Alex Ghibaudo, Esq.
Bar No. 10592
ALEX B. GHIBAUDO, PC.
197 E. California St., Suite 250
Las Vegas, Nevada 89104
T: (702) 978-7090
F: (702) 924-6553
Email: alex@glawvegas.com
Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEPHANIE RUBIDOUX, Appellant, vs. DANIEL RUBIDOUX, Respondent.	Nev. Sup. Ct. No.: 83628 **CHILD CUSTODY FAST TRACK STATEMENT**

1. **NAME OF THE PARTY FILING THIS FAST TRACK STATEMENT:**

   Stephanie Rubidoux

2. **NAME, LAW FIRM, ADDRESS, AND TELEPHONE NUMBER OF ATTORNEY SUBMITTING THIS FAST TRACK STATEMENT:**

   Alex Ghibaudo, Esq., Nev. Bar No. 10592
   Alex B. Ghibaudo, PC
   197 E. California St., Suite 250
   Las Vegas, Nevada 89104
   Telephone: 702-978-7090

3. **JUDICIAL DISTRICT, COUNTY, AND DISTRICT COURT DOCKET NUMBER OF LOWER COURT PROCEEDINGS:**

   Eighth Judicial District Court, Clark County, Nevada, Department U, District Court Case No. D-20-601936-D.

4. **NAME OF JUDGE ISSUING JUDGMENT OR ORDER APPEALED FROM:**

   District Court Judge Dawn Throne.

5. **LENGTH OF TRIAL OR EVIDENTIARY HEARING:**

   2-day evidentiary hearing.

6. **WRITTEN ORDER OR JUDGMENT APPEALED FROM:**

   Findings of fact and conclusions of law filed September 16, 2021.

7. **DATE NOTICE OF ENTRY OF ORDER FILED:**

   September 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):**

   N/A.

9. **DATE NOTICE OF APPEAL WAS FILED:**

   October 4, 2021.

10. **SPECIFY STATUTE OR RULE GOVERNING THE TIME LIMIT FOR FILING THE NOTICE OF APPEAL:**

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).

12. **PENDING AND PRIOR PROCEEDINGS IN THIS COURT. LIST THE CASE NAME AND DOCKET NUMBER OF ALL APPEALS OR ORIGINAL PROCEEDINGS PRESENTLY OR PREVIOUSLY PENDING BEFORE THIS COURT WHICH INVOLVE THE SAME OR SOME OF THE SAME PARTIES TO THIS APPEAL:**

N/A.

13. **PROCEEDINGS RAISING SAME ISSUES. IF YOU ARE AWARE OF ANY OTHER APPEAL OR ORIGINAL PROCEEDING PRESENTLY PENDING BEFORE THIS COURT, WHICH RAISE THE SAME LEGAL ISSUE(S) YOU INTEND TO RAISE IN THIS APPEAL, LIST THE CASE NAME(S) AND DOCKET NUMBER(S) OF THOSE PROCEEDINGS:**

There are no such proceedings that counsel is aware of.

14. **PROCEDURAL HISTORY**:

The parties to this matter, Stephanie Rubidoux and Daniel Rubidoux were married on June 21, 2014 in Las Vegas. Appellant's Appendix (AA) 0001; lines 26-27. They have one minor child of the marriage, Riley Rubidoux, born January 13, 2016. AA 0002; lines 1-3. Stephanie filed her complaint for divorce on January 7, 2020. AA 0001-0004. She alleged that she should be awarded primary physical custody of Riley. AA 0002; lines 5-6. Daniel filed his answer and counterclaim on January 21, 2020. AA 0005-0011. Daniel alleged that the parties should share custody of Riley. AA 0007; lines 9-11. A reply to Daniel's counterclaim was filed on February 7, 2020. AA 0012-0014.

On April 16, 2020 the district court entered temporary orders regarding custody, awarding Stephanie temporary primary physical custody without designating the visitation order as such. AA 0015-0019. The temporary visitation order awarded Daniel visitation every weekend: on week one (1), Daniel was awarded visitation from Friday at 6:00 p.m. to Sunday at 6:00 p.m. and on week two (2) from Friday at 6:00 p.m. to Monday at 10:00 a.m. AA 0016; lines 6-18.

On June 16, 2020 a partial parenting agreement was filed. AA 0020-0025. That partial parenting agreement resolved vacation time between the parties but did not resolve the question of custody. On June 16, 2020 an order was entered confirming that the parties reached a partial agreement as to custody, resolving

vacation time. AA 0026-0030. That order set trial for two (2) ½ days. AA 0028; lines 16-17. Ultimately, however, trial took two (2) full days. See AA 0069 and AA 0344. On September 16, 2021, after a two (2) day trial, the district court entered its written Findings of Fact and Conclusions of law. AA 0674-0705. A notice of appeal of that decision was filed on October 4, 2021.

