

Effects on Custody After Fleeing Domestic Violence

Sponsored by Legal Aid Center of Southern Nevada

Willick Law Group

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Effects on Custody after Fleeing Domestic Violence

Welcome/Intro:

Melanie Kushnir, Esq., Pro Bono Project Director, Legal Aid Center

Presenters:

The Honorable Robert Teuton, Family Court, Department D
Marshal Willick, Esq., Willick Law Group

Topics:

- *Does the act of fleeing domestic violence rebut the presumption of parental abduction?*
- *Can a protection order from a state court confer home state jurisdiction even if the child has lived there less than six months?*
- *How does domestic violence impact relocation where paternity has not been established and no court orders for custody exist?*
- *Can a fleeing domestic violence victim be deemed to have denied the other parent contact even if the child has lived there less than six months?*
- *What are the effects on litigation under the Hague Convention regarding international child abduction?*

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BIOGRAPHIES

HON. ROBERT “BOB” TEUTON is a judge in the Family Division of the Nevada Eighth Judicial District Court, Department D. He was appointed by Governor Gibbons in 2008. Judge Teuton was a member of the Board of Directors of WECAN (Working to Eliminate Child Abuse and Neglect) and a founding board member of Classroom on Wheels (COW). He is currently a member of the Honorary Board of Directors for the Nevada Partnership for Homeless Youth and Community Outreach Medical Center. He is also a member of the Board of Directors for the East Valley Family Services. He was a past member of the Southern Nevada State Bar Disciplinary Committee and was a member of the Supreme Court of Nevada Committee to Eliminate Racial, Gender and Economic Bias. Bob was also a member of the Supreme Court of Nevada’s Urban Court Workload Assessment Committee and Judicial Assessment. Bob is married and has two teenage children.

MARSHAL WILICK is the principal of the Willick Law Group, an A/V rated Family Law firm in Las Vegas, Nevada, and practices in trial and appellate Family Law. He is a Certified Family Law Specialist, a Fellow of both the American and International Academies of Matrimonial Lawyers, former Chair of the Nevada Bar Family Law Section and former President of the Nevada chapter of the AAML. He has authored many books and articles on Family Law and retirement benefits issues, and was managing editor of the Nevada Family Law Practice Manual.

In addition to litigating trial and appellate cases in Nevada, Mr. Willick has participated in hundreds of divorce and pension cases in the trial and appellate courts of other states, and in the drafting of various state and federal statutes in the areas of pensions, divorce, and property division. He has chaired several Committees of the American Bar Association Family Law

Section, AAML, and Nevada Bar, has served on many more committees, boards, and commissions of those organizations, and has been called on to sometimes represent the entire ABA in Congressional hearings on military pension matters. He has served as an alternate judge in various courts, and frequently testifies as an expert witness. He serves on the Board of Directors for the Legal Aid Center of Southern Nevada.

OUTLINE

EFFECTS ON CUSTODY AFTER FLEEING DOMESTIC VIOLENCE

I. Overview of the Role of Domestic Violence in Family Law

A. Definitions of domestic violence, kidnaping/abduction, abuse/neglect etc.

1. NRS 33.018.
2. NRS 200.310-200.340, 200.359.
3. NRS 432B.020.

B. Custody

1. Initial custody awards

a. NRS 125.480.

- (1) 125.480(1) & (j) & (k) (abuse/neglect of a child, sibling of child, or DV against the child, a parent of the child, or any other person residing with the child).
- (2) 125.480(5)-(6) (domestic violence allegation, findings, and resulting presumptions).

b. NRS 125C.230 (presumptions after domestic violence).

c. NRS 125.465 (joint custody for married parents); NRS 126.031 (primary custody for out-of-wedlock births).

d. *Russo v. Gardner*, 114 Nev. 283, 956 P.2d 98 (1998) (DV impact on paternity/custody orders).

2. Modifications of custody

a. *McDermott v. McDermott*, 113 Nev. 1134, 946 P.2d 177 (1997) (criminal conviction is per se proof of DV per NRS 33.018 and therefore triggers the presumption of NRS 125.480).

b. *Castle v. Simmons*, 120 Nev. 98, 86 P.3d 1042 (2004) (in evaluating whether factual circumstances have changed, the district court may consider facts that were previously unknown to the court or a party,

even if the facts predate the support order at issue; a parent may present evidence of child abuse that occurred before the entry of the last child custody order because of the presumption that physical custody with an abusive parent is not in the best interest of the child).

- c. *Mack-Manley v. Manley*, 122 Nev. 849, 138 P.3d 525 (2006) (notwithstanding Huneycutt, the district court always has jurisdiction “to make short-term, temporary adjustments to the parties’ custody arrangement, on an emergency basis to protect and safeguard a child’s welfare and security”; despite appeal, a district court has jurisdiction to rule on contempt because a lower court has the power to enforce its orders while an order is on appeal).

C. Visitation

- 1. NRS 125.480(4)(c)-(e) & denial of contact allegations where DV is alleged.

D. Child & Spousal Support

- 1. Less or no contact with child as upward deviation factor.
- 2. *Rodriguez v. Rodriguez*, 116 Nev. 993, 13 P.3d 415 (2000) (alimony is “no fault” in Nevada; misconduct or fault may not be considered when considering an award of alimony; however, “repetitive acts of physical or mental abuse” by one spouse “against the other, causing a condition in the injured spouse which generates expense or affects that person’s ability to work,” allows consideration of the resulting condition “in two ways: first, as a compelling reason to make an unequal distribution of property or second, without considering evidence of fault or misconduct, the court in deciding alimony will, per Buchanan, take that spouse’s physical and mental condition into account when examining his or her financial condition, health and ability to work”).

E. Relocations

- 1. 125C.200
- 2. Where there is a court order
- 3. Where there is no court order
- 4. Where no paternity has been established

5. NRS 125.510; bonds & *Pearson v. Dist. Ct.* (district court, having concluded that threshold for conducting relocation hearing has been satisfied, may not condition hearing on the posting of a bond).
6. *Hayes v. Gallacher*, 115 Nev. 1, 972 P.2d 1138 (1999) (district court's failure to address NRS 125.480(4), which requires consideration of domestic violence, given the Mother's obtaining of a Temporary Protective Order against the Father).

F. Kidnaping

1. 125.480(1) (any act of abduction against the child or any other child).
2. 125.480(7) (kidnaping allegation, findings, and resulting presumptions).
3. NRS 125C.240 (presumptions after abduction).
4. NRS ch. 125D.
5. SB 57 modifications to law:
 - a. Children's Advocate of A.G.
 - b. Hearings after warrants issue.

G. Protective orders

H. Other Resources

1. Local:
 - a. Safe Nest.
 - b. Safe House.
 - c. Other?
2. Battered Women's Justice Project.
3. Resource Center on DV from NCJFCJ.
4. Legal Resource Center on Violence Against Women.
5. WomensLaw.org.

6. HagueDV Project.

II. Jurisdictional Issues

A. TPOs & the UCCJEA

1. The limits of “emergency jurisdiction” under the UCCJEA.
2. Initial Child Custody Jurisdiction.
3. Child Custody Modification Jurisdiction.

B. Home State Status before 6 months

C. Hague Convention/ICARA – action to proceed in place of child’s location at moment of filing

III. Mechanical, Attorney, & Judicial Issues

A. Conflicting presumptions as to abduction & domestic violence

1. The process of how claims get before the court.
2. The judicial function – what is evaluated, and when.
3. Mechanics of pick-up orders, start to finish.

B. *Love v. Love*, 114 Nev. 572, 959 P.2d 523 (1998) (balancing “weightier” presumptions); discretionary? Subjective?

C. What an attorney should advise a client

1. If there has been a domestic violence allegation.
2. If there has been a TPO issued.
3. If an alleged victim shows up here from elsewhere.

D. Relocation Impacts (substantive and procedural)

1. Flight with children to, or from, NV.

IV. International Effects

- A. Ramifications of allegations or proof of domestic violence on Petitions for Return
- B. Grave Risk Defenses and DV allegations

STATUTES AND CASE LAW

EFFECTS ON CUSTODY AFTER FLEEING DOMESTIC VIOLENCE

NRS 33.018 Acts which constitute domestic violence.

1. Domestic violence occurs when a person commits one of the following acts against or upon the person's spouse or former spouse, any other person to whom the person is related by blood or marriage, any other person with whom the person is or was actually residing, any other person with whom the person has had or is having a dating relationship, any other person with whom the person has a child in common, the minor child of any of those persons, the person's minor child or any other person who has been appointed the custodian or legal guardian for the person's minor child:

- (a) A battery.
- (b) An assault.
- (c) Compelling the other person by force or threat of force to perform an act from which the other person has the right to refrain or to refrain from an act which the other person has the right to perform.
- (d) A sexual assault.
- (e) A knowing, purposeful or reckless course of conduct intended to harass the other person. Such conduct may include, but is not limited to:
 - (1) Stalking.
 - (2) Arson.
 - (3) Trespassing.
 - (4) Larceny.
 - (5) Destruction of private property.
 - (6) Carrying a concealed weapon without a permit.
 - (7) Injuring or killing an animal.
- (f) A false imprisonment.
- (g) Unlawful entry of the other person's residence, or forcible entry against the other person's will if there is a reasonably foreseeable risk of harm to the other person from the entry.

2. As used in this section, "dating relationship" means frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement. The term does not include a casual relationship or an ordinary association between persons in a business or social context.

2. Definition of Kidnapping/ Abduction

NRS 200.310 Degrees.

1. A person who willfully seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or

carries away a person by any means whatsoever with the intent to hold or detain, or who holds or detains, the person for ransom, or reward, or for the purpose of committing sexual assault, extortion or robbery upon or from the person, or for the purpose of killing the person or inflicting substantial bodily harm upon the person, or to exact from relatives, friends, or any other person any money or valuable thing for the return or disposition of the kidnapped person, and a person who leads, takes, entices, or carries away or detains any minor with the intent to keep, imprison, or confine the minor from his or her parents, guardians, or any other person having lawful custody of the minor, or with the intent to hold the minor to unlawful service, or perpetrate upon the person of the minor any unlawful act is guilty of kidnapping in the first degree which is a category A felony.

2. A person who willfully and without authority of law seizes, inveigles, takes, carries away or kidnaps another person with the intent to keep the person secretly imprisoned within the State, or for the purpose of conveying the person out of the State without authority of law, or in any manner held to service or detained against the person's will, is guilty of kidnapping in the second degree which is a category B felony.

NRS 200.320 Kidnapping in first degree: Penalties. A person convicted of kidnapping in the first degree is guilty of a category A felony and shall be punished:

1. Where the kidnapped person suffers substantial bodily harm during the act of kidnapping or the subsequent detention and confinement or in attempted escape or escape therefrom, by imprisonment in the state prison:

(a) For life without the possibility of parole;

(b) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 15 years has been served; or

(c) For a definite term of 40 years, with eligibility for parole beginning when a minimum of 15 years has been served.

2. Where the kidnapped person suffers no substantial bodily harm as a result of the kidnapping, by imprisonment in the state prison:

(a) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 5 years has been served; or

(b) For a definite term of 15 years, with eligibility for parole beginning when a minimum of 5 years has been served.

NRS 200.330 Kidnapping in second degree: Penalties. A person convicted of kidnapping in the second degree is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 15 years, and may be further punished by a fine of not more than \$15,000.

NRS 200.340 Penalty for aiding or abetting.

1. A person who aids and abets kidnapping in the first degree is guilty of a category A felony and shall be punished for kidnapping in the first degree as provided in [NRS 200.320](#).

2. A person who aids and abets kidnapping in the second degree is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 15 years.

NRS 200.359 Detention, concealment or removal of child from person having lawful custody or from jurisdiction of court: Penalties; limitation on issuance of arrest warrant; restitution; exceptions.

1. A person having a limited right of custody to a child by operation of law or pursuant to an order, judgment or decree of any court, including a judgment or decree which grants another person rights to custody or visitation of the child, or any parent having no right of custody to the child, who:

(a) In violation of an order, judgment or decree of any court willfully detains, conceals or removes the child from a parent, guardian or other person having lawful custody or a right of visitation of the child; or

(b) In the case of an order, judgment or decree of any court that does not specify when the right to physical custody or visitation is to be exercised, removes the child from the jurisdiction of the court without the consent of either the court or all persons who have the right to custody or visitation,

➔ is guilty of a category D felony and shall be punished as provided in [NRS 193.130](#).

2. A parent who has joint legal custody of a child pursuant to [NRS 125.465](#) shall not willfully conceal or remove the child from the custody of the other parent with the specific intent to deprive the other parent of the parent and child relationship. A person who violates this subsection shall be punished as provided in subsection 1.

3. If the mother of a child has primary physical custody pursuant to subsection 2 of [NRS 126.031](#), the father of the child shall not willfully conceal or remove the child from the physical custody of the mother. If the father of a child has primary physical custody pursuant to subsection 2 of [NRS 126.031](#), the mother of the child shall not willfully conceal or remove the child from the physical custody of the father. A person who violates this subsection shall be punished as provided in subsection 1.

4. Before an arrest warrant may be issued for a violation of this section, the court must find that:

(a) This is the home state of the child, as defined in [NRS 125A.085](#); and

(b) There is cause to believe that the entry of a court order in a civil proceeding brought pursuant to [chapter 125](#), [125A](#) or [125C](#) of NRS will not be effective to enforce the rights of the parties and would not be in the best interests of the child.

5. Upon conviction for a violation of this section, the court shall order the defendant to pay restitution for any expenses incurred in locating or recovering the child.

6. The prosecuting attorney may recommend to the judge that the defendant be sentenced as for a misdemeanor and the judge may impose such a sentence if the judge finds that:

(a) The defendant has no prior conviction for this offense and the child has suffered no substantial harm as a result of the offense; or

(b) The interests of justice require that the defendant be punished as for a misdemeanor.

7. A person who aids or abets any other person to violate this section shall be punished as provided in subsection 1.

8. This section does not apply to a person who detains, conceals or removes a child to protect the child from the imminent danger of abuse or neglect or to protect himself or herself from imminent physical harm, and reported the detention, concealment or removal to a law enforcement agency or an agency which provides child welfare services within 24 hours after detaining, concealing or removing the child, or as soon as the circumstances allowed. As used in this subsection:

(a) "Abuse or neglect" has the meaning ascribed to it in paragraph (a) of subsection 4 of [NRS 200.508](#).

