IN THE COURT OF APPEALS OF THE STATE OF NEVADA

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ADAM MICHAEL SOLINGER, Appellant, vs. CHALESE MARIE SOLINGER, Respondent.	)	Docket No: 84832-COA D.C. Case No: D-19-582245-D

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Elizabeth A. Brown
Clerk of Supreme Court

REPLY TO FAST-TRACK RESPONSE

I. Judge Perry Erred in Awarding Joint Physical Custody

Chalese commences her Response by summarizing Adam's argument: Judge Perry so enmeshed herself in the case that it clouded her judgment, leading Judge Perry to make unreasonable and unsubstantiated findings which amounted to an abuse of discretion. While Chalese then attempted to disprove Adam's position in her Response, she could not.

A. Judge Perry Erred in Finding Judge Moss' Orders were Punitive Against Chalese and by Imputing Her Bias Against Judge Moss' Rulings onto Adam

It is clear from the record that Judge Perry baselessly found Judge Moss' temporary orders "abhorrent" and imputed her extreme dislike of them onto Adam as Judge Perry believes Adam was the direct beneficiary of them. Chalese states Judge Perry was warranted in her belief that Judge Moss' Orders were punitive

Docket 84832-COA Document 2023-04581

towards Chalese but fails to provide a cite specifically substantiating this belief. Chalese also fails to provide argument contradicting that Judge Moss' orders were made in an attempt to safeguard the children against Chalese's violations of orders, which constituted a threat to the children's best interest. FTR at pages 5-7. Chalese also does not provide any citation supporting Judge Perry's erroneous claim that "almost all of Adam's motions" were requesting to take Chalese's custodial time away. Again, in those Adam did seek relief related to child custody, Adam was motivated out of a desire to protect the children, not out of some nefarious purpose.

In her Response, Chalese continuously attempts to defend Judge Perry's admonishment of Judge Moss' Orders (especially related to marijuana use by Chalese) by claiming her use was a non-issue. However, Chalese omits to address how Judge Perry herself found on July 8, 2021, that Chalese violated the order barring marijuana use and due it, deemed it necessary to change the then custodial order from joint physical custody to Adam having primary physical custody. 15 AA 3290. Was Judge Perry being punitive? Chalese noticeably does not elaborate. The same applies to Judge Perry's admonishment of Chalese during trial for using marijuana in her home, believing that exposing children to second-hand marijuana smoke was harmful to them and gets into their clothes. 20 AA 42845-4286.

B. Judge Perry Erred in Holding that Adam was Demeaning Towards Chalese or Engaged in Unjustifiable Behavior

The so-called examples Chalese provides of Judge Perry finding Adam acted

in a "demeaning" way towards Chalese are not supported by the evidence. Judge Perry decided at the outset of trial that Adam and Jessica (his significant other) were somehow in the wrong because she disliked them and as a result, concluded that any incident that occurred was their fault without citing to any specific wrongdoing. It is clear from Judge Perry's tirade of Jessica in the Decree of Divorce that she simply did not like Jessica being supportive of Adam's parenting nor being involved in the children's activities. 17 AA 3824-3825. However, there was no order barring such involvement by Jessica and such an order could have easily been obtained if Chalese or Judge Perry believed it in the children's best interests. Chalese also does not reference anything evidencing that Jessica was demeaning or abusive towards Chalese or that Jessica refused to allow Chalese her custodial time. The fact Judge Perry was biased against Jessica is also clear from how she had no issue with Josh being present at child exchanges, especially when it was Josh who instigated arguments and tried to engage Adam, Jessica, and Jessica's minor daughter in altercations. 10 AA 2206; PTE 52 at 1-3; PTE 53. Hence, Judge Perry's findings were an abuse of discretion.

C. Judge Perry Erred in Not Finding that the Ban Against Use of Alcohol and Drug was Mutually Applicable

Chalese claims that Judge Moss' order barring alcohol and drug use while caring for the minor children was not mutually applicable. Chalese's is wrong though and misinterpreting the applicable order of the district court. The initial

March 19, 2019 order did apply to both parties and required both parties to submit to drug testing. 1 AA 236-50. While Adam tested negative, Chalese tested positive. 3 AA 526.[1] It was only later when evidence arose that Chalese was continuing to use drugs and alcohol while she had the care of the children that Judge Moss ordered Chalese to random drug testing once a month. 3 AA 528. However, Judge Moss did not rescind her March 19, 2019 Order requiring Adam to continue being alcohol and drug free while caring for the children.