15.**STATEMENT OF FACTS**:

The testimony in this case centers on Stephanie's many allegations of domestic violence Daniel committed against her and whether or not he overcame the presumption against an award of joint or primary physical custody after the district court found by clear and convincing evidence that Daniel committed at least one such act.

The testimony relevant to that issue is as follows:

The parties' relationship was tumultuous, to say the least and was rife with arguments and instances of domestic violence perpetrated by Daniel against Stephanie. Indeed, Stephanie testified that there were multiple instances of domestic violence throughout the marriage. For example, she testified that the first incident occurred in July of 2013, before the parties were married. AA 0097; lines 3-11. In that incident, Stephanie testified that Daniel grabbed her arm forcibly and left bruises at a wedding the parties attended. The second incident occurred in the summer of 2015. Id. at 7-14. There, Stephanie testified that Daniel grabbed her and

threw her over his shoulder, as a wrestler would do, onto the couch and pinned her down over an argument the parties had concerning Daniel's excessive drinking and use of marijuana. Id. at lines 18-21. Stephanie testified that he would often use wrestling maneuvers to throw her down and pin her to the ground. AA 0133; lines 11-17. Stephanie testified that she would scream for help and scream for neighbors to call police during these incidents. Id. at lines 18-22. In his testimony, Daniel failed to rebut those allegations.

Daniel's tendency to drink excessively and get violent when intoxicated was a constant problem throughout the parties' relationship. In fact, at one point Stephanie testified that all the acts of violence and abuse she suffered occurred when Daniel was drinking or drunk. AA 0138; lines 19-21. Stephanie further testified:

- that Daniel would drink 2 to 3 times per week (AA 0107;lines 2-7), but his drinking was constant and excessive mostly during the weekends (AA 0104; lines 14-18), when the majority of the abuse took place (AA 0104; lines 4-12).
- that Daniel drank and smoked marijuana throughout the night, after he would come home from work. AA 0108; lines 11-15.
- that Daniel would leave his marijuana "pen" on the table and pass out, leaving the drug paraphernalia within reach of the minor child, as an

example of one concern she had about Daniel's excessive use of alcohol and drugs. AA 0108; lines 21-24.

- Stephanie's father testified later and stated that Daniel often reeked of alcohol. AA 308; lines 11-18.
- In direct examination by his attorney, Daniel admitted that he considered his drinking problem a "vice." AA 0535; line 16.

Daniel did not deny these allegations. On the contrary, in his testimony:

- Daniel admitted that he drank and used marijuana throughout the week during the parties' marriage. AA 0422; lines 11-20.
- Daniel admitted he drank "more" during the marriage (AA 0434; lines 3-4) and that he still drinks, just not as much, (AA 0433; line 24: 0434; line 1) having only "a few beers in the fridge." AA 0434; lines 8-9.
- Daniel also admits that he does not attend either Alcoholics Anonymous or any other counseling concerning his excessive drinking and use of marijuana, to which he freely admits. AA 0438; lines 15-18.

Stephanie further testified:

- that there was yet another incident of domestic violence occurring in July of 2017 – the third such incident during the parties' relationship.

AA 0097; lines 8-16. In that incident, Stephanie testified that Daniel kicked a barstool toward her and slammed her into the ground in front of the minor child, Riley. Id.

- that throughout 2017 to 2018 Daniel continued the same conduct – often throwing Stephanie on the ground and pinning her down. Id. at lines 17-24. For example, in that time period, Stephanie testified that in one incident, as she was trying to leave the home to de-escalate the situation, Daniel grabbed the back of her shirt and pulled her back, keeping her from leaving the residence. Id. at lines 21-24. Stephanie's bloody shirt was produced and admitted as "demonstrative evidence" over Daniel's counsel's objection. AA 0100; lines 16-17. Stephanie testified that she left the house for at least a week and stayed with her parents after that incident. AA 0101; lines 10-16. Neither Daniel nor his counsel addressed this allegation in direct testimony. Thus, it is unrebutted.

During this same time period, in yet another instance of domestic violence, Stephanie testified that:

- during one heated argument, Daniel took her phone from her hand, slammed it against the dresser, and destroyed it. AA 0110; lines 11-19. That phone was admitted into evidence. AA 0111; lines 2-8.

Stephanie testified that she was devastated because that phone had many photos of her child saved on it that could not be recovered. AA 0110; lines 17-19. In his testimony, Daniel admitted to destroying or damaging Stephanie's phone after taking it was out of her hands. AA 0555; lines 6-9.

Stephanie testified about the impact that these acts had on her. Stephanie stated that the look Daniel had on his face, his demeanor, the way he would scream at her when he was enraged and committed these acts, terrified her. AA 0104; line 1-3. Stephanie's father later testified that Stephanie would often leave the marital residence and stay at her parents' home because she was scared of Daniel. AA 0304; lines 9-14.