(b) "Agency which provides child welfare services" has the meaning ascribed to it in [NRS](#)

432B.030.**3. Abuse/Neglect****NRS 432B.020 “Abuse or neglect of a child” defined.**

1. “Abuse or neglect of a child” means, except as otherwise provided in subsection 2:

- (a) Physical or mental injury of a nonaccidental nature;
- (b) Sexual abuse or sexual exploitation; or
- (c) Negligent treatment or maltreatment as set forth in NRS 432B.140,

of a child caused or allowed by a person responsible for the welfare of the child under circumstances which indicate that the child’s health or welfare is harmed or threatened with harm.

2. A child is not abused or neglected, nor is the health or welfare of the child harmed or threatened for the sole reason that:

(a) The parent of the child delivers the child to a provider of emergency services pursuant to NRS 432B.630, if the parent complies with the requirements of paragraph (a) of subsection 3 of that section; or

(b) The parent or guardian of the child, in good faith, selects and depends upon nonmedical remedial treatment for such child, if such treatment is recognized and permitted under the laws of this State in lieu of medical treatment. This paragraph does not limit the court in ensuring that a child receive a medical examination and treatment pursuant to NRS 62E.280.

3. As used in this section, “allow” means to do nothing to prevent or stop the abuse or neglect of a child in circumstances where the person knows or has reason to know that a child is abused or neglected.

Custody**NRS 125.480 Best interests of child; preferences; presumptions when court determines parent or person seeking custody is perpetrator of domestic violence or has committed act of abduction against child or any other child.**

1. In determining custody of a minor child in an action brought under this chapter, the sole consideration of the court is the best interest of the child. If it appears to the court that joint custody would be in the best interest of the child, the court may grant custody to the parties jointly.

2. Preference must not be given to either parent for the sole reason that the parent is the mother or the father of the child.

3. The court shall award custody in the following order of preference unless in a particular case the best interest of the child requires otherwise:

(a) To both parents jointly pursuant to NRS 125.490 or to either parent. If the court does not enter an order awarding joint custody of a child after either parent has applied for joint custody, the court shall state in its decision the reason for its denial of the parent's application.

(b) To a person or persons in whose home the child has been living and where the child has had a wholesome and stable environment.

(c) To any person related within the fifth degree of consanguinity to the child whom the court finds suitable and able to provide proper care and guidance for the child, regardless of whether the relative resides within this State.

(d) To any other person or persons whom the court finds suitable and able to provide proper care and guidance for the child.

4. In determining the best interest of the child, the court shall consider and set forth its specific findings concerning, among other things:

(a) The wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his or her custody.

(b) Any nomination by a parent or a guardian for the child.

(c) Which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent.

(d) The level of conflict between the parents.

(e) The ability of the parents to cooperate to meet the needs of the child.

(f) The mental and physical health of the parents.

(g) The physical, developmental and emotional needs of the child.

(h) The nature of the relationship of the child with each parent.

(i) The ability of the child to maintain a relationship with any sibling.

(j) Any history of parental abuse or neglect of the child or a sibling of the child.

(k) Whether either parent or any other person seeking custody has engaged in an act of domestic violence against the child, a parent of the child or any other person residing with the child.

(l) Whether either parent or any other person seeking custody has committed any act of abduction against the child or any other child.

5. Except as otherwise provided in subsection 6 or NRS 125C.210, a determination by the court after an evidentiary hearing and finding by clear and convincing evidence that either parent or any other person seeking custody has engaged in one or more acts of domestic violence against the child, a parent of the child or any other person residing with the child creates a rebuttable presumption that sole or joint custody of the child by the perpetrator of the domestic violence is not in the best interest of the child. Upon making such a determination, the court shall set forth:

(a) Findings of fact that support the determination that one or more acts of domestic violence occurred; and

(b) Findings 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.

6. If after an evidentiary hearing held pursuant to subsection 5 the court determines that each party has engaged in acts of domestic violence, it shall, if possible, then determine which person was the primary physical aggressor. In determining which party was the primary physical aggressor for the purposes of this section, the court shall consider:

(a) All prior acts of domestic violence involving either party;

(b) The relative severity of the injuries, if any, inflicted upon the persons involved in those prior acts of domestic violence;

(c) The likelihood of future injury;

(d) Whether, during the prior acts, one of the parties acted in self-defense; and

(e) Any other factors which the court deems relevant to the determination.

➤ In such a case, if it is not possible for the court to determine which party is the primary physical aggressor, the presumption created pursuant to subsection 5 applies to both parties. If it is possible for the court to determine which party is the primary physical aggressor, the presumption created pursuant to subsection 5 applies only to the party determined by the court to be the primary physical aggressor.

7. A determination by the court after an evidentiary hearing and finding by clear and convincing evidence that either parent or any other person seeking custody has committed any act of abduction against the child or any other child creates a rebuttable presumption that sole or joint custody or unsupervised visitation of the child by the perpetrator of the abduction is not in the best interest of the child. If the parent or other person seeking custody does not rebut the presumption, the court shall not enter an order for sole or joint custody or unsupervised visitation of the child by the perpetrator and the court shall set forth:

(a) Findings of fact that support the determination that one or more acts of abduction occurred; and

(b) Findings that the custody or visitation arrangement ordered by the court adequately protects the child and the parent or other person from whom the child was abducted.

8. For purposes of subsection 7, any of the following acts constitute conclusive evidence that an act of abduction occurred:

(a) A conviction of the defendant of any violation of [NRS 200.310](#) to [200.340](#), inclusive, or [200.359](#) or a law of any other jurisdiction that prohibits the same or similar conduct;

(b) A plea of guilty or nolo contendere by the defendant to any violation of [NRS 200.310](#) to [200.340](#), inclusive, or [200.359](#) or a law of any other jurisdiction that prohibits the same or similar conduct; or

(c) An admission by the defendant to the court of the facts contained in the charging document alleging a violation of [NRS 200.310](#) to [200.340](#), inclusive, or [200.359](#) or a law of any other jurisdiction that prohibits the same or similar conduct.

9. If, after a court enters a final order concerning custody of the child, a magistrate determines there is probable cause to believe that an act of abduction has been committed against the child or any other child and that a person who has been awarded sole or joint custody or unsupervised visitation of the child has committed the act, the court shall, upon a motion to modify the order concerning custody, reconsider the previous order concerning custody pursuant to subsections 7 and 8.

10. As used in this section:

(a) “Abduction” means the commission of an act described in [NRS 200.310](#) to [200.340](#), inclusive, or [200.359](#) or a law of any other jurisdiction that prohibits the same or similar conduct.

(b) “Domestic violence” means the commission of any act described in [NRS 33.018](#).

NRS 125C.230 Presumption concerning custody when court determines that parent or other person seeking custody of child is perpetrator of domestic violence.

1. Except as otherwise provided in [NRS 125C.210](#) and [125C.220](#), a determination by the court after an evidentiary hearing and finding by clear and convincing evidence that either parent or any other person seeking custody of a child has engaged in one or more acts of domestic violence against the

child, a parent of the child or any other person residing with the child creates a rebuttable presumption that sole or joint custody of the child by the perpetrator of the domestic violence is not in the best interest of the child. Upon making such a determination, the court shall set forth:

(a) Findings of fact that support the determination that one or more acts of domestic violence occurred; and

(b) Findings 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.

2. If after an evidentiary hearing held pursuant to subsection 1 the court determines that more than one party has engaged in acts of domestic violence, it shall, if possible, determine which person was the primary physical aggressor. In determining which party was the primary physical aggressor for the purposes of this section, the court shall consider:

(a) All prior acts of domestic violence involving any of the parties;

(b) The relative severity of the injuries, if any, inflicted upon the persons involved in those prior acts of domestic violence;

(c) The likelihood of future injury;

(d) Whether, during the prior acts, one of the parties acted in self-defense; and

(e) Any other factors that the court deems relevant to the determination.

➔ In such a case, if it is not possible for the court to determine which party is the primary physical aggressor, the presumption created pursuant to subsection 1 applies to each of the parties. If it is possible for the court to determine which party is the primary physical aggressor, the presumption created pursuant to subsection 1 applies only to the party determined by the court to be the primary physical aggressor.

3. As used in this section, “domestic violence” means the commission of any act described in [NRS 33.018](#)

Joint custody for married parents.

NRS 125.465 Married parents have joint custody until otherwise ordered by court. If a court has not made a determination regarding the custody of a child and the parents of the child are married to each other, each parent has joint legal custody of the child until otherwise ordered by a court of competent jurisdiction.

Primary custody for out of wedlock births

NRS 126.031 Relationship of parent and child not dependent on marriage; primary physical custody of child born out of wedlock.

1. The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.

2. Except as otherwise provided in a court order for the custody of a child:

(a) Except as otherwise provided in paragraph (b), the mother of a child born out of wedlock has

primary physical custody of the child if:

- (1) The mother has not married the father of the child; and
 - (2) A judgment or order of a court, or a judgment or order entered pursuant to an expedited process, determining the paternity of the child has not been entered.
- (b) The father of a child born out of wedlock has primary physical custody of the child if:
- (1) The mother has abandoned the child to the custody of the father; and
 - (2) The father has provided sole care and custody of the child in her absence.
3. For the purposes of this section, “abandoned” means failed, for a continuous period of not less than 6 weeks, to provide substantial personal and economic support.
4. As used in this section, “expedited process” has the meaning ascribed to it in [NRS 126.161](#).
(Added to NRS by 1979, 1270; A 1993, 1425; [1997, 2303](#))

NRS 125C.200 Consent required from noncustodial parent to remove child from State; permission from court; change of custody. If custody has been established and the custodial parent intends to move his or her residence to a place outside of this State and to take the child with him or her, the custodial parent must, as soon as possible and before the planned move, attempt to obtain the written consent of the noncustodial parent to move the child from this State. If the noncustodial parent refuses to give that consent, the custodial parent shall, before leaving this State with the child, petition the court for permission to move the child. The failure of a parent to comply with the provisions of this section may be considered as a factor if a change of custody is requested by the noncustodial parent.

(Added to NRS by 1987, 1444; A [1999, 737](#))

NRS 125.510 Court orders; modification or termination of orders; form for orders; court may order parent to post bond if parent resides in or has significant commitments in foreign country.

1. In determining the custody of a minor child in an action brought pursuant to this chapter, the court may, except as otherwise provided in this section, [NRS 125C.100](#) to [125C.185](#), inclusive, and [chapter 130](#) of NRS:

(a) During the pendency of the action, at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such an order for the custody, care, education, maintenance and support of the minor children as appears in their best interest; and

(b) At any time modify or vacate its order, even if the divorce was obtained by default without an appearance in the action by one of the parties.

↪ The party seeking such an order shall submit to the jurisdiction of the court for the purposes of this subsection. The court may make such an order upon the application of one of the parties or the legal guardian of the minor.

2. Any order for joint custody may be modified or terminated by the court upon the petition of one or both parents or on the court’s own motion if it is shown that the best interest of the child requires the modification or termination. The court shall state in its decision the reasons for the order of

modification or termination if either parent opposes it.

3. Any order for custody of a minor child or children of a marriage entered by a court of another state may, subject to the provisions of [NRS 125C.100](#) to [125C.185](#), inclusive, and to the jurisdictional requirements in [chapter 125A](#) of NRS, be modified at any time to an order of joint custody.

4. A party may proceed pursuant to this section without counsel.

5. Any order awarding a party a limited right of custody to a child must define that right with sufficient particularity to ensure that the rights of the parties can be properly enforced and that the best interest of the child is achieved. The order must include all specific times and other terms of the limited right of custody. As used in this subsection, “sufficient particularity” means a statement of the rights in absolute terms and not by the use of the term “reasonable” or other similar term which is susceptible to different interpretations by the parties.

6. All orders authorized by this section must be made in accordance with the provisions of [chapter 125A](#) of NRS and [NRS 125C.100](#) to [125C.185](#), inclusive, and must contain the following language:

PENALTY FOR VIOLATION OF ORDER: THE ABDUCTION, CONCEALMENT OR DETENTION OF A CHILD IN VIOLATION OF THIS ORDER IS PUNISHABLE AS A CATEGORY D FELONY AS PROVIDED IN [NRS 193.130](#). [NRS 200.359](#) provides that every person having a limited right of custody to a child or any parent having no right of custody to the child who willfully detains, conceals or removes the child from a parent, guardian or other person having lawful custody or a right of visitation of the child in violation of an order of this court, or removes the child from the jurisdiction of the court without the consent of either the court or all persons who have the right to custody or visitation is subject to being punished for a category D felony as provided in [NRS 193.130](#).

7. In addition to the language required pursuant to subsection 6, all orders authorized by this section must specify that the terms of the Hague Convention of October 25, 1980, adopted by the 14th Session of the Hague Conference on Private International Law, apply if a parent abducts or wrongfully retains a child in a foreign country.

8. If a parent of the child lives in a foreign country or has significant commitments in a foreign country:

(a) The parties may agree, and the court shall include in the order for custody of the child, that the United States is the country of habitual residence of the child for the purposes of applying the terms of the Hague Convention as set forth in subsection 7.

(b) Upon motion of one of the parties, the court may order the parent to post a bond if the court determines that the parent poses an imminent risk of wrongfully removing or concealing the child outside the country of habitual residence. The bond must be in an amount determined by the court and may be used only to pay for the cost of locating the child and returning the child to his or her habitual residence if the child is wrongfully removed from or concealed outside the country of habitual residence. The fact that a parent has significant commitments in a foreign country does not create a presumption that the parent poses an imminent risk of wrongfully removing or concealing the child.

9. Except where a contract providing otherwise has been executed pursuant to [NRS 123.080](#), the obligation for care, education, maintenance and support of any minor child created by any order entered pursuant to this section ceases:

- (a) Upon the death of the person to whom the order was directed; or
- (b) When the child reaches 18 years of age if the child is no longer enrolled in high school, otherwise, when the child reaches 19 years of age.

10. As used in this section, a parent has “significant commitments in a foreign country” if the parent:

- (a) Is a citizen of a foreign country;
- (b) Possesses a passport in his or her name from a foreign country;
- (c) Became a citizen of the United States after marrying the other parent of the child; or
- (d) Frequently travels to a foreign country.

NRS 125C.240 Presumption concerning custody when court determines that parent or other person seeking custody of child has committed act of abduction against child or any other child.

