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Supreme Court No. 835225
District Court Case No. D598320

Respondent.

- 1 4. Names of judges issuing order appealed from: Charles J. Hoskins and Heidi
2 Almase.
- 3
- 4 5. Length of trial or evidentiary hearing: Non-applicable.
- 5
- 6 6. Written order or judgment appealed from: Denial of two separate Rule 60(b)
7 motions, the First was filed on July 21, 2020 and the Second was filed on
8 May 31, 2021.
- 9
- 10 7. Date that written notice of the appealed written judgment or order's entry
11 was served: No Order denying Appellant's First motion was served . The
12 Order denying the May 31, 2021 motion was served on August 10, 2021.
- 13
- 14 8. If the time for filing the notice of appeal was tolled by the timely filing of a
15 motion listed in NRAP 4(a)(4): Non-applicable.
- 16
- 17 9. Date notice of appeal was filed: September 9, 2021.
- 18
- 19 10. Specific statute governing the time limit for filing the notice of appeal: Rule
20 4(a), NRAP.
- 21
- 22 11. Specify the statute, rule or other authority, which grants this court
23 jurisdiction to review the judgment or order appealed from: Rule 3A(b)(8),
24 NRAP.
- 25
- 26 12. Pending and prior proceedings in this Court: Non-applicable.
- 27
- 28 13. Proceedings raising same issues: None known.

1 14. Procedural history.

- 2 a. On October 21, 2019, Respondent filed a compliant for divorce.
- 3 AA0001-0008.
- 4
- 5 b. On October 22, 2019, the Complaint was served. AA0038.
- 6
- 7 c. On November 7, 2019, Appellant Answered. AA0039-0043
- 8
- 9 d. On December 12, 2019, Respondent's Case Conference Brief was
- 10 filed. AA0051-0070.
- 11
- 12 e. On December 12, 2019, the Case and Non-Jury Trial Management
- 13 Order Issued. AA0093-0096.
- 14
- 15 f. On February 20, 2020, a hearing was held on Respondent's motion to
- 16 Modify the Court's Temporary Custodial Orders.
- 17
- 18 g. Also on February 20, 2020, an Order issued from the hearing of that
- 19 day. AA0073.
- 20
- 21 h. On May 4, 2020, Respondent filed his Pre-Trial Memorandum.
- 22 AA0139-0172.
- 23
- 24 i. On May 5, 2020, the Calendar Call occurred. AA0288-0296.
- 25
- 26 j. On May 19, 2020, Divorce trial or prove up hearing occurred.
- 27 AA0303-0323.
- 28
- k. On June 8, 2020, the Decree of Divorce was issued. AA0173-0186.

- 1 l. On July 21, 2020, Appellant's First Motion to Set Aside the Decree
2 was filed (First Motion). AA0202-0206.
3
4 m. On August 3, 2020, Respondent's Opposition was filed. AA0218-
5 0240.
6
7 n. On September 16, 2020, there was a Hearing on Appellants First
8 motion. AA0324-0360.
9
10 o. On December 7, 2020, an Order from the September 16, 2020 hearing
11 was filed. AA0241-0249.
12
13 p. On May 31, 2021, the Appellant filed Second Motion to Set Aside the
14 Decree (Second Motion). AA0250-273.
15
16 q. On August 10, 2021, an Order denying Appellant's Second Motion
17 was filed. AA0274-0276.
18
19 r. On September 9, 2021, a notice of appeal was filed. AA0286-0287.

20 15. Statement of facts:

21 The Respondent's Petition for Divorce alleged that the Appellant was a
22 continuous drug user and/or abuser. AA0002. Based thereon, that Respondent
23 should be awarded sole legal and primary physical care, custody, and control of
24 the couple's child. AA0002. On October 23, 2019, Respondent moved to modify
25 the temporary child custody order and to establish child support. AA0009-0037.
26
27
28

1 This motion was largely based upon claims that Appellant was addicted to drugs.
2 AA0012. Respondent alleged the use of illegal substances such as
3
4 methamphetamine, opiates and amphetamines. AA0012.

