

IN THE SUPREME COURT OF THE STATE OF NEVADA

NECHOLE GARCIA,

Appellant,

v.

EVGENY SHAPIRO,

Respondent.

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Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court No.: 83992-COA

CHILD CUSTODY FAST TRACK REPLY

1. Name of Party filing this fast reply:

Nechole Garcia

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

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

A complete and accurate recitation of the facts relevant to this appeal is set forth in Appellant, Nechole's Child Custody Fast Track Statement (FTS). Respondent, Evgeny Shapiro does not raise new or different facts in his Child

Custody Fast Track Response (FTR). Rather, he recites he and his witnesses' trial testimony, disregarding any unfavorable material. Accordingly, it is not necessary for Nechole to repeat her statement of facts.

4. 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 Nechole.
- 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 Nechole 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.

5. Legal argument, including authorities:

A. Eugene Has Not Supported Any Argument With Legal Authority; Therefore, This Court Should Not Consider His Arguments.

It is axiomatic that this Court will only consider a party's arguments when supported by relevant authority. *Carson v. Sheriff*, 87 Nev. 357, 487 P.2d 334 (1971); *Nevada Employment Sec. Dep't v. Weber*, 100 Nev. 121, 123, 676 P.2d 1318, 1319 (1984); *see also Stanfill v. State*, 99 Nev. 499, 665 P.2d 1146 (1983) (opinion on reh'g). Eugene has cited no legal authority to support any of his argument(s) on appeal. Accordingly, this Court need not and should not consider his contentions. However, in the event this Court decides to entertain his FTR, Nechole will address each of his responses in turn below.

B. The District Court's Admission of Settlement Negotiations Overwhelmingly Prejudiced Nechole's Ability To Be on Equal Footing with Eugene For Determination of Joint Physical Custody.

The district court erred on two different occasions by allowing evidence of settlement negotiations into the record. Evidence of settlement, its terms, and the dispute of validity or invalidity of the claim is inadmissible. NRS 48.105.

Eugene's Motion for Sanctions, Attorney's Fees and Costs, and Other Related Relief, Respondent included extensive details of the contents of the parties'

settlement conference. Eugene's purpose in filing the motion was to discredit or undermine Nechole's requests for custody and/or a specific timeshare. Eugene does not dispute that the Motion contained extensive settlement negotiations, specific reference to offers and counteroffers between the parties and their settlement judge, or the settlement conference was confidential. Eugene does not dispute his Motion was not stricken and remains part of the court's record.

Eugene alleges that Nechole's counsel "objected [to his attorney's questions at trial regarding the settlement negotiations] and the court sustained those objections," and that "settlement negotiations, if any, were stricken from the record." However, this allegation ignores that the district court overruled objections from Nechole's counsel to questions eliciting settlement negotiations details from Nechole during her testimony: Specifically, the lower court permitted questioning that was "not outright settlement negotiations."

Eugene's claim that "settlement negotiations, if any, were stricken from the record" further ignores that Eugene's Motion was not stricken from the record, despite Nechole's request in her Countermotion. Thus, the district court's trial rulings had no curative effect.

Eugene argues to the extent that the lower court *did* admit evidence as to the parties' settlement negotiations, it was harmless error because such evidence "would not change the outcome of this custody action." This Court has held that "[a]n error

is harmless when it does not affect a party's substantial rights.”¹ Whether an error is “harmless” requires the Court to evaluate the error in light of the entire record.² When the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached – reversal is appropriate.³

The error here was not harmless. The court considered the confidential settlement negotiations, which ultimately affected the outcome. The court stated, “[a]pparently at one point [the parties] almost reached an agreement. I believe that was when Judge Bailey was involved...[T]his 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.” Thus, without having heard testimony on the issue, Judge Harter was aware of the negotiations – and that Nechole was the reason that the negotiations failed – specifically because of Eugene’s Motion

Eugene has cited no legal authority for his argument that this error was not harmless or that he engaged in proper conduct. This Court should disregard his arguments, find that the error was not harmless, and remand this case for a new trial.

**C. Because The District Court Held the Settlement Negotiations
Against Nechole and She was Not on Equal Footing, She was Held**

¹ *Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) (citing Nev. R. Civ. P. 61).

² *Id.*

³ *Id.*

**to A Higher Standard to Prove Her Timeshare Was In the Best
Interest of the Child.**

“In any action for determining physical custody of a minor child, the sole consideration of the court is the best interest of the child.”⁴ It is an abuse of discretion for a court to apply an incorrect legal standard.⁵

The district court applied the incorrect legal standard in determining timeshare. Specifically, the court noted in its Decision and Order that the parties shall follow 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.”

In his FTR, Eugene argues that the proper legal standard was applied but notes that “Nechole was unable to rebut the presumption that joint physical custody was not in the child’s best interest” and references Nechole’s agreement to joint physical custody. Eugene recites portions of the trial transcript, fails to cite to any legal authority in support of his position, and he fails to address the legal standard and burden of proof to which each party was held.