In another instance of domestic violence, occurring on January 19, 2018, Stephanie testified to an incident occurring at her work (Stephanie is a school teacher). AA 0115 to 0119. In that incident, Daniel arrived at the school, went to her office, attempted to break into Stephanie's office with a knife, and demanded entry after the parties engaged in a heated exchange via text message. Id. When Stephanie refused, Daniel broke the window to the office, destroying school property. Id.. Daniel then fled, and Clark County School District police later arrested him and charged him with malicious destruction of property. Id. In his testimony, Daniel admits to breaking a window at Stephanie's place of work, a

school, for which he was later prosecuted. AA 0425; lines 19-21. That case also culminated in a dismissal after a plea of guilty and a stay of adjudication pending completion of certain requirements. As a result of that incident, Daniel was ordered to take anger management classes but that he compelled her to take those classes online because, according to him, it was her fault that he was arrested. AA 0119; line 21.

Just after that incident, in another instance, Stephanie testified:

- that Daniel woke her up late at night, drunk, and began berating her. AA 0114; lines 2-16.
- that she attempted to leave the room to avoid any argument but that Daniel followed her around the house. Id.
- that the minor child was awoken by the argument and witnessed it. Id. Because of Daniel's conduct, Stephanie picked up Riley and attempted to leave the residence. Id. She left the home and got in her car and put Riley on her lap. Id. Stephanie testified that she did that so that Daniel could not pull the child out of the car when she tried to leave, as he had done before. Id.
- that Daniel held on to the car in an attempt to keep her from leaving the home. Id. at lines 23-24.

In its decision and order, the district court made findings blaming Stephanie for this incident, opining that leaving the home with the child in the middle of the night and putting her in her lap rather than a car seat was not in the child's best interest and was irresponsible on Stephanie's part. AA 0638; lines 4-14.

In February of 2019, Stephanie testified that, after arguing about finances, she left the home and rented a hotel room. AA 0120; lines 18-24. Daniel incessantly called and texted Stephanie throughout the night, harassing her before he finally appeared at her hotel room demanding to talk to her. Id. Daniel's conduct placed Stephanie in fear that she would never be rid of him. Id. at line 24; 0121; line 1.

On January 20, 2019, there is an incident that begins in the morning, with Daniel demanding that Stephanie wear her wedding ring and blocks her car with his into the driveway until she does so. AA 0122; lines 16-24; 0123; 1-24. Throughout the day, Daniel continues to harass Stephanie with incessant text messages. Id. When the parties come home, they argue about finances. Id. The argument escalates because, by this point, Stephanie testifies that Daniel is drunk. Id. Stephanie then picks up the minor child and attempts to leave the house. Id. Daniel forcibly takes items Stephanie was holding and throws them aside, in view of the minor child, who Stephanie was holding. Id. Daniel then pushes Stephanie into the garage door. Id. Stephanie testifies that there is security footage of this

incident and that footage is admitted into evidence. AA 0124; lines 3-7. This later forms the basis for the district court's finding that Stephanie proved by clear and convincing evidence that Daniel committed a single act of domestic violence against her. AA 0685; lines 7-12.

Stephanie testified that the January 20, 2019 incident led to the filing of a criminal complaint for domestic violence and the entry of a guilty plea. AA 0144; lines 16-18. Later, when Daniel is examined by Stephanie's trial counsel, Fred Page, and Mr. Page attempts to compel Daniel to admit that he pleaded guilty to the January 2019 domestic violence charge, the district court interjects. AA 0335. The following discussion takes place:

> Q: Okay. And you see that on October 1, 2019 that the plea by you was guilty?
> A: Yes.
> Q: So you agree that you have a guilty plea for domestic battery here in Las Vegas.
> A: Yes.
> Q: Now as –
> THE COURT: Mr. Page, I don't think you're reading that correctly. Do you have the certified copy of his conviction?
> MR. PAGE: I don't, but we stipulated to its admission.
> THE COURT: Okay. But – but adjudication deferred means that this – this case – he wasn't convicted and it's been dismissed.
> MR. PAGE: I see here it says domestic battery first, guilty.
> THE COURT: Adjudication deferred the second thing. He – he was given conditions. He stays out of trouble it gets dismissed. And the – I think that your exhibit was also stipulated to, Mr. Blackham?
> MR. BLACKHAM: Yeah, it was.
> THE COURT: Yeah, which shows that – that it was dismissed. He completed all his conditions.

AA 0336; lines 1-24.

