NRS 3.225 Family court to encourage resolution of certain disputes through nonadversarial methods; cooperation to provide support services.

1. The family court shall, wherever practicable and appropriate, encourage the resolution of disputes before the court through nonadversarial methods or other alternatives to traditional methods of resolution of disputes.

2. The family court or, in a judicial district that does not include a family court, the district court, shall enter into agreements or otherwise cooperate with local agencies that provide services related to matters within the jurisdiction of family courts to assist the family court or district court in providing the necessary support services to the families before the court.

(Added to NRS by 1991, 2175)

Ex. 1

NRS 3.405 Masters: Appointment; powers and duties; findings.

1. In an action to establish paternity, the court may appoint a master to take testimony and recommend orders.

2. The court may appoint a master to hear all cases in a county to establish or enforce an obligation for the support of a child, or to modify or adjust an order for the support of a child pursuant to NRS 125B.145.

3. The master must be an attorney licensed to practice in this State. The master:

(a) Shall take testimony and establish a record;

(b) In complex cases shall issue temporary orders for support pending resolution of the case;

(c) Shall make findings of fact, conclusions of law and recommendations for the establishment and enforcement of an order;

(d) May accept voluntary acknowledgments of paternity or liability for support and stipulated agreements setting the amount of support;

(e) May, subject to confirmation by the district court, enter default orders against a responsible parent who does not respond to a notice or service within the required time; and

(f) Has any other power or duty contained in the order of reference issued by the court.

Ê If a temporary order for support is issued pursuant to paragraph (b), the master shall order that the support be paid to the Division of Welfare and Supportive Services of the Department of Health and Human Services, its designated representative or the district attorney, if the Division of Welfare and Supportive Services or district attorney is involved in the case, or otherwise to an appropriate party to the action, pending resolution of the case.

4. The findings of fact, conclusions of law and recommendations of the master must be furnished to each party or the party's attorney at the conclusion of the proceeding or as soon thereafter as possible. Within 10 days after receipt of the findings of fact, conclusions of law and recommendations, either party may file with the court and serve upon the other party written objections to the report. If no objection is filed, the court shall accept the findings of fact, unless clearly erroneous, and the judgment may be entered thereon. If an objection is filed within the 10-day period, the court shall review the matter upon notice and motion.

(Added to NRS by 1987, 2248; A 1989, 956, 1642; 1997, 2268)

Ex. 2

RULE 53. MASTERS

(a) Appointment and Compensation.

(1) The court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, an examiner and an assesor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain the master's report as security for the master's compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

[As amended; effective January 1, 2005.]

(2) Any party may object to the appointment of any person as a master on one or more of the following grounds:

1. A want of any of the qualifications prescribed by statute to render a person competent as a juror.

2. Consanguinity or affinity within the third degree to either party.

3. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent to either party, or being a member of the family of either party, or a partner in business with either party, or being security on any bond or obligation for either party.

4. Having served as a juror or been a witness on any trial between the same parties for the same cause of action, or being then a witness in the cause.

5. Interest on the part of such person in the event of the action, or in the main question involved in the action.

6. Having formed or expressed an unqualified opinion or belief as to the merits of the actions.

7. The existence of a state of mind in such person evincing enmity against or bias to either party.

(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

[As amended; effective September 27, 1971.]

EX. 3

(c) Powers. The order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order. The master may require the production before the master of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 43(c) and statutes for a court sitting without a jury.

[As amended; effective January 1, 2005.]

(d) Proceedings.

(1) Meetings. When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make the report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in the master's discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) Witnesses. The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, the witness may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) Statement of Accounts. When matters of accounting are in issue before the master, the master may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as the master directs.

[As amended; effective January 1, 2005.]

(e) Report.

(1) Contents and Filing. The master shall prepare a report upon the matters submitted to the master by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report. The master shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. Unless otherwise directed by the order of reference, the master shall serve a copy of the report on each party.

(2) In Nonjury Actions. In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) In Jury Actions. In an action to be tried by a jury the master shall not be directed to report the evidence. The master's findings upon the issues submitted to the master are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) Stipulation as to Findings. The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) Draft Report. Before filing a report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

[As amended; effective January 1, 2005.]

Drafter's Note

2004 Amendment

Subdivision (a)(1) is amended to add "assessor" to the definition of the word "master." The amendment conforms to the federal rule as it existed before the December 1, 2003, amendment to the federal rule. The provisions in subdivision (a)(2), regarding the grounds for objecting to a master's appointment, are retained.

Subdivision (c) is amended to include a reference to evidence statutes in addition to the existing reference to Rule 43(c).

The amendments to subdivision (d) are technical.

Subdivision (e)(1) is amended to provide that the master must serve a copy of his or her report on each party unless the referring court directs otherwise. The amendment conforms to the 1991

amendment to the federal rule, which is now reflected in subdivision (f) of the federal rule, as amended effective December 1, 2003.

SAO

DISTRICT COURT

CLARK COUNTY, NEVADA

| | | |
|---|---|---|
| _____, Plaintiff, vs. _____, Defendant. | ) | CASE NO. DEPT NO. |

**STIPULATION AND ORDER**

COMES NOW, _____, appointed as Special Master and Parenting Coordinator in this matter ("Parenting Coordinator") pursuant to the order of the Court filed _____, hereby submits the following stipulation of the parties as follows:

**IT IS HEREBY AGREED** that _____



EX. 4

**IT IS FURTHER AGREED** that _____

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**IT IS FURTHER AGREED** that _____

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**IT IS FURTHER AGREED** that _____

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Dated: _____ Dated: _____

_____ _____

Plaintiff Defendant

Dated: _____ Dated: _____

_____ _____

Attorney for Plaintiff Attorney for Defendant

**ORDER**

Upon a reading of the foregoing stipulation of the parties and good cause appearing,

**IT IS HEREBY ORDERED** that the parties' stipulation is adopted and made an Order of this Court.

**STATUTORY NOTICES**

**IT IS FURTHER ORDERED** that the parties are bound by the provisions of NRS 125C.200 which provides as follows:

> "If custody has been established and the custodial parent 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 noncustodial parent to move the child from this state. If the noncustodial parent refuses to give that consent, the custodial parent 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".

**IT IS FURTHER ORDERED** that the parties are bound by the provisions of NRS 125.510(6) which provides as follows:

> "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 NRS193.130."

**IT IS FURTHER ORDERED** that the terms of the Hague Convention of October 25, 1980, adopted by the 14th Section of the Hague Conference on Private International Law, apply if a parent abducts or wrongfully retains a child in a foreign country.

**IT IS FURTHER ORDERED** that, pursuant to NRS 135.130 and NRS 125B.055(3), the parties are hereby placed on notice that each of them, within ten (10) days after the entry of this Decree Of Divorce shall file with the Clerk of the Eighth Judicial District Court, Family Division (601 North Pecos Road, Las Vegas, Nevada 89101), a Child Support and Welfare Party Identification Sheet setting forth the following:

1. His or her social security numbers;
2. His or her residential and mailing address;
3. His or her telephone numbers;
4. His or her driver's license number; and
5. The name, address, and telephone of his or her employer.

**IT IS FURTHER ORDERED** that the parties are placed on notice that they are subject to the provisions of NRS 31A and 125.450 regarding the collection of delinquent child support payments.

**IT IS FURTHER ORDERED** that pursuant to NRS 125B.145, either party may request a review of child support pursuant to statute.

DATED this ____ day of _____, 201__.

_____
**DISTRICT COURT JUDGE**

**SUBMITTED BY:**

_____
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_____

ORD

DISTRICT COURT

CLARK COUNTY, NEVADA

| | |
|---|---|
| _____, Plaintiff, vs. _____, Defendant. | CASE NO. DEPT NO. |

**PARENTING COORDINATOR'S REPORT, RECOMMENDATIONS AND ORDER**

COMES NOW, _____, appointed as Special Master and Parenting Coordinator in this matter ("Parenting Coordinator") pursuant to the order of the Court filed _____, having considered the positions of the parties on the issues addressed herein and good cause appearing, hereby finds and recommends as follows:

**IT IS HEREBY RECOMMENDED** that _____

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EX. 5

**IT IS FURTHER RECOMMENDED** that _____

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**IT IS FURTHER RECOMMENDED** that _____

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**IT IS FURTHER RECOMMENDED** that _____

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DATED this ____ day of _____, 201__.

