

NECHOLE GARCIA,) Supreme Court Case No. 83992- COA
Appellant,) District Court Case No. D-25-01001
vs.) May 14 2022 09:14 p.m.
) Elizabeth A. Brown
) Clerk of Supreme Court
EVGENY SHAPIRO,)
Respondent.)

where he continued to request Joint Physical Custody seeking a week on/week off schedule. 1JA000062-000074.

On September 17, 2020, the parties attended a hearing where Nechole made numerous allegations against Eugene to prevent him from having joint physical custody over the minor child. As a result, the court ordered a custody evaluation, a temporary custodial schedule, inter alia. 1JA000207-000209. The parties agreed on Kathleen Bergquist, Ph.D. to conduct the custody evaluation. 1JA000199-000201.

On December 21, 2020, the court ordered a temporary holiday schedule as a result of Eugene filing an Ex-Parte Application requesting a 2020 Holiday Schedule, and the court granted the request and entered an order adopting Department N's Default Holiday Schedule. 1JA000221. The order allotted time for both parties to spend quality time with the child during the upcoming holidays. *Id.* Nechole immediately objected and sought a reconsideration of the order on the holiday schedule as she was contending that Eugene was not fit to have regular visitation time during the holidays. 1JA000232-000240.

Dr. Kathleen Bergquist conducted an extensive custody evaluation, where she interviewed the parties and third-parties, administered mental exams and observed the parties with and without their child. 1JA00032. Her recommendation after this extensive analysis recommended that the court order Joint Physical Custody. 1JA00032. Eugene continued to request Joint Physical Custody and requested to extend his visitation to overnights. 2JA000272. However, Nechole continued to object and oppose this position as she was adamant to have Primary

Physical Custody and no overnight visitation for Eugene. 2JA000265.

On July 13, 2021 the court ordered a settlement conference at the request of Nechole. 2JA000325. The parties attended the settlement conference for six hours with no success. 2JA000370-000378. Eugene sought sanctions against Nechole for agreeing to a custodial schedule but then reneging on her agreement when Eugene did not agree to waive child support. 15JA000372-15JA000375. The court did not hear the motion or entertain any arguments regarding this issue. There was no order from that hearing. Further, Nechole failed to provide the minutes and the transcript from that hearing. Instead, the court encouraged the parties to reach out to the department if the matter settles.

The court rescheduled the evidentiary hearing from October 15, 2021 to November 3, 2021 and November 5, 2021 in order to accommodate the expert witnesses. 3JA000540. Nechole's counsel, Ms. Molly Rosenblum, Esq. reached out to Eugene's counsel, Ms. Jennifer Isso, Esq. requesting accommodation of Nechole's witnesses. Ms. Isso agreed as long as Eugene's witnesses would also be accommodated; witnesses such as Dr. Kathleen Bergquist and Expert Witness Dr. Carter (both of which were only available to testify on November 5, 2021). However, Nechole and Ms. Rosenblum only wanted the courtesy to be extended to them and they did not want to reciprocate the accommodation. In other words, they wanted their witnesses to be accommodated but did not want to accommodate the opposing parties' witnesses, whatsoever. 3JA000574-000577.

After months and months of litigation and hearings, the day of the

evidentiary hearing finally arrived. Shortly before, on October 7, 2021, Eugene filed his Pretrial Memo requesting Joint physical Custody. 2JA000483-492. On October 8, 2021, Nechole filed her Pretrial Memo and continued to request Primary Physical Custody. 2JA000493-3JA000530.

During Day 1 of the Evidentiary Hearing on November 3, 2021, Nechole stated during her opening statements through her counsel that she would agree to Joint Physical Custody. 15JA003694. Nechole's counsel stated this on more than one occasion during Nechole's opening statement. 15JA003695.

Nechole's counsel again confirmed her client's stipulation to joint physical custody during a telephonic hearing held on November 4, 2021. 17JA004030. During the November 4, 2021 telephonic conference, the court stated, "Ms. Rosenblum at least three times in the a.m. yesterday it was stipulated on the record and it was also confirmed through your expert the parties have agreed to joint physical custody, correct?". 17JA004030. In response, Ms. Rosenblum stated. "That is correct.". 17JA004030. As such, there was a stipulation to Joint Physical Custody. 17JA004030.

Therefore, since there was an agreement on custody, Judge Harter wanted parties to focus more on presenting evidence regarding the schedule and child support because those were the remaining issues. 17JA004032. For example, the logistics of the schedule, like transportation, geographics, along with the best interest factors, inter alia. 17JA004032. The evidentiary hearing proceeded to Day 2 on November 5, 2021 and concluded on that day. The court took the matter under

advisement and requested the parties submit “simultaneous” closing briefs regarding timeshare and child support.

Nechole submitted a closing brief requesting that Eugene only have 2 days/2 nights per week. 19JA004681. Specifically, Nechole was requesting that Eugene only be permitted to have the following schedule:

Week 1: Eugene Sunday 7am to Tuesday 7pm

Week 2: Eugene Monday 7am to Wednesday 7pm

19JA004681 – 19JA004690.

In other words, Nechole was comfortable with Eugene having Ava for two consecutive days and nights. 19JA004681 – 19JA004690. Nechole however did not want Eugene to have three nights a week and did not want Eugene to have custodial days on any Fridays and Saturdays despite the fact that this is when Eugene has his other children so the siblings can see each other and play. 19JA004681 – 19JA004690.

Eugene submitted a closing brief requesting a 2-2-3 schedule so the parties can alternate the weekends and both have quality bonding time with the child. 19JA004696-19JA004715.

The parties further submitted closing briefs on child support. 19JA004691-19JA004695 and 19JA004696-19JA004715.

After two full days of testimony both lay and expert, observing and analyzing demonstrative evidence, analyzing exhibits, reading closing briefs, inter

alia¹, Judge Harter issued a Decision and Order. 19JA004716-20JA004728. The Decision and Order analyzed the best interest factors and made findings supported by substantial evidence, 19JA004716-20JA004728, as will further be discussed below.

5. Statement of Facts

Background. Respondent Evgeny Shapiro (“Eugene”) and Appellant Nechole Garcia (“Nechole”) are the parents of one minor child, to wit: Ava Garcia-Shapiro, born September 26, 2018 (“Ava”). 1JA000001; 16JA003773. Eugene and Nechole had a ten (10) year relationship. The two met in 2013 on an online dating website. 2JA000304. Eugene attended all prenatal appointments and was present at the hospital for the birth of his child. 16JA003773, 16JA003923. Eugene cared for Nechole during her prenatal time. 16JASN003924. Nechole testified that Eugene would cook for her several times a week in 2019 and 2020. 16JASN003924-25.