D. Judge Perry Erred in Finding that Adam's Behavior was Somehow Consistent with Domestic Violence

The acts Chalese claims Judge Perry "rightfully" found to be tantamount to domestic violence were clearly not. No reasonable person could characterize Adam having a private investigator follow Chalese on a limited basis to ensure she was not violating court orders as "domestic violence." 17 AA 3838; 21 AA 4630-31. No reasonable person could characterize Adam taking vacation time pursuant to a Parenting Plan as "depriving Chalese of her time" while also finding that Chalese's use of vacation time, even if she was not going out of town, constituted valid vacation time. 17 AA 3826; 21 AA 4493. No reasonable person could conclude that Adam entering the marital residence when he was an owner in it, there was no order giving Chalese exclusive possession, Chalese was out of town, and Adam went there

[1] A Mutual Behavior Order (MBO) was issued at the same hearing but Adam has not taken the position that the MBO addressed alcohol use or testing.

to retrieve Michael's medication constituted "domestic violence." 17 AA 3838.[2]

E. Judge Perry Erred in Finding Adam did not Financially Support Chalese

Adam addressed in his Fast Track Statement Judge Perry's erroneous finding that Adam did not financially support Chalese post-separation (with Judge Perry using same as a basis to claim Adam was harassing Chalese) when Adam in fact continued to voluntarily pay the mortgage and all utilities on the residence Chalese inhabited from November 2018 through March 2019 and until the property sold, all without a court order. 1 AA 174-84. While Chalese responds that Adam had to do so or else his nonpayment could be construed as waste, she misses the point that there was no court order requiring Adam to make the payments. By continuing to pay same on the marital residence that Chalese continued to inhabit, in addition to paying for his own residence, Chalese was able to use her income for her own personal bills and discretionary expenses.

F. Judge Perry Erred in Concluding Adam Micromanaged Chalese

While Chalese tries to rationalize Judge Perry's belief that Adam attempted to "micromanage" Chalese's parenting, she does not cite to any rational basis for same on Judge Perry's part. As stated in his Fast Track Statement, Adam continued

[2] Further, Chalese did not have exclusive possession of the marital residence when Adam entered it as Chalese wrongly states in her Response. FTR at page 8. Adam entered the marital residence in January 2019 and while Chalese requested an order for exclusive possession of the marital residence, the district court never issued an order prior to the sale of the home.

owning the marital residence post-separation and there was no order giving Chalese exclusive possession. FTS at pages 4-5. Adam was only outside the marital residence post-separation to pick up the children or his personal property. FTS at pages 14-15. Adam was entitled under the law to have a PI track the parties' vehicle to confirm Chalese was conforming with the district court's temporary orders. 10 AA 2206. Hence, Judge Perry interpreting said actions to constitute "micromanaging" of Chalese by Adam and base custody on same, was an abuse of discretion.

G. Judge Perry Erred in Disregarding Dr. Paglini's Testimony

Chalese argues that Judge Perry was warranted in disregarding Dr. Paglini's 66-page child custody report because she believed he did not address the concept of "gatekeeping. FTR at page 10. While Dr. Paglini did not include a provision in his report titled "Gatekeeping," he addressed gatekeeping and the examples of gatekeeping Chalese included in her Response. FTR at page 11. Dr. Paglini addressed Adam's abilities as a father and his ability to co-parent. Specifically, Dr. Paglini found Adam to be a good co-parent who communicated with Chalese and cooperated in adjusting the childcare schedule. PTE 202 at 58-66. Dr. Paglini also did not find that Adam made derogatory statements about Chalese to the children nor that Adam micromanaged Chalese.

H. Judge Perry Erred in Failing to Address How Josh's Behavior Affected the Children's Best Interests and in Not Extending Trial to Adjudicate Same

Chalese argues that because she and Josh allegedly broke up following her

representation that Josh committed domestic violence against her on March 13, 2022, Judge Perry was relieved from determining at trial whether Josh being around and caring for the children was in their bests interests. FTR at page 12. However, when asked by Judge Perry on April 14, 2022 if Chalese would be taking Josh back following the domestic violence incident, Chalese answered, "I don't have a definitive answer at this time…I'm not sure at this moment." 22 AA 4775-76. Adam also presented evidence that Chalese had previously broken up with Josh during the divorce due to domestic violence but that Chalese nevertheless reconciled with Josh. In fact, Chalese's March 16, 2022 Motion specifically asked for the district court to take additional evidence on the issue "before the Findings of Fact and Conclusions of Law are issued." 16 AA 3611. Chalese even represented that the allegations against Josh are "serious" and Josh's behavior "was alarming." 16 AA 3610. Chalese therefore cannot now take a position in the appeal contrary to the one she took at trial.[3]