1. A determination by the court after an evidentiary hearing and finding by clear and convincing evidence that either parent or any other person seeking custody of a child has committed any act of abduction against the child or any other child creates a rebuttable presumption that sole or joint custody or unsupervised visitation of the child by the perpetrator of the abduction is not in the best interest of the child. If the parent or other person seeking custody does not rebut the presumption, the court shall not enter an order for sole or joint custody or unsupervised visitation of the child by the perpetrator and the court shall set forth:

- (a) Findings of fact that support the determination that one or more acts of abduction occurred; and
- (b) Findings that the custody or visitation arrangement ordered by the court adequately protects the child and the parent or other person from whom the child was abducted.

2. For purposes of subsection 1, any of the following acts constitute conclusive evidence that an act of abduction occurred:

(a) A conviction of the defendant of any violation of NRS 200.310 to 200.340, inclusive, or 200.359 or a law of any other jurisdiction that prohibits the same or similar conduct;

(b) A plea of guilty or nolo contendere by the defendant to any violation of NRS 200.310 to 200.340, inclusive, or 200.359 or a law of any other jurisdiction that prohibits the same or similar conduct; or

(c) An admission by the defendant to the court of the facts contained in the charging document alleging a violation of NRS 200.310 to 200.340, inclusive, or 200.359 or a law of any other jurisdiction that prohibits the same or similar conduct.

3. If, after a court enters a final order concerning custody of the child, a magistrate determines there is probable cause to believe that an act of abduction has been committed against the child or any other child and that a person who has been awarded sole or joint custody or unsupervised visitation of the child has committed the act, the court shall, upon a motion to modify the order concerning custody, reconsider the previous order concerning custody pursuant to subsections 1 and 2.

4. As used in this section, “abduction” means the commission of an act described in NRS 200.310 to 200.340, inclusive, or 200.359 or a law of any other jurisdiction that prohibits the same or similar conduct.

NRS 125D.010 Uniform Child Abduction Prevention Act.

NRS 125D.030 “Abduction” defined. “Abduction” means the wrongful removal or wrongful retention of a child.

NRS 125D.040 “Child” defined. “Child” means an unemancipated individual who is less than 18 years of age.

NRS 125D.050 “Child custody determination” defined. “Child custody determination” means a judgment, decree or other order of a court providing for the legal custody, physical custody or visitation with respect to a child. The term includes a permanent, temporary, initial and modification order.

NRS 125D.060 “Child custody proceeding” defined. “Child custody proceeding” means a proceeding in which legal custody, physical custody or visitation with respect to a child is at issue. The term includes a proceeding for divorce, dissolution of marriage, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights or protection from domestic violence.

NRS 125D.070 “Court” defined. “Court” means an entity authorized pursuant to the law of a state to establish, enforce or modify a child custody determination.

NRS 125D.080 “Petition” defined. “Petition” includes a motion or its equivalent.

NRS 125D.090 “Record” defined. “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

NRS 125D.100 “State” defined. “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe or nation.

NRS 125D.110 “Travel document” defined. “Travel document” means records relating to a travel itinerary, including travel tickets, passes, reservations for transportation or accommodations. The term does not include a passport or visa.

NRS 125D.120 “Wrongful removal” defined. “Wrongful removal” means the taking of a child that breaches rights of custody or visitation given or recognized pursuant to the law of this State.

NRS 125D.130 “Wrongful retention” defined. “Wrongful retention” means the keeping or concealing of a child that breaches rights of custody or visitation given or recognized pursuant to the law of this State.

NRS 125D.140 Applicability of other law. [NRS 125A.275](#), [125A.285](#) and [125A.295](#) apply to cooperation and communication among courts in proceedings pursuant to the provisions of this chapter.

ABDUCTION PREVENTION MEASURES

NRS 125D.150 Orders and petitions.

1. A court on its own motion may order abduction prevention measures in a child custody proceeding if the court finds that the evidence establishes a credible risk of abduction of the child.
2. A party to a child custody determination or another individual or entity having a right pursuant to the law of this State or any other state to seek a child custody determination for the child may file a petition seeking abduction prevention measures to protect the child pursuant to the provisions of this chapter.
3. A district attorney or the Attorney General acting pursuant to [NRS 125A.565](#) may seek a warrant to take physical custody of a child pursuant to [NRS 125D.200](#) or other appropriate abduction prevention measures.

NRS 125D.160 Jurisdiction.

1. A petition pursuant to the provisions of this chapter may be filed only in a court that has jurisdiction to make a child custody determination with respect to the child at issue pursuant to the provisions of [chapter 125A](#) of NRS.
2. A court of this State has temporary emergency jurisdiction pursuant to [NRS 125A.335](#) if the court finds a credible risk of abduction.

NRS 125D.170 Contents of petition for abduction prevention order. A petition pursuant to the provisions of this chapter must be verified and include a copy of any existing child custody determination, if available. The petition must specify the risk factors for abduction, including the relevant factors described in [NRS 125D.180](#). Subject to subsection 5 of [NRS 125A.385](#), if reasonably ascertainable, the petition must contain:

1. The name, date of birth and gender of the child;
2. The customary address and current physical location of the child;
3. The identity, customary address and current physical location of the respondent;
4. A statement of whether a prior action to prevent abduction or domestic violence has been filed by a party or other individual or entity having custody of the child, and the date, location and disposition of the action;
5. A statement of whether a party to the proceeding has been arrested for a crime related to domestic violence, stalking, or child abuse or neglect, and the date, location and disposition of the case; and
6. Any other information required to be submitted to the court for a child custody determination pursuant to [NRS 125A.385](#).

NRS 125D.180 Evidence considered in determining credible risk of abduction.

1. In determining whether there is a credible risk of abduction of a child, the court shall consider any evidence that the petitioner or respondent:

- (a) Has previously abducted or attempted to abduct the child;
- (b) Has threatened to abduct the child;
- (c) Has recently engaged in activities that may indicate a planned abduction, including:
 - (1) Abandoning employment;
 - (2) Selling a primary residence;
 - (3) Terminating a lease;
 - (4) Closing bank or other financial management accounts, liquidating assets, hiding or destroying financial documents, or conducting any unusual financial activities;
 - (5) Applying for a passport or visa or obtaining travel documents for the respondent, a family member or the child; or
 - (6) Seeking to obtain the child's birth certificate or school or medical records;
- (d) Has engaged in domestic violence, stalking, or child abuse or neglect;
- (e) Has refused to follow a child custody determination;
- (f) Lacks strong familial, financial, emotional or cultural ties to the State or the United States;
- (g) Has strong familial, financial, emotional or cultural ties to another state or country;
- (h) Is likely to take the child to a country that:
 - (1) Is not a party to the Hague Convention on the Civil Aspects of International Child Abduction and does not provide for the extradition of an abducting parent or for the return of an abducted child;
 - (2) Is a party to the Hague Convention on the Civil Aspects of International Child Abduction but:
 - (I) The Hague Convention on the Civil Aspects of International Child Abduction is not in force between the United States and that country;
 - (II) Is noncompliant according to the most recent compliance report issued by the United States Department of State; or
 - (III) Lacks legal mechanisms for immediately and effectively enforcing a return order pursuant to the Hague Convention on the Civil Aspects of International Child Abduction;
- (3) Poses a risk that the child's physical or emotional health or safety would be endangered in the country because of specific circumstances relating to the child or because of human rights violations committed against children;
- (4) Has laws or practices that would:
 - (I) Enable the respondent, without due cause, to prevent the petitioner from contacting the child;
 - (II) Restrict the petitioner from freely traveling to or exiting from the country because of the petitioner's gender, nationality, marital status or religion; or
 - (III) Restrict the child's ability legally to leave the country after the child reaches the age of majority because of the child's gender, nationality or religion;
- (5) Is included by the United States Department of State on a current list of state sponsors of terrorism;
- (6) Does not have an official United States diplomatic presence in the country; or
- (7) Is engaged in active military action or war, including a civil war, to which the child may be exposed;
- (i) Is undergoing a change in immigration or citizenship status that would adversely affect the

respondent's ability to remain in the United States legally;

(j) Has had an application for United States citizenship denied;

(k) Has forged or presented misleading or false evidence on government forms or supporting documents to obtain or attempt to obtain a passport, a visa, travel documents, a social security card, a driver's license or other government-issued identification card or has made a misrepresentation to the United States Government;

(l) Has used multiple names to attempt to mislead or defraud; or

(m) Has engaged in any other conduct the court considers relevant to the risk of abduction.

2. In the hearing on a petition pursuant to the provisions of this chapter, the court shall consider any evidence that the respondent believed in good faith that the respondent's conduct was necessary to avoid imminent harm to the child or respondent and any other evidence that may be relevant to whether the respondent may be permitted to remove or retain the child.

3. If the court finds during the hearing on the petition that the respondent's conduct is intended to avoid imminent harm to the child or respondent, the court shall not issue an abduction prevention order.

NRS 125D.190 Order upon filing of petition; abduction prevention order after hearing; actions authorized to prevent imminent abduction; remedies not exclusive.

1. If a petition is filed pursuant to the provisions of this chapter, the court may enter an order that must include:

(a) The basis for the court's exercise of jurisdiction;

(b) The manner in which notice and opportunity to be heard were given to the persons entitled to notice of the proceeding;

(c) A detailed description of each party's custody and visitation rights and residential arrangements for the child;

(d) A provision stating that a violation of the order may subject the party in violation to civil and criminal penalties; and

(e) Identification of the child's country of habitual residence at the time of the issuance of the order.

2. Except as otherwise provided in subsection 3 of [NRS 125D.180](#), if, at a hearing on a petition pursuant to the provisions of this chapter or on the court's own motion, the court after reviewing the evidence finds a credible risk of abduction of the child, the court shall enter an abduction prevention order. The order must include the provisions required by subsection 1 and measures and conditions, including those in subsections 3, 4 and 5, that are reasonably calculated to prevent abduction of the child, giving due consideration to the custody and visitation rights of the parties. The court shall consider the age of the child, the potential harm to the child from an abduction, the legal and practical difficulties of returning the child to the jurisdiction if abducted, and the reasons for the potential abduction, including evidence of domestic violence, stalking, or child abuse or neglect.

3. An abduction prevention order may include one or more of the following:

(a) An imposition of travel restrictions that require that a party traveling with the child outside a designated geographical area provide the other party with the following:

- (1) The travel itinerary of the child;
- (2) A list of physical addresses and telephone numbers at which the child can be reached at specified times; and
- (3) Copies of all travel documents;
- (b) A prohibition of the respondent directly or indirectly:
 - (1) Removing the child from this State, the United States or another geographic area without permission of the court or the petitioner's written consent;
 - (2) Removing or retaining the child in violation of a child custody determination;
 - (3) Removing the child from school or a child care or similar facility; or
 - (4) Approaching the child at any location other than a site designated for supervised visitation;
- (c) A requirement that a party register the order in another state as a prerequisite to allowing the child to travel to that state;
- (d) With regard to the child's passport:
 - (1) A direction that the petitioner place the child's name in the United States Department of State's Child Passport Issuance Alert Program;
 - (2) A requirement that the respondent surrender to the court or the petitioner's attorney any United States or foreign passport issued in the child's name, including a passport issued in the name of both the parent and the child; and
 - (3) A prohibition upon the respondent from applying on behalf of the child for a new or replacement passport or visa;
- (e) As a prerequisite to exercising custody or visitation, a requirement that the respondent provide:
 - (1) To the United States Department of State's Office of Children's Issues and to the relevant foreign consulate or embassy, an authenticated copy of the order detailing passport and travel restrictions for the child;
 - (2) To the court:
 - (I) Proof that the respondent has provided the information in subparagraph (1); and
 - (II) An acknowledgment in a record from the relevant foreign consulate or embassy that no passport application has been made, or passport issued, on behalf of the child;
- (3) To the petitioner, proof of registration with the United States Embassy or other United States diplomatic presence in the destination country and with the Central Authority for the Hague Convention on the Civil Aspects of International Child Abduction, if that Convention is in effect between the United States and the destination country, unless one of the parties objects; and
- (4) A written waiver pursuant to the provisions of the Privacy Act, 5 U.S.C. § 552a, as amended, with respect to any document, application or other information pertaining to the child authorizing its disclosure to the court and the petitioner; and
- (f) Upon the petitioner's request, a requirement that the respondent obtain an order from the relevant foreign country containing terms identical to the child custody determination issued in the United States.

4. In an abduction prevention order, the court may impose conditions on the exercise of custody or visitation that:

- (a) Limit visitation or require that visitation with the child by the respondent be supervised until the court finds that supervision is no longer necessary, and order the respondent to pay the costs of

supervision;

(b) Require the respondent to post a bond or provide other security in an amount sufficient to serve as a financial deterrent to abduction, the proceeds of which may be used to pay for the reasonable expenses of recovery of the child, including reasonable attorney's fees and costs if there is an abduction; and

(c) Require the respondent to obtain education on the potentially harmful effects to the child from abduction.

5. To prevent imminent abduction of a child, a court may:

(a) Issue a warrant to take physical custody of the child pursuant to [NRS 125D.200](#) or the law of this State other than this chapter;

(b) Direct the use of law enforcement to take any action reasonably necessary to locate the child, obtain return of the child or enforce a custody determination pursuant to the provisions of this chapter or the law of this State other than this chapter; or

(c) Grant any other relief allowed pursuant to the law of this State other than this chapter.

6. The remedies provided in this chapter are cumulative and do not affect the availability of other remedies to prevent abduction.

NRS 125D.200 Ex parte warrant to take physical custody of child; remedies not exclusive.

1. If a petition pursuant to the provisions of this chapter contains allegations, and the court finds that there is a credible risk that the child is imminently likely to be wrongfully removed, the court may issue an ex parte warrant to take physical custody of the child.

2. The respondent on a petition pursuant to subsection 1 must be afforded an opportunity to be heard at the earliest possible time after the ex parte warrant is executed, but not later than the next judicial day unless a hearing on that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible.

3. An ex parte warrant pursuant to subsection 1 to take physical custody of a child must:

(a) Recite the facts upon which a determination of a credible risk of imminent wrongful removal of the child is based;

(b) Direct law enforcement officers to take physical custody of the child immediately;

(c) State the date and time for the hearing on the petition; and

(d) Provide for the safe interim placement of the child pending further order of the court.

4. If feasible, before issuing a warrant and before determining the placement of the child after the warrant is executed, the court may order a search of the relevant databases of the National Crime Information Center and similar state databases to determine if either the petitioner or respondent has a history of domestic violence, stalking, or child abuse or neglect.