Eugene’s name is on the birth certificate and he has been acting as the father of the

1 On November 3, 2021, during day one of the evidentiary hearing, the following witnesses testified: Dr. Daniel Pickar (Nechole's Expert), Eugene Shapiro (Plaintiff), Nechole Garcia (Defendant), and Heather Tauchen (BCBA, Firefly Behavior Services, Eugene's witness). On November 5, 2021, during day two of the evidentiary hearing, the following witnesses testified: Nechole Garcia, Marnie Lanz (TMG, Supervisor, Nechole's witness), Mark James (TMG, Speech Pathologist, Feeding Specialist, Eugene's witness), Amber Harris (TMG, Specialist, Nechole's witness), Dr. Leslie Carter (Eugene's Expert), Montana Garcia (Nechole's mother, Eugene's witness), Eugene Shapiro, and Dr. Mario Gaspar (Ackerman Autism Center, Nechole's witness).

minor child, paternity is not disputed. AASN003774, 16JA003774. That after the child was born, Eugene was at Nechole's home at least four days a week taking care of the child. 16JA003774. Eugene would watch the child, cook for her, feed her, change her diapers, teach her Russian and English, he would sing to her, play guitar and piano for her. 16JA003774, 16JA003933-34. Eugene would also take the child to his home. 16JA003774. Eugene would be responsible for watching the child when Nechole was working. 16JA003775. Eugene would watch the child for eleven plus hours anywhere from two to four days per week. 16JA003774. Eugene also watched the child exclusively in the summer of 2019 between mid-May 2019 to mid-August 2019 for four days per week, 11 plus hours at a time. 16JA003775. Eugene would care for the child on demand when Nechole would fight with her mother (the maternal grandmother). 16JA003775. During these arguments, Nechole would deny the maternal grandmother access to the minor child when they had an argument. 16JA003775. And at those times, Nechole would immediately expect Eugene and his mother (paternal grandmother) to jump in and care for the child. 16JA003776. That Nechole would use the maternal grandmother to babysit despite the fact that she is old, overweight, has a plethora of health issues, has to wear grip socks so she doesn't slip and fall. 16JA003797. That Montana Garcia has mobility issues where she cannot get down or up from the

floor without holding on to something, that she wears grip socks to avoid her from falling. 17AASN004231. That during her deposition, Montana testified that she recently fell and Eugene has safety concerns regarding Montana babysitting/watching the child. 17AASN004232. Montana is diabetic and overweight. 17AASN004232.

Nechole testified that Eugene was around her and the child and present in the child's life since the child's birth. 16JA003925-26. That Eugene was caring for the child and spending time with her. 16JA003926. Nechole further testified Eugene has been involved in the child's medical care and attended the child's medical appointments. 16JA003776.

Eugene testified that Ava is treating with Dr. Hutchings at Sienna Pediatrics, Dr. Miyake at Allergy Partners, Dr. Gaspar at Ackerman Autism Center, with Firefly Behavior Services for ABA therapy. 16JA003776. That the child on August 10, 2021 was diagnosed with mild Autism level one and that she has an ABA plan developed by Heather Tauchen with Firefly Behavior Services. 16JA003776. That the child has an Individualized Education Plan issued on October 21, 2021 by CCSD which recommends and places the minor child in a general classroom. 16JA03779. Eugene has participated and been present for all school meetings with the school district. 16JA003779.

Eugene also contributed financially to the child since she was born in an amount over \$10,000. 16JA003783-85. Eugene is capable and available to care for the child for at least 146 days per year. 16JA003785. Eugene has no criminal record, has never been arrested. 16JA003785.

Eugene requested a 2-2-3 schedule so the minor child could see her siblings that she has a wonderful relationship with. She loves her siblings and they love her. That she smiles and waves at her siblings and it would be cruel if they do not get to see each other and spend time with each other regularly. 16JA003786, 4JA000784-4JA000797. That Eugene takes the child and her siblings to the pumpkin patch, park, pool. 16JA003787. Eugene requested a time share where he would have the minor child during the same time he had his other children. 16JA003787.

Nechole is uncooperative and has anger management issues, it is impossible to get along with her unless one does basically whatever she says as she is very controlling and unwilling to compromise. 16JA003791. On page 30 of Kathleen Bergquist's report, the results of Nechole's PAI suggest that Nechole is assured, confident and dominant and prefers to interact with others in situations over which she can exercise a measure of control. 16JA003792. Nechole's communications with her co-parent often sound like an interrogation or criminal investigation, assuming the worst and challenging Eugene on every detail of the story.

16JA003792. That Nechole has anger issues and can go from one to zero in a split second and when she would get upset she would change the custody schedule.

16JA003792. That Nechole would limit Eugene's time with Ava since she was born. 16JA003794. Initially, Nechole would prevent Eugene from seeing Ava on Fridays and then it also became the weekends, then she would only allow Eugene to see Ava at the park for 25 minutes while Nechole held the child the entire time.

16JA003794. That Nechole continued to limit and dictate when Eugene could see the child. 16JA003794. Eugene could not take it anymore and then filed a complaint for custody. 1JA000001-1JA000005. Nechole agreed for Eugene to spend time with the child when it financially benefited Nechole (e.g while Nechole was working). 16JA003796. Eugene testified that Nechole only wants him in the child's life to the extent that she wants him to be, on her own terms and only when it suits her and is good for her, otherwise absolutely not. 17AASN004231. Nechole told Eugene that she saves \$10,000 a year in daycare expense when he babysits. 16JA003796.

That previously Eugene attempted to resolve custody issues with Nechole and informed that he wanted joint physical custody. 16JA0037798. Nechole would get upset and respond that she would never allow that and she would spend her last dollar to fight him in court. 16JA003797. Nechole denied Eugene access to Ava for

33 days. 16JA003809. After the child was born, Nechole had physically pushed Eugene several times out of her house, she would scream and curse at him and then give him the silent treatment for weeks. 16JA003839, 18JA004316.

During the evidentiary hearing, Ms. Isso inquired about the settlement conference and Ms. Rosenblum objected and the court sustained those objections so they were not admitted or considered by the court. 16JA003840-41. Settlement negotiations was stricken from the record. 16JA003903-05.

Nechole would make excuses to deny Eugene access to the child, at one time she alleged it was because of babyproofing. But Eugene babyproofed his home as early as 2019. 16JA003824. Eugene never refused to babyproof his home or removed the babyproofing. 17AASN004197. Nechole demanded pictures of the babyproofing which Eugene sent to her. 16JA003824. Nechole testified that Eugene sent her more than 10 photos of the baby proofing in August of 2020. 16JA003932-33. Nechole testified that on August 3, 2020, Eugene messaged her pictures of a crib he purchased and pictures of the baby proofing in his house. 16JA003961. The pictures showed that Eugene baby proofed the cabinets, drawers, stove, door knob and placed rubber guards on the corners of tables. 16JA003961-62. Nechole then testified that she did not want to inspect Eugene's home. 16JA003933.

That Dr. Kathleen Bergquist observed the child at Eugene's home and made no complaints or suggestions about baby proofing. 16JA003828. In fact, Dr. Bergquist was happy with the babyproofing. 16JA003828. That Dr. Bergquist made no complaints while observing Eugene with the child at his home and she did not ask for additional time to observe him and the child. 16JA003830. That as a mandatory reporter, Dr. Bergquist did not report Eugene to CPS for any reason. 16JA003830.

Dr. Bergquist ordered psychological exams on the parties and after her observations recommended the court adopt a joint physical custody arrangement. 16JA003943. That Dr. Bergquist indicated that it is not in the child's best interest for Nechole to have primary physical custody. 16JA003943. Dr. Bergquist recommended that Nechole continues her individual therapy to assist her with coparenting and trust issues. 16JA003943. Nechole was diagnosed with adjustment disorder with anxiety. 16JA003995.

Eugene works as a college educator, teaches music for CSN and NSC and he performs music. 16JA003798. Eugene discussed a typical day with Ava would consist of waking up and getting dressed, brushing teeth and hair, going for walk or to park, then do some therapy, play games and activities, read books, practice words and play. 16JA003847. That Eugene has worked with Ava on speech,

occupational and feeding therapy and he has participated in every appointment.

16JA003851. That he is studying to be an RBT. 16JA3850-16JA3851.

Eugene lives in a three-bedroom house, 1100 sq feet, where his sons share a room and Ava has her own room in the house. 16JA003860-61. Nechole testified that the reason that she did not want Eugene to have overnights is because there is no room in his house for Ava to sleep. 16JA003931. Nechole did not bring up any other reason why she did not want to have overnights. 16JA003932.