Such evidence clearly evidences that a best interest analysis regarding Josh's involvement in the children's lives was ripe and required pursuant to NRS 125C.0035(4)(g). Child custody matters must be decided on the merits in light of the

[3] *Garaventa v. Gardella*, 63 Nev. 304, 169 P.2d 540 (1946).

courts' mandates to serve children's best interest.[4] Furthermore, not addressing the threat by Josh to the children's welfare during trial would be tantamount to an impermissible bifurcation and result in an incomplete adjudication of custody. It would also potentially result in a custody order in violation of *McMonigle v. McMonigle* and *Castle v. Simmons* and a heightened change of custody standard post-judgment.[5]

II. Chalese Admits that Judge Perry Erred in Calculating Child Support

In her Reply, and without realizing it, Chalese substantiates Adam's position that Judge Perry erred in calculating Adam's child support. Judge Perry found Adam's gross monthly income (GMI) to be $9,799. 17 AA 3854. $9,799 per month comes out to $117,588 per year. Chalese, however, cites to Adam's trial testimony that his gross yearly income was approximately $94,000. 22 AA 4569. Chalese supports this figure by referencing Adam's pay stubs as follows:

> A review of Adam's paystubs, filed March 4, 2022 (22AA 3601), it shows Adam is paid $3,618.40 gross twice a month. Divide that by 2 and multiply by 52 (which are the number of weeks in a year), Adam earns $94,078.40 per year, as he estimated under oath.
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> FTR at page 14.

For some unknown reason though, Chalese stops her analysis of Adam's GMI there

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[4] *Blanco v. Blanco*, 129 Nev. 723, 311 P.3d 1170 (2013); *Price v. Dunn*, 106 Nev. 100, 787 P.2d 785 (1990).

[5] *McMonigle v. McMonigle*, 110 Nev. 1407, 887 P.2d 742 (1994)(reversed on other grounds); *Castle v. Simmons*, 120 Nev. 98, 86 P.3d 1042 (2004); See also *Romano v. Romano*, 138 Nev. Adv. Rep. 1, 501 P.3d 980 (2022).

and inexplicably fails to calculate Adam's yearly income of $94,078.40 over 12 months as is required. $94,078.40 divided over 12 months comes out to $7,839.86 per month, not the $9,799 per month Judge Perry incorrectly listed as Adam's GMI.

Therefore, and applying Adam's actual GMI of $7,839.86 and Chalese's GMI of $2,377 to the NAC 425.155(3) formula, Adam's child support for the two children comes out to $999.44 per month, not the $1,214.75 Judge Perry stated in the Decree.

III. Chalese Admits that Judge Perry's Order that Adam is 65% Responsible for the Children's Medical, Educational, and Extracurricular Costs is Not Based on Specific Findings

Chalese does not contest that Judge Perry was required to make specific findings in support of her order requiring Adam to pay 65% of the children's medical, educational, and extracurricular expenses. Instead, Chalese argues that Judge Perry's reference to a "disparity in income" in the medical expense section of the Decree constituted a sufficient finding for that section and that it "was evident" that the same reason was applied to the educational and extracurricular sections. Such a position is not consistent with Nevada law.

NAC 425.135(1)(b) requires that orders addressing funds for medical support of children must be based on "details relating to that requirement." Specific findings are also required in relation to monetary awards for the care of minor children, including those under NAC 425.150.[6] Said findings cannot just be sufficient but

[6] *Malkulak v. Davis*, 138 Nev. Adv. Rep. 61, 516 P.3d 667 (2022).

rather must be substantial.[7] Further, "[e]ven if the record reveals the district court's reasoning for the deviation, the court must **expressly** set forth its findings of fact to support its decision."[8] It is also "not enough to simply process a case through a list of statutory factors and then announce a ruling. Rather, the district court's decree or order must be tied to the underlying factual findings.[9]

Judge Perry's reliance on just stating that there is a "disparity in income" in making Adam 65% responsible for the children's medical expenses is not sufficient as it does not establish how this factor is related to the parties' financial positions. For example, Judge Perry does not state that Chalese is unable to afford her portion of the expenses nor that she is shouldering some other expense. Judge Perry's reason is not detailed and does not list any applicable factors under NAC 425.150(1). Without specifics and details, Judge Perry's Order is an abuse of discretion.

Likewise, Judge Perry does not provide a specific reason for why she is making Adam 65% responsible for the children's schooling and extracurricular expenses. Chalese's claim that the reason is "evident" and "obvious" from the fact Judge Perry made a similar division arguably based on disparity in income in the

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[7] *Miller v. Miller*, 134 Nev. 120, 125, 412 P.3d 1081, 1085 (2018); *Hargrove v. Ward*, 506 P.3d 329, 331 (2022); *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009).

