. If these deposits are counted as income, Eugene's gross monthly income in 2020 was $7,782.42.19JA004694.

Nechole also works for a public agency. 1JA000162; 2JA000457. Her income is consistent month to month. 1JA000163; 2JA000457.

A. *Child Support Arrears*

Between September 2018 and September 2020, it is undisputed that the minor child lived primarily with Appellant. 1JA000047.

Between September 2018 and September 2020, Eugene rarely provided any type of financial support for Ava. 1JA000048. Both parties agree that Eugene paid Nechole two-thousand dollars ($2,000) for medical expenses related to Ava's birth. 1JA000068; 19JA004695; Eugene also asserted that he "contributed at least $10,000" in expenses without providing any financial records to support this contention. 18JA004314.

Defendant's Exhibit G detailed the medical expenses incurred by Appellant for the minor child and shows that Eugene owes $16,638.72 in child support arrears and $3,309.67 (half of $6,619.34) in medical expenses. JA003626-3669; 19JA004695.

B. *Settlement Negotiations*

Through her attorney, Nechole requested a settlement conference to resolve issues before going to trial. 2JA000325-000328. The parties agreed and on

May 4, 2021, the court issued an Order requiring the parties and their attorneys to attend a settlement conference. 2JA000325-000328. On July 13, 2021, the parties appeared at a settlement conference with the Honorable Judge Sunny Bailey presiding over the conference. 2JA000325-000328. The court's Order required the parties to follow the rule pertaining to settlement conferences for the Rules of Practice for the Eighth Judicial District Court ("EDCR"). 2JA000325; EDCR 5.524. After the conference, Ms. Isso filed a motion that revealed confidential details of the settlement conference. 2JA000370-000378. Ms. Isso ("Isso") filed a motion accusing Nechole of participating in the settlement conference in bad faith. 2JA000370. The motion included points of contention that the parties originally reached agreement on such as specifics of a timeshare schedule. 2JA000373. And, Isso included a statement from Judge Bailey in her motion that indicated the parties reached a deal: "great, we will just set the child support pursuant to statute." 2JA000373. But then the motion accused Nechole of terminating the negotiations because Judge Bailey returned to Eugene and Isso "in shock and stated Ms. Garcia will no longer agree to the custodial schedule unless Mr. Shapiro waives child support." 2JA000373. Although Isso was not in the room with Judge Bailey and Nechole, she concludes that Nechole "did not want to agree to a custodial schedule unless child support was waived". 2JA000373.

The motion also informed the court of the details of a counteroffer made by Nechole to Eugene during the negotiations. 2JA000373. Isso wrote "[s]he counter offered with Joint physical Custody alternating weekends including nights, and then when it came to child support, she backed out and stated that she will not agree to any custodial arrangement unless child support is waived!" 2JA000373.

Isso informed the court that this was "after 6 straight hours of negotiations!" 2JA000373. (emphasis in the original).

During trial, Isso again informed the court of the details of the settlement conference. 16JA003903. Isso asked Nechole "[s]o did Eugene propose to you a week on, week off schedule?" 16JA003903. Nechole's attorney objected to the line of questioning arguing that Isso's question went to settlement negotiations. 16JA003903.

Allowing the testimony, the court responded that the question is "not outright settlement negotiations. 16JA003903. That part I'm going to go ahead and allow in." 16JA003903. Nechole then explained part of the negotiations to the court by stating, "[s]o my response was that I didn't think it was appropriate for a child's of Ava's age to follow a week on, week off schedule." 16JA003903. Isso then asked Nechole, "Well, then what did you propose to him?" 16JA003903. Once again, Nechole's attorney objected to the line of questioning. 16JA003904. After hearing argument on the objection, the court stated "Now, you're going beyond telling me now. I'll go

ahead and strike the prior portion as well, the part for the week on, week off. That is settlement negotiations." 16JA003904. Once again, a question from Isso drew an objection when she asked, "Isn't it true that you stated that a child should not be away from another parent for more than two to three days at a time?" 16JA003904. The court sustained the objection. 16JA003905. The court then informed the parties "It's what they were negotiating back and forth. 16JA003905. And apparently at one point they almost reached an agreement. I believe that was when Judge Bailey was involved. Again, this is how I remember all these cases and it fills my mind with this stuff, but for today's purposes at trial, settlement negotiations, the objection is sustained." 16JA003905.