_____

**PARENTING COORDINATOR**

/ / /

/ / /

/ / /

**NOTICE**

You are hereby notified that you have ten (10) days from the date you receive this document within which to file any written objections pursuant to NRCP 53:

> [The Commissioner's Report is deemed received when signed and dated by a party, his attorney or his attorney's employee, or three (3) days after mailing to a party or his attorney, or three (3) days after the Clerk of Courts deposits a copy of the Report in a folder of a party's lawyer in the Clerk's office.]

A copy of the foregoing **PARENTING COORDINATOR'S REPORT, RECOMMENDATIONS AND ORDER** was:

___ Mailed to Plaintiff and Defendant at the following address on the ____ day of _____, 201__:

Plaintiff: _____

_____

_____

Defendant: _____

_____

_____

___ Placed in the folder of Plaintiff's and/or Defendant's counsel in the Clerk's Office on the ____ day of _____, 201__.

CLERK OF THE COURT

By: _____
Deputy Clerk

/ / /

/ / /

**ORDER**

The Court, having reviewed the foregoing **PARENTING COORDINATOR'S REPORT, RECOMMENDATIONS AND ORDER** prepared by the Parenting Coordinator in the instant matter,

_____ The parties having waived the right to object thereto.

_____ No timely objections having been filed thereto.

_____ Having received the objections thereto and the written arguments in support of said objection, and good cause appearing,

_____ **IT IS HEREBY ORDERED** the Parenting Coordinator's Report and Recommendations are affirmed and adopted.

_____ **IT IS HEREBY ORDERED** the Parenting Coordinator's Report and Recommendations are affirmed and adopted as modified in the following manner. (Attached hereto)

_____ **IT IS HEREBY ORDERED** that a hearing on the Parenting Coordinator's Report and Recommendations is set for the _____ day of _____, 20____ at the hour of _____ _.m.

DATED this ____ day of _____, 20___.

_____
DISTRICT COURT JUDGE

**SUBMITTED BY:**

_____
_____
_____
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Referring Disputed Custody Issues to Guardians or Other Third Parties

Brett Turner—Senior Attorney

Guardians ad litem serve a very useful role in child custody proceedings. But it is important to remember that a guardian ad litem is not a judge, and an order giving the guardian too much authority may be invalid.

In Van Schaik v. Van Schaik, 24 A.3d 241 (Md. Ct. Spec. App. 2011), the trial court was faced with a very common situation: The parents of two children had shown persistent inability to communicate and resolve differences without court intervention. In response, the court entered the following order:

[E]xcept in emergencies, the parties shall communicate through e-mail and any contentious matters or disputed e-mail issues shall be forwarded to the attorney for the minor children, Leigh R. Melton, Esquire, for her review. In the event [appellant] and [appellee] cannot reach a mutual agreement on any disputed matter regarding the minor children within twenty-four (24) hours, then the attorney for the minor children shall serve as the "tie-breaker" and resolve the dispute.

Id. at 244. The attorney to whom the disputes were referred was formally the children's "best interests attorney." A best-interests attorney is not quite exactly a guardian ad litem, but fulfills a very similar role as an advocate for a child's best interests. A best-interests attorney can be contrasted with a "child advocate attorney," who advocates the child's wishes without considering whether the wishes are in the child's objective best interests.

The trial court's order was well intentioned, but it was nevertheless reversed upon appeal. "Maryland cases have made clear that a court may not delegate to a non-judicial person decisions regarding child visitation and custody." Id. at 245. The order under review allowed the best-interests attorney to resolve literally any disputed matter, without indicating that the attorney's resolution was subject to any form of judicial review or modification. Because the power granted was so broad, "we conclude that the court erred by delegating judicial authority to Melton, a non-judicial person." Id. at 246.

When delegating authority to a guardian ad litem or other representative of the child's interests, therefore, it is essential to preserve the right to seek judicial review of the guardian's decisions. If that right is not expressly preserved, a court might well conclude that the order makes an improper delegation of judicial power.

EX. 6

Mack-Manley v. Manley, 122 Nev. 849, 138 P.3d 525 (2006)
During the divorce proceedings, the mother was granted temporary primary physical custody of the two minor children. At the custody trial, however, after hearing witnesses and a court-appointed psychologist, the district court found clear and convincing evidence that the father had committed at least one act of domestic violence, but that the eldest child had been absent from school 25 times and late 43 times while in the mother's care. The court found that the father had rebutted the presumption that joint custody was not in the children's best interests and awarded primary physical custody to the father and gave the mother liberal visitation. The mother appealed.

While the appeal was pending, the mother took one of the children to the emergency room because of a bruised knee. Child Protective Services was contacted, the children were taken away from the father for two days, but the allegation was dismissed as being unsubstantiated. The father responded by requesting that the mother be held in contempt for refusing to comply with custody and moved for sole legal custody. A hearing was held and concluded that there was adequate cause for there to be an evidentiary hearing on the issue of contempt. The hearing was held and the mother was found to be in contempt of the "anti-alienation" provision of the decree. The mother was sentenced to three days in jail which was stayed if she would comply with the custody orders. The father was awarded sole legal and physical custody and attorney's fees. The mother appeal from these orders as well.

The Court framed the issue as whether a district court retained jurisdiction, after an appeal has been perfected, to decide a motion to modify child custody when the custody issue is on appeal. The Court noted that a properly filed notice of appeal divested the district court of jurisdiction to consider any issues that were in the pending appeal. The Court concluded that when a custody issue was on appeal the proper procedure to follow was for a remand under *Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978) and it was error for the district court to have concluded that it retained jurisdiction over any child custody modification requests. However, in the interests of judicial economy, the Court affirmed the post-decree order, holding that, 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."

As to contempt, the Court concluded that the district court did have jurisdiction to rule on contempt because a lower court has the power to enforce its orders while an order is on appeal, citing *Rust v. Clark Cty. School District*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987); *Smith v. Emery*, 109 Nev. 737, 740, 856 P.2d 1386, 1388 (1993); and *Huneycutt*, 94 Nev. at 80, 575 P.2d at 585. The Court further held that a parent's hiring of an "investigator" to interview a child violates EDCR 5.12(a), which prohibits "a therapist, counselor, psychologist, or other similar professional" examining a child for the purpose of obtaining an expert opinion for trial or a hearing. For attorney's fees, the Court concluded that the district court could award attorney's fee as part of its continuing jurisdiction, and that an award under NRS 18.010(2)(b), could be made if the other party's claim was brought or maintained without reasonable grounds or to harass.

EX. 7

Rule 5.12. Expert testimony and reports.

(a) No party to an action pending before the court may cause a child who is subject to the jurisdiction of the court to be examined by a therapist, counselor, psychologist or similar professional for the purpose of obtaining an expert opinion for trial or hearing except upon court order, upon written stipulation of the parties or pursuant to the procedure prescribed by N.R.C.P. 35.

(b) When it appears an expert medical, psychiatric or psychological evaluation is necessary for the parties or their child(ren), the parties are encouraged to stipulate to retention of one expert. Upon request of either party, or on its own initiative, the court may appoint a neutral expert if the parties cannot agree on one provider. The parties are responsible for all fees.

[Added; effective August 21, 2000.]

EX. 8

Rule 5.13. Child interview and outsource evaluation reports.

(a) A written child interview report or outsource evaluation report prepared by the Family Mediation Center or an outsource evaluator shall be delivered to the judge in chambers. Only the parties and their attorneys are entitled to read the written reports, which are confidential except as provided by order of the judge.

(b) Only a licensed attorney may retain possession of a written report outside the court. An attorney retaining a copy of a written report may not make copies of the report or disclose its contents to anyone without advance permission of the judge. If an attorney retaining a copy of a written report leaves the case, the attorney may not give the written report to the client. The attorney must either turn the written report over to another licensed attorney who has appeared as successor counsel for that party or return the written report to the judge or hearing master who ordered the report.

(c) No copy of a written report, or any part thereof, may be made an exhibit to, or a part of, the open court file except by the judge. No child who is the subject of a written report may see a copy of the report or be advised of its contents by anyone. No party may reproduce a copy of a written report or any part thereof or share the contents of a written report with any other person. A written report may be received as direct evidence of the facts contained therein that are within the personal knowledge of the specialist who prepared the report.

(d) If a party is proceeding in proper person, that party may not retain a copy of a written report. That party is entitled to read a written report in the judge's courtroom or chambers or at such other place designated by the judge.