5 On November 7, a hearing was held on Respondent's motion. Thereafter,
6
7 the Court issued an Order giving the couple joint physical and legal custody of
8 their minor child. AA0048. Also, both parties were required to take drug tests.
9 AA0048-0049.

10
11 The Appellant took a drug test, which did not find any of the
12
13 aforementioned substances or other prohibited substances. AA0055. Instead of
14
15 moving on from this disproved allegation, Respondent doubled down arguing that
16
17 the Appellant had masked her drug use using body and/or hair cleansing products
18
19 to avoid positive drug test results. AA0055.

20 On December 12, 2019, the Case and Non-Jury Trial Management Order
21
22 was issued. Therein, the Court required that a deadline of April 28, 2020 for the
23
24 Pre Non-Jury Trial Memorandum/Brief. AA0055. The Court warned that a late
25
26 Pre-Trial Memorandum will result in the trial date being vacated and the matter
27
28 rescheduled in ordinary course and/or sanctions. AA0094-0095. The Court also
ordered that the Discovery process must be used to request further drug testing of
the Appellant.

1 Between November of 2019 and the end of January of 2020 Respondent
2 filed two more motions seeking to obtain primary custody among other things.
3
4 Each of these motions contained allegations of drug use, even though disproved.¹

5 On February 14, 2020, the Court issued an order shorting time for a hearing
6 on the aforementioned motion (AA0134-0135) and on February 18th a notice of
7 this hearing. AA0136. The hearing date was February 20th, two days from the date
8 of the issuance of the Notice. *Id.* Appellant was not served this Notice. AA0289.
9
10

11 On or about January 23, 2020, Respondent withdrew Gianna from her
12 Elementary School and concealed her whereabouts over several weeks. AA0255.
13 On February 13, 2020, and after locating Gianna's new Elementary School,
14 Appellant picked her up after school and took her to St. George Utah for the
15 weekend. On Sunday, February 16, 2020, Appellant took Gianna to Respondent's
16 mother's house and encountered Respondent. AA0255. At that time Appellant
17 determined that Respondent had been heavily drinking and confronted him on it.
18 AA0255. Respondent physically pushed Appellant out of the door, causing her to
19 fall and become injured while Gianna witnessed. AA0255.
20
21
22

23 The Appellant did not attend the February 20th hearing. AA0289. This is
24

25
26 ¹These motions were each accompanied by motions to shorten time for the hearings
27 thereon. The series of these motions and hearings is confusing and no substantive decisions were
28 reached. Therefore, the motions were not supplied in the Appellant's Appendix.

1 presumably because she did not receive notice of it. The Court acknowledged that
2 the order shortening time had not been served on her. AA0289. Respondent's
3 counsel alleged, without providing evidence, that Appellant was evading service.
4 AA0289. Respondent's attorney admitted that any orders given from the hearing
5 would be "problematic" because the Appellant had not been properly served.
6 AA0290. Instead of rescheduling the hearing, the temporary child custody order
7 was modified to award sole legal and physical custody to the Respondent.
8 AA0291-0292.

12 On May 4, 2020, seven days after the deadline Respondent filed his Pre-
13 Trial Memorandum. AA0139-0172. As a result of this late filing, the trial date
14 should have been vacated and/or the Respondent should have been sanctioned.
15 AA0094-0095. The Respondent's Pre-Trial Memorandum made additional
16 allegations of drug use and abuse. AA0162-0164. However, it was silent
17 regarding the Appellant's drug test which did not find any illegal or misused
18 substances. This is particularly galling because Respondent never attempted to
19 compel another test.

23 On May 5, 2020, the Calendar Call was conducted. AA0297-0302. Neither
24 party appeared, however, Respondent was represented by legal counsel. As the
25 result of the Appellate's failure to appear, the Court invoked EDCR 2.69. This

1 defaulted Appellant for all purposes including child custody. AA0300-0301.