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

A. Whether the district court abused its discretion by allowing settlement negotiations into evidence.
B. Whether the district court abused its discretion by not striking the settlement negotiations contained in Plaintiff's Motion.
C. Whether the district court abused its discretion by allowing settlement negotiations to affect its view of Appellant.
D. Whether this case should be assigned to a different judicial department on remand.
E. Whether the district court abused its discretion when it did not consider factors regarding the minor child's special needs when setting timeshare.
F. Whether the district court abused its discretion by holding Appellant to a higher standard to prove that her requested the timeshare was in the best interests of the minor child.
G. Whether the district court abused its discretion when it did not consider the conflict between the parties when setting the timeshare.
H. Whether the district court erred in setting child support based solely on tax return income.

I. Whether the district court erred in applying the law as to how to calculate income for child support purposes.
J. Whether the district court erred in not awarding constructive child support arrears to Appellant for the period prior to litigation.

17. Legal argument, including authorities:

A. Standard of Review

The appellate court may reverse the trial court's determination of child custody issues when there is a clear abuse of discretion in light of the best interest of the child. *Sims v. Sims*, 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993). Trial courts have discretionary powers in determining child custody, which will not be disturbed absent an abuse of discretion. *Primm v. Lopes*, 109 Nev. 502, 504, 853 P.2d 103, 104 (1993). A district court's factual determinations may be reversed when unsupported by substantial evidence. *Jensen v. Jenson*, 104 Nev. 95, 99-100, 753 P.2d 342, 345 (1988). This court reviews a district court's decisions regarding custody, including visitation schedules, for an abuse of discretion. *Rivero v. Rivero*, 125 Nev. 210, 428, 216 P.3d 214, 226 (2009); *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d49 541, 543 (1996).

Generally, a court abuses its discretion when it makes a factual finding which is not supported by substantial evidence and is "clearly erroneous." *Real*

Estate Division v. Jones, 98 Nev. 260, 645 P.2d 1371 (1982). Substantial evidence is evidence that "a reasonable mind might accept as adequate to support a conclusion." *State Emp't Sec Dep't v. Hilton Hotels*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986). A decision that is not supported by substantial evidence is arbitrary and capricious. See id.

An open and obvious error of law can also be an abuse of discretion, as can a court's failure to exercise discretion when required to do so. *Franklin v. Bartsas Realty, Inc*., 95 Nev. 559, 598 P.2d 1147 (1979); *see also Massey v. Sunrise Hospital*, 102 Nev. 367, 724 P.2d 208 (1986).

In reviewing a mixed question of law and fact, an appellate court gives deference to the district court's findings of fact but independently reviews whether those facts satisfy the applicable legal standard. *Hernandez v. State*, 124 Nev. 639, 647, 188 P.3d 1126, 1132 (2008).

The appellate courts review questions of law under a de novo standard. *SIIS v. United Exposition Servs. Co.,* 109 Nev. 28, 30, 846 P.2d 294, 295 (1993).

It is an abuse of discretion for a court to apply an incorrect legal standard. *Matter of Halverson*, 123 Nev. 493, 510, 169 P.3d 1161, 1173 (2007). In the absence of express findings, findings may be implied if the record is clear and will support the judgment. *Pease v. Taylor*, 86 Nev. 195, 197, 467 P.2d 109, 100 (1970). In the absence of a clear record to imply findings, reversible error exists, and

reversal is proper. *Hardy v. First Nat. Bank of Nev.*, 86 Nev. 921, 923, 478 P.2d 581, 582-83 (1970), citing *Pease*, 86 Nev. at 195, 467 P.2d at 109.