(e) Any confidential exhibits attached to a written report may not be distributed to anyone without an order of the court. Such exhibits may be viewed, upon request of counsel or a party proceeding in proper person, in the judge's courtroom or chambers or such other place designated by the judge. Statements of a child may only be viewed upon order of the court.

(f) The original written report and any confidential exhibits must be returned to the clerk and sealed in a separate file or kept by the judge in chambers subject to the direction of the judge who is assigned the case. This separate file may not be viewed by or released to anyone except a judicial officer or an employee of a judicial officer without an order from the court.

[Added; effective November 27, 2003.]

EX. 9

ORDR

Attorneys for

**DISTRICT COURT**
**FAMILY DIVISION**
**CLARK COUNTY, NEVADA**

| | |
|---|---|
| , Plaintiff, vs. , Defendant. | Case No.: Dept. No.: Hearing Date: N/A Hearing Time: N/A |

# ORDER FOR APPOINTMENT OF SPECIAL MASTER AND PARENTING COORDINATOR

The Court, having considered all the pleadings on file, and good cause appearing, hereby orders the appointment of a Special Master and Parenting Coordinator under the following terms and conditions:

## I. APPOINTMENT AND DESIGNATION OF TERMS

A. is hereby appointed as Parenting Coordinator in this matter (said appointee hereafter referred to as the "Parenting Coordinator"). The Parenting Coordinator's full name, title, mailing address and phone numbers are as follows:

WILLICK LAW GROUP
3591 East Bonanza Road
Suite 200
Las Vegas, NV 89110-2101
(702) 438-4100

EX.10

B. This appointment is made pursuant to NRCP 53(a) and is intended to be a delegation of judicial authority pursuant to said Rule, subject to the grievance procedures described herein.

## II. PARENTING COORDINATOR FEES/EXPENSE SHARING

A. Hourly fees for the services of the Parenting Coordinator shall be set by the Parenting Coordinator pursuant to a written agreement with the parties. shall pay of the fees and shall pay of the fees. All fees shall be advanced by the parties. The Court reserves jurisdiction to re-allocate said payments between the parties. The Parenting Coordinator may determine a re-allocation of fees and costs on any single issue if it appears that the conduct of one party warrants the same.

B. Objection to any fees or costs billed by the Parenting Coordinator shall be made in writing within 30 days of receipt, or the billing is deemed accepted. Objections will be handled in accordance with the grievance procedure as set forth below.

C. In the event that the testimony and/or written report of the Parenting Coordinator is required for any hearing, settlement conference, or court action, by one or both parties, the Parenting Coordinator's fees for such services shall be paid by both parties, in advance, according to the estimate by the Parenting Coordinator. Ultimately, the Court shall determine the proper allocation between the parties for all fees of the Parenting Coordinator for such services and may require reimbursement by one party to the other for any payment to the Parenting Coordinator.

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WILLICK LAW GROUP
3591 East Bonanza Road
Suite 200
Las Vegas, NV 89110-2101
(702) 438-4100

## III. GENERAL AUTHORITY

A. The Parenting Coordinator shall have the general authority to resolve parent/child and custody/visitation issues as set forth below, with the following guidelines:

1. Facilitate the resolution of disputes regarding the implementation of the *Parenting Plan*, the schedule, or parenting issues, provided that such resolution does not involve a substantive change[1] to the shared *Parenting Plan*.

2. Direct as necessary one or both parties to utilize resources for the following services, including but not limited to, random drug screens, parenting classes, and any mental health and/or counseling services, psychotherapy or a substance-abuse assessment or treatment for either or both parties , or the children, with the Parenting Coordinator to have access to the results of any psychological testing or other assessments of the children and/or parties .

3. Implement non-substantive changes to, and/or clarify, the shared *Parenting Plan*, including but not limited to issues such as:

   a. Transitions/exchanges of the children including date, time, place, means of transportation and transporter;

   b. Holiday sharing;

   c. Summer and/or track break vacation sharing and scheduling;

   d. Communication between parties ;

   e. Health care management issues, including choice of medical providers (including dental, orthodontic, psychological, psychiatric, or vision care), pursuant to the Court's order for payment of said expenses;

[1] A substantive change is defined as a modification to the *Parenting Plan* that significantly changes the timeshare of the children with either party or modifies the timeshare such that it amounts to a change in the designation of primary physical custody or a shared physical custodial arrangement.

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(702) 438-4100

f. Education or daycare including, but not limited to, school choice, tutoring, summer school, and participation in special education testing and programs;

g. Children's participation in religious observances and religious education;

h. Children's participation in extracurricular activities, including camps and jobs;

i. Children's travel and passport issues;

j. Purchase and sharing of children's clothing, equipment and personal possessions, including possession and transporting of same between households;

k. Children's appearance and/or alteration of children's appearance, including haircuts, tattoos, ear, face, or body piercing;

l. Communication between parties including telephone, fax, e-mail, notes in backpacks, etc., as well as communication by a party with the children including telephone, cell phone, pager, fax, and e-mail when the children are not in that party's care;

m. Contact with significant others and/or extended families;

n. Require the signing of appropriate releases from each party to provide access to confidential and privileged records, including medical, psychological or psychiatric records of a party or the children;

o. Report to the Court regarding compliance with the parenting coordination process, which could include recommendations to the Court about how to more effectively implement the parenting coordination process;

p. Report to the Court the extent of the parties ' compliance with other Court orders (therapy, drug tests, children's therapy) with or without

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providing a recommendation on what should be done regarding any lack of compliance;

q. Individually communicate with, and provide information to, persons involved with, or providing services to the family member, including but not limited to, the custody evaluator, lawyers, teachers, school officials, physical and mental health providers, grandparents, stepparents, significant others, or anyone else the Parenting Coordinator determines to have a significant role in the life of the family.

(1) Any communication between the Parenting Coordinator and the attorneys shall be via phone conference involving both attorneys.

## IV. ADDITIONAL RESPONSIBILITIES

The Parenting Coordinator should have the following additional responsibilities, if initialed below by the Judge making this Order:

A. Temporary decision-making authority to resolve minor disputes between the parties concerning shared parenting decisions until such time as a Court order is entered modifying the decision. Such decision-making services provided by the Parenting Coordinator shall apply both substantive and non-substantive changes to the *Parenting Plan*. _____(*Judge's Initials*)

B. Make recommendations to the Court concerning modifications to the shared *Parenting Plan*, including, but not limited to, parenting time/access schedules or conditions including variations from the existing *Parenting Plan*. _____(*Judge's Initials*)

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## V. PROCEDURES AND RELATED REQUIREMENTS

A. The Parenting Coordinator shall be provided with copies of pertinent pleadings, orders, and custody evaluation reports which relate to the issues to be brought to the Parenting Coordinator. The Parenting Coordinator shall also have direct access to all orders and pleadings on file in the case, including all files under a Sealing Order of the Court.

B. All written communications by a party to the Parenting Coordinator shall be copied or provided to the other party, concurrently.

C. The parties shall make themselves and the minor children available for meetings and/or appointments as deemed necessary by the Parenting Coordinator. The Parenting Coordinator shall determine in each instance whether an issue warrants a meeting with the parties.

D. The parties shall participate, in good faith, in an initial mediation/conflict resolution process with the Parenting Coordinator in an effort to resolve a dispute. Should mediation result in an agreement, the Parenting Coordinator shall prepare a simple "Agreement" on the subject for signature by each party and the Parenting Coordinator. The Parenting Coordinator shall send a copy of the agreement to each party; the parties shall each sign the agreement and return a copy to the Parenting Coordinator within two weeks.

E. Should the mediation not result in a stipulated agreement, the Parenting Coordinator shall prepare and send to the parties, as well as a courtesy copy to the Court, a written decision ("Decision") resolving the dispute, which shall be followed by the parties until otherwise ordered by the Court. Said Decision shall set forth the reasons for the Parenting Coordinator's Decision. Should either party dispute the written Decision of the Parenting Coordinator, that party must file a motion with the Court within two weeks of receiving the Decision.

F. The parties understand that the Parenting Coordinator's Decision is not a final decision, but rather can be reviewed by the Court. However, the parties are on notice

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and understand that the purpose and intent of the Court in appointing a Parenting Coordinator is to resolve disputes between the parties without the expense of litigation and the expenditure of judicial resources. Therefore, the Court will not overturn a Decision of the Parenting Coordinator without substantial cause. A Decision of the Parenting Coordinator remains a binding decision unless and until it is overturned or modified by the Court.