2 Under the assumption that the Appellant would not appear The Court held the trial
3
4 date of May 19, 2020 for a prove up hearing. AA0301.

5 On May 19, 2020, the hearing was convened *via* video conference. AA0305.
6
7 The Respondent and his legal counsel were in attendance. AA0305. The
8 Appellant was not in attendance. AA0305-0307. The Court gave the Appellant
9 one more chance to participate in the proceedings even though it had invoked Rule
10 2.69, EDCR, at the calendar call. AA0306. The Respondent was called as a
11 witness. AA0307-0317. Therein, he stated his desire to have sole legal and
12 physical custody of Gianna. AA0313. Based upon questions from the Court and
13 legal counsel, the Respondent provided testimony regarding some of the best
14 interest factors of NRS 125C.0035(4). Testimony was given on the following: the
15 likelihood of the child having a continued relationship with the non-custodial
16 parent (AA0316); Communication and cooperation in child rearing (AA0316); the
17 mental and physical health of the parents (AA0315-0316); allegations of parental
18 neglect (AA0318-0319) and whether either parent has committed an act of
19 abduction. *Id.* Left open were important and relevant NRS 125C.0035(4) factors
20 such as, Respondent's acts of domestic violence, the ability of Gianna to maintain
21 relationships with her siblings and Gianna's physical and emotional needs. Of
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1 note, there was no discussion of the Respondent's Pre-Trial Memorandum. It is
2 assumed that this was omitted because the memorandum's late filing should have
3 resulted in continuing the trial.
4

5 The Decree of Divorce was issued on June 8, 2020. AA0173-0186. As
6 stated above, the Respondent did not provide analysis of the NRS 125C.0035(4)
7 facts in his Complaint. The Decree's discussion of the best interest factors was
8 limited to the single sentence.
9
10

11 Based upon the testimony of the plaintiff and the factors set forth in
12 NRS 125C.0035 it is in the child's best interest for the plaintiff to
13 have SOLE LEGAL and SOLE PHYSICAL custody of said minor
14 child. AA0176(Emphasis in original).

15 Accordingly, the Court failed to provide any findings on the NRS 125C.0035(4)
16 factors.
17

18 On July 21, 2020, the Appellant filed her First Motion pursuant to Rule
19 60(b), NRCP alleged that several due process violations. AA0202-0206. Included
20 in an appendix to the motion was a protective order from Washington County,
21 Utah, wherein that Court found reason to believe that the Respondent had
22 committed domestic violence against Appellant based upon the incident on
23 February 16, 2020. AA0207-0217.
24
25

26 Respondent opposed Appellant's Rule 60(b) motion. AA0218-0240. This
27
28

1 Opposition did not dispute Appellant's allegations of domestic violence. The
2 Opposition provided no discussion of the best interest of the child standard except
3 to say, "Based on the testimony of Plaintiff, and an analysis of the factors set forth
4 in NRS 125C.0035, it is in the minor child's best interest for Plaintiff to have
5 SOLE LEGAL and SOLE PHYSICAL custody of said minor child." AA0223.
6

7
8 On September 16, 2020, a hearing was held on Appellant's First Motion.
9 AA0324-0360. Therein the Court failed to address the Decree's incomplete
10 application of the NRS 125C.0035(4) factors. The Court heard no evidence
11 regarding relevant best interest factors such as; Gianna's continued relationship
12 with her siblings, the nature of Gianna's relationship with each parent, and the
13 Respondent's acts of domestic violence.
14

15
16 The Court indicated a willingness to entertain a motion to modify the
17 custody and visitation portions of the Decree, should Appellant bring such motion.
18 AA0354. However, Appellant would be at a disadvantage because the
19 modification of a child custody order requires a showing of a change in
20 circumstance. *Mizrachi v. Mizrachi*, 132 Nev. 666, 673, 385 P.3d 982, 987 (Nev.
21 App. 2016). Therefore, Appellant did not file a motion to modify the decree.
22
23