[8] Emphasis added. See *Jackson v. Jackson*, 111 Nev. 1551, 1553, 907 P.2d 990 (1995).

[9] *Davis v. Ewalefo*, 131 Nev. 445, 451, 352 P.3d 1139, 1143 (2021).

medical expense section is not sufficient. FTR at pages 14-15. Reasons for payment of child expenses / deviations must be expressly stated.[10] Further, undermining Chalese's argument that Judge Perry's order is obvious and evident is the fact Judge Perry made the parties equally responsible for the children's school supplies instead of making a 65% / 35% division of them like she did with the other support orders. Therefore, Judge Perry's ruling should be reversed.

IV. Substantial Law Supports that Adam's Separate Property is not Available for the Payment of Attorney's Fees

Adam is at a loss in response to Chalese's claim that he did not provide any Nevada law in support of the fact attorney's fees are community in nature. He expressly did so via *Wolff v. Wolff*[11] *and Northwest Fin. v. Lawver*.[12] Adam also provided supporting authority from other jurisdictions as well (which Chalese notably does not refute or challenge). At any rate, Adam fails to see how his argument that the district court cannot, as part of the divorce, directly award Chalese an asset it has no jurisdiction over is not cogent as to Chalese claims. Nevada courts are without jurisdiction to award the separate property of one spouse to the other or to the children except specifically for support purposes (which must be expressly ruled on). NRS 125.140(5). Hence, Judge Perry was barred from awarding Adam's

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[10] *Jackson*, 111 Nev. at 1553.

[11] *Wolff v. Wolff*, 112 Nev. 1355, 1361, 929 P.2d 916, 920 (1996).

[12] *Northwest Fin. V. Lawver*, 109 Nev. 242, 246, 849 P.2d 324, 326 (1993)

separate property to Chalese as and for attorney's fees.

V. Judge Perry Made No Findings in Support of Awarding Chalese a Survivorship Interest in Adam's PERS or in Making Adam Responsible for the Survivorship Premiums

Chalese argues that Adam's survivorship right in his PERS benefits is a marital asset. However, the Nevada Supreme Court held in *Henson v. Henson* that "Nevada does not consider a survivorship interest to be a community property asset and, as such, … does not also entitle the nonemployee spouse to survivor benefits."[13] However, NRS 125.150(1)(b) requires a district court to make specific findings when a final division is not equal. This means that the district court was required to provide findings as to why Adam must provide Chalese a survivorship interest, as well as payment of the survivorship premiums—something Judge Perry did not.

VI. Judge Perry Did Not Provide Sufficient Findings in Awarding Chalese ALL of her Attorney's Fees and Costs

A. A Request for Attorney's Fees MUST be made by Motion Under NRCP 54

NRCP 54 specifically states that, "A claim for attorney's fees ***must*** be made by motion…" Further, the rule requires a filing party to "specify the judgment and the statute, rule, or other grounds entitling the movant to the award." *Id.* Hence, an award of fees under EDCR 7.60(b) and a disparity of income under *Wright v.*

[13] *Henson v. Henson*, 130 Nev. 814, 815-16, 334 P.3d 933, 934 (2014); *see also Holguin v. Holguin*, 2021 Nev. Unpub. LEXIS 561, 491 P.3d 735 (2021).

Osburn[14] had to be made via a Rule 54 motion.

B. Adam was Denied Due Process Rights in Regard to Attorney's Fees

Adam was entitled to know at the conclusion of Trial on March 3, 2023, how the district court wished to proceed in regard to requests for attorney's fees. The district court did not reference this, only mentioning that the parties could submit their Closing Arguments via Briefs. 22 AA 4764. There was no order by Judge Perry for or reference to *Brunzell* Affidavits or Memoranda nor the right to file an opposition to any submitted. "Due process requires that notice be given before a party's substantial rights are affected."[15] Adam therefore relied on this lack of direction by Judge Perry to presume the district court would order the parties to submit NRCP 54 motions to address all requests for fees and costs after she had issued a decision.

C. Judge Perry Erred in Failing to Properly Consider the *Brunzell* Factors

Chalese does not provide a specific citation establishing that Judge Perry sufficiently considered the *Brunzell* factors nor that any consideration is supported by substantial evidence. Instead, Chalese just references to Judge Perry stating that she did. FTR at page 3. Further, Judge Perry simply referencing that Chalese's attorneys submitted Memorandum of Fees & Costs was insufficient for said purpose.