G. The parties shall provide in a timely manner any documents requested by the Parenting Coordinator and/or execute any releases required for the Parenting Coordinator to directly obtain documents or records which the Parenting Coordinator deems relevant to the submitted issues. Failure to do so may result in imposition of sanctions by the Court.

H. The Parenting Coordinator shall have the authority to determine the protocol of all fact-finding procedures. The Parenting Coordinator shall have the authority to engage in ex-parte communications with the parties.

I. The Parenting Coordinator shall have the authority to interview and require the participation of other persons whom the Parenting Coordinator deems to have relevant information or to be useful to participants in the parenting coordination process, including, but not limited to custody evaluators, teachers, health and medical providers, step-parents. and significant others.

## VI. PARENTING COORDINATOR LIMITATIONS

The Parenting Coordinator may not serve as a custody evaluator, investigator, mediator, psychotherapist, attorney, or guardian ad litem for any party or another member of the family for whom the Parenting Coordinator is providing or has provided parenting coordination services.

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## VII. SCHEDULING

Each party is responsible for contacting the Parenting Coordinator within ten days of this order to schedule an initial meeting. Subsequent appointments may be scheduled at the request of the parties or at the request of the Parenting Coordinator.

## VIII. EMERGENCY COMMUNICATION WITH THE COURT

The Parenting Coordinator shall work with both parties to resolve conflicts and may recommend appropriate resolution to the parties and their legal counsel prior to the parties seeking Court action. However, the Parenting Coordinator shall immediately communicate with the Court, without prior notice to the parties, counsel, or a guardian ad litem, in the event of an emergency in which:

A. A party or the children are anticipated to suffer or is suffering abuse, neglect, or abandonment.

B. A party or someone acting on his or her behalf, is expected to wrongfully remove or is wrongfully removing the children from the other party and the jurisdiction of the Court without prior Court approval.

## IX. PARENTING COORDINATOR REPORTS AND APPEARANCES IN COURT

A. The Parenting Coordinator's reports to the Court shall be sent to the parties, and the guardian ad litem (if any). Each party shall be responsible for providing a copy to their attorney. The Parenting Coordinator's reports are not confidential and may be presented to the Court by the parties or counsel according to the rules of evidence. In cases where there is a history of domestic violence, the Parenting Coordinator shall take necessary steps to protect certain personal information about the victim which may be necessary to protect the safety of the victim and the integrity of the parenting coordination process.

B. In the event that the testimony and/or written report of the Parenting Coordinator is required for any hearing, settlement conference, including depositions, or other Court

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action by one or both parties, the Parenting Coordinator's fees for such services shall be paid by both parties, in advance, according to the estimate by the Parenting Coordinator. Ultimately, the Court shall determine the ultimate allocation of such fees between the parties. The Parenting Coordinator shall be given a copy of the motion and notice of the hearing. The Court shall determine who is responsible to pay the Parenting Coordinator for the Court appearance.

C. A Parenting Coordinator directed by the Court to testify in a Court proceeding shall not be disqualified from participating in further parenting coordination efforts with the family, but the Court, in its discretion, may order the substitution of a new parenting coordinator, or may relieve the Parenting Coordinator of some or all duties, or the Parenting Coordinator may voluntarily determine that such substitution would be in the best interest of the children.

## X. GRIEVANCES

A. The Parenting Coordinator may be disqualified on any of the grounds applicable to removal of a Judge, Referee or Arbitrator, except that no peremptory challenge shall be permitted.

B. Complaints and grievances from any party regarding the performance, actions, or billing of the Parenting Coordinator shall only be determined according to the following procedure:

1. A person having a complaint or grievance regarding the Parenting Coordinator must discuss the matter with the Parenting Coordinator personally before pursuing it in any other manner.

2. If, after the discussion, the party decides to pursue a complaint, that party must first submit a written letter detailing the complaint or grievance to the Parenting Coordinator with a copy to all other counsel or parties.

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3. The Parenting Coordinator shall then provide a written response to the grievance to the party and all counsel or parties within 30 days of the written complaint or grievance.

4. If the grievance or complaint is not resolved after this exchange, the complaining party may proceed by noticed motion to the Court, addressing the issues raised in the complaint or grievance.

5. Neither party may initiate Court proceedings for a complaint, without first complying with these grievance procedures. Failure to comply with said procedures may result in sanctions by the Court.

6. The Court shall reserve jurisdiction to determine if either or both parties and/or the Parenting Coordinator shall ultimately be responsible for any portion or all of the Parenting Coordinator's time and costs spent in responding to the grievance and the Parenting Coordinator's attorney's fees, if any.

7. Neither party shall file any complaint or make any written submission regarding the Parenting Coordinator to the Parenting Coordinator's licensing board without first complying with these grievance procedures and obtaining the Court's decision ratifying the grievance.

## XI. TERMS OF APPOINTMENT

A. The Parenting Coordinator is appointed until discharge by the Court. The Parenting Coordinator may apply directly to the Court for discharge, and shall provide the parties and counsel with notice of the application for discharge. The Court may discharge the Parenting Coordinator without a hearing unless either party requests a hearing in writing within ten days from the application for discharge.

B. Either party may seek to suspend or terminate the Parenting Coordinator process by filing a motion with the Court. The Parenting Coordinator's services may not be terminated by either of the parties without order of the Court.

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C. In the event the Parenting Coordinator is discharged, the Court will furnish a copy of the Order of termination of the Parenting Coordinator to the parties and counsel.

**DATED** this _____ day of _____, 2009.

_____
**DISTRICT COURT JUDGE**

Respectfully submitted by:

_____

Attorneys for Plaintiff

Approved as to form and content:

_____

Attorneys for Defendant

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SUMMARY RECAP OF CHANGES TO PROPOSED MODEL ORDER

I. Eliminated unconstitutional or unlawful provisions.

A. Specifically, provisions restricting access to court without first participating in subjectively-managed "grievance" procedure (see *Van Schaik v. Van Schaik*, 24 A.3d 241 (Md. Ct. Spec. App. 2011)) and those that apparently could be read as permitting PC to interfere with attorney/client privilege (see, *e.g.*, *Gideon v. Wainwright*, 83 S. Ct. 792 ((1963) (noting that such access, unimpaired and unimpeded, was guaranteed by the 14th Amendment); *Morales v. Turman*, 326 F. Supp. 677 (E.D. Tex. 1971) (noting the fundamental nature of the right to confer with counsel of one's own choosing)).

B. Altered virtually all references to PC having "authority" to "resolve issues" (with the exception of specific enumerated powers) in favor of duty to obey existing orders and to recommend changes, while resolving conflicting interpretations or applications where orders are imprecise or silent, and to facilitate non-substantive administrative details such as pick ups and drop-offs.

C. Eliminated unenforceable assertion of authority to "compel" participation by third parties (non-parties to the dispute before the court) in favor of power to "request the participation" of third parties.

D. Made explicit the need to abide by current orders, not attempt to "treat" any person involved, to respect the attorney/client relationship, and to not interfere in any way with access to court.

II. Moved matters of judicial discretion to specific section to be individually delegated – or not.

A. Power to resolve minor disputes pending court decision on modification.

B. Power to recommend modifications to the Parenting Plan (as opposed to simply enforcing/facilitating the existing order).

C. Power to direct the parties to drug screens, parenting classes, psychological services, etc.

III. Moved to Court discretion the methodology of communications.

A. Specifically, removed unilateral power of unlimited ex parte communications (which have been abused, according to some counsel), in favor of judicial call whether all communications are to be joint (verbal) or contemporaneous (written), or in the alternative to permit ex parte communications with counsel and parties.

IV. Streamlined requirements for recommendations and objections to recommendations.

EX. 11

A. Eliminated the months of unreviewed time the PCs were given to impose on litigants in favor of 10-day curve for objections to recommendations for proposed dispute resolutions.

B. Made it clear that the court can allocate costs in any way it wishes among the parties and the PC.

V. Made explicit the judicial authority to terminate/alter the PC (both the person and the process) upon motion or *sua sponte*.

**ORDR**
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Attorneys for Plaintiff

**DISTRICT COURT**
**FAMILY DIVISION**
**CLARK COUNTY, NEVADA**

,

Plaintiff,

vs.

,

Defendant.