24
25 The Order from the September 16th hearing was not filed until December 7,
26 2020. AA0241-0249. The automated certificate of service attached thereto stated
27

1 that there are no users registered for the electronic notice system on the case.
2 AA0249. Instead, the Respondent's attorney was required to serve the order by
3 traditional means. *Id.* This never occurred.
4

5 On May 31, 2021, the Appellant filed her Second Motion. AA0205-0273.
6
7 Therein, Appellant specifically alleged that Respondent committed an act of
8 domestic violence on February 16, 2020, in Gianna's presence. AA0255,
9 AA0269-0270. In her Second Motion, Appellant provided her analysis of the NRS
10 125C.0035(4) factors. AA0264-0270. This Motion and notice of the hearing
11 thereon were served on the Respondent before the hearing.² AA0281-0282.
12 Respondent did not oppose the Second Motion. AA0274.
13
14

15 Appellant's Second Motion was denied based upon the law of the case.
16 AA0275-0276. Therein, the Court referenced the September 16, 2020 Order
17 (actually a December 7, 2020 written order from September 16, 2020). AA0276.
18 In so ordering, the Court upheld the Decree which failed to make specific findings
19 pursuant to NRS 125C.0035(4). Further, the Judge rubber stamped the September
20 16, 2020 Order which failed to conduct an evidentiary hearing regarding
21 Respondent's domestic abuse. AA0325-0359. Such evidentiary hearing on
22
23
24
25

26 ²The certificate of mailing of the motion is dated after the date of the Order. However, it
27 states, under penalty of perjury, that it was mailed concurrent with the filing of the motion.
28

1 domestic violence would likely have given rise to a presumption that
2 Respondent's sole legal and physical custody would not have been in the child's
3 best interest.
4

5 16. Issues on appeal.

6
7 Issue 1: The Court erred in its review of the Appellant's First Motion
8 because it did not conduct an evidentiary hearing to determine whether the
9 Respondent engaged in one or more acts of domestic violence.
10

11 Issue 2: The Court erred in its review of the Appellant's First Motion by
12 failing to require the trial court to make specific findings regarding the best
13 interest of the child as set forth in NRS 125C.0035(4)
14

15 Issue 3: The Court erred in its review of the Appellant's First and Second
16 Motions because it did not set aside the child custody order issued as a sanction
17 for non-compliance with discovery and procedural orders.
18

19 17. Legal argument:

20 Issue 1:

21
22 The Court erred by failing to hold an evidentiary hearing regarding the
23 allegation that Respondent engaged in one or more acts of domestic violence. A
24 finding that a parent committed an act of domestic violence creates a presumption
25 that the perpetrator's sole custody is not in the child's best interest. NRS
26
27
28

1 125C.0035(5). Evidence of domestic violence which was not known before
2 granting custody may be offered in a subsequent hearing. *Castle v. Simmons*, 120
3 Nev. 98, 105, 86 P.3d 1042, 1047 (2004).
4

5 During the Case Conference and the Trial, the Court was unaware of the
6 allegations of domestic violence based upon the incident which occurred on or
7 about February 16, 2020. AA0255, 0269-0270. Appellant supplied Evidence of
8 the incident in both her First and Second Motions to set aside the Decree.
9
10

11 The appendix to First Motion contained a Temporary Protective Order
12 (TPO) issued by Washington County, Utah. AA0212-0214. Therein, the Utah
13 Court found that “the Respondent has abused or committed domestic violence
14 against [Appellant], or that there is a substantial likelihood that Respondent
15 immediately threatens [Appellant’s] physical safety.” *Id.* Respondent’s Opposition
16 to this motion was silent on the allegation. AA0221-0235. Accordingly, the Court
17 erred in failing to require an evidentiary hearing on the issue. *See*, NRS
18 125C.0035(5).
19
20
21