Later, after Mr. Page asks if Daniel agreed that the facts alleged in the criminal complaint were true and correct when he entered his plea, the district court states: "—you know – you know that no contest is – is different in what you can do with it in this case." AA 0338; lines 13-14. Then, the district court makes the following statement, commenting on Daniel's previous testimony that he pleaded "no contest" rather than "guilty" to the criminal complaint for battery – domestic violence: "No, he said that the plea was no contest. That's what he just – he testified to…at the beginning of this line of questioning." Id. at 17-21. The district court then opines the following:

> Well, yeah, they have to find him guilty and then they – adjudication deferred. This is – and the statute in Nevada says that the – this was in Justice Court. The Deputy DA can't agree to dismiss this unless they're convinced that there's a problem with the proof of it. There's a very – there's a specific statute on that that they cannot just agree to dismiss these even with this deferred adjudication if they – unless they believe there's a proof problem.

AA 0338; line 24: AA 0339; lines 1-8. This colloquy is relevant to the incident occurring at Stephanie's school, which will be discussed in more detail below.

Stephanie also testified that Daniel would often threaten to commit suicide. AA 0122; lines 2-4. In one instance, Daniel had a gun in his hand and started to countdown "3, 2, 1" indicating that he would kill himself with his gun after the countdown reached zero. Id. at 6-12. Daniel admitted that he threatened to kill

himself on multiple occasions and exhibits were produced and admitted into evidence demonstrating that point. AA 0318; lines 10-13.

In his testimony, on direct examination by his trial counsel, Daniel admits that he was "not happy" with his conduct. AA 0487; lines 7-11. Indeed, Daniel admits to much. He admits that he committed acts of domestic violence against Stephanie. AA 0487; lines 21-24: 0488; lines 1-5. He admits to screaming at Stephanie and using profanity in one video introduced as evidence. AA 0493; line 24: AA 0494; lines 12-13.

Daniel admits it all sounds bad, but he excuses it by stating that Stephanie would provoke those arguments by calling him names like "little bitch" without substantiating that claim.[1] AA 0494; lines 20-23. He further admits that the minor child was present during some instances when he was acting out of control. AA 0498; lines 7-11. He admits that on at least one occasion in which the parties argued, which was recorded and admitted into evidence, he was intoxicated. AA 0499; lines 22-24: 0500; lines 1-17. He further admits that he forcibly threw an

[1] The district court later uses this testimony specifically, in part, to justify claiming Daniel overcame the presumption that was raised against him having either primary or joint physical custody as a result of domestic violence perpetrated against Stephanie. Daniel testified that the words Stephanie used against him prior to the recordings admitted into evidence, which Daniel admits are terrible, demonstrated that she was not afraid of him, which the district court, again, used in its justification concerning the presumption that had arisen as a result of his act of domestic violence. AA 0685; lines 14-16

item into the trash during an argument and that he caused some damage to the house out of anger. AA 0501; lines 8-18. He admits that he would often threaten to kill himself to Stephanie in order to "get her attention." AA 0525; lines 1-5. Indeed, a text message from Daniel to Stephanie admitted into evidence wherein Daniel claims that if Stephanie is awarded "full custody" of Riley, that he will kill himself. AA 0328; 10-13.

He also admits to destroying Stephanie's phone, as she testified to. AA 0555; lines 6-22. He admits to breaking the school window. AA 0331; lines12-14. Daniel further admits that he punched holes in the walls of the marital residence on a "couple" of occasions when he was angry. AA 0410; lines 11-17. Notably, he admits to pleading no contest to a domestic violence charge, states the case was dismissed, but does not discuss what he did or why the case was dismissed (in other words, he does not explain what requirements the criminal court imposed on him to have his case dismissed). AA 0491; lines 5-9.

Despite all these admissions, and the many acts of domestic violence that Daniel does not deny occurred, the district court found that Daniel overcame the presumption against awarding him joint physical custody and did just that. See AA 0695; lines 4-14.

16. **ISSUES ON APPEAL**:

a. Whether the district court abused its discretion by failing to make specific findings of fact justifying its belief that Daniel overcame the presumption against joint or primary physical custody after the district court found by clear and convincing evidence that acts of domestic violence in fact occurred?

b. Whether the district court abused its discretion when it failed to make specific findings or orders that would protect the child or victim of abuse (Stephanie) from further acts of domestic violence?

c. Whether Daniel rebutted the presumption that arose prohibiting him from an award of either joint or primary physical custody?

17. **LEGAL ARGUMENT, INCLUDING AUTHORITIES**:

A. STANDARD ON REVIEW

a. Child custody decisions are reviewed for an abuse of discretion.