Case No.:
Dept. No.:

Hearing Date:
Hearing Time:

# ORDER FOR APPOINTMENT OF PARENTING COORDINATOR AS A SPECIAL MASTER

The Court, having considered all the pleadings on file herein, and good cause appearing, does hereby Order the appointment of a Special Master and Parenting Coordinator under the following terms and conditions.

**1.0. APPOINTMENT AND DESIGNATION OF TERMS**

1.1. ... is hereby appointed as the Special Master and Parenting Coordinator in this matter (said appointee hereafter referred to as the "Parenting Coordinator"). The Parenting Coordinator's full name, title, mailing address, and phone numbers are as follows:



Ex. 12

...

1.2. This appointment is made pursuant to NRCP 53(a) and is intended to be a delegation of judicial authority pursuant to said Rule, subject to the grievance procedures described herein.

**2.0. PARENTING COORDINATOR FEES/EXPENSE SHARING**

2.1. Hourly fees for the services of the Parenting Coordinator shall be set by the Parenting Coordinator pursuant to a written agreement with the parties. The parties shall equally split the cost of the Parenting Coordinator's fees. All fees shall be paid in advance by the parties. The Court reserves jurisdiction to re-allocate said payments between the parties. The Parenting Coordinator may recommend a different fee split to the parties and the Court.

2.2. Objection to any fees or costs billed by the Parenting Coordinator shall be made in writing within thirty (30) days of receipt, or the billing is deemed accepted. Objections will be handled in accordance with the grievance procedure as set forth below

2.3. In the event that the testimony and/or written report of the Parenting Coordinator is required for any hearing, settlement conference, or court action, by one or both parties, the Parenting Coordinator's fees for such services shall be paid by both parties, in advance, according to the estimate by the Parenting Coordinator. Ultimately, the Court shall determine the proper allocation between the parties for all fees to the Parenting Coordinator for such services and may require reimbursement by one party to the other for any payment to the Parenting Coordinator.

...

...

...

**3.0. GENERAL AUTHORITY**

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3.1. The Parenting Coordinator shall have the general authority to obtain agreement or recommend resolution of parent/child and custody/visitation issues as set forth below and with the following guidelines:

3.1.1. A parenting Coordinator may facilitate the resolution of disputes regarding the implementation of the *Parenting Plan, Custody Order*, the schedule, or parenting issues, provided that such resolution does not involve a substantive change to the *Parenting Plan* or *Custody Order*.

(a). A substantive change is defined as a modification to the *Parenting Plan* or *Custody Order* that (a) significantly changes the timeshare of the child with either parent; (b) modifies the timeshare such that it amounts to a change in the designation of primary physical custody or a shared physical custodial arrangement; (c) changes to supervised visitation, or changes from supervised to unsupervised visitation; or (d) addition of overnight visits.

3.1.2. Implement non-substantive changes to, and/or clarify, the Court's orders, including but not limited to issues such as:

(a). Transitions/exchanges of the child(ren) including date, time, place, means of transportation, and transporter;

(b) Holiday sharing;

(c) Summer and/or track break vacation sharing and scheduling;

(d) Communication between parties;

(e) Health care management issues, including choice of child medical providers (including dental, orthodontic, psychological, psychiatric, or vision care) and payment of unreimbursed medical expenses, pursuant to the Court's order for payment of said expenses;

(f) Education or daycare including, but not limited to, school choice, tutoring, summer school, and participation in special education testing and programs; allocation of the cost for the foregoing items shall be determined by the

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Parenting Coordinator, subject to the Court's review, if requested by either party;

(g) Child(ren)'s participation in religious observances and religious education;

(h) Child(ren)'s participation in extracurricular activities, including camps and jobs;

(i) Child(ren)'s travel and passport issues;

(j) Purchase and sharing of child(ren)'s clothing, equipment, and personal possessions, including possession and transporting of same between households;

(k) Child(ren)'s appearance and/or alteration of child(ren)'s appearance, including haircuts, tattoos, ear, face, or body piercing;

(l) Communication between the parties including, but not limited to, telephone, fax, e-mail, notes in backpacks, etc., as well as communication by a party with the child(ren) including, but not limited to, telephone, cell phone, pager, fax, and e-mail when the child(ren) are not in that party's care;

(m) Contact with significant others and/or extended families;

(n) Requiring the signing of appropriate releases from each party to provide access to confidential and privileged records, including medical, psychological, or psychiatric records of a party or the child(ren);

(o) Reporting to the Court regarding compliance with the parenting coordination process which could include recommendations to the Court about how to more effectively implement the parenting coordination process;

(p) Reporting to the Court the extent of the parties ' compliance with other Court orders (therapy, drug tests, child(ren)'s therapy) with or without providing a recommendation on what should be done regarding any lack of compliance;

(q) Individually communicating with, and providing information to, persons involved with, or providing services to, the family members, including but not limited to, the custody evaluator, lawyers, teachers, school officials,

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physical and mental health providers, grandparents, stepparents, significant others, or anyone else the Parenting Coordinator determines to have a significant role in the life of the family.

(i) Any non-emergency verbal communication between the Parenting Coordinator and any of the attorneys shall be via phone conference involving all other attorneys of record.

(ii) Written communication between the Parenting Coordinator and any of the attorneys should normally be copied simultaneously to all other attorneys of record.

(r) Making recommendations to the parties and Court regarding overnight visits and supervision issues.

**4.0. ADDITIONAL RESPONSIBILITIES**

The Parenting Coordinator should have the following additional responsibilities, if initialed below by the Judge making this Order:

4.1. Temporary decision-making authority to resolve minor disputes between the parties concerning shared parenting decisions until such time as a Court order is entered modifying the decision. Such decision-making services provided by the Parenting Coordinator shall apply to non-substantive changes to the *Parenting Plan* or *Custody Order*. _____ (*Judge's Initials*).

4.2. Make recommendations to the Court concerning modifications to the *Parenting Plan* or *Custody Order*, including but not limited to, parenting time/access schedules or conditions, including variations from the existing *Parenting Plan* or *Custody Order*. _____ (*Judge's Initials*).

4.3. Direct, as necessary, one or both parties to utilize community resources for the following services, including but not limited to: random drug screens; parenting classes; and any mental health and/or counseling services; psychotherapy or a substance abuse assessment or treatment for either or both parties, or the child(ren); with the Parenting Coordinator to have access to the results of any psychological

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testing or other assessments of the child(ren) and/or parties. _____ (*Judge's Initials*).

**5.0. PROCEDURES AND RELATED REQUIREMENTS**

5.1. The Parenting Coordinator shall be provided with copies of pertinent pleadings, orders, and custody evaluation reports which relate to the issues to be brought to the Parenting Coordinator. The Parenting Coordinator shall also have direct access to all orders and pleadings on file in the case, including all files under a *Sealing Order* of the Court. If both parties are representing themselves Pro Per, the JEA shall provide a copy of the custody evaluation report(s) to the Parenting Coordinator.

5.2. All written communications by a party or a party's counsel to the Parenting Coordinator shall be copied or provided to the other party or all other attorneys of record, concurrently.

5.3. The parties shall make themselves and the minor child(ren) available for meetings and/or appointments as deemed necessary by the Parenting Coordinator. The Parenting Coordinator shall determine in each instance whether an issue warrants a meeting with the parties.

5.4. In the event of a dispute as to the construction, interpretation, or application of the Court's orders, or a dispute regarding a matter not encompassed within the scope of the Court's orders, the following procedures will be followed. In no event, however, may the Parenting Coordinator override, suspend, or contradict the Court's orders by *Agreement*, *Recommendation*, or otherwise.

(a). The parties shall participate, in good faith, in an initial mediation/conflict resolution process with the Parenting Coordinator in an effort to resolve a dispute. Should mediation result in an agreement, the Parenting Coordinator shall prepare a simple *Agreement* on the subject for signature by each party and the Parenting Coordinator. The Parenting Coordinator shall send a copy of the *Agreement* to each party, and, if represented, to their attorney(s); the parties shall each sign the *Agreement*, have it notarized, and return their copy

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to the Parenting Coordinator within two weeks. The *Agreement* shall not have the force of a court order, but shall be binding as between the parties until and unless superseded by *Recommendation* or further court order.