22 The Appellant’s Second motion for reconsideration contained a specific
23 description of the incident which resulted in the issuance of the TPO. AA0255,
24 AA0269-0270. This allegation should have caused the Court additional concern
25 because the minor child witnessed it. As there was uncontroverted evidence of
26
27
28

1 domestic violence before the Court from Appellant's First motion and narrative of
2 it in her Second, the Court abused its discretion by not requiring an evidentiary
3 hearing thereon.
4

5 The Court's Order after the August 11, 2021 chamber review also
6 constituted an abuse of discretion because the decision was based upon the law of
7 the case. AA0275. The error was that the allegation of domestic violence had not
8 been reviewed. AA0274-0275. Issues which were not addressed and decided are
9 not subject to the law of the case doctrine. *Dictor v. Creative Mgmt. Servs., LLC*,
10 126 Nev. 41, 44, 223 P.3d 332, 334 (2010)("[T]he [law of the case] doctrine does
11 not bar a district court from hearing and adjudicating issues not previously
12 decided") *Id.* Accordingly, the Court abused its discretion by failing to require an
13 evidentiary hearing on domestic violence and instead denying Appellant's motions
14 for reconsideration.
15

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19 Issue 2:
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21 In its review of both of Appellant's motions, the Court failed to consider the
22 best interest factors. Courts are required to consider and set forth specific findings
23 on these factors. NRS 125C.0035(4). In Nevada, the child's best interest is the
24 override priority. *St. Mary v. Damon*, 129 Nev. 647, 654, 309 P.3d 1027, 1033
25 (2013)("[T]he best interest of the child is the paramount concern in determining
26
27
28

1 the custody and care of children.”) Courts are required to “consider all the best
2 interest factors in determining the nature of the parties’ custody arrangement”
3
4 *Nance v. Ferraro*, 134 Nev. 152, 161, 418 P.3d 679, 687 (Nev. App.
5 2018)(Emphasis added).

6
7 Neither review of Appellant’s motions noted that the Divorce Decree lacked
8 specific findings regarding the child’s best interest. This failure was particularly
9 pronounced in the review of the Second Motion wherein Appellant analyzed the
10 NRS 125C.0035(4) factors. AA0265-0270. The Court abused its discretion when
11 it did not set a hearing to provide specific findings regarding the relevant NRS
12 125C.0035(4) factors. When the district court fails to make written findings to
13 support its decision where required by law, the decision must be reversed and
14 remanded for additional findings. *Armijo v. Urbina*, 487 P.3d 25 (Nev. App. 2021)
15 citing *Rivero v. Rivero*, 125 Nev. 410, 438, 216 P.3d 213, 232 (2009).

16
17 Appellant’s Second Motion made clear that certain NRS 125C.0035(4)
18 factors were at issue, such as: the relationship of this child with her siblings
19 (AA0264); the relationship of the child with each parent (AA0268); and, the
20 history of parental abuse of the spouse AA0255, 0269-0270. The Appellant’s
21 Second Motion showed that these issues were prevalent in the case. However, the
22 Decree did not provide findings on these enumerated factors.
23
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1 Further, the transcript from the May 19, 2020, hearing shows that the
2 aforementioned factors were not discussed. The only factors that were discussed
3 were the likelihood of the child having a continued relationship with the non-
4 custodial parent (AA0315-0317); the parents communication and cooperation in
5 child rearing (AA0316); the mental and physical health of the parents (AA0315-
6 0316); allegations of parental neglect (AA0318-0319) and allegations of parental
7 abduction³. *Id.*

8
9
10
11 Since no evidence was taken at the May 19, hearing the only way to resolve
12 the failures is to remand the matter to the District Court for consideration of all of
13 the NRS 125C.0035(4) factors. Thereafter, the District Court needed to provide an
14 amended Decree setting forth its findings on the relevant factors.
15

16 Issue 3:
17

18 This is related to the second issue because the Court awarded child custody
19 based upon something other than the child's best interest. The problem starts with
20 the improperly noticed hearing of February 20, 2020. Therein, the temporary child
21 custody order was modified to award the Respondent with sole legal and physical
22 custody, pending further orders. AA0291. The further orders were issued at the
23
24

25
26 ³This allegation must be viewed in light of the fact that the child was taken to
27 Respondent's mother's home in Utah. AA0255.