This court reviews a child custody decision for an abuse of discretion. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007). In reviewing child custody determinations, this court will affirm the district court's determinations if they are supported by substantial evidence. *Id*. at 149, 161 P.3d at 242. Substantial evidence is that which a reasonable person may accept as adequate to sustain a judgment. *Id*. When making a custody determination, the sole consideration is the

best interest of the child. NRS 125C.0035(1); *Davis v. Ewalefo*, 131 Nev. 445, 451, 352 P.3d 1139, 1143 (2015). Further, we presume the district court properly exercised its discretion in determining the child's best interest. *Flynn v. Flynn*, 120 Nev. 436, 440, 92 P.3d 1224, 1226-27 (2004). In addition, "[t]his court conducts a de novo review of the district court's conclusions of law." Id.; see also, *SIIS v. United Exposition Services Co.*, 109 Nev. 28, 30, 846 P.2d 294, 295 (1993).

b. The district court abused its discretion by failing to make specific findings of fact justifying its belief that Daniel overcame the presumption against joint or primary physical custody after the district court found by clear and convincing evidence that acts of domestic violence in fact occurred.

This Court has previously held that the district court's "order must tie the child's best interest, as informed by specific, relevant findings respecting the [best interest factors] and any other relevant factors, to the custody determination made." *Davis v. Ewalefo*, 131 Nev . 445, 451, 352 P.3d 1139, 1143 (2015). This Court went on to note that "[w]ithout specific findings and an adequate explanation for the custody determination, this court cannot determine whether the custody determination was appropriate." Id. at 452, 352 P.3d at 1143.

Here, as in *Davis*, although the district court's order enumerates all of NRS 125C.0035's best interest factors,[2] the order simply restates the parties' testimony,

[2] The district court rendered its analysis concerning the impact of domestic violence on its decision under NRS 125C.0035(4)(k) rather than NRS 125C.0035(5), which is a clear legal error.

without making findings, or sets forth factual findings without discussion of the associated best interest factors as they relate to the custody order. *Davis* requires the district court to tie the child's best interest, based on specific, relevant findings regarding the best interest factors and any other relevant factors, to the ultimate custody determination. *Davis v. Ewalefo*, 131 Nev . 445, 451 (2015).

For example, here the Findings of Fact and Conclusions of Law (FAC) state as follows regarding the presumption that arose as a result of its finding that Daniel committed an act of domestic violence by clear and convincing evidence:

> Dan has rebutted the presumption under NRS 124C.0035(5) **because he has been able to parent Riley over the past 14 months**, and he has demonstrated that Stephanie did not appear afraid in any of the alleged domestic violence incidents, but in fact, antagonized him by calling him things such as an "oversensitive bitch." Both parties have engaged in inappropriate behavior, but in the January 2019 incident, Dan's actions rose to the level of domestic violence. (Emphasis added).

The statement "Dan has rebutted the presumption…because he has been able to parent Riley over the past 14 months" is a conclusory statement bereft of facts supporting that conclusion. In this case, there was a temporary custody order rendered by the district court on April 16, 2020, awarding Stephanie primary physical custody on a temporary basis (though the district court declined to designate the custodial arrangement as such). See AA 0015-0019.

In that order, Daniel was awarded visitation from Friday at 6:00 p.m. to Sunday at 6.00 p.m. on week one and week two from Friday at 6:00 p.m. to

Monday at 10:00 a.m. AA 0016; lines 6-18. All Daniel did throughout the course of the litigation was follow the district court's order. The district court failed to articulate why that fact supports the conclusion that Daniel overcame the presumption that arose prohibiting him from an award of either joint or primary physical custody.

Thus, again as in *Davis*, the district court failed to tie the child's best interest, based on specific, relevant findings regarding the best interest factors and any other relevant factors, to the ultimate custody determination. It simply restated the fact that the temporary order granted Daniel visitation pending trial and that he followed that order without articulating why that fact serves the child's best interests.

The district court also found that:

> [T]here is one act of domestic violence that Stephanie proved by clear and convincing evidence, and that is the incident that occurred in January 2019. The Court concludes this incident was clearly domestic violence on the part of Dan, as he put his hands on Stephanie, and **it does not matter what Stephanie said to antagonize the incident**. (Emphasis added).

AA 0685; lines 7-12. However, the district court made a finding that Daniel overcame the presumption because: "Stephanie did not appear afraid in any of the alleged domestic violence incidents, but in fact, antagonized him by calling him things such as an "oversensitive bitch."" (AA 0685; lines 14-16).

Like in *Davis*, here, the district court makes contradictory findings that cannot be reconciled. On the one hand, the district court states that there is nothing that Stephanie could have said to justify being abused while on the other, the district court states that she brought on the abuse by provoking Daniel. In *Davis*, this Court stated that internally contradictory statements, such as the statements above, do not provide an adequate explanation for the custody determination. See *Davis v. Ewalefo*, 131 Nev . 445, 452 (2015). The same could be said here. As such, the district court abused its discretion in finding that Daniel overcame the rebuttable presumption against an award of joint or primary physical custody.

c. <u>The district court abused its discretion when it failed to make specific findings or orders that would protect the child or victim of abuse (Stephanie) from further acts of domestic violence</u>.