5. The petition and warrant must be served on the respondent when or immediately after the child is taken into physical custody.

6. A warrant to take physical custody of a child, issued by this State or another state, is enforceable throughout this State. If the court finds that a less intrusive remedy will not be effective, it may authorize law enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances, the court may authorize law enforcement officers to make a forcible entry at any hour.

7. If the court finds, after a hearing, that a petitioner sought an ex parte warrant pursuant to

subsection 1 for the purpose of harassment or in bad faith, the court may award the respondent reasonable attorney's fees, costs and expenses.

8. This chapter does not affect the availability of relief allowed pursuant to the law of this State other than this chapter.

NRS 125D.210 Duration of abduction prevention order. An abduction prevention order remains in effect until the earliest of:

1. The time stated in the order;
2. The emancipation of the child;
3. The child's attaining 18 years of age; or
4. The time the order is modified, revoked, vacated or superseded by a court with jurisdiction pursuant to [NRS 125A.305](#), [125A.315](#) and [125A.325](#).

MISCELLANEOUS PROVISIONS

NRS 125D.220 Application and construction. In applying and construing the Uniform Child Abduction Prevention Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

NRS 125D.230 Relation to Electronic Signatures in Global and National Commerce Act. This chapter modifies, limits and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001 et seq., but does not modify, limit or supersede 15 U.S.C. § 7001(c), or authorize electronic delivery of any of the notices described in 15 U.S.C. § 7003(b).

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edges that the award for pain and suffering was supported by the record.

The majority opinion does claim that the evidence in *DeJesus* did not support the \$100,000.00 awarded as future medical expenses, but only \$21,000.00, as indicated by Flick's experts.⁴ This is correct, but the appropriate action in *DeJesus* would have been to strike the \$79,000.00 from the special damages award and let the rest of the verdict stand—not strike the entire verdict that was overwhelmingly supported by competent evidence.

Finally, the majority claims that the *DeJesus* verdict could only be explained by the inflammatory language used by Flick's attorney. This simply is not true. The evidence on damages was more than sufficient to support the verdict, with the exception of the excess damages awarded for future medical expenses. As explained in the *DeJesus* dissent, Flick was injured when DeJesus, in a rage, cut off the vehicle Flick was riding in and sent it crashing into the highway median.⁵ DeJesus then jumped onto the front hood of the car and pounded on the windshield, demanding that the two women come out.⁶ In addition to the damages evidence, DeJesus's road rage certainly helps explain why Flick was given full recovery for her injuries. As the *DeJesus* dissent began: "This is a case about the road rage conduct of Kenneth DeJesus that caused a substantial permanent brain injury to Sherry Flick."⁷ With liability admitted, it was probable that a sizeable verdict would have been returned regardless of the arguments of Flick's attorney.

By now stating that the damages awarded in *DeJesus* were not supported by the evidence and that the sole reason for the award was the improper remarks of counsel, the majority is repeating the same errors made in *DeJesus*, giving new viability to a decision that was thought to be rejected by a majority of the justices on this court.

4. *Id.* at 820, 7 P.3d at 464–65.

5. *Id.* at 823, 7 P.3d at 466 (Rose, C.J., dissenting).

I concur in all other aspects of the majority opinion.

MAUPIN, J., concurs.



**Carol CASTLE, f/k/a Carol
Simmons, Appellant,**

v.

Jon SIMMONS, Respondent.

No. 38989.

Supreme Court of Nevada.

April 1, 2004.

Background: Ex-wife appealed an order of the District Court, Fourth Judicial District Court, Elko County, J. Michael Memeo, J., modifying custody of parties' children from ex-wife to ex-husband.

Holdings: The Supreme Court, Maupin, J., held that:

- (1) clear and convincing evidence supported finding that ex-wife had committed acts of domestic violence against children;
- (2) changed circumstances doctrine does not apply when party seeking to change custody attempts to introduce evidence of domestic violence if moving party or court was unaware of existence or extent of conduct when court rendered its prior custody decision, overruling, *McMonigle v. McMonigle*, 110 Nev. 1407, 887 P.2d 742, *Hopper v. Hopper*, 113 Nev. 1138, 946 P.2d 171;
- (3) trial court appropriately considered ex-wife's pre-decree conduct in determining that modification in custody of chil-

6. *Id.* (Rose, C.J., dissenting).

7. *Id.* (Rose, C.J., dissenting).

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dren from ex-wife to ex-husband was warranted; and

- (4) ex-wife failed to rebut statutory presumption that person who has engaged in one or more acts of domestic violence should not be given custody of a child.

Affirmed.

1. Child Custody ⚖️921(1)

Unless there has been a clear abuse of discretion, the Supreme Court will not disturb, on appeal, a district court's determination of child custody.

2. Child Custody ⚖️456

Clear and convincing evidence supported finding that ex-wife had committed acts of domestic violence against children, for purposes of statute creating rebuttable presumption that person who has engaged in one or more acts of domestic violence should not be given custody of a child; ex-wife conceded that one very serious physical altercation had occurred with child, children reported instances of kicking, punching, and administration of beatings with a hairbrush, and at least one instance was corroborated by oldest child's companion. West's NRSA 125C.230(1).

3. Appeal and Error ⚖️994(3)

Supreme Court will not reweigh the credibility of witnesses on appeal; that duty rests within the trier of fact's sound discretion.

4. Child Custody ⚖️553

A change of child custody is warranted, when one parent has primary physical custody, only when: (1) the circumstances of the parents have been materially altered, and (2) the child's welfare would be substantially enhanced by the change; first prong is based on principle of *res judicata*, which prevents persons dissatisfied with custody decrees from filing immediate, repetitive, serial motions until the right circumstances or the right judge allows them to achieve a different result, based on essentially the same facts.

5. Child Custody ⚖️555, 632

Although the doctrine of *res judicata*, as applied through the changed circumstances doctrine, which requires circumstances of parents to have been materially altered in order for custody modification to be warranted, promotes finality and therefore stability in child custody cases, it should not be used to preclude parties from introducing evidence of domestic violence that was unknown to a party or to the court when the prior custody determination was made.

6. Child Custody ⚖️557(3)

Changed circumstances doctrine, which requires circumstances of parents to have been materially altered in order for custody modification to be warranted, does not apply when a party seeking to change custody attempts to introduce evidence of domestic violence if the moving party or the court was unaware of the existence or extent of the conduct when the court rendered its prior custody decision, overruling, *McMonigle v. McMonigle*, 110 Nev. 1407, 887 P.2d 742, *Hopper v. Hopper*, 113 Nev. 1138, 946 P.2d 171..

7. Child Custody ⚖️76

District court has an obligation to make a sound decision on the paramount concern in custody cases, which is the child's best interests. West's NRSA 125.480.

8. Child Custody ⚖️557(3)

Trial court appropriately considered ex-wife's pre-decree conduct in determining that modification in custody of children from ex-wife to ex-husband was warranted; ex-husband was not aware of extent of ex-wife's physical abuse of children until after decree had been entered, when two children came forward, parties had previously stipulated to original custody arrangement, so no evidence with respect to parental fitness had been considered, and, consequently, ex-husband could not have fully litigated issue in prior custody proceedings. West's NRSA 125C.230(1).

9. Child Custody ⚖️637

Ex-wife failed to rebut statutory presumption that person who has engaged in one or more acts of domestic violence should

not be given custody of a child, and thus modification of custody from ex-wife to ex-husband was warranted. West's NRS 125C.230(1).

10. Judges ¶24

Counsel for ex-husband did not violate "one family/one judge" rule set forth in local district court rules by setting motion to modify child custody before judge who signed parties' original divorce decree, even though intervening order for child support was signed by another judge; ex-wife made no motion to disqualify judge who modified custody, and, since judge who modified custody also heard original application for divorce, no violation of local rules occurred.

David D. Loreman, Elko, for Appellant.

Easterly Armstrong & Lambert and John E. Lambert, Elko, for Respondent.

Before the Court En Banc.¹

OPINION

MAUPIN, J.

In this appeal, we primarily consider whether the district court, in granting a motion to change child custody, properly considered evidence of domestic violence that occurred before the parties' divorce decree was entered. We conclude that a party seeking to change custody may introduce evidence of domestic violence if he or she or the district court was unaware of the existence or extent of the conduct when the prior custody order was entered. Consequently, in this case, the district court did not err in considering the pre-decree domestic violence evidence.

FACTUAL AND PROCEDURAL HISTORY

Jon and Carol were married on June 22, 1979, and divorced August 13, 1998. The marriage produced six children. The divorce decree incorporated a settlement agreement that awarded "full legal and physical" custo-

dy of the minor children to Carol, subject to specifically defined "reasonable" visitation and Jon's obligation to pay child support.

After the divorce, Jon learned from his two oldest children that Carol, before and after entry of the original decree and award of custody, engaged in acts of domestic violence against them and their younger siblings, the extent of which he was previously unaware. Thereafter, Jon sought to modify the custody arrangement, relying on the alleged instances of domestic abuse before and after the divorce. The district court granted Jon's ex parte application for temporary custody. The parties then stipulated to share custody of the three remaining minor children pending a final ruling on the motion to modify, and an evidentiary hearing was scheduled.

The hearing was held over four separate court sessions in November 2001. Independent counsel represented the children. More than twenty witnesses, including an expert retained by Carol, presented conflicting testimony as to whether and the extent to which Carol had engaged in acts of domestic violence before and after entry of the divorce decree. Finally, a court-appointed child advocate testified that, based upon interviews with the children, custody should be transferred from Carol to Jon.

Although not mentioning the recommendations of the child advocate in its decision, the district court found that clear and convincing evidence supported the claims of Carol's abuse, including instances of mutual combat, physical beatings, kicking, hair pulling, and scratching, accompanied by screaming and yelling. In concluding that a change in custody was warranted, the district court followed NRS 125C.230(1), which creates a presumption that when a parent engages in domestic violence, that parent's sole or joint custody of the children is not in the children's best interest. In the court's view, Carol had not rebutted this presumption. The district court then determined that changed circumstances were demonstrated, *i.e.*, changes in demeanor and problems with visitation, and that Jon was not aware of the

1. This matter was submitted for decision by the seven-justice court. The Honorable Myron E. Leavitt, Justice, having died in office on January

9, 2004, this matter was decided by a six-justice court.

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extent of the physical abuse until the summer of 2000, when two of the children apprised him of the extent of the abuse. Accordingly, the district court ordered that custody of the three minor children be changed from Carol to Jon.

Carol appeals, primarily contending that the district court abused its discretion in considering allegations of pre-decree misconduct, in finding that instances of abuse were shown by clear and convincing evidence, in failing to find that any showing of abuse was rebutted, in finding that Jon satisfactorily established a change in circumstances between the entry of the divorce decree in 1998 and the ex parte application to change custody in 2001, and in concluding that modification was in the children's best interest.

DISCUSSION*Standard of review*

[1] Unless there has been a clear abuse of discretion, we will not disturb, on appeal, a district court's determination of child custody.²

Rebuttable presumption in domestic violence cases

In light of the dangers that domestic violence poses to a child's physical, emotional and mental health, our Legislature enacted NRS 125C.230(1), which creates a rebuttable presumption that a person who has engaged in one or more acts of domestic violence should not be given custody of a child:

Except as otherwise provided in NRS 125C.210 and 125C.220, a determination by the court after an evidentiary hearing and finding by clear and convincing evidence that either parent or any other person seeking custody of a child has engaged in one or more acts of domestic violence against the child, a parent of the child or any other person residing with the child creates a rebuttable presumption that sole or joint custody of the child by the perpetrator of the domestic violence is not in the

best interest of the child. Upon making such a determination, the court shall set forth:

(a) Findings of fact that support the determination that one or more acts of domestic violence occurred; and

(b) Findings 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.³

Clear and convincing evidence of domestic violence

[2] Carol argues that clear and convincing evidence did not exist for the district court to conclude that acts of domestic violence had been committed against any of the children. We disagree.

We initially note that by requiring the court, under NRS 125C.230(1), to conduct a hearing and to find by clear and convincing evidence that domestic violence occurred, the Legislature has protected innocent parents from unfounded allegations. Here, the court heard testimony from over twenty witnesses, including the minor children of the marriage. Admittedly, some of the evidence given by the children was either internally inconsistent or was contradicted in some way. Carol conceded, however, that one very serious physical altercation occurred with one of the children, and the children reported instances of kicking, punching, and administration of beatings with a blunt object (a hairbrush) causing significant bleeding. At least one of these instances was corroborated by the oldest child's companion.

The district court ruled on the totality of the evidence as follows:

Based upon the testimony of [three of the children], the Court finds by clear and convincing evidence that Carol committed acts of domestic violence against the . . . children. The court credits the testimony of [three daughters] and Jon, and does not credit any testimony to the contrary. To

2. *Primm v. Lopes*, 109 Nev. 502, 504, 853 P.2d 103, 104 (1993).

3. The Legislature also included this rebuttable presumption provision in NRS 125.480(5), which concerns custody determinations in divorce proceedings.

the extent that the physical altercations implicate conditions arguably amounting to “provocation” or “mutual combat,” the Court finds that Carol was the primary aggressor. This finding is based upon the testimony indicating a history of this type of behavior, and self defense type actions by other persons in the family.

....

... Most significantly, the extent of the domestic violence was revealed to Jon post-divorce, and there have been post-divorce incidents of domestic violence. [One daughter] has expressed her desire to live with her father. [Another daughter] has recently experienced a change in demeanor, in which she has become withdrawn and distant.

[3] While Carol makes numerous assessments of the credibility of Jon’s witnesses, we will not reweigh the credibility of witnesses on appeal; that duty rests within the trier of fact’s sound discretion.⁴ We conclude that substantial evidence supports the district court’s finding of domestic violence by clear and convincing evidence.⁵

Custody modification

Carol argues that the district court should not have relied upon evidence of alleged physical abuse that occurred before the divorce. Further, Carol argues that the district court erred in determining that Jon satisfied the analysis under *Murphy v. Murphy*⁶ for custody modification.

[4] In *Murphy*, we adopted a two-part test for custody changes, which applies when one parent has primary physical custody: “A change of custody is warranted only when: (1) the circumstances of the parents have been materially altered; and (2) the child’s welfare would be substantially enhanced by the change.”⁷ *Murphy*’s first “changed circumstances” prong is required by most courts and is based on the principle of *res judicata*.⁸ As we recognized in *Mosley v. Figliuzzi*,⁹ *res judicata* prevents “persons dissatisfied with custody decrees [from filing] immediate, repetitive, serial motions until the right circumstances or the right judge allows them to achieve a different result, based on essentially the same facts.”