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[14] *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998).

[15] *Weise v. Granata*, 110 Nev. 1410, 1412, 887 P.2d 744, 745 (1994).

Judge Perry was required to set out and analyze the four *Brunzell* factors and she did not.

D. Judge Perry Awarded Fees and Costs Based on an Overly Broad and Unsupported Characterization of Adam's Conduct During the Case

Chalese provides nothing in her Response evidencing Judge Perry based her award of attorney's fees and costs on anything other than biased and vague overstatements concerning Adam's behavior in the case. Chalese makes a weak effort to do so by referencing Judge Perry's "chronicling" the parties' motion practice. 17 AA 3816-18. However, she does not address how Adam's motions were based on violations of Judge Moss' Orders. Chalese also does not address Judge Perry taking into consideration Chalese's numerous motions that were denied by Judge Moss (and a few by Judge Perry herself).

E. Judge Perry Failed to Properly Consider NRS 18.010

Chalese references in her Response that attorney's fees based on NRS 18.010 are permissible but did not address Judge Perry's failure to set forth exactly how Chalese prevailed on a majority of issues or that Adam's position at trial was maintained without reasonable grounds.

F. The Ruling in *Logan v. Abe* does not Apply to this Matter

In her analysis of the decision in *Logan v. Abe*, Chalese completely ignores that the Respondent's request for fees in that case was based on a successful offer of judgment under NRCP 68(f)(2), thereby ***requiring*** the Appellant to pay

Respondent's fees and costs. Chalese's reliance on *Healthcare Corp. v. Lomelo*[16] is similarly flawed as that federal case also involved a party that was insured.

As to the matter in this case, Chalese provides no law holding that a non-insured party who has their fees voluntarily paid by a third party is entitled to an award of attorney's fees as a prevailing party. Further, such a result could be against public policy: if Chalese receives an award of attorney's fees despite her mother voluntarily paying for same and just keeps the funds, she will essentially receive a windfall. This is because prevailing party fees arise out of the principle that a person be made whole for having to spend money to defend their positions—which Chalese did not do. Also, when a person is a prevailing party, the district courts must still consider all of the *Brunzell* factors, which includes their financial situation. By logical extension, a third party who voluntarily pays for a litigant's fees would need to undergo the same analysis. Such a concept is wholly unworkable.

DATED Tuesday, February 14, 2023.

Respectfully Submitted,

THE ABRAMS & MAYO LAW FIRM

/s/ Vincent Mayo, Esq.
Vincent Mayo, Esq.
Nevada State Bar Number: 8564
6252 South Rainbow Blvd., Suite 100
Las Vegas, Nevada 89118
Attorney for Appellant

[16] *Healthcare Corp. v. Lomelo* 929 F.2d 633, 639 (11th Cir. 1991).

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this reply to 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:

[x] It has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in font-size 14 of Times New Roman; or

[ ] It has been prepared in a monospaced typeface using Microsoft Word 2010 with 10 ½ characters per inch of Courier New.

2. I further certify that this reply to fast-track response complies with the page-volume limitations of NRAP 3E(d)(1), or the type-volume limitations of NRAP 3E(e)(2), because it is either:

[x] Proportionately spaced, has a typeface of 14 points or more, and contains _____; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

[ ] Does not exceed 15 pages.[17]

3. Finally, I recognize that pursuant to NRAP 3E, I am responsible for filing a timely reply to fast-track response and that this Court may sanction an

[17] Pursuant to this Court's January 31, 2023, order, the page limitation of this reply to fast-track response was enlarged to no more than 15 pages.

attorney for failing to file a timely reply to fast-track response e or failing to cooperate fully with appellate counsel during the course of an appeal. I, therefore, certify that the information provided in this reply to fast-track response is true and complete to the best of my knowledge, information, and belief.

DATED Tuesday, February 14, 2023.

Respectfully Submitted,

THE ABRAMS & MAYO LAW FIRM

/s/ Vincent Mayo, Esq.
Vincent Mayo, Esq.
Nevada State Bar Number: 8564
6252 South Rainbow Blvd., Suite 100
Las Vegas, Nevada 89118
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Reply to Fast-track Response* was filed electronically with the Clerk of the Court of Appeals of Nevada in the above-entitled matters on Tuesday, February 14, 2023. Electronic service of the foregoing document shall be made in accordance with the Master Service List, pursuant to NEFCR 9, as follows:

Alex Ghibaudo, Esq.
Michancy Cramer, Esq.
Attorneys for Respondent

/s/ David J. Schoen, IV, ACP
An employee of The Abrams & Mayo Law Firm