Nechole testified that she made 112,000 per year. 16JA003914. That she works 10-hour days and that she used to use her mom and Eugene to babysit. 16JA003914. Nechole testified that she made a big deal about Eugene having the child for two consecutive weeks because she was breast feeding, but in the next sentence she stated that the minor child was eating other foods as well such as carrots, fruit bars, Gerber chicken apple, cheerios. 16JA003917. That the minor child does not solely rely on breast milk. 16JA003917. Nechole told Eugene that she stopped breast feeding in May 2020 and even prior to that prior to Ava's one year well visit with the pediatrician. 16JA003848.

Nechole called Dr. Pickar as an expert in her case and chief to conduct a product review of Kathleen Bergquists' custody evaluation report. 15JA003719. Dr. Pickar explained that he was not providing expert testimony on custody

evaluations. 15JA003720. That he was not here to make a custody evaluation. 15JA003740. That he would have to be appointed by the court in order to provide a custody evaluation. 15JA003720. And that he is not in a position to make individual diagnosis. 15JA003720. Dr. Pickar further testified that he cannot recommend a parenting plan regarding a specific child if he has not evaluated that child and the family members because that would be improper. 15JA003720. That Dr. Pickar did not evaluate Eugene, Nechole or the child. 15JA003740. That he did not observe the child with either Eugene or Nechole. 15JA003740. That he is lacking firsthand observations regarding this matter. 15JA003740. Dr. Pickar then went on to say that it is proper for him to do an examination of an evaluator's work product to look at does their methodology confirm with the professional standards in the field (He was examining Dr. Bergquist's report). 15JA003720. Dr. Pickar immediately makes clear his scope and purpose related to his testimony and scope of employment. 15JA003720. He then goes to suggest to the court that a model he developed should be considered by this court. 15JA003735-36. He states that he has been presenting his model around the country. 15JA003734. Dr. Pickar then claimed that his model has been accepted into other jurisdictions but then he could not name a single jurisdiction that is in fact using or incorporating his model. 15JA003735. In fact, he goes on to confirm that his model has not been

incorporated into any caselaw. 15JA003735. However, he was insisting that Judge Harter consider his model (and not the best interest factors pursuant to the Nevada Revised Statutes) when judging this case. 15JA003736. Dr. Pickar admitted that he was not familiar with Nevada law. 15JA003739. He also admitted that he did not consider the factors in his model in his report. For example, he admitted that he did not consider the factor “parent time available at home”. 15JA003742. That he did not consider this factor in addition to other factors, even though Nechole works four 10-hours shifts. 15JA003743. Even though Dr. Pickar admitted that this is an important factor in his model when conducting a custody evaluation, however he failed to consider this factor in his analysis. 15JA003744. Nechole withheld Ava from Eugene for 33 days. 17AASN004206. During this time, the child forgot most of the Russian words she was taught. 17AASN004206. Dr. Pickar further did not address when Nechole withheld the child from Eugene for 33 days. 16JA003754. Eugene testified that Nechole denied him access to Ava for 33 days. 16JA003809.

Nechole testified that since she works Monday through Thursday that she should have the child for the entire weekend every weekend. 16JA003927. Nechole is okay with Eugene caring for the child while she is working because it financially benefits her. 16JA003928. Nechole testified that Eugene would care for the child Monday through Thursday for at least 10 hours a day while Nechole was

working. 16JA003928. Nechole testified that Eugene should not have full weekends because that is when she is off work as she works Monday-Thurs. Nechole testified that Eugene would care for the child by prepare food for her and then feed her, change her diaper, sing to her, bathe her, rock her to sleep at night and that Eugene had been to almost every doctor and prenatal appointment, that he teaches her Russian. 16JA003934-16JA003935. Nechole testified that Eugene drops off and picks up Ava from school on time. 17AASN004085.

Despite Nechole saying this, she continued to say that Eugene puts his interest before Ava. 16JA003935-36. Further, when Eugene would care for the child at Nechole's home, she put cameras in the home to monitor him.

16JA003937. Nechole has taken down the cameras because she broke up with Eugene. 16JA003937.

Nechole testified that the majority of the communication between Eugene and herself was good. 16JA003954. That the parties communicated regularly regarding the minor child and gave each other updates about the child.

16JA003954. For example, Eugene would regularly text Nechole what the child ate and when she pooped and when and how long she napped. 16JA003954-55.

However, there were times when Nechole would deny Eugene access to the child even though Eugene was requesting to see the child. 16JA003955. On March 20,

2020, Eugene requested to see the child. 16JA003955. Nechole's response was "Not today, I need a break. Don't you have your boys? Focus on them instead of leading them to come over here.". 16JA003955. On March 22, 2022, Eugene messaged Nechole, "Can I see Ava for a little bit when it is convenient for you". 16JA003956. Nechole did not agree to the visit but rather said, "Why did you wait until so late in the day to ask? 16JA003956. Eugene had sent the message at 2:28 pm that day. 16JA003955. Nechole began to question whether it was Eugene and his sons that wanted to see Ava, rather than just Eugene. 16JA003957. Nechole did not allow the visit, she however requested that Eugene walk her dog the following morning. 16JA003957. On April 5, 2020, Eugene asked Nechole to visit with the child and wanted to bring his sons along. 16JA003959. Nechole questioned why he was bringing his sons. 16JA003959. Nechole did not allow the visit and told Eugene to go enjoy his day with his sons. 16JA003959. Eugene stated that he is enjoying his day but would also like to see his daughter and requested to see Ava at a time that is convenient for Nechole. 14JA003312, 16JA3959. Nechole testified that she and Eugene absolutely co-parented well, before this litigation. 17JA004012. Nechole testified that in the summer of 2019, that she and Eugene took the child for swimming lessons and that they were getting along. 17JA004015.

Heather Tauchen, clinical director and board-certified behavior analyst, from Firefly Behavior Services testified that Ava has a treatment plan for ABA therapy. 16JA003968, 16JA003972. Heather Tauchen testified that the goals in the plan consist of social communications, working on communication and adaptive goals becoming more flexible and tolerating changes in her environment. 16JA003968. That Ava's treatment is going great, she's made progress that she is doing awesome. 16JA003968. That Ava is becoming more flexible. 16JA003968. Heather Tauchen observed Eugene and the child at Eugene's home and she did not observe anything that would give her any concern. 16JA003969. That Eugene had participated in all appointments for the child and he asked questions and that he followed the medical provider's questions. 19JA003969. In fact, Heather testified that she told Eugene that she was impressed with his involvement in Ava's ABA therapy and that she wished that all parents that she worked with were like him. 16JA003979. Heather Tauchen testified that she witnessed a bond between Eugene and the child and she described Eugene as caring, affectionate and that he definitely wants to put the child's needs first. 16JA003971. Heather Tauchen testified that she attended the IEP meeting for Ava and that Ava was placed in a regular inclusive general educational classroom. 16JA003971. That Nechole never requested that Ava is homeschooled due to adaptability issues. 17AASN004216.

Heather Tauchen testified that she witnessed Ava interact with her brothers.

16JA003972. Heather Tauchen described the interaction as good and that Ava would seek out that interaction and would want to hold her brother's hand and to bring him to play with her. 16JA003972. That Heather would do parent training at the parents' home alternating every week. Ava started at John Dooley Elementary School. 16JA003999. That the Firefly behavioral plan, 3JA000614-3JA000637, specifically, 3JA000616 talks about Ava being high functioning and "ABA will target increasing flexibility with new toys, changes in routines, potty training and accepting new foods," which shows she's appropriate for teaching a tolerance to change.

Nechole testified that the child is not prescribed any medication.

17AASN004044. Nechole testified that Eugene has made it to all of the child's appointments and has been involved, let's say in the past 6 months.