We utilized the *Murphy* test in two noteworthy subsequent cases: *McMonigle v. McMonigle*¹⁰ and *Hopper v. Hopper*.¹¹ These cases relied on an Oregon case, *Stevens v. Stevens*,¹² in concluding that “[t]he moving party in a custody proceeding must show that circumstances . . . have substantially changed *since* the most recent custodial order Events that took place before that proceeding [are] inadmissible to establish a change of circumstances.”¹³ In *McMonigle*, the custodial parent had relocated before the final decree was entered, and the decree reflected this relocation. The non-custodial parent then moved for a change of custody. In granting the motion, the district court was “preoccupied” with the custodial parent’s relocation.¹⁴ Additionally, the court considered

4. See *Krause Inc. v. Little*, 117 Nev. 929, 933, 34 P.3d 566, 569 (2001).

5. See, e.g., *Matter of Parental Rights as to N.J.*, 116 Nev. 790, 795, 8 P.3d 126, 129 (2000) (noting that this court will uphold parental termination orders, which require a finding by clear and convincing evidence, if substantial evidence in the record supports the district court’s finding).

6. 84 Nev. 710, 711, 447 P.2d 664, 665 (1968).

7. *Id.* In joint physical custody cases, the child’s best interest is the only factor governing modification. NRS 125.510(2); see also *Hopper v. Hopper*, 113 Nev. 1138, 1142 n. 2, 946 P.2d 171, 174 n. 2 (1997).

8. Sally Burnett Sharp, *Modification of Agreement-Based Custody Decrees: Unitary or Dual Standard?*, 68 Va. L.Rev. 1263, 1265–66 (1982).

9. 113 Nev. 51, 58, 930 P.2d 1110, 1114 (1997).

10. 110 Nev. 1407, 887 P.2d 742 (1994).

11. 113 Nev. 1138, 946 P.2d 171.

12. 107 Or.App. 137, 810 P.2d 1334 (1991).

13. *McMonigle*, 110 Nev. at 1408, 887 P.2d at 743 (quoting *Stevens*, 810 P.2d at 1336); see also *Hopper*, 113 Nev. at 1143, 946 P.2d at 174–75; see also *Mosley*, 113 Nev. at 58, 930 P.2d at 1115 (recognizing *Stevens* for the proposition that pre-decree issues cannot be relitigated).

14. *McMonigle*, 110 Nev. at 1409, 887 P.2d at 744.

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evidence that before the divorce decree was entered, the custodial parent had failed to provide the non-custodial parent with reports about the child.¹⁵ On appeal, this court reversed the district court's order changing custody, stating that the district court had improperly relied on inadmissible pre-decree evidence in rendering its decision.¹⁶

In *Hopper*, the parties stipulated to custody.¹⁷ At that time, the non-custodial parent was aware that the custodial parent had a tendency to yell at the child. In reversing the district court's subsequent order changing custody, which was based, in part, on the custodial parent's yelling, this court reiterated that actions preceding the prior custody determination cannot be admitted to show a change in circumstances.¹⁸

Our *McMonigle* and *Hopper* decisions include broad language suggesting that important facts relevant to the child's best interests, if they existed at the time of the prior custody determination, cannot be introduced at a later proceeding, even if these facts were unknown to one of the parties or the court when the prior determination was made. Nevertheless, this court has never expressly determined whether generalized principles underlying the res judicata doctrine should prohibit parties from introducing evidence of domestic violence that was not previously considered by the court in a custody matter.

[5, 6] Although the doctrine of res judicata, as applied through the changed circumstances doctrine, promotes finality and therefore stability in child custody cases, it should not be used to preclude parties from introducing evidence of domestic violence that was unknown to a party or to the court when the prior custody determination was made. We recognized this principle long ago in *Abell v. District Court*,¹⁹ when we concluded that a change of custody may be based on material

facts that existed when the decree was entered but were unknown to either the moving party or the court. Consequently, we conclude that the changed circumstances doctrine does not apply when a party seeking to change custody attempts to introduce evidence of domestic violence if the moving party or the court was unaware of the existence or extent of the conduct when the court rendered its prior custody decision. To the extent that *McMonigle* and *Hopper* can be read as inconsistent with this conclusion, they are overruled.²⁰

[7] The district court has an obligation to make a sound decision on the paramount concern in custody cases—the child's best interests.²¹ Although the res judicata doctrine, as articulated in *Murphy's* "changed circumstances" requirement, serves an extremely important function in preventing dissatisfied parties from filing repetitive, serial motions in an attempt to manipulate the judicial system, res judicata principles should not prevent a court from ensuring that the child's best interests are served. As our Legislature has recognized, domestic violence poses a very real threat to a child's safety and well-being. The court must hear *all* information regarding domestic violence in order to determine the child's best interests. Domestic violence, by its very nature, may be difficult to discover. Once it is discovered, the court should not be precluded from considering it simply because it was not previously raised. Consequently, evidence of domestic violence that was not previously discovered, or the extent of which was unknown, when the prior custody order was entered is properly considered by the district court in determining custody, along with any post-order domestic violence. Even previously litigated acts of domestic violence may

that it can be read to preclude evidence of which the moving party was unaware when the prior custody order was entered.

15. *Id.* at 1409, 887 P.2d at 743–44.

16. *Id.* at 1409, 887 P.2d at 744.

17. 113 Nev. at 1140, 946 P.2d at 173.

18. *Id.* at 1143–44, 946 P.2d at 174–75.

19. 58 Nev. 89, 96–97, 71 P.2d 111, 113 (1937).

20. Additionally, *Mosley v. Figliuzzi*, 113 Nev. 51, 930 P.2d 1110 (1997), is overruled to the extent

21. *See, e.g.*, NRS 125.480 (providing that the court's sole consideration is the child's best interest when the court makes custody decisions in divorce proceedings).

need to be reviewed if additional acts occur.²² As the North Dakota Supreme Court has recognized, “The legislature intended that courts *presume* that *any* domestic violence negatively impacts the best interests of the children.”²³

[8, 9] In this case, Jon was not aware of the extent of Carol’s physical abuse until the summer of 2000, when two of the children came forward. Further, the parties had previously stipulated to the original custody arrangement, so the district court had considered no evidence with respect to parental fitness. Consequently, Jon could not have fully litigated this issue in the prior custody proceedings, and thus, the district court appropriately considered Carol’s pre-decree conduct in making its most recent child custody determination.

With respect to the second prong of *Murphy*, whether “the child’s welfare would be substantially enhanced by [a custody] change,” the rebuttable presumption set forth in NRS 125C.230 subsumes this inquiry. The statute requires that the court presume that the child’s best interests are served by being placed with the non-offending parent. Consequently, in custody cases involving alleged acts of domestic violence, *Murphy*’s second prong plays no role in the court’s custody determination. In this case, the district court concluded that, under NRS 125C.230, a rebuttable presumption arose that the sole or joint custody of the children by Carol was not in the children’s best inter-

ests. The court then found that Carol had not rebutted the presumption. We conclude that the district court did not abuse its discretion in finding that Carol had not rebutted the NRS 125C.230 presumption.

Other issues

Carol argues that the district court failed to properly take into account other issues concerning the children’s best interests. We disagree. In determining custody modification, the district court took into account the status of Jon’s employment prospects, the financial abilities of Jon’s current spouse, and the relative residential situations of the parties. Given the district court’s findings concerning the domestic violence perpetrated by Carol against the parties’ minor children, we cannot conclude that an abuse of discretion occurred with regard to these other factual issues.

Carol also argues that under local district court rule 5(5),²⁴ Jeff Osmonson, the child advocate appointed by the court, did not meet the requirements for a qualified child advocate under NRS 433.209.²⁵ We conclude that while Mr. Osmonson did not meet the technical definition of a child advocate under NRS 433.209, his qualifications were in substantial compliance with the statute.

[10] Carol claims that Jon’s counsel violated the “One Family/One Judge” policy set forth in the local district court rules²⁶ by

22. We note, however, that the doctrine of res judicata, as articulated in *Murphy*’s changed circumstances prong, would preclude parties from relitigating isolated instances of domestic violence that the court has previously examined.

23. *Heck v. Reed*, 529 N.W.2d 155, 164 (N.D. 1995).

24. 4JDCR 5(5)(b)(5) states, “A Child Advocate must be a ‘person professionally qualified in the field of psychiatric mental health’ as defined by NRS 433.209.”

25. NRS 433.209 states:

“Person professionally qualified in the field of psychiatric mental health” means:

1. A psychiatrist licensed to practice medicine in the State of Nevada and certified by the American Board of Psychiatry and Neurology;

2. A psychologist licensed to practice in this state;

3. A social worker who holds a master’s degree in social work, is licensed by the state as a clinical social worker and is employed by the Division;

4. A registered nurse who:

(a) Is licensed to practice professional nursing in this state;

(b) Holds a master’s degree in the field of psychiatric nursing; and

(c) Is employed by the Division.

5. A marriage and family therapist licensed pursuant to chapter 641A of NRS.

26. 4JDCR 2(5) states:

It is the intent of the District Judges, to the extent reasonably possible, to implement a “One Family/One Judge” assignment of domestic relations cases. The Court Clerk and attorneys practicing within the Fourth Judicial District Court shall bring to the attention of the District Judges cases which might be trans-

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setting the motion to modify before District Judge J. Michael Memeo. Although Judge Memeo signed the original decree, Carol claims that, because the intervening order modifying child support was signed by District Judge Jack Ames, the motion to modify should have been placed upon Judge Ames' calendar. First, we note that Carol lodged no formal attempt to disqualify Judge Memeo. Second, since Judge Memeo heard the original application for divorce, no substantial violation of the local rules occurred.

Carol also represents that the lawyer for the children ultimately secured employment with Judge Memeo as a judicial law clerk. However, she makes no claim as to how the custody determination was somehow tainted by that turn of events.

ferred between departments in order to accom-

CONCLUSION

Unless the district court has clearly abused its discretion, we will not disturb, on appeal, its child custody determination. In this case, the district court did not abuse its discretion in modifying the custody arrangement concerning the minor children. Therefore, we affirm the district court's order.

SHEARING, C.J., AGOSTI, ROSE,
BECKER and GIBBONS, JJ., concur.



plish this goal.

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972 PACIFIC REPORTER, 2d SERIES

Sheri Lyn HAYES, Appellant,

v.

**Harold Gay GALLACHER,
III, Respondent.****No. 31191.**

Supreme Court of Nevada.

Feb. 12, 1999.

Former wife filed petition seeking permission to relocate with parties children to site of her current husband's new job assignment in Japan. The District Court, Clark County, Gary L. Redmon, J., denied former wife's motion to relocate and entered conditional order transferring primary custody of children from former wife to former husband if former wife chose to move. Former wife appealed. The Supreme Court, Shearing, J., held that (1) proposed relocation constituted substantial change in circumstances justifying reexamination of award of primary custody based on best interests of children, and (2) remand was required for reconsideration of denial of former wife's motion to relocate and of conditional order transferring primary custody.

Reversed and remanded.

1. Infants ⚡19.3(7)

The district court has broad discretionary power in determining questions of child custody, and the Supreme Court will not disturb the district court's determinations absent a clear abuse of discretion.

2. Parent and Child ⚡2(17)

When parent having primary physical custody of parties children seeks permission to relocate out-of-state with children, district court must first determine whether the custodial parent has made threshold showing of sensible, good faith reason for the move. N.R.S. 125A.350.

3. Parent and Child ⚡2(17)

If custodial parent meets threshold requirement of showing sensible, good faith reason for proposed out-of-state move with

parties children, district court must consider whether adequate alternative opportunity exists for visitation with noncustodial parent. N.R.S. 125A.350.

4. Divorce ⚡303(2)

Former wife's proposed relocation with parties children to site of her current husband's new job assignment in Japan constituted substantial change in circumstances justifying reexamination of award of primary custody based on best interests of children.

5. Divorce ⚡312.7

Remand was required for reconsideration of denial of former wife's motion to relocate with parties children to site of her current husband's new job assignment in Japan, and of conditional order transferring primary custody of children from former wife to former husband if former wife chose to move with her husband, where trial court heard no evidence regarding relative merits of former husband and former wife as primary custodians, made no determination as to best interests of children, and failed to consider former wife's proven allegation that former husband had committed domestic violence. N.R.S. 125A.350.

6. Infants ⚡19.3(3)

If an allegation of domestic violence is proven, a rebuttable presumption arises that sole or joint custody of the child by the perpetrator of the domestic violence is not in the best interest of the child. N.R.S. 125.480, subd. 5.

7. Parent and Child ⚡2(18)

Trial courts may not use changes of custody as a sword to punish perceived parental misconduct.

8. Parent and Child ⚡2(18)

Conditional orders changing custody based upon custodial parent's proposed out-of-state move with parties children should be made only if the trial court affirmatively determines that the best interests of the children are served by the change in custody, taking into consideration all factors, not just the move.

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9. Parent and Child ⚡2(17, 18)

Even if a relocating parent is moving for illegitimate reasons or to an unreasonable location, that parent should retain primary custody and be allowed to relocate with the parties children if he or she shows that the relocation would be better for the children than a transfer of primary custody to the other parent.

10. Parent and Child ⚡2(18)

Primary custody should not be given to a parent who is not able or fit to exercise this right, or whose relationship with the child is such that the modification is not in the child's best interest.

Keefer, O Reilly, Ferrario & Lubbers and Anita A. Webster, Las Vegas, for appellant.

Law Offices of Israel L. Kunin, P.C. and Rebecca L. Burton, Las Vegas, for respondent.

OPINION

By the Court, SHEARING, J.:

Sheri Lyn Hayes and Harold Gay Gallacher were married in 1987. In July 1995, Harold filed for divorce. Sheri and Harold have three minor children.

On November 13, 1995, the district court issued a divorce decree granting Sheri and Harold joint legal custody of their children. The district court granted primary physical custody to Sheri, subject to Harold's right of visitation twice during the week, on alternating holidays, and for two weeks during the summer.

In March 1997, Sheri married Shane Hayes, who is a member of the United States Air Force. The Air Force scheduled Shane to transfer to an air base in Japan effective no later than August 1997. Thus, on May 29,

1997, pursuant to NRS 125A.350¹, Sheri petitioned the district court for an order allowing her to move to Japan with the children. In response, Harold filed a countermotion for a change of primary physical custody in the event Sheri moved to Japan.