B. The District Court Erred When it Allowed Settlement Negotiations into Evidence and In the Record and did not Strike Plaintiff's Motion

The District Court Erred on two different occasions in allowing evidence of settlement negotiations into the record. Pursuant to NRS 48.105, evidence of offering or accepting a valuable consideration in compromising a claim what was disputed as to validity is not admissible to prove the invalidity of the claim. Additionally, evidence of conduct or statements made in negotiations is not admissible. Id.

Here, Attorney Isso included extensive details of the Parties' settlement conference in a motion. The purpose of these details was to try to invalidate Appellant's requests for custody or specific timeshare. Additionally, at trial, Judge Harter overruled objections to questions eliciting this same information from Appellant during her testimony.

While the admission of this information in other situations may be viewed as harmless error, in this case it is clear that Judge Harter held ill feelings toward Appellant maintaining a claim for anything other than an exact equal timeshare and request to use Respondent's actual income for child support calculation purposes.

His awareness of the settlement negotiations may have influenced his decisions on both timeshare and child support. As such, the District Court erred in allowing such information into the record and into evidence. The District Court's decisions for timeshare and child support should be reversed due to this error. Additionally, Plaintiff's motion filed on July 19, 2021, should be struck from the record. Finally on remand, this case should be assigned to a different judicial department because Judge Harter was exposed to these confidential settlement negotiations. His exposure to the settlement negotiations affected his decision in this case and it is not possible for him to undo his exposure to the settlement negotiations.

C. The District Court Abused its Discretion By Holding Appellant to a Higher Standard to Prove That the Timeshare She Requested Was In the Best Interests of the Minor Child

The District Court erred in holding Appellant to a higher standard to prove that her requested timeshare was better than Respondent's requested schedule.

NRS 125C.0035(1) provides, "In any action for determining physical custody of a minor child, the sole consideration of the court is the best interest of the child." It is an abuse of discretion for a court to apply an incorrect legal standard. *Matter of Halverson*, 123 Nev. 493, 510, 169 P.3d 1161, 1173 (2007). The District Court applied the incorrect legal standard in determining timeshare.

The District Court erred stated that it set a 2-2-3 timeshare because, "it was simply not proven to this Court with sufficient evidence that the current schedule or any 55/45 or 60/40 schedule was in AVA's best interest." Appellant was the one asking for the current schedule, 55/45 or 60/40 schedule. In its decision, Judge Harter points out, "the Court REMINDS the parties that the burden of proof in domestic relations cases is *the preponderance of the evidence standard (i.e.,* proof by 50.00001%), which is a far lower legal standard than Defendant uses as a prosecutor." 19JA004717. Judge Harter also provides in the analysis, "After going through the trial and the underlying record, this Court cannot find why the current schedule is better for Ava than the standard 2-2-3 schedule… It was simply not proven to this Court with sufficient evidence that the current schedule or any 55/44 or 60/40 schedule was in Ava's best interest." 19JA004720.

In its Decision and Order, the District Court held Appellant to a higher standard to prove that her requested schedule was better than Respondent's requested schedule. This applied an incorrect legal standard. As, such it was error.

The District Court's order for a 2-2-3 timeshare should be reversed and remanded with directions for the District Court to hold both Parties to the same standard, not one party to a higher standard.

D. The District Court Erred When it Did Not Consider Factors Regarding the Minor Child's Special Needs When Setting the Timeshare

The District Court erred when it did not consider the extensive evidence about the specific needs of this particular child due to her special needs when setting the timeshare. Further, the expert witnesses detailing a specific set of factors to consider in making orders for timeshare of a minor child on the autism spectrum, yet the District Court did not even mention or consider these factors. Pursuant to NRS 125C.0035(3)(g), when making a child custody decision, the District Court must taken into account the physical, developmental and emotional needs of the child. Additionally, "the court must take its specific findings as to the applicable factors and tie them to its conclusion regarding the child's best interests." *Monahan v. Hogan*, 138 Nev. Adv. Op. 7 (Feb. 24, 2022), citing *Davis v. Ewalefo*, 131 Nev. 445, 451, 352 P.3d 1139, 1143 (2015) (holding that the district court must issue specific findings when making a best interest custody determination and tie them to its conclusion).