(b). Should the mediation not result in a stipulated agreement, the Parenting Coordinator shall prepare and send to the parties and, if represented, their attorney(s), as well as a courtesy copy to the Court, a written *Recommendation* proposing a resolution to the dispute, which shall be posted on OurFamilyWizard.com (if the parties are utilizing Our Family Wizard) and shall also be mailed to each party and their attorney(s), if represented, and which shall be followed by the parties until otherwise ordered by the Court. Said *Recommendation* shall set forth the reasons for the Parenting Coordinator's Recommendation.

(c). Should either party dispute the written *Recommendation* of the Parenting Coordinator, that party must file an objection with the Court within 10 judicial days of receiving the *Recommendation*. Any such objection must be served upon the other party (or, if represented, all other attorneys of record), concurrently.

(d). The Parenting Coordinator's *Recommendation* is not a final decision, but rather can be reviewed by the Court. However, the parties are on notice that the purpose and intent of the Court in appointing a Parenting Coordinator is to resolve minor disputes between the parties where possible without the expense of litigation and the expenditure of judicial resources. A *Recommendation* of the Parenting Coordinator shall become an order of the Court unless an objection is filed with the Court as specified above, or unless the Court elects to reject the *Recommendation sua sponte*.

5.7. The parties shall provide, in a timely manner, any documents requested by the Parenting Coordinator and/or execute any releases required for the Parenting Coordinator to directly obtain documents or records which the Parenting Coordinator

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deems relevant to the submitted issues. Failure to do so may result in imposition of sanctions by the Court.

5.8. The Parenting Coordinator shall have the authority to determine the protocol of all fact-finding procedures.

5.9. Communications by the Parenting Coordinator shall be per whichever of the following protocols is directed by the Court:

(a). The Parenting Coordinator shall have the authority to engage in ex-parte communications with the parties, and/or their counsel. _____ (*Judge's Initials*).

***OR***

(b). Any non-emergency verbal communication between the Parenting Coordinator and any of the parties or attorneys shall be via phone conference involving all parties or attorneys of record, and all non-emergency written communication between the Parenting Coordinator and any party or attorney shall be copied to all other parties (and, if represented, their attorneys of record), concurrently. _____ (*Judge's Initials*).

5.10. The Parenting Coordinator shall have the authority to interview and request the participation of other persons whom the Parenting Coordinator deems to have relevant information or to be useful to participants in the parenting coordination process, including, but not limited to custody evaluators, teachers, health and medical providers, step-parents, and significant others.

**6.0. PARENTING COORDINATOR LIMITATIONS**

6.1. The Parenting Coordinator may not serve and shall not attempt to act as a custody evaluator, investigator, mediator, psychotherapist, attorney, or guardian *ad litem* for any party, or another member of the family of any party, for whom the Parenting Coordinator is providing, or has provided, parenting coordination services.

6.2. The Parenting Coordinator shall abide by all existing court orders. A court order may only be modified by the Court.

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6.3. The Parenting Coordinator will take no action having the appearance, substance, or intimation of interference in the attorney/client relationship between any party and that party's existing or prospective counsel, nor seek to invade the attorney/client privilege, nor to hinder any party's free access to the Court.

**7.0. SCHEDULING**

7.1. Each party is responsible for contacting the Parenting Coordinator within ten days of this Order to schedule an initial meeting. Subsequent appointments may be scheduled at the request of the parties or at the request of the Parenting Coordinator.

**8.0. EMERGENCY COMMUNICATION WITH THE COURT**

8.1. The Parenting Coordinator shall work with both parties to resolve conflicts and may recommend appropriate resolution to the parties and their legal counsel prior to the parties seeking Court action. However, the Parenting Coordinator shall immediately communicate with the Court, without prior notice to the parties, counsel, or a guardian ad litem, in the event of an emergency in which:

(a). A party, or any child(ren), is anticipated to suffer, or is suffering abuse, neglect, or abandonment.

(b). A party, or someone acting on his or her behalf, is expected to wrongfully remove, or is wrongfully removing, the child(ren) from the other party and the jurisdiction of the Court without prior Court approval.

**9.0. PARENTING COORDINATOR REPORTS AND APPEARANCES IN COURT**

9.1. The Parenting Coordinator's report(s) to the Court shall be sent to the Court, the parties, the parties' attorney(s), if represented, and the guardian ad litem (if any), concurrently. The Parenting Coordinator's reports are not confidential and may be presented to the Court by the parties or counsel according to the rules of evidence. In cases where there is a history of domestic violence, the Parenting Coordinator shall take necessary steps to protect certain personal information about the victim, which may be necessary to protect the safety of the victim and the integrity of the parenting coordination process. The Parenting Coordinator shall make available file

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documents and notes upon the request of either party, or their attorney(s) if represented.

9.2. In the event that testimony and/or a written report of the Parenting Coordinator is required for any hearing, settlement conference, including depositions, or other Court action by one or both parties, the Parenting Coordinator's fees for such services shall be paid by both parties, in advance, according to the estimate by the Parenting Coordinator. The Court shall determine the ultimate allocation of such fees between the parties. The Parenting Coordinator shall be given a copy of the motion and notice of the hearing, at least 20 days prior to the hearing, unless otherwise ordered by the Court.

9.3. A Parenting Coordinator directed by the Court to testify in a Court proceeding shall not be disqualified from participating in further parenting coordination efforts with the family, but the Court, in its discretion, may order the substitution of a new Parenting Coordinator, or may relieve the Parenting Coordinator of some or all duties, or the Parenting Coordinator may voluntarily determine that such substitution would be in the best interest of the child(ren).

**10.0. GRIEVANCES**

10.1. The Parenting Coordinator may be disqualified on any of the grounds applicable to removal of a Judge, Referee, Arbitrator, or Mediator, except that no peremptory challenge shall be permitted.

10.2. Complaints and grievances from any party regarding the performance, actions, or billing of the Parenting Coordinator shall be determined according to the following procedure:

(a) A party (or attorney, if that party is represented) having a complaint or grievance regarding the Parenting Coordinator is urged wherever practical and appropriate to discuss the matter with the Parenting Coordinator personally, verbally or in writing, before pursuing it in any other manner.

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(b) If the Parenting Coordinator receives a complaint or grievance, either verbally or in writing, the Parenting Coordinator shall provide a written response to the grievance to all parties (and attorneys, if parties are represented) within 10 days of the written complaint or grievance.

(c) If the grievance or complaint is resolved by this exchange, any complaining party or attorney with a motion pending concerning the same complaint may take the matter off calendar.

10.3. The Court reserves jurisdiction to determine if either or both parties and/or the Parenting Coordinator shall ultimately be responsible for all or any portion of any party's attorney's fees, or the Parenting Coordinator's time and costs spent in responding to the grievance and the Parenting Coordinator's attorney's fees, if any.

**11.0. TERMS OF APPOINTMENT**

11.1. The Parenting Coordinator is appointed until discharge by the Court. The Parenting Coordinator may apply directly to the Court for a discharge, and shall provide the parties and counsel with notice of any such application for discharge. The Court may discharge the Parenting Coordinator without a hearing at any time, *sua sponte* or upon written request by any party (or attorney for a party, if represented), or the Parenting Coordinator.

11.2. Either party may seek to suspend or terminate the Parenting Coordinator process by filing a motion with the Court. The Parenting Coordinator's services may not be terminated by either of the parties without order of the Court.

11.3. In the event the Parenting Coordinator is discharged, at any time and for any reason, the Court will furnish a copy of the Order of termination of the Parenting Coordinator

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to the Parenting Coordinator, and to all parties (or, if parties are represented, to counsel).

**DATED** this _____ day of _____, 20__.

_____
**DISTRICT COURT JUDGE**

Respectfully:

_____
, ESQ.
Nevada Bar No.

Las Vegas, Nevada 89
Attorneys for
P:\wp13\MISC\0000*095.WPD

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A legal note from Marshal Willick about pervasive problems in Nevada with Mental Health Professionals ("MHPs") involved with the court system.

For over a year, we have been increasingly alarmed at how MHPs have been given latitude, and accorded deference, entirely out of keeping with their training, expertise, abilities, knowledge, or legitimate function. Lawyers, and especially judges, have been failing in their duty to ensure that the input of psychologists in court decisions is restricted to a correct and quite limited place in legal proceedings. It is lazy, if not irresponsible, to give such practitioners any authority beyond their competence, and doing so has been harmful to too many innocent people for too long.