On September 2, 1997, the district court entered an order (1) denying Sheri's motion to relocate the minor children to Japan and (2) granting Harold's countermotion to change primary physical custody of the children if Sheri moved to Japan. The order was entered without any evidentiary hearing, based on the written record alone. The district judge entering the order was a different district judge than the one who originally heard the evidence regarding custody. Sheri has appealed the order denying relocation and the order granting Harold's countermotion for change of custody.

The district court made the following findings of fact:

1. It is in the best interest of the minor children to remain in Las Vegas.
2. Sheri's desire to move is due to her military spouse's transfer to Japan. Her motives therefore, are honorable and not designed to frustrate Harold's visitation rights.
3. Notwithstanding Sheri's honorable motives, she fails to justify relocation of the children to Japan under the standards set forth in *Schwartz v. Schwartz*, 107 Nev. 378, 812 P.2d 1268 (1991). The court has concerns about the move to Japan such as that the children would be placed in a country where they do not speak the language, that they would lose contact with their extended family, that the available medical facilities would not be adequate in the event of an emergency medical situation, that the quality of the housing and environmental conditions in Japan is un-

1. NRS 125A.350 provides:

If custody has been established and the custodial parent or a parent having joint custody intends to move his residence to a place outside of this state and to take the child with him, he must, as soon as possible and before the planned move, attempt to obtain the written consent of the other parent to move the child from the state. If the noncustodial parent

or other parent having joint custody refuses to give that consent, the parent planning the move shall, before he leaves the state with the child, petition the court for permission to move the child. The failure of a parent to comply with the provisions of this section may be considered as a factor if a change of custody is requested by the noncustodial parent or other parent having joint custody.

known, and that Sheri's overall financial situation would be reduced.

4. The cost of visitation transportation would be approximately \$6,000 per round-trip ticket for the three children.

5. Any cultural advantages for the children could take place over a summer visit to Japan.

6. Harold's motive for resisting Sheri's relocation of the children halfway around the world is natural and also honorable.

7. If Sheri chooses to move to Japan, then Harold has met the standard under *Murphy v. Murphy*, 84 Nev. 710, 447 P.2d 664 (1968) for a change of circumstances.

[1] The district court has broad discretionary power in determining questions of child custody, and this court will not disturb the district court's determinations absent a clear abuse of discretion. *Primm v. Lopes*, 109 Nev. 502, 504, 853 P.2d 103, 104 (1993). However, we must be satisfied that the court's determination was made for appropriate reasons. *Sims v. Sims*, 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993).

[2] We have construed NRS 125A.350 in several recent cases in which one parent had primary physical custody: *Davis v. Davis*, 114 Nev. , 970 P.2d 1084 (1998); *Gandee v. Gandee*, 111 Nev. 754, 895 P.2d 1285 (1995); *Trent v. Trent*, 111 Nev. 309, 890 P.2d 1309 (1995); *Jones v. Jones*, 110 Nev. 1253, 885 P.2d 563 (1994); and *Schwartz v. Schwartz*, 107 Nev. 378, 812 P.2d 1268 (1991). These cases establish a two-step process that the district court must undertake when deciding a motion to relocate pursuant to NRS 125A.350. First, the district court must find whether the custodial parent wishing to leave Nevada made a threshold showing of a sensible, good faith reason for the move. *Gandee*, 111 Nev. at 757, 895 P.2d at 1287.

[3] If the custodial parent meets this threshold requirement, the district court must then weigh the factors as outlined in *Schwartz*, 107 Nev. at 383, 812 P.2d at 1271. Additionally, in *Trent* we determined that when considering the *Schwartz* factors, a district court should focus on the availability of

adequate, alternative visitation. 111 Nev. at 315 16, 890 P.2d at 1313.

The present matter is particularly difficult because it does not fit into the traditional analysis outlined above. It appears that there is no adequate alternative visitation for the non-custodial parent, whether it is the father or the mother. There appears to be no dispute as to the good faith of either party. The custodial parent wishes to move with her family to be with her husband at his new assignment. However, the requested move is so far away from the non-custodial parent that frequent visitation is precluded and longer visits may be prohibitively expensive. Here, important interests and policies come into conflict: (1) the right of children to have frequent associations and a continuing relationship with both parents after a divorce, NRS. 125.460(1); (2) the individual right of a parent to change his or her residence; and (3) the right of a parent to have access to his or her children. The decision in this case either requires that Sheri choose between her husband and her children, or that Harold risk losing physical contact with his children for a significant period of time. Whatever the decision, one party or the other, as well as the children, will be negatively impacted.

When parents cannot agree, this difficult custody decision must be made by the district court after it hears the evidence and applies the appropriate guidelines. Courts have applied a wide variety of approaches to a question like this, none of which are fully satisfactory. Some courts attach little value to the needs of the relocating parents; others ignore what may amount to substantial consequences to the non-moving parent. Still others weigh interests and values that are, at bottom, immeasurable.

On matters where relocation of the primary custodian would substantially obliterate the possibility of a traditional alternative visitation, this court chooses to adopt the approach stated in Section 2.20 of the American Law Institute's Principles of the Law of Family Dissolution, (Tentative Draft No. 3, Mar. 20, 1998).² The parts of Section 2.20 relevant to this matter are:

2. Although the draft has not been finally ap-

proved, it has been prepared by family law ex-

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§ 2.20 Relocation of a Parent

(1) The relocation of a parent constitutes substantially changed circumstances under this section only when it significantly impairs another parent's ability to exercise responsibilities that parent has been exercising under a parenting plan.

....

(4) When the relocation constituting changed circumstances under paragraph (1) renders it impractical to maintain the same proportion of residential responsibility as that being exercised by each of the parents, the court should modify the parenting plan in accordance with the child's best interests, as defined in § 2.09 and § 2.10, and in accordance with the following principles:

(a) A parent who has been exercising primary residential responsibility for the child should be allowed to relocate with the child so long as it is for a legitimate purpose and to a location that is reasonable in light of the purpose. A relocation is for a legitimate purpose if it is to be close to family or other support networks, for significant health reasons, to protect the safety of the child or another member of the child's household, to pursue an employment or educational opportunity, or to be with one's spouse [or spouse equivalent, if such is defined in Chapter 6] who is established, or who is pursuing an employment or educational opportunity, in another location. The relocating parent has the burden of proving the legitimacy of any other purpose. A move with a legitimate purpose is reasonable unless its purpose is shown to be substantially achievable without moving, or by moving to a location that is substantially less disruptive of the other parent's relationship to the child.

....

(d) The court should attempt to minimize the impairment to a parent-child relationship caused by a parent's relocation through alternative arrangements for the exercise of residential responsibility appropriate to the parents' resources and circumstances and the developmental level of the child.

perts and has received careful consideration by

[4] The relocation proposed here significantly impairs the other parent's ability to exercise the responsibilities he had been exercising. Therefore, it constitutes substantially changed circumstances which justify a reexamination of custody based on the best interest of the children, taking into account all relevant factors, including the effects of the relocation.

[5] In this matter, the district court not only denied Sheri's motion to relocate, but also ordered that primary custody of the children be transferred from Sheri to Harold if Sheri chooses to move to Japan. The district court issued the orders without hearing any evidence regarding the relative merits of the parents as primary custodians. Furthermore, the district court made findings of fact contrary to the unrefuted evidence in the record regarding the quality of life at a military base in Japan. Also, the district court apparently failed to consider the application of NRS 125.480(4) which provides:

In determining the best interest of the child, the court shall consider, among other things:

....

(c) Whether either parent or any other person seeking custody has engaged in an act of domestic violence against the child, a parent of the child or any other person residing with the child.

[6] The record reflects that Sheri had obtained a Temporary Protective Order Against Domestic Violence directed at Harold. After a hearing on the matter, the district court found that violence had occurred and extended the protective order against Harold for one year. Under NRS 125.480(5), if domestic violence is proven, a rebuttable presumption arises that sole or joint custody of the child by the perpetrator of the domestic violence is not in the best interest of the child. It does not appear that the district court gave any consideration to the issue of domestic violence when denying Sheri's motion to relocate and ordering the change of custody of the children to Harold.

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Therefore, the orders of the district court must be reversed and remanded for consideration of the relevant evidence.

[7] An order changing primary custody if the primary custodian chooses to move after the court denies a motion to relocate appears to be designed to punish the primary custodian for relocating. The punitive nature of the order in this case is made clear by the fact that it changes custody without any provision for Sheri, who has been primary custodian, to have contact with the children. This court has made it clear that Nevada courts may not use changes of custody as a sword to punish perceived parental misconduct. *Sims v. Sims*, 109 Nev. 1146, 1149, 865 P.2d 328, 330 (1993).

[8 10] In this case, the public policy considerations make the district court's conditional order particularly unacceptable in that it is designed to test the maternal attachment by forcing Sheri to choose between her children and her husband. Such conditional orders changing custody should be made only if the court affirmatively determines that the best interests of the child are served by the change in custody, taking into consideration all factors, not just the move. ALI, *supra*, § 2.20(4). Thus, even if a relocating parent is moving for illegitimate reasons or to an unreasonable location, that parent should retain primary custody and be allowed to relocate with the child if he or she shows that the

relocation would be better for the child than a transfer of primary custody to the other parent. ALI, *supra*, § 2.20 cmt. b. Primary custody should not be given to a parent who is not able or fit to exercise this right, or whose relationship with the child is such that the modification is not in the child's best interest. *Id.*

The district court issuing the conditional order transferring custody to Harold heard no evidence regarding the best interest of the children. Further, it does not appear that the district court considered the indications of domestic violence by Harold, or other factors considered by the original district court judge who determined that the best interest of the children was to grant primary custody to Sheri. Therefore, the district court order denying relocation and changing custody of the Hayes children is reversed and remanded for reconsideration in accordance with the appropriate standards.³

ROSE, C.J., YOUNG and MAUPIN, JJ., concur.



3. This matter was submitted for decision prior to expansion of the court from five to seven justices on January 4, 1999; only those justices remain-

ing on the court who previously heard this matter participated in the decision.

Key Provisions of UCCJA, PKPA, UCCJEA, & ICWA and Improvements Made by the UCCJEA for Battered Women¹

Overview of Attached Chart

Critical Inquiry: Is there a prior state or tribal court order regarding child custody?

If no: See page 2 to determine which court has initial jurisdiction,
paying careful attention to whether ICWA applies.

Once you've determined a Court has initial jurisdiction:

- should the Court decline jurisdiction? (see pages 5-6)

If the Court does not have initial jurisdiction (from page 2):

- can the Court exercise emergency jurisdiction? (see page 3)

If yes: See page 4 regarding modification jurisdiction.

If the Court has jurisdiction to modify:

- should the Court decline its jurisdiction? (see pages 5-6)

This project was supported by Grant No. 96-VF-GX-K005 awarded by the Office on Violence Against Women, U.S. Department of Justice. Points of view in these documents are those of the NCFWC and do not necessarily represent the official position or policies of the U.S. Department of Justice.

Key Provisions of UCCJA, PKPA, UCCJEA, & ICWA and Improvements Made by the UCCJEA for Battered Women²

Page 40

PKPA³

UCCJEA⁴

UCCJA⁵

ICWA⁶

Initial Jurisdiction
(no prior court order
regarding "custody")

Note: PKPA and UCCJEA give clear priority to home state jurisdiction. UCCJA does not give home state priority; instead it is one of three equally weighted bases for jurisdiction.

Note: PKPA and UCCJEA both define emergency jurisdiction more broadly than UCCJA, to include not just abuse perpetrated on subject child, but also on parent or sibling of child.. (UCCJEA temporary emergency jurisdiction discussed below.)

Requirements of §1738A(c):
1) forum state must have jurisdiction according to own state law (UCCJA or -JEA);
2) forum state must satisfy one of following conditions:
a) state is now (or was within last six months) the child's home state;
b) if there is no home state, and it is in the best interest of the child that forum state assumes jurisdiction because the child and parents or the child and one contestant have a significant connection (other than mere presence) with the state and there is substantial evidence concerning the child's present or future care, protection, training and personal relationships; or
c) the child is physically present in the forum state and:
i) child has been abandoned, or
ii) it is necessary in an emergency to protect the child because the child, a sibling, or a parent has been subjected to or threatened with mistreatment or abuse; or
d) no other state has jurisdiction or another state has declined jurisdiction because this state is the more appropriate forum to determine custody and it is in the best interest of child that this court assert jurisdiction.

Requirements of §201:
1) forum state is child's home state, or was the home state within last six months and a parent or person acting as a parent lives in the state;
2) another state does not have home state jurisdiction, or the home state has declined jurisdiction on the ground that this state is more appropriate forum; and
(i) child and at least one person acting as parent have a significant connection with this state (other than mere physical presence); and
(ii) substantial evidence is available in this state concerning the child's care, protection, training, & personal relationships;
3) all courts having jurisdiction under (1) and (2) above have declined on ground that this state is more appropriate forum, or
4) no other state has jurisdiction under above stated criteria.

Requirements of §3:
Any one of these criteria must be satisfied:
1) forum state is home state of child (or was within last six months and a parent or person acting as parent lives in the state);
2) forum state has a significant connection with the child and one of the parents and substantial evidence regarding child's present or future care, protection, training and personal relationships, or
3) child is physically present within the jurisdiction and either has been abandoned or is threatened with child abuse, or
4) no other state has jurisdiction under above-stated criteria or has declined, and it is in best interest of child that this state assert jurisdiction.