17AASN004045. However, Nechole would schedule appointments at times for the child without consulting with Eugene. 17AASN004208-09. Nechole testified that the child has the same items at both Nechole's and Eugene's home.

17AASN004055. For example, the child has the same sippy cup, same brand and same color and the child has identical toys at both parents' homes.

17AASN004055. That Eugene has structures and routines for Ava in his household

that are similar to the structures and routines in Nechole's household.

17AASN004215-16.

Further, Marnie Lanz, director, with Therapy Management Group testified at the evidentiary hearing. 17AASN004062. Dr. Gaspar even testified that he considered that Ava's speech delay could be due to bilingualism. 18JA004279. That Eugene participated in the appointment with Dr. Gaspar and that Eugene was involved and supportive. 18JA004280.

Nechole testified that she works Monday through Thursday 7:30am to 5:30pm. 17AASN004071. That she uses her mother as a babysitter.

17AASN004071. Nechole testified she should have the child every weekend because it would maximize each parents' time with the child. 16JA003927.

Nechole later changed her testimony and stated that she wanted to keep the temporary schedule ordered by the court mainly because Ava has become accustomed to the schedule. 17AASN004074.

The temporary custodial schedule ordered by the court was that during week 1, Eugene would have Sunday at 7am through Tuesday at 7pm and during week 2, Eugene would have Monday at 7am through Wednesday at 7pm. 17AASN004073. Nechole also testified that this schedule would maximize each parent's time but had previously testified that she did not know Eugene's work schedule.

17AASN004079. Nechole also did not want to agree to use the department's default holiday schedule. 17AASN004080.

Mark James a speech pathologist testified that he treated Ava about 20-25 times, sometimes the treatment occurred at the parties' homes. 17AASN004092. Mark James testified that he treated the child at Eugene's home as well and he did not observe anything unusual and that Eugene participated in these sessions and was always susceptible and open to accepting medical info and advice on the child. 17AASN004044. Amber Lynn Harris with TMG also testified and stated that Eugene participated in every appointment. 17AASN004101.

Expert Leslie Carter, is a licensed psychologist for 25 years and has a doctorate in clinical psychology and has been working in the field of autism since 2002 and three quarters of her practice is about consulting about autism. 17AASN004138. That she has been retained as an expert in hundreds of cases. 17AASN004138. Dr. Carter testified that Ava with level 1 autism does not need "sameness". 17AASN004142. That the need for sameness is a symptom for autism which needs to be treated and the way to treat it is by learning how to tolerate change. 17AASN004143. That Ava needs to tolerate changes in schedule, environment and this is how she will become more flexible. 17AASN004143. That Ava at her age and with diagnosis would be a good candidate for a 2-2-3 schedule.

17AASN004143. That this schedule would allow her to have time with each parent and transition from house to house and get used to the different schedules and parenting styles. 17AASN004143-44. Ava's schedule is from 8am to 10:30am she is at school, then from noon to 6:30pm she has ABA services treatment at home. 17AASN004146. That a child with this schedule would benefit from a 2-2-3 schedule because it teaches flexibility and how to behave in different environment (e.g., grocery store vs. mom's home). 17AASN004147. Dr. Carter testified that Eugene has never denied to her that the child has autism and that he is very supportive of Ava. 17AASN004147. Dr. Carter testified that children benefit from the exposing them to both parents because it helps them promote bonding and consistency of that bonding and it reduces separation anxiety which can happen when one parent does not have regular access to the child particularly a child of this age. 17AASN004148. That children who have a history of having access to a parent and then not being able to have access to that same parent often becomes anxious about when they're going to see that parent. 17AASN004148. A child of this age and diagnosis, a consistent schedule such as a 2-2-3 is beneficial for bonding purposes as well as continuing to benefit from gender differences, skill differences, interest differences that parents invariably bring to teaching and raising a child. 17AASN004148-49. Dr. Carter testified that if the Judge limits

Ava's access to one parent that it could be determinantal to her success later on. 17AASN004149. That it is beneficial for Ava to expose her on a regular basis to everyone who is a caregiver. 17AASN004149. Dr. Carter also testified about the least restrictive theory and stated that it is better to have a more naturalistic environment- living as much of a normal lifestyle and not to restrict to a limited learning environment unless there is a demonstrated failure of learning in the least restrictive environment. 17AASN004150. That a student in the ABA program should not be restricted to a more limited learning environment until they demonstrated failure of learning in the least restrictive environment.

17AASN004150. Dr. Carter testified that in Ava's case after reviewing the ABA documents is that the child does not require more restrictions or more structure at this time and that she is adapting well to the amount of structure provided under the ABA direction. 17AASN004151. Dr. Carter testified that Ava's ABA program specifically states that Ava is a good candidate for teaching increased flexibility because of her level mild one – milder symptoms that she does not need excessive amounts of structure and that she is responding well to their program.

17AASN004152.

Ava was diagnosed in January 2020 with allergies to soy, nuts, egg, dairy and dogs. 16JA003871-72. But Nechole refused to remove her dog, Athena, from

the home despite the fact the child was allergic to it. 16JA003872, 74. Nechole even refused to remove the dog after it became aggressive with Ava. 16JA003873. Nechole admitted to having the dog living in her home even though the child was allergic to it. 16JA003913-14. In fact, it was only in Nechole's care did the minor child end up in the ER because of an allergic reaction to food and what Nechole believed may have been hair products. 16JA003919-20. When Nechole's mom babysat, Nechole did not tell her mother that the child was allergic to dogs despite that there was a dog in the house with them. 16JA003922-23. That Eugene would receive the child from Nechole with diaper rashes on her private area.

16JA003863, 4JA000765-4JA000782. Eugene denies his other son was ever molested as Nechole has alleged. 17AASN004198. Eugene denied that he was not a concerned parent when the sippy cup fell on Ava's wrist. Eugene testified that he offered to take Ava to the doctor, but Nechole got mad and kicked him out of her house and then offered him to come to the appointment, which he did. 17AASN004198-17AASN004199.

Nechole testified that she made \$112,000 per year. 16JA003914. Nechole received all of the Biden Administration child payments and the addition \$300 payments since July of 2021. 16JA003854. Nechole testified that Ava's health insurance through her employer is \$78.78 per month. 17AASN004134. Eugene

testified on cross that he gave Nechole \$2000 when the child was born.

18JA004314. Nechole admitted to this as well. 18JA004316. Eugene constantly gave Nechole money and that he found at least \$10,000 that he has contributed.

18JA004314. That he gave her a check and she returned it to him for \$1900.

18JA004314. Eugene never said that he paid more than the child costs.

1JA000064.

Standard of Review: A district court properly exercises its discretion where it gives appropriate, careful, correct and express consideration of the factual and legal circumstances before it. *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 93-94, 787 P.2d 777, 780 (1990). When reviewing the district court decision for abuse of discretion, the appellate court does not substitute its judgement for that of the district court. *Id.* At 92, 787 P.2d at 779.

The appellate court will not disturb the trial court's determination of child custody issues absent 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).

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 supported by substantial evidence is not arbitrary and capricious. *See id.*

6. Response to Issues on appeal.

A. Whether the district court abused its discretion by allowing settlement negotiations into evidence.

Response: The court did not allow settlement negotiations into evidence. In fact, during day one of the evidentiary hearing, Nechole's counsel during Nechole's opening statement stated that Nechole will agree to Joint Physical Custody. 15JA003694. Nechole by her own statements and admissions indicated to the court that she is no longer seeking primary physical custody. *Id.* Nechole divulged this information to the court on her own volition. *Id.* Nechole's counsel then confirmed the following day, during the hearing held on November 4, 2021, that Nechole is agreeing to Joint physical custody 17JA004030. Specifically on this day, the court stated, "Ms. Rosenblum at least three times in the a.m. yesterday it was stipulated on the record and it was also confirmed through your expert the parties have agreed to joint physical custody, correct?" 17JA004030. In response, Ms. Rosenblum stated. "That is correct." 17JA004030.