The Decision and Order notes that Ava was assessed with having Autism Spectrum Disorder, there is no analysis or consideration of this fact in the timeshare decision nor did the district court tie any best interest factors to its ultimate timeshare decision. There was extensive expert testimony dealing with Ava's needs for consistency, supervision, etc. There were specific recommendations made by the court appointed neutral expert for Nechole to have a greater timeshare. Dr. Pickar detailed a Risk-Assessment Model that included a list of factors to consider. These

factors include the physical safety and supervision, structure routine, time availability at home, acceptance about or denial about child's condition, openness to medical intervention, co-parenting communication and communication about special educational needs, take steps to arrange for special education services, OT, PT, or other special needed services, transitions between homes, predictability of schedule, parenting plan schedule consistent with developmental level. The District Court just ignored all of these factors in assessing the developmental and emotional needs of the child when all of these factors favored Nechole's request for Ava's timeshare to remain the same. It was error for the District Court to not make findings relating to Ava's special needs in making its timeshare determination. As such, the timeshare order should be reversed and either: 1) remanded for further findings that specifically include analysis of all of the Risk-Assessment Model factors or 2) setting timeshare as maintaining the temporary orders as a final order.

E. The District Court Erred When it Did Not Consider the Conflict Between the Parties When Setting the Timeshare

The District Court erred when it did not consider the conflict between the Parties when setting the timeshare, despite finding, "these are one of the most divergent set of parents this Court has had an in depth trial on". Pursuant to NRS 125C.0035(3)(d), when making a child custody decision, the District Court must take into account the level of conflict between the parents. In its findings, the District

Court merely states, "This factor has been *high* to date." Despite all of the evidence on conflict between the parents indicating that Eugene is the cause of the conflict and Nechole being conflict avoidant, the Court makes no findings other than to say conflict is high. The point of requiring findings in child custody decisions is to ensure that the District Court is actually looking at the facts of each case and considering how they affect the best interests of the minor child. Simply saying that conflict is high and then setting a timeshare that requires more interaction and coordination between the parties does not actually satisfy this requirement. In this case, reducing conflict by reducing exchanges and need for communications was the main basis for Nechole's requested timeshare.

The District Court erred when it did not consider the conflict between the parties when setting timeshare, specifically that it did not analyze how the conflict between the parties would be increased or decreased with each of the timeshare options presented. As such, the timeshare order should be reversed and either: 1) remanded for further findings that specifically include analysis of the conflict between the Parties or 2) setting timeshare as maintaining the temporary orders as a final order as it would significantly reduce conflict between the Parties.

F. The District Court Did Not Correctly Apply the Law when it Set Child Support Based Solely on Tax Return Income, Ignoring Evidence of Other Income

The District Court set child support based solely on the income stated on each Party's 2020 income tax returns. Because there was evidence of income not included on Respondent's tax return, it was error for Judge Harter to only consider the tax return income. Doing so incorrectly applied the law.

NAC 425.025 provides the definition of "Gross income" to be used for child support purposes. Section (1)(n) includes "all other income of a party, regardless of whether such income is taxable."

The Decision and Order attributes a burden to Appellant to prove that Respondent was willfully underemployed in order to consider the income not included on Respondent's tax returns. The law does not require a finding of willful underemployment in order to consider income that is not reported on a tax return. It is a required part of the definition of "Gross income" and therefore was required to be considered by the District Court in calculating child support. Respondent's bank accounts showed an exact dollar amount deposited into his accounts in 2020, the year used for child support calculations. As detailed in Appellant's closing brief, these deposits totaled $93,398.03.

The District Court's child support order should be reversed and either: 1) remanded for an accurate determination of Respondent's income that includes income not included on his tax returns; or 2) child support set based upon Respondent's gross monthly income of $7,72.42, which result in a child support

obligation from Appellant to Respondent of $84.22 per month minus $39.39 for half the health insurance premium, for a final child support amount of $44.83.

G. The District Court Erred in Not Awarding Constructive Child Support Arrears to Appellant

The District Court abused its discretion when it did not award Appellant child support arrears for the period between September 2018 and 2020 when the minor child was in her primary care without any child support orders in place.