Requirements of §1911:
(a) Indian tribe has exclusive jurisdiction over a child custody proceeding involving an Indian child who resides or is domiciled within the reservation, except where such jurisdiction is otherwise vested in the State by existing federal law;
(b) in any State court proceeding for foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding;
(d) every court shall give full faith and credit to any proceedings of Indian tribal court.
Definitions:
§1903(1) defines "child custody proceeding" to include foster care placement, termination of parental rights, preadoptive placement, and adoptive placement.
§1903(3) defines "Indian" as any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation.
§1903(4) defines "Indian child" as an unmarried person who is under age 18 and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member

	PKPA	UCCJEA	UCCJA	ICWA
Emergency Jurisdiction <i>Note: UCCJEA makes a major improvement from the UCCJA for battered women. When a woman flees to S2 to escape abuse, this provision permits S2 to assume jurisdiction, enabling the woman to protect not only the subject child, but herself and the child's siblings. It tells the courts of both states that the safety of the parties and the child are of primary concern..</i>	§1738A(c) provides that emergency jurisdiction may be exercised when child is physically present in state and: 1) child has been abandoned, or 2) it is necessary in an emergency to protect the child because the child, a sibling or parent of the child has been subjected to or threatened with mistreatment or abuse. <i>Note: This definition does not include neglect, but directly addresses dv.</i>	§204 provides that temporary emergency jurisdiction may be used when the child is physically present in the state and: 1) has been abandoned, or 2) it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse. Emergency jurisdiction is usually only temporary but can evolve into home state jurisdiction as follows: 1) State with home state or continuing jurisdiction declines on basis of inconvenient forum. 2) If there is no prior order, and if there is no proceeding pending in the state with home state jurisdiction an emergency order will remain in effect until an order is obtained from the court having proper jurisdiction.	§3 provides that emergency jurisdiction may be exercised when child is physically present in the state and: 1) child has been abandoned, or 2) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent.	See page 1, "Initial Jurisdiction" to analyze whether the tribal court has exclusive or concurrent jurisdiction; whether the proceeding could be transferred to tribal court, and/or who may intervene. If the ICWA requires the case be heard in tribal court, ICWA's provisions determine jurisdiction (not the UCCJEA or UCCJA).

	PKPA	UCCJEA	UCCJA	ICWA
Modification Jurisdiction	§1738A(f) says S2⁷ can modify if: 1) S2 has what would otherwise be initial jurisdiction (under its own state law, whether UCCJA or UCCJEA) to do so, and 2) S1 no longer has PKPA jurisdiction, or has declined to exercise jurisdiction to modify its prior order. How do you know if S1 “no longer has” jurisdiction to modify its order? (See below.)	§203 says no other state⁸ can modify S1's decree unless: 1) S2 has jurisdiction to make an initial (-JEA) custody determination; and 2) One of the following two determinations are made: i) S1 decides it no longer has exclusive, continuing jurisdiction, or S1 says S2 would be more convenient forum; or ii) S1 or S2 decides all parties and the child no longer live in S1.	§3 says S2 can not modify unless: 1) S1 no longer has UCCJA jurisdiction (home state, significant contacts, emergency, etc) or 2) S1 has declined jurisdiction, and 3) S2 has jurisdiction (home state, significant contacts, etc)	§1911(d) provides that every court shall give full faith and credit to any Indian child custody proceedings of an Indian tribal court. However, the ICWA does not make explicit mention of the requirements for jurisdiction to modify.
Continuing, exclusive jurisdiction (aka “CEJ”)	§1738A(d) clarifies when S1 has <i>continuing jurisdiction</i>: 1) if the initial custody order was made consistent with the PKPA, 2) S1 presently has a basis for proper jurisdiction under its own law (UCCJA/JEA), and 3) S1 remains the residence of a child <u>or</u> contestant.	§202 provides that S1 has continuing, exclusive jurisdiction until: 1) S1 decides that neither the child, parents or person acting as parent have a significant connection with S1 and that substantial evidence is no longer available in S1 concerning the child's care, protection, training & personal relationships; or 2) S1 or S2 determines that <u>neither</u> the child nor any parent/person acting as parent resides in S1.	No mention of this concept.	No mention of this concept.

	PKPA	UCCJEA	UCCJA
Inconvenient Forum Factors <i>Note: This doctrine only comes into play after a determination of which state has proper jurisdiction, based on home state, significant connection, appropriate forum or "no other state."</i> <i>Note: UCCJEA's explicit mention of domestic violence as a factor, as well as relative financial positions of parties (for majority of battered women who are denied access to funds or are fleeing abusers) are great improvements from UCCJA for battered women.</i>	This issue is not directly addressed but there are references to the possibility of a state declining jurisdiction.	§207 says forum court should decide whether it is appropriate for another state to exercise jurisdiction by considering: 1) whether domestic violence has occurred and is likely to continue, and which state could best protect the parties and the child; 2) how long child has lived out of state; 3) distance between court in this state and court in other state; 4) relative financial circumstances of parties; 5) any agreement of parties re which state should have jurisdiction; 6) nature and location of evidence required to resolve the pending litigation, including testimony of child; 7) ability of court of each state to decide issue expeditiously and procedures necessary to present the evidence; and 8) familiarity of court of each state with the facts and issues in the pending litigation.	§7 provides the court will determine whether it is in the interest of the child that another state assume jurisdiction by considering: 1) if another state is or recently was child's home state; 2) if another state has closer connections with child and a contestant; 3) if substantial evidence re future care, protection, training, and personal relationships is more readily available elsewhere; 4) prior agreement of parties re jurisdiction; 5) if exercising jurisdiction thwarts the purposes of the UCCJA (preventing forum shopping and child snatching; creating secure, stable environment for child). <i>Note: No mention of domestic violence.</i>

	PKPA	UCCJEA	UCCJA
Unjustifiable Conduct/ Unclean Hands <i>Note: This doctrine only comes into play after a determination of which state has proper jurisdiction, based on home state, significant connection, appropriate forum, or "no other state."</i>	No comment.	§208 says that when a party can assert proper jurisdiction (alleging home state, significant connection, etc) because of unjustifiable conduct, court shall decline jurisdiction, unless: 1) parties acquiesce to it; 2) court that otherwise has jurisdiction says other state is more appropriate forum; or 3) no other state would have jurisdiction. <i>Note: Commentary for §208 (which defines unjustifiable conduct) states: "Domestic violence victims should not be charged with unjustifiable conduct for conduct that occurred in the process of fleeing domestic violence, even if their conduct is technically illegal." Thus, if a parent flees with a child to escape domestic violence and in the process violates a decree, the case should not be automatically dismissed under this section. However, an abusive parent who seizes the child and flees to another state to establish jurisdiction has engaged in unjustifiable conduct and the new state must decline jurisdiction.</i>	§8 provides that the court may decline to exercise initial jurisdiction if petitioner wrongfully took child from a state (or engaged in other similar reprehensible conduct) if it is just and proper under the circumstances. In a modification case, S2 will not take jurisdiction if petitioner improperly removed child from state, without consent of party entitled to custody, or improperly kept child after visitation, or if petitioner violated custody order in any other way and court deems it just and proper not to exercise jurisdiction in the circumstances.

	PKPA	UCCJEA	UCCJA
Effect of DVPO	Not directly addressed.	§102 states that DVPOs are specifically included in the definition of “custody proceeding.”	Does not specify.
Notice When a Person is Outside the State	§1738A(e) requires reasonable notice and an opportunity to be heard.	§108 provides that notice may be given under either state’s notice laws or by publication if other means are not effective. <i>Note: This provision protects fleeing battered women by allowing her to bind abuser to the custody determination by serving him notice; also prevents her from being subject to federal kidnapping charges in cases where he has filed an action in the home state without ever giving her notice, but the court nevertheless defaults her and awards him custody.</i>	§5 provides notice be given in a manner reasonably calculated to give actual notice, and may be by personal delivery in the manner prescribed by the state being asked to enter the custody decree, in the manner prescribed by the law of the place in which service is made, by any form of mail addressed to the person and requiring a receipt, or as directed by the court.

¹ This chart was prepared in April 2005 by Tamara Kuennen, Assistant Professor of Law, University of Denver Sturm College of Law.

² To determine which states have adopted the UCCJEA vs. the UCCJA, see www.nccusl.org, and then check your jurisdiction’s statutes to determine whether those statutes adopt the Act in whole or in part.

³ 28 U.S.C. 1738A (1994).

⁴ For the full text of the Act, see www.nccusl.org.

⁵ For the full text of the Act, see www.nccusl.org.

⁶ 25 U.S.C 1901, *et seq.* (1978). See your jurisdiction’s juvenile and/or family codes to determine whether and how ICWA has been adopted.

⁷ “S2” stands for “State 2” and “S1” means “State 1” for purposes of discussing modification jurisdiction.

⁸ The UCCJEA declares (in § 104) that states are to treat Indian tribes the same as other states when applying the UCCJEA.

Senate Bill No. 57—Committee on Judiciary

CHAPTER.....

AN ACT relating to children; establishing procedures for the Children's Advocate or his or her designee to obtain, under certain circumstances, a warrant to take physical custody of a missing child who was allegedly abducted; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law as set forth in the Uniform Child Custody Jurisdiction and Enforcement Act (chapter 125A of NRS) authorizes a court in a proceeding to enforce a child custody determination to issue a warrant to take physical custody of a child in an emergency situation if the court finds that the child is immediately likely to suffer serious physical harm or to be removed from this State. Before issuing the warrant, the court is required to hold a hearing at which the party alleging the need for the warrant is present but not the party who has physical custody of the child. (NRS 125A.525) The Uniform Child Custody Jurisdiction and Enforcement Act also authorizes a court in this State, to enforce a child custody determination issued by a court in another state, to issue an order to take physical custody of a child in a nonemergency situation after holding a hearing at which both parties, the petitioner and the respondent, are given an opportunity to be heard. (NRS 125A.495)

Existing law as set forth in the Uniform Child Abduction Prevention Act (chapter 125D of NRS) authorizes a court, pursuant to a petition filed either before or after a child custody determination has been made, to issue a warrant to take physical custody of a child in an emergency situation if the court finds that there is a credible risk that the child is imminently likely to be wrongfully removed. The court may issue the warrant without providing prior notice and an opportunity to be heard to the party who has physical custody of the child. (NRS 125D.200)

Finally, existing law establishes the Office of Advocate for Missing or Exploited Children within the Office of the Attorney General and requires the Children's Advocate to carry out various duties relating to missing or exploited children in this State. (NRS 432.157) **Section 2** of this bill authorizes the Children's Advocate or his or her designee, under certain circumstances, to apply to a court for a warrant to take physical custody of a missing child where there is probable cause to believe that the child has been abducted. Further, **section 2** establishes the procedures for issuing such a warrant. **Section 2** also defines the term "abduction" to include kidnapping, aiding and abetting kidnapping and the willful detaining, concealing or removing of a child from a person having lawful custody or a right of visitation of the child by a person who has a limited right of custody to the child by operation of law or pursuant to a court order, judgment or decree or who has no right of custody to the child.



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EXPLANATION – Matter in *bolded italics* is new; matter between brackets ~~{omitted material}~~ is material to be omitted.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. (Deleted by amendment.)

Sec. 2. Chapter 432 of NRS is hereby amended by adding thereto a new section to read as follows:

1. The Children's Advocate or his or her designee may apply to the court for a warrant to take physical custody of a missing child if, during an investigation of the missing child, it appears that there is probable cause to believe that:

(a) An act of abduction has been committed against the child; and

(b) The act of abduction was not committed to protect:

(1) The child from continued abuse or neglect or from a bona fide and imminent threat of abuse or neglect; or

(2) The person who allegedly abducted the child from continued domestic violence or a bona fide and imminent threat of domestic violence.

2. In filing the application for a warrant, the Children's Advocate and his or her designee acts on behalf of the court and not on behalf of any party.

3. The application must include, without limitation:

(a) The name of the person having legal custody of the child;

(b) The name of the person alleged to have committed the act of abduction of the child;

(c) The name of the person alleged to have possession of the child, if different from the person described in paragraph (b);

(d) A statement of the facts and circumstances pertaining to the abduction of the child;

(e) A statement indicating whether, to the knowledge of the applicant after reasonable investigation under the circumstances, the child, the person having legal custody of the child, the person alleged to have committed the act of abduction or the person alleged to have possession of the child has been:

(1) The subject of an investigation of alleged abuse or neglect of a child or domestic violence;

(2) A party to a proceeding concerning the alleged abuse or neglect of a child, an act of abduction of a child or domestic violence; or

(3) A party against whom an order for protection against domestic violence was issued;



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(f) A statement indicating which court, if any, has exercised jurisdiction over the custody or welfare of the child;

(g) A copy of the most recent child custody determination, if any, concerning the child, or if there is no such determination, a statement as to the legal basis for the custody of the child; and

(h) A declaration made under oath and penalty of perjury that every factual representation made in the application is true and correct to the best of the knowledge of the applicant.

4. The court may, in its discretion, supplement the allegations made in the application with the sworn testimony of the applicant at a hearing before the court. Any such testimony must be recorded and preserved in the records of the court.

5. If an application is filed pursuant to this section:

(a) The Children's Advocate or his or her designee may not be assessed a filing fee for the application; and

(b) Any proceedings regarding the application must be expedited by the court.

6. If the court determines that no exigent circumstances exist in relation to the issuance of the warrant, the court:

(a) Shall hold a hearing before it issues the warrant;

(b) Shall provide, or ensure that the Children's Advocate or his or her designee provides, notice of the hearing to the custodial parent, the person alleged to have committed the act of abduction and, if different, the person alleged to have possession of the child;

(c) If the person alleged to have committed the act of abduction or, if different, the person alleged to have possession of the child is present at the hearing or otherwise appears at the hearing, may:

(1) Order such person to return the child in accordance with the determination of the court regarding the placement of the child; and

(2) Issue the warrant in accordance with subsection 9; and

(d) If the person alleged to have committed the act of abduction and, if different, the person alleged to have possession of the child received notice but are not present at the hearing, do not otherwise appear at the hearing and do not submit statements to the court, may issue the warrant in accordance with subsection 9.

7. If the court determines that exigent circumstances exist in relation to the issuance of the warrant, including, without limitation, that the child is in imminent danger of being removed from this State or in imminent danger of serious physical harm,



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the court may issue the warrant after an ex parte hearing. If the court issues the warrant after an ex parte hearing:

(a) The court shall afford the custodial parent, the person alleged to have committed the act of abduction and, if different, the person alleged to have possession of the child an opportunity to be heard at the earliest possible time after the warrant is executed, but not later than 48 hours after the warrant is executed unless a hearing within that period is impossible. If a hearing within that period is impossible, the court shall hold the hearing on the first judicial day possible.

(b) The Children's Advocate or his or her designee shall provide notice of the hearing to be held pursuant to paragraph (a) to the custodial parent, the person alleged to have committed the act of abduction and, if different, the person alleged to have possession of the child.

8. The custodial parent of the child, the person alleged to have committed the act of abduction and, if different, the person alleged to have possession of the child may:

(a) Appear at a hearing held pursuant to subsection 6 or 7 in person, by telephone or by video; and

(b) Submit written statements to the court electronically or by other means.