During the evidentiary hearing, Ms. Isso inquired about the settlement conference to show "bad faith". NRS 48.105². However, Ms. Rosenblum objected

² NRS 48.105 allows evidence of compromise or offers to compromise for purposes such as bad faith or negative contention of undue delay.

and the court sustained those objections. 16JA003840-41. As such, they were not admitted or considered by the court. 16JA003840-41. Furthermore, settlement negotiations, if any, were stricken from the record. 16JA003903-05. If such evidence were admitted, it was harmless error and would not change the outcome of the custody action as Nechole by her own admissions during her opening statement stated that she is agreeing to joint physical custody and she requested a schedule where Eugene would have two consecutive nights in a row with the child. 19JA004681 – 19JA004690. In other words, Nechole by her own statements agreed to Eugene having overnight custodial time with the child on a joint physical custody arrangement. *Id.* Specifically, Nechole requested that Eugene only be permitted to have the child during the following times: Week 1: Eugene Sunday 7am to Tuesday 7pm; Week 2: Eugene Monday 7am to Wednesday 7pm. 19JA004681 – 19JA004690. Eugene requested a 2-2-3 schedule so the parties can alternate the weekends and both have quality binding time with the child. 19JA004696-19JA004715. The outcome of the evidentiary hearing was not based on any settlement negotiations but rather substantial evidence presented during the evidentiary hearing supporting the best interest of the child and the factors codified in NRS 125C.

B. Whether the district court abused its discretion by not striking the settlement negotiations contained in Plaintiff's Motion.

Response: Nechole has not demonstrated that the custody decision was based on the statements filed in Eugene's motion. Motions, pleadings and exhibits filed with the court are not evidence at an evidentiary hearing. If so, then the court would be required to strike almost every pleading because most contain hearsay and other inadmissible evidence. In fact, at the motion hearing on the Motion for Sanctions held on August 12, 2021, the Judge did not entertain the motion on its merits and did not hear arguments on the motion. The judge also did not change the temporary custody schedule. There were no orders made from that hearing. Nechole failed to include the minutes and the transcripts from the August 12, 2021 hearing in the joint appendix for the sole purpose to confuse and mislead the upper court.³ The motion for sanctions was not entertained, no arguments were made regarding the motion and there were no orders from that hearing. Judge Harter did not give Eugene more custodial time at that hearing as a result of that motion. Had Judge Harter entertained the motion or been affected by the statements in the Motion for Sanctions, Judge Harter would have given Eugene more custodial time

³ Failure to include necessary documentation in the appellate records will result in the Appellate Court presuming that the missing portions support the districts court's decision. *See Cuzze v. Univ. & Cmty. College Sys.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007).

at the motion hearing. Instead, the court encouraged the parties to contact chambers if this matter were to get resolved. Considering that Nechole failed to include the minutes from the motion hearing and failed to provide the transcripts from that hearing, the Appellate Court should presume that the missing documents support the district court's decision.

Further, Judge Harter sustained all of evidentiary objections raised by the opposing party regarding settlement negotiations. The objections were sustained and any such statements were stricken from the record at the evidentiary hearing. 16JA003840-41, 16JA003903-05. During the evidentiary hearing, Ms. Isso inquired about the settlement conference and Ms. Rosenblum objected and the court sustained those objections so they were not admitted or considered by the court 16JA003840-41. Furthermore, Settlement negotiations was stricken from the record during the evidentiary hearing. 16JA003903-05. If such error existed, it would be a harmless error. In order to obtain reversal, the errors below must have inured to the benefit of the winning party and affect the substantial rights of the Appellant. However, such evidence was not admitted or considered by the court. In the event that such evidence was admitted, it was harmless error and would not change the outcome of the custody action as Nechole by her own admissions during her opening statement stated that she is agreeing to joint physical custody

and to Eugene having overnights and there was a plethora of evidence submitted that indicated that a 2-2-3 schedule was in the child's best interest.

C. Whether the district court abused its discretion by allowing settlement negotiations to affect its view of Appellant.

Response: Nechole presented no evidence that the settlement negotiations affected the court's view of Appellant. In fact, Nechole failed to cite to the record to show that the court's view of the Appellant was affected by settlement negotiations or anything else as a matter of fact. In fact, at the motion hearing on the Motion for Sanctions held on August 12, 2021, the Judge did not entertain the motion on its merits and did not change the temporary custody schedule. There were no arguments made regarding the motion and no orders from that hearing. In other words, Judge Harter did not give Eugene more custodial time. Had Judge Harter entertained the motion or been affected by the statements in the Motion for Sanctions, Judge Harter would have given Eugene more time at the motion hearing. Instead, the court encouraged the parties to contact chambers if this matter were to get resolved.

Further, Nechole intentionally did not include the minutes from the motion for sanctions hearing held on August 12, 2021. She further failed to obtain the transcripts from that hearing. Nechole's counsel prepared the joint appendix for

undersigned counsel's review and intentionally omitted the minutes and did not include the transcript for the sole purpose to mislead and confuse the upper court.

In fact, the court held a two full day evidentiary hearing and heard a plethora of evidence regarding custody and timeshare which assisted the court in reaching its decision. Nechole stated by her own admissions that she will agree to joint physical custody and she had no issue with Eugene having the child for two consecutive nights. Nechole furthermore changed her testimony. Initially, Nechole testified she should have the child every weekend because it would maximize each parents' time with the child. 16JA003927. Nechole later changed her testimony and stated that she wanted to keep the temporary schedule ordered by the court mainly because Ava has become accustomed to the schedule. 17AASN004074. Nechole presented no evidence to support her request for Eugene to only have two days/nights per week is in the child's best interest.

D. Whether this case should be assigned to a different judicial department on remand.

Response: Nechole presented no evidence of bias or prejudice to warrant a new judge, nor is there any grounds for a remand. Nechole only does not like the outcome, and this is not grounds to change judges. In fact, Nechole already used her one-time preemption in the beginning of the case and the case was reassigned

to Department N. Nechole failed to include the preemptory challenge in the joint appendix as well. The court heard two full days of evidence and issued a decision that was supported by substantial evidence.

E. Whether the district court abused its discretion when it did not consider factors regarding the minor child's special needs when setting timeshare.

Response: There is no evidence that the court did not consider the child's special needs when establishing the timeshare. To the contrary, the district court considered the minor's needs and heard two full days of testimony from the parties, expert witnesses and treating witnesses regarding this issue and then took the matter under advisement. The court requested closing briefs and copies of tax returns. The court then issued a decision and order which considered the best interest factors in NRS 125C.0035(4) and supported its analysis with substantial evidence.

In fact, there was substantial evidence to support the court's findings: Regarding factors (a) and (b), the wishes of the child and nomination of guardianship, these are not applicable in this case. 19JA004717.

Regarding factor (c), which parent is more likely to allow the child to have frequent associations and a continuing relationship with the non-custodial parent.

19JA004717. This factor favored Eugene as the evidence admitted showed that Nechole would only allow Eugene to watch Ava at Nechole's home with cameras activated. 19JA004717. It was rare that Nechole would allow Eugene unfettered access. 19JA004717. That Nechole would limit Eugene's time with Ava since she was born. 16JA003794. Initially, Nechole would prevent Eugene from seeing Ava on Fridays and then it also became the weekends, then she would only allow Eugene to see Ava at the park for 25 minutes while Nechole held the child the entire time. 16JA003794. That Nechole continued to limit and dictate when Eugene could see the child. 16JA003794. Eugene could not take it anymore and then filed a complaint for custody. 1JA000001-1JA000005. Nechole agreed for Eugene to spend time with the child when it financially benefited Nechole (e.g while Nechole was working). 16JA003796. Eugene testified that Nechole only wants him in the child's life to the extent that she wants him to be, on her own terms and only when it suits her and is good for her, otherwise absolutely not. 17AASN004231. Nechole told Eugene that she saves \$10,000 a year in daycare expense when he babysits. 16JA003796.