## I. BACKGROUND

A number of problems have been evident for some time. In February, 2011, Legal note No. 34, "Shrinks Gone Wild," posted at http://www.willicklawgroup.com/newsletters, lamented the "gross and pervasive failure of various mental health professionals to perceive and fill their proper place in the legal process." The primary focus of that note was on custody and relocation decisions.

It noted that courts were bound to specific statutory factors and criteria, but that MHPs were often asked to provide input into such decisions without knowledge of any such legal factors, or standards. The MHPs are most often called on to perform tasks such as child interviews on contested questions of fact or full-blown custody evaluations, but they are also are being called on to perform tasks that are given titles that presume some scientific basis for the activity, such as "parenting coordinator" or "reunification therapist" – even if no objective standards for such tasks even exist.

A disturbing trend was identified in legal note No. 34, in which MHPs sought to exceed their range of competence – which is applying appropriate objective and subjective tests and reporting the results of those procedures to the court, perhaps accompanied by an opinion (where called for) of the "psychological best interests" of an affected child or other person.

Such informed opinion as to "psychological best interest," accompanied by any objective data uncovered by a mental health professional as to the ability of the parents to function (generally, or specifically as care-givers), gives a trial court ***one*** piece of information (among many others) that it must weigh in making family law decisions.

The note cautioned that some MHPs appeared to misconstrue their role in legal proceedings, ceasing to see themselves as contributing a piece to a puzzle, and instead very improperly seeing themselves in the role of decision-makers, even when entirely ignorant of the factors required to be weighed, or standards required to be applied. If anything, these problems appear to be worse with MHPs lacking doctoral credentials, as if such practitioners seek to compensate for lack of education and training with greater assertions of claimed authority.

The dangers of this self-aggrandizing arrogance, to the parties, their children, and the legal validity of the court process, were spelled out in some detail in legal note No. 34. That note urged lawyers, and especially judges, to be far more jealous in safeguarding the legitimacy of the processes by

which legal decisions are reached, and suggested a couple of mechanisms for doing so.

But the situation appears to be worse – considerably worse – than was suggested there, to the point that the family court should ***entirely terminate*** the use of such MHPs for nearly all court proceedings until structural deficiencies with their education, assignments, and reports have been adequately addressed.

## II. THE CASE GIVING RISE TO DISCOVERY OF THE PROBLEM

### A. BASIC CASE FACTS

Recently, a case at trial primarily concerned the custody, visitation, and support of three children. The father had been in a physical altercation with the eldest of the children, and had, at best, a strained relationship with the two others. His behavior during the case led to issuance of a TPO by the mother against him and an order of supervised visitation, which continued during the year his antics in and out of court caused the case to be prolonged. Ultimately, he did a few weeks at the detention center for TPO violations, with much more time suspended.

But he claimed in court that he wanted to maintain a relationship with the children. A psychologist did a full outsourced evaluation, recommending appointment of a "parenting coordinator" and a "reunification therapist," and urging intensive psychological intervention and counseling for the father (expected to last 18 months or so), upon the successful completion of which unsupervised visitation might be resumed. The evaluator predicted prospects for success as "poor."

The judge adopted the evaluator's recommendation, ordering that "upon successful reunification with the minor children, [father] may request expanded visitation with the minor children." The judge tried to set up a reasonable process, whereby the "parenting coordinator's general authority" allowed for the resolution of disputes regarding the implementation of the custody order, the schedule, or parenting issues, provided that the resolution did ***not*** involve a substantive change to the custody order. If a ***major*** change was contemplated (for example, from supervised visitation to unsupervised visitation) and was agreed to by the parties, it was to be put in writing, with a specific start date and laying out of ground rules, and be run by counsel for approval.

The father had names he insisted upon for both the "parenting coordinator" and the "reunification therapist." While this seemed rather suspicious, both names appeared on the court's "approved list" of mediators, parenting coordinators, and outsourced evaluators, indicating expertise in the relevant areas, and were accepted.

### B. WHAT THE MHPS DID DURING THE CASE

Inexplicably, without a recommendation to or permission from the Court, the two MHPs talked between themselves, and within weeks of appointment, after two or three short sessions with the father, unilaterally decided to permit the father unsupervised visitation with the two littlest children, in an unsecured setting (a restaurant) with no one observing. We later found out that they had not

bothered reading the file sent to them – not even the outsourced evaluation or controlling orders – but had relied upon the father's "explanation" of the record.

One of them – ignoring the years of TPOs and the mother's safety concerns, directed the mother to stay in an unsecured, unsupervised waiting room where the father was present, refusing to separate the parties, on the basis that the former TPO had just expired, and "it is important for the children to see that there is no danger or need to worry about being in the same area as their father." Naturally, the father took full advantage of the opportunity, and immediately began lying in wait out of sight of the waiting room camera, in the hallway when the mother went to the restroom, so he could verbally accost her when she returned to the waiting room.

Without any kind of objective testing, or investigation into complaints of the father's continued stalking, harassment, and vandalism directed toward the mother, or discussions with counsel, the "reunification therapist" concluded that "it is recommended at this time that [the father] begin unsupervised visitation" with the two youngest children, suggesting that he have access to them "in a park setting or area where the children have room to be more active and engage in positive activities with their father." ***Zero*** safety parameters were mentioned, or apparently even crossed the mind of the reunification therapist.

When counsel found out about what the MHPs were doing, and protested that it violated the supervised visitation order and put children at risk, the reaction by the "professionals" was not to actually do anything about their own actions or to protect the children, but instead to "circle the wagons" and complain about how counsel was "interfering" with "their authority."

Three weeks later, the father was arrested on felony charges of sending agents or toxins through the mails. The ensuing search of his residence revealed evidence that he was next targeting the homes of the outsourced evaluator, the trial judge, and counsel. The mother obtained a new TPO because of the father's ongoing stalking and harassment.

Astonishingly, the MHPs entirely ***ignored*** the father's arrest and impending felony prosecution, the constant misbehavior at the visits they had arranged, the TPO – and the host of outrageous conduct by the father that led to issuance of that TPO – and anything else that might actually have to do with the safety and welfare of the children involved, their mother, or the common sense of reconsidering in light of those developments whether it made sense to provide ***any*** further services.

Instead, informed of all these developments, the MHPs ***saw no reason*** to change any of their recommendations for unsupervised contact. Without even copying counsel, one of them fired off a screed addressed to the trial court judge, basically complaining about "interference and accusations by the counsel involved in this case."

Almost unbelievably, they both wrote to the judge (who by then had recused for inability to be free of bias in the case, given the threats to him personally), actually professing to believe that if they get parties to agree to whatever they suggest, MHPs are not required to obey court orders. They also quietly conceded that in this case they had not actually taken the time to ***read*** the court orders, but complained (despite counsel's four letters providing all relevant court orders) that the order for

supervised visitation "was not made clear."

But the pair's written submissions were even more outrageous. They admitted openly that "it is not unusual" for the MHPs to ignore court orders for supervision at will, a history ascribed to the (false) belief that "that is how the PC process is designed to work."

Perhaps the highlight of their astonishing ignorance of the court process came in recounting that they "explain" to people that "when a PC is ordered, attorneys actively disengage from the process unless a strong need arises to return to Court." One of them actually ***complained*** that "[the mother] addressed several concerns she had with her attorney, instead of coming directly to the PC."

This was not a slip of the tongue, or a fluke. The MHP went into considerable detail on the point:

> [The mother] assured this provider that she was not trying to circumvent the PC process by speaking with her attorney without consulting with me first, and she appeared to understand that she needed to direct all future concerns to me . . . .
>
> [The mother] once again contacted her attorney instead of bringing up any concerns or issues with this PC. This attorney interference is a blatant disregard for my position on this case. . . .
>
> I once again discussed with [the mother] that she cannot circumvent the PC process and collude with her attorney without first attempting to address the issues with me first [*sic*]. . . . It appears that [the mother] once again went directly to her attorney instead of addressing her issues with this PC.

Their submissions to the Court revealed an apparent total ignorance of the Constitutional right of all persons to confer with counsel of their choice. *See, e.g., Gideon v. Wainwright*, 83 S. Ct. 792 ((1963) (noting that such access, unimpaired and unimpeded, was guaranteed by the 14th Amendment); *Morales v. Turman*, 326 F. Supp. 677 (E.D. Tex. 1971) (noting the fundamental nature of the right to confer with counsel of one's own choosing).