Here, the district court ruled that:

> Both parties have engaged in inappropriate behavior, but in the January 2019 incident, Dan's actions rose to the level of domestic violence. Despite this, and because Dan rebutted the presumption that sole or joint physical custody of the child by the perpetrator of the domestic violence is not in the best interest of the child, the Court can craft a custodial timeshare and exchange protocol (contained in the orders below) that minimizes the parties' contact with each other and the chances of further inappropriate verbal arguments or physical altercations, thereby protecting Stephanie and Riley.

AA 0685; lines 16-20: 0686; lines 1-3. The actual timeshare and exchange protocol the district court referred to is as follows:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the

> parties are awarded joint physical custody of Riley in accordance with the following timeshare: Riley shall reside with Dan every Monday morning at daycare/school drop off until Wednesday morning at daycare/school drop off; Riley shall reside with Stephanie every Wednesday morning at daycare/school drop off until Friday at daycare/school drop off; the parties shall alternate the weekends, which shall be defined as beginning Friday at daycare/school drop off until Monday at daycare/school drop off. This custodial timeshare shall begin on August 6, 2021, which shall be deemed as Dan's weekend with Riley. Prior to August 6, 2021, the parties shall continue to abide by the temporary custodial timeshare in effect at the time of trial.

AA 0695; lines 4-14.

The analysis made above, in subsection (c) of this brief, applies here. The district court states, in conclusory fashion, that it:

> [C]an craft a custodial timeshare and exchange protocol (contained in the orders below) that minimizes the parties' contact with each other and the chances of further inappropriate verbal arguments or physical altercations, thereby protecting Stephanie and Riley.

AA 0685; line 20: 0686; lines 1-3. However, the district court fails to explain how its order in fact adequately protects the victim of abuse (Stephanie) and the minor child, as demanded by NRS 125C.0035(5)(b) which requires the district court to make specific "[f]indings that the custody or visitation arrangement ordered by the court adequately protects the child and the parent or other victim of domestic violence who resided with the child."

Here, the district court simply proclaims by fiat that it can make such findings and then makes no findings whatsoever: it simply enters an order that, presumably, doubles as specific findings. As such, the district court failed to

comply with NRS 125C.0035(5)(b) and it fails to "tie the child's best interest, as informed by specific, relevant findings respecting the [best interest factors] and any other relevant factors, to the custody determination made." *Davis v. Ewalefo*, 131 Nev . 445, 451 (2015). The district court thus abused its discretion in this regard.

d. Daniel did not rebut the presumption that arose prohibiting him from an award of either joint or primary physical custody.

In Nevada, there is very little guidance for the district courts to rely on in determining what facts or factors satisfied will rebut the presumption against joint or primary physical custody where there is a finding by clear and convincing evidence that a parent committed acts of domestic violence against the other parent. Though NRS 125C.230(1)(a) and (b) presumably address this question, that rule simply restates NRS 125C.0035(5)(a) and (b) without providing much guidance as to what factors or facts the district courts should consider when making such a determination. As such, by operation of logic, district court orders in this regard can be wildly inconsistent.

In California, both statutory and case law provide its courts with that guidance. For example, in California, Subdivision (b) of section 3044 sets forth the criteria and factors that must be evaluated by the trial court before determining the presumption is overcome. To make such a determination, the trial court must find "[t]he perpetrator of domestic violence has demonstrated that giving sole or joint

physical or legal custody of a child to the perpetrator is in the best interest of the child pursuant to Sections 3011 and 3020." (§ 3044, subd. (b)(1).)

In addition, the trial court must also consider six other factors and be satisfied that, on balance, they satisfy the legislative policy of protecting the health, safety, and welfare (i.e., the best interests) of the child. (§ 3044, subd. (b).) The additional statutory factors to be considered are the following: "(A) The perpetrator has successfully completed a batterer's treatment program that meets the criteria outlined in subdivision (c) of Section 1203.097 of the Penal Code. [¶] (B) The perpetrator has successfully completed a program of alcohol or drug abuse counseling, if the court determines that counseling is appropriate. [¶] (C) The perpetrator has successfully completed a parenting class, if the court determines the class to be appropriate. [¶] (D) The perpetrator is on probation or parole, and has or has not complied with the terms and conditions of probation or parole. [¶] (E) The perpetrator is restrained by a protective order or restraining order, and has or has not complied with its terms and conditions. [¶] (F) The perpetrator of domestic violence has committed further acts of domestic violence ." (§ 3044, subd. (b)(2).)