That previously Eugene attempted to resolve custody issues with Nechole and informed that he wanted joint physical custody. 16JA0037798. Nechole would get upset and respond that she would never allow that and she would spend her last

dollar to fight him in court. 16JA003797. Nechole denied Eugene access to Ava for 33 days. 16JA003809.

However, there were times when Nechole would deny Eugene access to the child even though Eugene was requesting to see the child. 16JA003955. On March 20, 2020, Eugene requested to see the child. 16JA003955. Nechole's response was "Not today, I need a break. Don't you have your boys? Focus on them instead of leading them to come over here.". 16JA003955. On March 22, 2022, Eugene messaged Nechole, "Can I see Ava for a little bit when it is convenient for you". 16JA003956. Nechole did not agree to the visit but rather said, "Why did you wait until so late in the day to ask? 16JA003956. Eugene had sent the message at 2:28 pm that day. 16JA003955. Nechole began to question whether it was Eugene and his sons that wanted to see Ava, rather than just Eugene. 16JA003957. Nechole did not allow the visit, she however requested that Eugene walk her dog the following morning. 16JA003957. On April 5, 2020, Eugene asked Nechole to visit with the child and wanted to bring his sons along. 16JA003959. Nechole questioned why he was bringing his sons. 16JA003959. Nechole did not allow the visit and told Eugene to go enjoy his day with his sons. 16JA003959. Eugene stated that he is enjoying his day but would also like to see his daughter and requested to see Ava at a time that is convenient for Nechole. 14JA003312, 16JA3959.

Further through testimony at trial, Eugene testified that Nechole denied him access to Ava for 33 days. 16JA003809.

Regarding factor (d), the level of conflict between parents. 19JA004717. The record shows that the conflict was high today, but it is anticipated that it will deescalate now that the trial is complete. 19JA004717. Our Family Wizard was ordered for communication purposes and the completion of the UNLV Parenting Cooperative Course. 19JA004718.

Further during the evidentiary hearing, Nechole testified that the majority of the communication between Eugene and herself was good. 16JA003954. That the parties communicated regularly regarding the minor child and gave each other updates about the child. 16JA003954. For example, Eugene would regularly text Nechole what the child ate and when she pooped and when and how long she napped. 16JA003954-55. Nechole testified that she and Eugene absolutely co-parented well before this litigation. 17JA040012. Nechole testified that in the summer of 2019, that she and Eugene took the child for swimming lessons and that they were getting along. 17JA040015. In other words, the parties have a good co-parenting relationship. As such, the court considered conflict between the parties and its finding was supported by substantial evidence.

Regarding factor (f), the mental and physical health of the parents,

Nechole was diagnosed with adjustment disorder with anxiety, 16JA003995, and the court obtained those medical notes, 19JA004718, however, the court found that there is insufficient proof either party's mental or physical health affected their ability to parent Ava. In fact, Dr. Bergquist recommended that Nechole continue her individual therapy to assist her with coparenting and trust issues. 16JA003943. On page 30 of Kathleen Bergquist's report, the results of Nechole's PAI suggest that Nechole is assured, confident and dominant and prefers to interact with others in situations over which she can exercise a measure of control. 16JA003792. Nechole's communications with her co-parent often sound like an interrogation or criminal investigation, assuming the worst and challenging Eugene on every detail of the story. 16JA003792. That Nechole has anger issues and can go from one to zero in a split second and when she would get upset she would change the custody schedule. 16JA003792.

Regarding factor (g), the physical, developmental and emotional needs of the child. 19JA004718. The court considered the custody evaluation conducted by Dr. Bergquist and her report issued on February 19, 2021. 19JA004718. Dr. Bergquist recommended that the parties share joint legal and joint physical custody with a 55/45 or 60/40 split. 19JA004718. The court further considered the child's diagnosis of Autism Spectrum Disorder, mild to moderate and that the child was

enrolled in a myriad of services, such as ABA therapy. 19JA004718. The court heard the testimony from treating therapists. During the evidentiary hearing, Heather Tauchen, clinical director and board-certified behavior analyst, from Firefly Behavior Services testified that Ava has a treatment plan for ABA therapy. 16JA003968, 16JA003972. Heather Tauchen testified that the goals in the plan consist of social communications, working on communication and adaptive goals becoming more flexible and tolerating changes in her environment. 16JA003968. That Ava's treatment is going great, she's made progress that she is doing awesome. 16JA003968. That Ava is becoming more flexible. 16JA003968.

Further the court heard testimony from Mark James a speech pathologist who testified that he treated Ava about 20-25 times, sometimes the treatment occurred at the parties' homes. 17AASN004092. Mark James testified that he treated the child at Eugene's home as well and he did not observe anything unusual and that Eugene participated in these sessions and was always susceptible and open to accepting medical info and advice on the child. 17AASN004044. Amber Lynn Harris with TMG also testified and stated that Eugene participated in every appointment. 17AASN004101. That the child has an Individualized Education Plan issued on October 21, 2021 by CCSD which recommends and places the minor child in a general classroom. 16JA03779.

Regarding factor (h), the nature of the relationship of the child with each parent. 19JA004719. The court found that there is insufficient evidence submitted that the child had a better or worse relationship with either parent. 19JA004719. Evidence showed that Eugene has a good relationship with the child. Nechole testified that Eugene was around her and the child and present in the child's life since the child's birth. 16JA003925-26. That Eugene was caring for the child and spending time with her. 16JA003926. Nechole further testified Eugene has been involved in the child's medical care and attended the child's medical appointments. 16JA003776. Nechole testified that Eugene would care for the child by prepare food for her and then feed her, change her diaper, sing to her, bathe her, rock her to sleep at night and that Eugene had been to almost every doctor and prenatal appointment, that he teaches her Russian. 16JA003934-16JA003935.

Eugene would watch the child, cook for her, feed her, change her diapers, teach her Russian and English, he would sing to her, play guitar and piano for her. 16JA003774, 16JA003933-34. Eugene would be responsible for watching the child when Nechole was working. 16JA003775. Eugene would watch the child for eleven plus hours anywhere from two to four days per week. 16JA003774. Eugene also watched the child exclusively in the summer of 2019 between mid-May 2019 to mid-August 2019 for four days per week, 11 plus hours at a time. 16JA003775.

Eugene discussed a typical day with Ava would consist of waking up and getting dressed, brushing teeth and hair, going for walk or to park, then do some therapy, play games and activities, read books, practice words and play.

16JA003847. That Eugene has worked with Ava on speech, occupational and feeding therapy and he has participated in every appointment. 16JA003851.

Regarding factor (i), the ability of the child to maintain a relationship with any sibling. Eugene requested a 2-2-3 schedule so the minor child could see her siblings that she has a wonderful relationship with. She loves her siblings and they love her. That she smiles and waves at her siblings and it would be cruel if they do not get to see each other and spend time with each other regularly. 16JA003786, 4JA000784-4JA000797. That Eugene takes the child and her siblings to the pumpkin patch, park, pool. 16JA003787. Eugene requested a time share where he would have the minor child during the same time he had his other children. 16JA003787. Nechole testified that Eugene has his sons every other weekend. 17AASN004126. Nechole testified that Ava is bonded with her brothers and that she loves them. 17AASN004126. Despite Nechole's testimony at trial, Nechole has restricted Ava from seeing her siblings and requested a timeshare so Eugene never has all of his children at the same time. In fact, Eugene testified that there were times that Nechole restricted Ava from seeing her siblings. 16JA003794. One

time in particular was on April 5, 2020, Eugene asked Nechole to visit with the child and wanted to bring his sons along. 16JA003959. Nechole questioned why he was bringing his sons. 16JA003959. Nechole did not allow the visit and told Eugene to go enjoy his day with his sons. 16JA003959, 14JA003312.