Pursuant to NRS 125B.030, the physical custodian of a child may recover for up to four years of support, a reasonable portion of the cost of care, support, education and maintenance from the other parent when there is no child support order.

In the Decision and Order, the District Court improperly denies arrears because Respondent alleged that Appellant would not give him joint physical custody during that time period. Whether or not any fault could be found for the timeshare in place during the two years that Respondent waited to file for custody orders, this is not an appropriate factor to take into account in ensuring that both parents are supporting the minor child. Appellant provided almost all financial support for the minor child during those two years. NRS 125B.020(1) requires that the parents of a child have a duty to provide the child necessary maintenance, health care, education and support. Additionally, under NRS 125B.020(3) the father is

liable to pay the expenses of the mother's pregnancy and confinement. While Respondent contributed $2,000 toward the pregnancy and birth expenses, he did not contribute significantly toward the child's maintenance between September 2018 and 2020.

The Decision and Order went out of its way to highlight that the District Court believes that child support arrears are discretionary and limited. This interpretation of child support law ignores the obligation of a parent to provide. Such obligation is not contingent upon there being court orders. Such obligation is not contingent upon the physical custodian allowing visitation or joint physical custody.

The District Court erred in denying Appellant's request for child support arrears. As such, the Decision and Order should be reversed and either: 1) remanded for calculation of arrears, or 2) arrears set at Eugene owing $16,638.72 in child support arrears and $3,309.67 (half of $6,619.34) in medical expenses.

H. The District Court Erred When it Did Not Consider the Appellant's Request for Child Support Arrears

The District Court erred by not considering Appellant's request for arrears. Under NRS 125B.030, the District Court has discretion to allow the physical custodian of a child to recover up to four years of support. The award is a reasonable portion of the cost of care, support, education and maintenance from the other parent when there is no child support order. NRS 125B.030. A claim for retroactive award

of child support is proper unless there are issues of jurisdiction or waiver. *Mason v. Cuisenaire*, 128 P.3d 446, 451–52 (Nev. 2006). Waiver is an issue of fact that must be raised during trial. *Parkinson v. Parkinson*, 106 Nev. 481, 483, 796 P.2d 229, 231 (1990), *abrogated on other grounds by Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009).

The Court's Decision and Order ignored Appellant's request for child support arrears. In fact, the Court even states that Appellant "did not request any arrears." This demonstrates that the Court did not consider Appellant's Closing Brief because the Brief specifically requested an award for arrears in the amount of $16,638.72, which covers the period of September 2018 until September 2020. While the award of arrears is discretionary, the Court's determination is still required to rely on substantial evidence, or the ruling is deemed "clearly erroneous." There is no explanation whatsoever in the Court's Decision and Order that justifies or explains any rationale for ignoring Appellant's request.

The District Court erred when it ignored Appellant's request for child support arrears. Thus, the Decision and Order should be reversed and either: 1) remanded for calculation of arrears, or 2) arrears set at Eugene owing $16,638.72 in child support arrears and $3,309.67 (half of $6,619.34) in medical expenses.

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:

N/A

19. Routing Statement:

This case should be assigned to the Court of Appeals as stated in NRAP 17(b)(10) because it involves a family law issue other than the termination of parental 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 12,000 words; or

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

☐ Does not exceed 21 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 14th day of March, 2022.

MCFARLING LAW GROUP

/s/ Emily McFarling
Emily McFarling, Esq.
Nevada Bar Number 8567
6230 W. Desert Inn Road
Las Vegas, NV 89146
(702) 565-4335
Attorney for Appellant,
Nechole Garcia

CERTIFICATE OF SERVICE

I, an employee of McFarling Law Group, hereby certify that on the 14th day of March, 2022, I served a true and correct copy of this Child Custody Fast Track Statement as follows:

☐ by United States mail in Las Vegas, Nevada, with First-Class postage prepaid and addressed as follows:

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

Jennifer Isso, Esq.
ji@issohugheslaw.com

/s/ Alex Aguilar
Alex Aguilar