Furthermore, in California “the perpetrator cannot overcome the rebuttable presumption by referring to the preference for frequent and continuing contact with both parents.” (§ 3044, subd. (b)(1).)” Cal. Fam. Code § 3044. In addition,

California Courts make clear who has the burden of persuasion in such cases. There, "[t]he legal effect of the presumption is to shift the burden of persuasion on the best interest question to the parent who the court found committed domestic violence." *Celia S. v. Hugo H.*, 3 Cal.App.5th 655, 662 (Cal. Ct. App. 2016).

Here, in evaluating the best interest factors, the district court made the following findings concerning NRS 125C.0035(4)(c) regarding frequent and continuing contact between the child and the other parent:

> The Court concludes this factor favors Dan. The Court has serious concerns with Stephanie's ability to support Dan's relationship with Riley. Specifically, prior to the April 16, 2020 hearing in this matter, where the Court awarded visitation to Dan, Stephanie refused to allow Dan any visitation with Riley from March 15, 2020 until the Court ordered the same at the hearing. Likewise, Stephanie withheld Dan's visitation during Christmas, which was a violation of the Court's order. These actions demonstrate Stephanie's unwillingness to foster Riley's relationship with Dan.

AA 0681; lines 8-15. However, the district court failed to make any findings specific to NRS 125C.0035(5) et seq. regarding the best interest factors at all, never mind articulating how those factors work to overcome the presumption against domestic violence.

Furthermore, the district court made findings that put the blame on Stephanie for provoking Daniel into causing her harm. The district court's reasoning is absurd, and directly contradicted its finding regarding the question of whether Stephanie suffered from abuse at all: in that regard, the district court stated

nothing justifies abuse while at the same time opining that the abuser overcame the presumption because Stephanie insulted and provoked him with words, demonstrating she could not possibly be scared of her abuser or inferring that the harm Stephanie suffered is no harm at all since she had the gall to insult her abuser.

In light of the fact that the district court found that an act of domestic violence in fact occurred, and given the testimony presented above concerning the extent of the violence Stephanie suffered at Daniel's hand, it is prudent not to put Stephanie, the victim of domestic violence, in a position to justify why she did not attempt to foster a close and continuing relationship between the child and the other parent, who is the perpetrator of the abuse suffered by the victim (Stephanie).

As in California, that factor should not be considered when making a determination under NRS 125C.0035(5), as the district court in this matter did – and which it weighed heavily against Stephanie. Furthermore, the factors set forth in Cal. Fam. Code § 3044 subd. (b) should be considered and adopted in this state when determining whether a perpetrator of domestic violence has overcome the presumption the legislature enacted specifically for the protection of children and victims of domestic violence – this would provide the district courts with some guidance in making such determinations and would assist in rendering more uniform decisions that would inspire trust in the judiciary with the community.

In addition, it should be made clear that the burden of persuasion in overcoming the presumption lies with the abuser to demonstrate that it is in the child(ren)'s best interest that the perpetrator of domestic violence have primary or joint physical custody when there is a finding by clear and convincing evidence that acts of domestic violence in fact occurred.

As a matter of public policy, this approach is consistent with this Court's views on the effects of domestic violence on children. For example, in *Castle v. Simmons*, this Court observed that domestic violence poses a unique danger to a child's physical, emotional, and mental health. *Castle v. Simmons*, 120 Nev. 98, 101 (Nev. 2004). Furthermore, as in California, the best interest factors enacted by the Nevada legislature are specifically designed to promote the health and well-being of children residing in this state.

Considering the foregoing, and applicable Nevada law, the district court should not have concluded that Daniel rebutted the presumption against awarding him joint physical custody of Riley. In the first place, the district court failed to consider all acts of domestic violence alleged by Stephanie that qualify as domestic violence pursuant to NRS 33.018.[3] Under that rule, the following acts constitute domestic violence: 1) assault; 2) coercion; or 3) a knowing, purposeful or reckless

[3] Pursuant to NRS 125.480(10(b), "domestic violence has the meaning ascribed to it under NRS 33.018.

course of conduct intended to harass the other person: Such conduct may include, but is not limited to: a) stalking, and b) destruction of private property.

In this case, Daniel admitted to destroying property belonging to the community, which in part belongs to Stephanie, such as punching holes in the walls of the marital residence, to which Daniel admitted in his own testimony. AA 0410; lines 11-17. More importantly, Daniel was arrested for destroying a window at Stephanie's place of employment; i.e., the school in which she works – and he admitted to the same in his testimony. AA 0331; lines 12-14.