Regarding factors (j), (k), and (l), relating to domestic violence, abduction, or abuse or neglect, there was no sufficient evidence presented regarding these factors. 19JA004719.

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.

Response: Nechole failed to provide any evidence whatsoever that the court held her to a higher standard than Eugene in setting custody in the best interest of the minor child. The proper standard was applied and it was applied equally to both parties. Nechole was unable to rebut the presumption that joint physical custody was not in the child's best interest. Therefore, on the day of the evidentiary hearing during her opening statement, she agreed to joint physical custody.

The court heard expert testimony on the reasons why a 2-2-3 schedule would best for Ava. Specifically, Dr. Leslie Carter, a licensed psychologist for 25 years

and has a doctorate in clinical psychology and has been working in the field of autism since 2002 and has been retained as an expert in hundreds of cases, 17AASN004138, testified that Ava with level 1 autism does not need “sameness”. 17AASN004142. That the need for sameness is a symptom for autism which needs to be treated and the way to treat it is by learning how to tolerate change. 17AASN004143. That Ava needs to tolerate changes in schedule, environment and this is how she will become more flexible. 17AASN004143. That Ava at her age and with diagnosis would be a good candidate for a 2-2-3 schedule. 17AASN004143. That this schedule would allow her to have time with each parent and transition from house to house and get used to the different schedules and parenting styles. 17AASN004143-44. Ava’s schedule is from 8am to 10:30am she is at school, then from noon to 6:30pm she has ABA services treatment at home. AASN004146. That a child with this schedule would benefit from a 2-2-3 schedule because it teaches flexibility and how to behave in different environment (e.g., grocery store vs. mom’s home). 17AASN004147. Dr. Carter testified that Eugene has never denied to her that the child has autism and that he is very supportive of Ava. 17AASN004147. Dr. Carter testified that children benefit from the exposing them to both parents because it helps them promote bonding and consistency of that bonding and it reduces separation anxiety which can happen when one parent

does not have regular access to the child particularly a child of this age.

17AASN004148. That children who have a history of having access to a parent and then not being able to have access to that same parent often becomes anxious about when they're going to see that parent. 17AASN004148. A child of this age and diagnosis, a consistent schedule such as a 2-2-3 is beneficial for bonding purposes as well as continuing to benefit from gender differences, skill differences, interest differences that parents invariably bring to teaching and raising a child.

17AASN004148-49. Dr. Carter testified that if the Judge limits Ava's access to one parent that it could be determinantal to her success later on. 17AASN004149.

That it is beneficial for Ava to expose her on a regular basis to everyone who is a caregiver. 17AASN004149. Dr. Carter also testified about the least restrictive theory and stated that it is better to have a more naturalistic environment- living as much of a normal lifestyle and not to restrict to a limited learning environment unless there is a demonstrated failure of learning in the least restrictive

environment. 17AASN004150. That a student in the ABA program should not be restricted to a more limited learning environment until they demonstrated failure of learning in the least restrictive environment. 17AASN004150. Dr. Carter further testified that in Ava's case after reviewing the ABA documents is that she does not require more restrictions or more structure at this time and that she is adapting well

to the amount of structure provided under the ABA direction. 17AASN004151. Dr. Carter testified that Ava's ABA program specifically states that Ava is a good candidate for teaching increased flexibility because of her level mild one – milder symptoms that she does not need excessive amounts of structure and that she is responding well to their program. 17AASN004152.

Furthermore, Eugene requested a 2-2-3 schedule so Ava could see her siblings (Eugene's sons from another relationship that he gets every other weekend). 16JA003785. Nechole testified that Eugene has his sons every other weekend. 17AASN004126. Nechole testified that Ava is bonded with her brothers and that she loves them. 17AASN004126.

Eugene testified that Ava has a wonderful relationship and loves her siblings and they love her. 16JA003786, 4JA000784-4JA000797. That she smiles and waves at her siblings and it would be cruel if they do not get to see each other and spend time with each other regularly. 16JA003786. That Eugene takes Ava and her siblings to the pumpkin patch, park, pool. 16JA003787. Eugene requested a time share where he would have the minor child during the same time he had his other children. 16JA003787. Nechole testified that Eugene has his sons every other weekend. 17AASN004126. Nechole testified that Ava is bonded with her brothers and that she loves them. 17AASN004126.

Nechole on the other hand, has restricted Ava from seeing her siblings and requested a timeshare so Eugene never has all of his children at the same time. Nechole testified that since she works Monday through Thursday that she should have the child for the entire weekend every weekend. 16JA003927. Nechole testified she should have the child every weekend because it would maximize each parents' time with the child. 16JA003927. Nechole later changed her testimony and stated that she wanted to keep the temporary schedule ordered by the court mainly because Ava has become accustomed to the schedule. 17AASN004074. Nechole presented no evidence to indicate that her request is in the child's best interest.

If the court gave Nechole every weekend, then Ava would not see her siblings. Eugene testified that there were times that Nechole restricted Ava from seeing her siblings. 16JA003794. One time in particular was on April 5, 2020, Eugene asked Nechole to visit with the child and wanted to bring his sons along. 16JA003959. Nechole questioned why he was bringing his sons. 16JA003959. Nechole did not allow the visit and told Eugene to go enjoy his day with his sons. 16JA003959, 14JA003312.

In other words, both parties equally were held to the same standard and the proper best interest analysis was applied but Nechole's request to have each and

every weekend was not justified or in the child's best interest.

G. Whether the district court abused its discretion when it did not consider the conflict between the parties when setting the timeshare.

Response: Nechole sought to create conflict, to maintain control of the custody of the child. However, Nechole's statements indicated the contrary. Nechole testified that the majority of the communication between Eugene and herself was good. 16JA003954. That the parties communicated regularly regarding the minor child and gave each other updates about the child. 16JA003954. For example, Eugene would regularly text Nechole what the child ate and when she pooped and when and how long she napped. 16JA003954-55. Nechole testified that she and Eugene absolutely co-parented well before this litigation. 17JA040012. Nechole testified that in the summer of 2019, that she and Eugene took the child for swimming lessons and that they were getting along. 17JA040015. Eugene disclosed in his closing brief 15 references to Our Family Wizard communications that show him fully cooperating with Nechole. 19JA004703-19JA004704; 4JA000815-7JA001715. In other words, the parties have a good co-parenting relationship. As such, the court considered conflict between the parties and its finding was supported by substantial evidence.

The court found that the conflict was high but will deescalate now that the trial is

over. This finding is supported by substantial evidence as indicated above.