1 Calendar Call and Trial as sanctions pursuant to Rule 2.69, EDCR.

2 The transcript of May 5, 2020, shows that default was effectively given on
3 that date, with a prove up hearing scheduled for May 19, 2020.
4

5 Typically, if I have a party that doesn't show up for calendar call, I -- I give
6 the parties the option of using EDCR 2.69, essentially defaulting them and -
7 - and proving it up, which proves difficult if your client's not available via
8 video for me to take that testimony. AA0298.

9 At the trial, testimony was given on the mental health of the Appellant
10 which indicated that Appellant was a drug user or addict. AA0314. This testimony
11 was given despite the negative finding of any illegal substance in the Appellant's
12 drug test. AA0055. As set forth above, four of the relevant factors were not
13 discussed. The Court rendered its decision without receiving any input on factors
14 applicable to this child's health and well being.
15

16 This grant of child custody was based upon the Court's determination that
17 the Appellant had defaulted and that it had the authority to grant child custody as a
18 result thereof.
19

20 The Court finds that it is in the minor child's best interest, based upon
21 the testimony that's been received today and analysis of NRS
22 125C.0035 and those factors, that sole legal and sole physical custody
23 will be granted to the Plaintiff in this action. AA0320.
24

25 Awarding child custody as a sanction flies in the teeth of the NRS
26 125C.0035(4) factors. It is inconceivable that the conduct of a parent in litigation
27

1 should determine the child's best interest. In light of the Court's failure to consider
2 certain relevant NRS 125C.0035(4) factors, this matter must be remanded to the
3 trial court for an evidentiary hearing thereon.
4

5 18. Issues of first impression or of public interest: This case highlights the need
6 for Nevada courts to make a sufficient inquiry into the best interest of the
7 child factors and to set forth specific findings thereon.
8

9 VERIFICATION
10

11 1. That I attempted reach an agreement regarding a possible joint appendix. No
12 agreement could be reached with counsel for Respondent, despite multiple
13 communications and a sincere effort by both attorneys to reach such
14 agreement. The four certified transcripts included in the Appellant's
15 Appendix were purchased by Appellant before this appeal was filed.
16 Appellant did not desire to pay for them twice, so a certificate of no
17 transcript was filed on December 12, 2021. Legal counsel for Appellant
18 consulted with the Supreme Court's Clerk who indicated that the certified
19 transcripts could be included in the appendix.
20
21
22

23 2. I hereby certify that this fast track statement complies with the formatting
24 requirements of NRAP 32(a)(4), the typeface requirements of NRAP
25 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:
26
27
28

1 This fast track statement has been prepared in a proportionally spaced
2 typeface using WordPerfect in 14 font size and name of type style New
3 Times Roman.
4

- 5 3. I further certify that this fast track statement complies with the page- or
6 type-volume limitations of NRAP 3E(e)(2) because is proportionately
7 spaced, has a typeface of 14 points or more, and contains 3925 words
8
9 4. Finally, I recognize that under NRAP 3E I am responsible for timely filing a
10 fast track statement and that the Supreme Court of Nevada may impose
11 sanctions for failing to timely file a fast track statement, or failing to raise
12 material issues or arguments in the fast track statement. I therefore certify
13 that the information provided in this fast track statement is true and
14 complete to the best of my knowledge, information, and belief.
15
16
17

18 Dated this 25th day of January, 2022

19 The Law Offices of Charles R. Zeh. Esq.
20

21 By: /s/ Pete Cladianos III, Esq.
22 Bar Number 8406
23 50 West Liberty St. Ste. 950
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25 775 323 5700
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