By requiring Nechole to prove to the district court “with sufficient evidence that the current schedule” is in the child’s best interest, the court ignored the correct

⁴ NRS 125C.0035(1).

⁵ *Matter of Halverson*, 123 Nev. 493, 510, 169 P.3d 1161, 1173 (2007).

legal standard, which is to consider testimony and evidence presented by both parties on equal footing to determine the schedule that is in the child's best interest. The district court only forced Nechole to prove that her schedule was best—Eugene did not have the same burden. Accordingly, the district court manifestly abused its discretion. Its decision should be reversed for a new timeshare where both parties are considered.

**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 ignored the special needs of the parties' child, despite the expert witnesses giving a specific set of factors to consider for the timeshare. The district court wholly abrogated its custodial decision-making duties under NRS 125C.0035(3)(g). 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). Eugene's FTR does the same. He simply parrots the trial testimony and NRS 125C.0035(4).

The district court's decision must be reversed and remanded for factual findings consistent with the expert testimony in accordance with the Risk Assessment Model factors.

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

When making a child custody decision, the District Court must consider “and set forth its specific findings concerning” the level of conflict between the parents. NRS 125C.0035(3)(d). Despite the court making high conflict findings, it disregarded them when setting the timeshare. The court made no effort to comply with its NRS 125C.0035(4)(d) requirements when making custodial orders. Therefore, this decision must be reversed and remanded for further findings consistent with the law.

F. The District Court Incorrectly Set Child Support.

NAC 425.100(1) provides that “[a]ny order [for support of children] must be based on the obligor’s earnings, income and other evidence of ability to pay.” NAC 425.025 defines “gross income” for the purpose of determining a party’s child support and lists fourteen (14) sources, without limitation, for determining a party’s income. NAC 425.025(1)(n) includes “all other income of a party, regardless of whether such income is taxable.”

Eugene asserts (again, without providing any legal basis) that the court properly declined to consider evidence of his bank transactions. He acknowledges that the bank statements were admitted into evidence and were raised in Nechole's closing argument brief – both of which are part of the parties' evidentiary hearing and trial record – yet argues that this Court cannot consider the bank statements because he was not questioned or cross-examined about the statements. He also argues that the court followed NAC 425.120.

However, NAC 425.120 provides that the courts must determine the gross monthly income of each obligor “after considering **all financial or other information relevant to the earning capacity of the obligor**” (emphasis added). The court's reliance on a self-reported tax returns and a self-reported Financial Disclosure Form was improper when evidence of other income was admitted into evidence.

Thus, this Court should reverse the decision and remand for accurate findings of Eugene's true gross monthly income.

G. Nechole is Entitled to Constructive Child Support Arrears.

Eugene argues, without *any* legal authority, that Nechole is not entitled to child support arrears. While Eugene alleges that he “was around” Nechole, the child, and “present in the child's life,” he agrees that pursuant to NRS 125B.030, he and Nechole did not live together, Nechole was the child's physical custodian, and

Nechole provided almost all the financial support for the child during the time that she had physical custody. Eugene argues he should not have to pay child support because he bathed the child, taught the child Russian, prepared food, and changed diapers-none of these activities contribute to the “cost of care, support, education, and maintenance provided by the custodian”. Nechole was the custodial parent between September 2018 and 2020.

Finally, Eugene alleges that he contributed \$10,000.00 to the child’s care and maintenance, yet he alleges in the same paragraph that he sought child support arrears from Nechole in the amount of \$14,000.00, as if this somehow proves that he contributed equally to the child’s maintenance, education, and support during the two-year period that the child was in Nechole’s physical custody. Eugene further alleges that Nechole saves nearly \$10,000.00 per year in daycare costs when he “babysits,” which further underscores that Nechole was historically the child’s physical custodian.

The district court erred in not awarding arrears. It’s decision should be reversed and remanded for (1) an Order for calculation of arrears, or (2) to instruct the lower court to set arrears at Eugene owing \$16,638.72 in child support arrears and \$3,309.67 (half of \$6,619.34) in medical expenses.

H. Nechole is Entitled to Child Support Arrears.

In Eugene’s FTR, he had the same response to the Child Support Arrears as

to the Constructive Child Support Arrears. Therefore, Nechole refers to her response above.

DATED this 31st day of May, 2022.

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VERIFICATION

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word–Office 365 Business in font type Times New Roman size 14.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ Proportionately spaced, has a typeface of 14 points or more and contains

2149 words; or

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

or ____ lines of text; or

☐ Does not exceed ____ pages.

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

DATED this 31st day of May, 2022.

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CERTIFICATE OF SERVICE

I, an employee of McFarling Law Group, hereby certify that on the 31st day of May, 2022, I served a true and correct copy of this Appellant's Reply Brief as follows:

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

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/s/Alex Aguilar
Alex Aguilar