H. Whether the district court erred in setting child support based solely on tax return income.

Response: Eugene provided his FDF and his tax returns. The district court set child support via *Wright v. Osborne* and NAC 425.120. Nechole argues that the court did not consider deposits that are allegedly shown on Eugene's bank accounts. However, this issue was never raised at the evidentiary hearing. Nechole moved to admit Eugene's bank statements but then did not ask a single question about any alleged deposits or any questions regarding the bank statements during the evidentiary hearing. In fact, Nechole's fast track brief does not cite to the record as to when this inquiry regarding "deposits" was made. Because there was no inquiry. Nechole moved to admit the bank statements and then did not ask any questions regarding the statements. This issue was not presented to the district court during the evidentiary hearing for consideration for direct or cross examination and therefore the issue was not preserved for appeal. *Peke Res., Inc. v. Dist. Ct.*, 113 Nev. 1062, 1068 n.5, 944 P.2d 843, 848 n.5 (1997); *Hooper v. State*, 95 Nev. 924, 926, 604 P.2d 115, 116 (1979). The first time⁴ Nechole raised this

⁴ The appellate court will not hear arguments raised for the first time on appeal. *See Old Aztec Mine., Inc. v. Brown*, 97 Nev. 49, 52, 629 P.2d 981, 983 (1981) ("A point not urged in the trail

issue was in Nechole's closing brief (and the closing briefs were simultaneously filed)⁵. In other words, the closing briefs were not responsive to each other.

Therefore, Eugene was never examined on this issue at the evidentiary hearing⁶.

The issue was not fully briefed, and the district court had not thoroughly explored

the objection as it was raised for the first time in Nechole's closing brief. Nechole

for the first time in her closing brief raised the argument of deposits greater than

\$90,000 and gross income over \$7000 per month, however Eugene does not make

that kind of money and disputes depositing such money in his account. In fact,

Nechole forgot to question Eugene on this issue at the evidentiary hearing and is

now seeking a re-do so she can get a second bite of the apple. Further, Nechole's

statement that Eugene earns up to \$100 per hour performing side gigs is not true.

Nechole cites to 19JA004693, 18JA004300, but there's no such a statement on these

pages. Eugene testified that he currently does not gig and that there's no set

court, unless it goes to jurisdiction of the court, is deemed to have been waived and will not be considered on appeal.”). That the Appellate Court need not consider contentions that were not cogently argued to the district court. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n38, 130 P.3d 1280, 1288 n.38 (2006). *See Nevada Appellate Practice Manual 2021.*

5 Raising this argument for the first time in a closing brief is not a sufficient objection. An issue is sufficiently preserved for appellate review, “where the objection has been full briefed, the district court has thoroughly explored the objection during a hearing on a pretrial motion and the district court has made a definitive ruling....” *Richmond v. State*, 118 Nev. 924, 932, 59 p.3d 1249, 1254 (2002). *See Nevada Appellate Practice Manual 2021.*

amount of pay per gig. 18JA004308. Further, Nechole incorrectly states that Eugene's monthly pay as a professor is \$2132 but this is incorrect. 18JA004311. Eugene testified that his gross monthly income is between \$2400 and \$2600 a month. 18JA004311. Nechole alleges that Eugene deposited large amounts of money in his bank accounts but this issue was never raised at trial and Eugene was never asked about such alleged deposit. All Eugene's bank statements show the consistency in both checking and savings accounts of between \$23,000 and \$9,000. 18JA004489, 18JA004499, 18JA004474. As this litigation started, Eugene spent all of his money on attorney's fees and other related fees. Also, Eugene's taxes are correct, 19JA004646- 19JA004653, 19JA004654-19JA004665, 19JA004666- 19JA004677. Eugene has been using a professional tax accountant, Ella Tkach, Tax Services Co. for years and never had any issues with the IRS. Judge Harter followed NAC 425.120 to determine the amount of child support. Nechole's allegation that Eugene's monthly income is \$7,782.42 is another blatant lie. Eugene did not have \$93,000 in deposits, his bank records are consistent and show a consistent amount of money, between \$23,000 and \$9,000 on every statement between 2018 and 2020. 18JA004489, 18JA004499, 18JA004474. Nechole raised this allegation for the first time in her closing brief to create a false impression of large sums of money in Eugene's accounts, which was NEVER the case.

19JA004513-19JA004599.

The court reviewed the parties' 2020 tax returns and calculated child support based off the income amounts found therein and applied the proper adjustments. Specifically, as indicated in the footnote of the decision, the court laid out its mathematical calculation, where it states "Defendant's Gross Monthly Income: \$9,466.58; Number of Children: 1: Tier 1 ($\$6000 \times 16\% = \960) + Tier 2 ($\$3466.58 \times 8\% = \277.33); Obligation amount is \$1237.33. Defendant's [Plaintiff's] Gross Monthly Income: \$1970.42; Number of Children 1: Tier 1 ($\$1970.42 \times 16\% = \315.27); Obligation amount is \$315.27. Respondent's [Defendant's] Obligation: ($\$1237.33 - \315.27) = \$922.06." 19JA004722. The court further gave the Defendant an adjustment for health insurance in the amount of \$78.78. 19JA004722. The court clearly laid out the mathematical formula and it was done correctly and in accordance with the law.

I. Whether the district court erred in applying the law as to how to calculate income for child support purposes.

Response: This is a repeat of item H, above.

J. Whether the district court erred in not awarding constructive child support arrears to Appellant for the period prior to litigation.

Response: The District Court did not err in not awarding child support

arrears, as the parties were in a relationship and Eugene was caring for the child. In fact, Eugene requested arrears of almost \$14,000. 19JA004704.

Nechole testified that Eugene was around her and Ava and present in the child's life since the child's birth. 16JA003925-26. That he was caring for the child and spending time with her. 16JA003926. Eugene also contributed financially to the child since she was born in an amount over \$10,000. 16JA003783-85.

Eugene testified on cross that he gave Nechole \$2000 when the child was born.

18JA004314. Nechole admitted that she received the \$2000. 18JA004316. Eugene constantly gave Nechole money and that he found at least \$10,000 that he has

contributed. 18JA004314. That he gave her a check and she returned it to him for

\$1900. 18JA004314. Nechole testified that Eugene would care for the child

Monday through Thursday for at least 10 hours a day while Nechole was working.

16JA003928. Nechole testified that Eugene would care for the child by preparing

food for her and then feed her, change her diaper, sing to her, bathe her, rock her to

sleep at night and that Eugene had been to almost every doctor and prenatal

appointment, that he teaches her Russian. 16JA003934-16JA003935. Nechole's

allegation that Eugene has not provided proof of paying child support for over

\$10,000 is not true. Eugene testified that he paid over \$10,000 in child support.

16JA003783. Eugene also testified that Nechole never asked him to contribute and

he did, nevertheless. 18JA004325. Eugene also provided evidence of his contribution of at least \$10,000 towards Ava, 18JA004467-19JA004509, 18JA004465-18JA004466, 18JA004391- 18JA004399, 18JA004402-18JA004459, 18JA004460-18JA004464. The court relied on substantial evidence when reaching its decision not to award child support arrears.

CONCLUSION

The lower court's decision should be affirmed as it follows the law and the findings are supported by substantial evidence.

Dated this 14th day of May, 2022.

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VERIFICATION

1. I hereby certify that this fast track response complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

2. I further certify that this fast track response complies with the page- or type-volume limitations of NRAP 3E(3)(2) because it has been prepared in a proportionally spaced typeface using WordPerfect in 14 font size and name of type style New Times Roman.

3. I further certify that this fast track response complies with the page-or type -volume limitations of NRAP 3E(e)(2) because it is proportionately spaced, has a typeface of 14 points or more, and contains 12,000 words.

4. Finally, I recognize that under NRAP 3E I am responsible for timely filing a fast track response and that the Supreme Court of Nevada may impose sanctions for failing to timely file a fast track response, or failing to raise material issues or arguments in the fast track response. I therefore certify that the information provided in this fast track response is true and complete to the best of my knowledge, information and belief.

Dated this 14th day of May, 2022.

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CERTIFICATE OF SERVICE

I certify that on the date indicated below, I served a copy of this completed child custody fast track response statement upon all parties to the appeal as follows:

By E-mailing it and via the Supreme Court's electronic filing system (eflex) to the following:

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DATED this 14th day of May, 2022.

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