As to the latter, the district court was mistaken in believing that the dismissal in the criminal matter freed Daniel from consideration of the same in the district court. Under NRS 48.125(2), "[e]vidence of a plea of nolo contendere or of an offer to plead nolo contendere to the crime charged or any other crime is not admissible in a civil or criminal proceeding involving the person who made the plea or offer." See AA 0639; lines 18-22. Here, the district court, sua sponte, declared that Daniel's nolo contendere plea and the subsequent dismissal of his case put the actual act constituting domestic violence, i.e., the destruction of his own, and Stephanie's property, (AA 0410; lines 2-14), the destruction of Stephanie's phone (AA 0555; lines 6-22), after he ripped it out of her hands, and the destruction of the window in the office (AA 0331; lines 12-14) behind which

Stephanie was hiding from him at the school in which she worked rendered those acts out of bounds for consideration in this matter. See AA 0639; lines 18-22.

Had the district court made the proper findings in that respect, then it stands to reason that Daniel would have had to provide more substantial evidence to overcome the presumption. Instead, the district court considered only one act of many acts that constitute domestic violence (the instance when he was caught on camera pushing Stephanie into the garage on January 20, 2019), making it easier for Daniel to overcome that presumption. See AA 0638; line 24: 0639; lines 1-3.

In addition to that, Stephanie's testimony that Daniel would follow her wherever she was to confront her (AA 0120; lines 18-24) which can constitute stalking and harassment, that he ripped items from her hands (AA 0110; lines 11-19) which could constitute domestic violence or coercion, that he would block her from leaving her own residence or attempt to stop her from leaving when she wanted to (AA 0122; lines 16-24; 0123; 1-24) which could constitute coercion, and when he repeatedly threatened to kill himself to "get her attention" i.e., control her (AA 0318; lines 10-13: AA 0525; lines 1-5) which could constitute a knowing, purposeful, and reckless course of conduct intended to harass Stephanie - all of which constituted domestic violence under NRS 33.018 et seq. and all were ignored by the district court despite the fact that Stephanie testified to those acts and Daniel either failed to rebut her claims or admitted them..

Furthermore, had it been made clear that the burden of persuasion rested with Daniel, and had there been factors the district court was forced to consider, as discussed above, which are required in California, such as: "(A) The perpetrator has successfully completed a batterer's treatment program…(B) The perpetrator has successfully completed a program of alcohol or drug abuse counseling, if the court determines that counseling is appropriate…(C) The perpetrator has successfully completed a parenting class, if the court determines the class to be appropriate" which are required in California, Daniel's testimony would have fallen far short of what would be required to overcome the presumption: Daniel did not testify to completion of any batterer's treatment program, insisting that his plea of nolo contendere and the dismissal of his criminal matter were enough to overcome the presumption (AA 0491; lines 5-9); he did not show that he engaged in any counseling whatsoever for his admitted "vice", i.e., drinking alcohol to excess (See AA 0438; lines 15-18), and he failed to testify that he completed any parenting classes, which would be appropriate here given that much of the conduct he admitted to occurred in front of Riley.

The district court made no mention of any of these common-sense factors because it had no guidance or was not compelled to do so. This caused Stephanie harm in that she continues to be exposed to her batterer and it potentially puts the child in danger as Daniel has demonstrated nothing that would suggest he learned

anything from what he repeatedly testified were mistakes he made. Finally, that he did not make such a showing, even under Nevada law, demonstrates that he failed to overcome the presumption against awarding him joint physical custody because there is no substantial evidence provided in Daniel's testimony rebutting any of Stephanie's allegations, aside from his self-serving statement that he is a changed man. Based on the foregoing, the district court abused its discretion when it found that Daniel overcame the presumption because that finding exceeds the bounds of reason.

B. 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. IF SO, EXPLAIN:

Yes. See 17(A)(d) above. Stephanie asks this Court to consider adopting the California law discussed above and compelling the district courts to apply that law to any determination of whether a perpetrator of domestic violence rebutted the presumption against physical or joint custody of a child.

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 Word 2016 in 14 point font, Times New Roman typeface;

2. I further certify that this fast track statement 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 7189 words (out of 7,267 allowed).

3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track statement and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track statement, or failing to raise material issues or arguments in the fast track statement, or failing to cooperate fully with appellate counsel during the course of an appeal. 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 December, 2021.

/s/ Alex Ghibaudo
ALEX B. GHIBAUDO, Nevada Bar No. 10592
ALEX B. GHIBAUDO, PC
Attorney for Appellant

CERTIFICATE OF MAILING

I certify that on the 14th day of August, 2021, I served a copy of this FAST TRACK STATEMENT upon Respondent through the Supreme Court's efiling system to:

Brian Blackham, Esq.
Ghandi Deeter Blackham
725 S 8th St, Suite 210.
Las Vegas, NV 89101
brian@ghandilaw.com
P - (702) 878-1115,
ATTORNEYS FOR RESPONDENT DANIEL RUBIDOUX

Dated this 14th Day of December, 2021.

/s/ Alex Ghibaudo, Esq.

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Alex B. Ghibaudo, PC