9. If, after a hearing held pursuant to subsection 6 or 7, as applicable, the court:

(a) Determines that there is probable cause to believe that an act of abduction has been committed against the child and that the act of abduction was not committed for the protection of the child or the person who allegedly abducted the child as described in subsection 1, the court may issue a warrant to take physical custody of the child; or

(b) Finds by a preponderance of the evidence that the act of abduction of the child was committed for the protection of the child or the person who allegedly abducted the child as described in subsection 1, the court shall:

(1) Assume temporary emergency jurisdiction of the matter and shall enter a temporary emergency order for the custody of the child which is in the best interest of the child and which is sufficient to protect the safety and welfare of all interested persons; and

(2) Provide in the order a period of time which the court considers adequate and within which the person seeking the emergency order may obtain an initial or modified child custody



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determination regarding the child from a court that has jurisdiction to enter such an order.

10. A warrant issued by the court pursuant to this section:

(a) Must set forth findings of fact that establish probable cause for believing that an act of abduction occurred and that the act of abduction was not committed for the protection of the child or the person who allegedly abducted the child as described in subsection 1;

(b) Must direct law enforcement officers to take physical custody of the child and deliver the child in accordance with the determination of the court regarding the placement of the child;

(c) Must specify the property that may be searched and the child who may be seized pursuant to the warrant;

(d) Must authorize law enforcement officers to enter private property as described in paragraph (c) to take physical custody of the child;

(e) Must order that the child be returned to his or her legal custodian unless such placement is not in the best interest of the child; and

(f) Is enforceable throughout this State.

11. As soon as reasonably practicable but not later than 24 hours after a law enforcement officer executes a warrant issued pursuant to this section, the Children's Advocate or his or her designee shall inform the court of the execution of the warrant.

12. As used in this section:

(a) "Abduction" means the commission of an act described in NRS 200.310 to 200.340, inclusive, or 200.359.

(b) "Abuse or neglect of a child" has the meaning ascribed to it in NRS 432B.020.

(c) "Child custody determination" means a judgment, decree or other order of a court providing for the legal custody, physical custody or visitation with respect to a child. The term includes a permanent, temporary, initial and modification order.

(d) "Court" means a court of this state authorized to establish, enforce or modify a child custody determination.

(e) "Domestic violence" means the commission of any act described in NRS 33.018.

Sec. 2.5. NRS 432.150 is hereby amended to read as follows:

432.150 As used in NRS 432.150 to 432.220, inclusive, *and section 2 of this act*, unless the context otherwise requires:

1. "Clearinghouse" means the program established by the Attorney General pursuant to NRS 432.170.

2. "Director" means the Director of the Clearinghouse.



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3. “Exploited child” means a person under the age of 18 years who has been:

(a) Used in the production of pornography in violation of the provisions of NRS 200.710;

(b) Subjected to sexual exploitation as defined in NRS 432B.110; or

(c) Employed or exhibited in any injurious, immoral or dangerous business or occupation in violation of the provisions of NRS 609.210.

4. “Missing child” means a person under the age of 18 years who has run away or is otherwise missing from the lawful care, custody and control of a parent or guardian.

Sec. 3. (Deleted by amendment.)

Sec. 4. This act becomes effective on July 1, 2011.

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National Technical Assistance on Custody Issues

Excerpt from Battered Women's Justice Project E-Newsletter, November 2011

There are a variety of national resources available to the public to provide technical assistance on a variety of civil custody matters in which domestic violence is involved. Below are descriptions of some of the national providers available, as well as contact information for the organizations. While none of the organizations listed may provide specific legal advice to individual survivors, they may assist survivors by providing information about the legal system and legal resources available in the relevant jurisdictions. The organizations and resources listed are intended as resources for attorneys and advocates working on custody cases in which domestic violence is involved.

The Battered Women's Justice Project

In addition to providing assistance on a host of criminal and other civil legal issues, the Battered Women's Justice Project (BWJP) provides technical assistance to survivors, advocates, and attorneys dealing with custody cases where domestic violence is involved. Advocates are on-call from 8:30 AM to 4:30 PM CT to take calls and respond to emails from survivors, as well as those working with survivors, at various stages of their custody cases. However, BWJP staff does not provide any direct legal representation on cases. BWJP also provides training and promotes best practices for professionals involved in custody cases, and offers a number of relevant legal policy articles on BWJP's website.

Toll Free Phone: (800) 903-0111, prompt 1

Email: technicalassistance@bwjp.org

Website: www.bwjp.org

The Resource Center on Domestic Violence: Child Protection and Custody, National Council of Juvenile and Family Court Judges

The Resource Center on Domestic Violence: Child Protection and Custody provides consultation, leadership, access to the best possible sources of information, and tangible products to advocates, judges and court professionals, attorneys, social workers, and others working in the fields of domestic violence, child protection, and custody. We offer technical assistance, training, policy development, and other resources both in person and via phone and e-mail that increase safety, promote stability, and enhance the well-being of battered parents and their children.

Toll Free Phone: (800) 527-3223 or (800) 52-PEACE

Email: fvdinfo@ncjfcj.org

Website: <http://www.ncjfcj.org/content/blogcategory/260/301/>

The Legal Resource Center on Violence Against Women

The Legal Resource Center on Violence Against Women (LRC) provides free technical assistance on interstate custody and relocation legal issues to attorneys, victim advocates, judges, and other professionals throughout the country. The LRC's technical assistance activities focus on child custody cases involving two or more jurisdictions where there is a question as to which jurisdiction has the power to hear the custody matter; the LRC does not provide technical assistance in international custody cases, including those involving the Hague Convention on the Civil Aspects of International Child Abduction. The LRC also operates a toll-free hotline for individual survivors to call for assistance with interstate custody cases.

Toll Free Survivor Hotline: (800) 556-4053

Email: lrc@lrcvaw.org

Website: www.lrcvaw.org

WomensLaw.org

WomensLaw.org, a project of the National Network to End Domestic Violence, provides general legal information on restraining orders, custody, and immigration matters that relate to abuse victims as well as other family law and domestic violence matters. Requests for TA on these matters can be made by advocates, victims, family/friends of victims, or by anyone seeking information via WomensLaw.org's email helpline and a response will be provided within 3 - 5 business days. Go to www.WomensLaw.org and click on "ASK A QUESTION!" to contact the hotline.

Website: www.WomensLaw.org

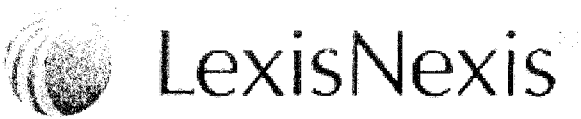
The HagueDV Project

The HagueDV Project has completed a national study of Hague Convention international child abduction cases involving allegations of domestic violence and a bench guide for judges in both Washington State and most recently Minnesota. The Project has just received a new OVW TA grant starting later this Fall to provide limited training and assistance to judges, attorneys, and advocates representing battered mothers who are respondents to a Hague petition.

Toll Free Phone: (866) 820-4599

Email: info@haguedv.org

Website: www.haguedv.org



1 of 24 DOCUMENTS

**HYDEE MCDERMOTT, N/K/A HYDEE MYRES, Appellant, vs. BRADLEY
MCDERMOTT, Respondent.**

No. 29003

SUPREME COURT OF NEVADA

113 Nev. 1134; 946 P.2d 177; 1997 Nev. LEXIS 134

October 1, 1997, Filed

PRIOR HISTORY: [***1] Appeal from a district court order changing primary custody of a minor child. Eighth Judicial District Court, Clark County; Frances-Ann Fine, Judge.

DISPOSITION: Reversed and remanded.

COUNSEL: Carol Menninger, Las Vegas, for Appellant.

Paul M. Gaudet, Las Vegas, for Respondent.

JUDGES: SHEARING, C.J. We concur: Rose, J., Young, J., Maupin, J. Springer, J., dissenting.

OPINION BY: SHEARING

OPINION

[**177] [*1134] *OPINION*

By the Court, SHEARING, C.J.:

Appellant Hydee McDermott, now Hydee Myres ("Hydee"), and respondent Bradley McDermott ("Brad") divorced in February [**178] [*1135] 1992 after a two-year marriage. The decree of divorce gave the couple joint legal custody of their minor child, Kaylee, and designated Hydee as the primary custodial parent.

On August 1, 1995, Brad filed a motion to modify child custody. On October 4, 1995, Brad was arrested

following an altercation with Hydee and later convicted of misdemeanor battery/domestic violence.

In late December 1995, the district court conducted an evidentiary hearing to resolve the child custody dispute. Ultimately, the court ordered a change of custody in favor of Brad based on *Murphy v. Murphy*, 84 Nev. 710, 447 P.2d 664 (1968), and *Truax v. Truax*, 110 Nev. 437, 874 [***2] P.2d 10 (1994). On appeal, Hydee contends, *inter alia*, that the district court erred by modifying custody.

DISCUSSION

Hydee contends that the district court failed to properly consider *NRS 125.480* when making its decision to change custody.

"A change in custody is warranted only when: '(1) the circumstances of the parents have been materially altered; and (2) the child's welfare would be substantially enhanced by the change.'" *Wiese v. Granata*, 110 Nev. 1410, 1413, 887 P.2d 744, 746 (1994) (quoting *Murphy*, 84 Nev. at 711, 447 P.2d at 665). A trial court's determination of custody will not be disturbed unless there has been a clear abuse of discretion, so long as this court is satisfied that the determination was made for appropriate reasons. *Sims v. Sims*, 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993).

NRS 125.480 provides that, in determining the best

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interest of the child, the court shall consider whether either parent has engaged in domestic violence. *NRS 125.480(4)(c)*. On October 1, 1995, *NRS 125.480(5)* came into effect. ¹ Under *NRS 125.480(5)* and (7), ² if the court finds by clear and convincing [*1136] evidence that one of the parents has committed domestic violence, [***3] as defined in *NRS 33.018*, upon "a parent of the child," a rebuttable presumption is created that "sole or joint custody of the child by the perpetrator of the domestic violence is not in the best interest of the child." *NRS 33.018* provides that an act of domestic violence occurs when one person commits battery or assault upon another with whom he or she "has a child in common." *NRS 33.018*. ³

1 In the instant matter, Brad filed his motion to modify custody on August 1, 1995; however, the act of domestic violence and the hearing on the motion did not occur until after October 1, 1995, the effective date of the amendments to *NRS 125.480*. Therefore, we conclude that *NRS 125.480(5)* applies.

2 *NRS 125.480* provides, in pertinent part:

5. Except as otherwise provided in subsection 6 or *NRS 125A.360*, a determination by the court after an evidentiary hearing and finding by clear and convincing evidence that either parent or any other person seeking custody has engaged in one or more acts of domestic violence against the child, a parent of the child or any other person residing with the child creates a rebuttable presumption that sole or joint custody of the child by the perpetrator of the domestic violence is not in the best interest of the child. Upon making such a determination, the court shall set forth:

(a) Findings of fact that support the determination that one or more acts of domestic violence occurred; and

(b) Findings 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.

....

7. As used in this section, "domestic violence" means the commission of any act described in *NRS 33.018*.

[***4]

3 *NRS 33.018* provides, in relevant part:

Domestic violence occurs when a person commits one of the following against or upon another to whom he is related by blood or marriage, with whom he is or was actually residing, with whom he had or is having a dating relationship or with whom he has a child in common, or upon his minor child or a minor child of that person:

1. A battery.

2. An assault.

....

At the custody hearing, Brad testified that, on December 6, 1995, he was convicted of misdemeanor battery/domestic violence. That conviction stemmed from Brad's battery of Hydee on October 4, 1995, when she arrived at Brad's house to pick up Kaylee. Because Brad was found guilty beyond a [**179] reasonable doubt, we conclude that the incident qualifies as an act of domestic violence under *NRS 33.018*. Consequently, the district court should have considered Brad's conviction in light of the rebuttable presumption in *NRS 125.480* when making its decision on the motion for modification of child custody.

The record shows that the district court was aware of Brad's domestic [***5] violence conviction. However,

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the sole references to Brad's violence and temperament problems in the district court's order were embodied in its findings that: (1) it did not approve of the October 4, 1995 violence, but that it "understands the provocation which might have existed"; (2) the defendant should attend domestic violence classes; (3) attendance at these classes will be ordered by the court unless Brad voluntarily goes; (4) the October 4, 1995, behavior will not be tolerated in the future; (5) [*1137] the court will revisit its order if Brad fails to comply with the suggested treatment; and (6) Brad must complete the suggested programs within the school year.

There is no indication that the district court gave due weight to, or even considered, the rebuttable presumption in *NRS 125.480(5)* that sole custody or joint custody of the child by the perpetrator is not in the best interest of the child. Accordingly, we conclude that the district court abused its discretion by failing to expressly consider all necessary components of *NRS 125.480*.

We reverse the order of the lower court and remand this case so that the court may reconsider its child custody modification order in light of [***6] the rebuttable presumption in *NRS 125.480*.⁴

4 The district court should also make findings pursuant to *NRS 125.480(5)(b)*, discussing how visitation arrangements would be made to adequately protect Kaylee and Hydee.

Shearing, C.J.

We concur:

Rose, J.

Young, J.

Maupin, J.

SPRINGER, J., dissenting.

DISSENT BY: SPRINGER

DISSENT

SPRINGER, J., dissenting:

In 1995, the legislature added subsections 5 and 6 to *NRS 125.480*, which provide in some detail procedures that must be followed by the court in custody disputes in which a prospective custodian is charged with "acts of domestic violence" against a child or person residing with the child. The two new subsections spell out the manner in which the court must deal with these matters and create a rebuttable presumption against the violent party.

The mentioned amendments present substantial changes in the law. These changes became effective after "Brad" (as the majority so familiarly calls him) instituted these proceedings. At no time did either [***7] party call the trial court's attention to the substantial changes in the statute, and neither relied in any way on the statute in its amended form. None of the appellate briefs makes mention of the added subsections 5 and 6. Under these circumstances, I do not think it is proper to reverse the judgment of the trial court, based upon a statute that was never mentioned by the parties and upon points that were not raised in this appeal.

The record shows that although the trial court did not consider subparagraphs 5 and 6, it did give careful attention and sufficient consideration to the charges of domestic violence that were made in this case. Overall, the decision in this matter appears to me to be well within the discretion given to trial courts in domestic matters. I would affirm the judgment of the trial court.

Springer, J.