Better comprehension of basic legal principles should be expected – and demanded – of any high school student making it through Civics class. To not just believe, but actually commit to print, that it is ***possible*** for a party to a legal action to "collude" by consulting with their own counsel reflects a depth of legal illiteracy intolerable of any "professional" having ***any*** connection with the court system.

There was even more. The "parenting coordinator" professed to perceive no distinction between (on one hand) a court order allowing submission of a recommendation to the Court to alter custodial orders, and (on the other) the parenting coordinator simply changing custody and visitation at will. The self-important pretense of authority was astounding, including the assertion that "unsupervised visits are a part of the process of reunification, and it is up to the reunification therapist to decide when that part of the process should begin."

Finally, the parenting coordinator claimed to have achieved elevation to judicial authority from misreading the form order of appointment. This alone indicates with fair clarity that the form order (which was largely put together by various psychologists) needs a pretty drastic overhaul to prevent

similar future delusions of authority.

By the time we got to court to have the successor judge formally remove those two "professionals" from any further responsibilities, they were blithely not just proceeding with their prior plans, but had taken it upon themselves to attempt to "negotiate" between the parties the mother's relocation request (despite their total ignorance of the legal parameters of such a request) and had even decided to address economic issues between the parties – all without even notifying counsel that they were attempting to do any such things.

## III. THE COURT'S "APPROVED LIST" IS WORSE THAN A FARCE

Staggered by the display of ignorance of the Court process (and complete failure of common sense) set out in the letters from the MHPs to the trial judge and their other actions, I met with the folks who maintain and distribute the "approved list" for such MHPs – the Family Mediation Center.

Contrary to the apparent belief of many judges, FMC does ***no*** vetting, monitoring, or approval of the persons placed on the "approved list" ***at all***, beyond providing a suggested minimum of psychological continuing education courses. But even that is illusory. Apparently, those who have been providing such "services" for years – however ignorant, misinformed, and misguided they might be – are "grandfathered" onto the "approved list" so they don't have to ***take*** any additional training. The decision to do so was made out of no valid policy that anyone was able to articulate. None is apparent.

No ***legal*** training or instruction of any such persons – even to ensure that they understand the orders appointing them or know their place in the court system and process – is even ***offered***. FMC made it clear that it has no time or money to do any such instruction, but suggested that if someone (else) takes the time and makes the effort to volunteer to put together a seminar, this deficiency might be addressed by way of voluntary additional training courses in the future – if any MHPs actually decide to attend such a seminar.

In fact, FMC claims that it has no "resources" with which to even ***attempt*** to evaluate the competence, training, experience, ability, or qualifications of anyone on their "approved" list. That makes the list much worse than useless – it makes the list a sham, and the lawyers and judges relying on it complicit in placing innocent parties in the hands of some uninformed incompetents who could directly place them in harm's way.

The "specialties" listed on the "approved list" do not even appear to have any objective ***existence***. So far as can be determined, there is no such ***thing*** as a "reunification therapist," for example – no training, certification, approved methodology, objective benchmarks for success or failure, or peer review appear to exist.

In other words, as near as can be determined, the list – and the alleged "specializations" on it – are nothing more than meaningless self-proclaimed hype. No court should appoint any such person to any such task without first conducting an evidentiary hearing at which a detailed examination can

be made of what training, expertise, methodology, practice, peer-review, standards, and measuring mark would be used for the proposed services.

It will almost certainly become readily apparent at such a hearing that virtually every one of the MHPs proclaiming their abilities on that list have no legitimate basis for any of their observations or plans, nevertheless have the ability to satisfy the legal standard of legitimacy of their intentions and methodology. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993), setting out the minimum standards for scientific legitimacy of a practice or procedure. These factors include: (1) "whether a theory or technique . . . can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review and publication"; (3) "the known or potential rate of error"; and (4) general acceptance in the scientific community. *Daubert*, 509 U.S. at 593-594.

And the *Daubert* standard applies to other experts besides scientists; *Daubert's* general holding setting forth a trial judge's general "gatekeeping" obligation applies not only to testimony based on "scientific" knowledge, but also to testimony based on "technical" and "other specialized" knowledge. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).

Where that standard is not met, such "experts" should not even be allowed to ***testify*** in court proceedings, nevertheless be vested with delegations of judicial authority. The on-the-fly and off-the-cuff snake oil being peddled by MHPs in Nevada family court comes nowhere close to that minimum standard, and should not be tolerated as any part of ***any*** "court-sanctioned" process, nevertheless be ordered as if it reflected some legitimate methodology leading to some legitimate result.

## IV. A CAUTIONARY TALE FROM WASHINGTON STATE

Is there anyone who did ***not*** read about the Powell case in Washington? Briefly, the mother disappeared. The father was named a "person of interest" in the case, but law enforcement was still "investigating" two years after the mother vanished. The children had been living with the mother's parents, but the father – insisting on his "parental rights" – was granted twice-weekly supervised visitation at his home.

On one such day, Powell sent his attorney a three-word message: "I'm sorry. Goodbye." When the supervisor arrived, he grabbed the kids, shoved the supervisor out the door, and then took a hatchet to both children, after which he blew up the house with the children and himself inside. The news story referenced similar cases from elsewhere, where a parent killed children during court-ordered visitation that had been provided despite a history of stalking or threats against the other parent.

The newspaper reports quoted the administrators of the local agency providing child visitation, expressing that they didn't "think there's anything else we could have done." Attorneys quoted in the story had no problem coming up with "more the court could have done," such as starting its analysis with a focus on child safety rather than viewing all custody and visitation cases through the lens of how to preserve a parent's right if at all possible.

In short, the Powell children "fell through the cracks" and died because the judge and other professionals involved were more concerned with providing access and "maintaining relationships" than with the safety and welfare of those children. The story remarked on the "resistance" among family court judges to assessment of risk factors in family law cases, since they are not criminal cases, but also noted that "criminals have families."

## V. JUDGES CAN'T – AND SHOULDN'T – DELEGATE JUDICIAL POWER

It's very tempting for family court judges to try to find some mechanism to free themselves from the endless squabbling of intractable parties. Here in Nevada, such efforts have resulted in the creation of entirely made up "specialties" such as "reunification therapist" and "parenting coordinator." In other places, judges have attempted to delegate judicial authority to guardians ad litem or others lacking legal qualification – and have committed reversible error.

In *Van Schaik v. Van Schaik*, 24 A.3d 241 (Md. Ct. Spec. App. 2011), the trial court was faced with the common situation of parents demonstrating a persistent inability to communicate and resolve differences without court intervention. In response, the court entered an order requiring them to communicate through e-mail except in emergencies, and directed that "any contentious matters or disputed e-mail issues" be forwarded to an appointed attorney for the children (a designation similar to a guardian ad litem), to review. If the parties were unable to reach agreement on "any disputed matter regarding the minor children" within 24 hours, the attorney was directed to act as "tie-breaker" and resolve the dispute.

On appeal, the trial court was reversed for "delegating to a non-judicial person decisions regarding child visitation and custody." 24 A.3d at 245. The specific defect identified by the appellate court was the absence of a mechanism for judicial review or modification, making it a definitionally overbroad delegation.

The form order for parenting coordinators in use in Nevada family court tries to avoid the specific error of having no mechanism for review (see "Model Order for Appointment of Parenting Coordinator (draft)," posted at http://www.willicklawgroup.com/clark-county-bench-bar-committee). However, parenting coordinator appointments in Nevada usually create a larger error – attempting to make "special masters" out of persons entirely ignorant of the legal process or their role in it.

The problems addressed in this writing are not an isolated problem, and not just about a specific case, or a couple of rogue mental health professionals. ***Multiple*** attorneys have written in complaining about therapist parenting coordinators who seem clueless about the legal structure in which they operate, and the role they are called upon to perform. The problems are endemic.

We have observed that much too often, therapist MHPs misperceive their role and intended function. Instead of applying court orders and assisting in the resolution of low-level disputes to try to keep them out of the courtroom, many therapists just can't seem to help themselves – they try to "fix" the people they are working with, rather than trying to get orders enforced. For that reason (among others), ***most*** parenting coordinator appointments should be made to lawyers, ***not*** mental health

professionals; that topic will be given greater attention in a separate legal note.

## VI. VIOLATIONS OF STATUTES AND LIKELY BOARD ACTIONS

NRS 641A.310 provides for the "denial, suspension, or revocation of license" of a psychologist who renders or offers services outside the area of his or her training, experience, or competence, or commits unethical practices contrary to the interest of the public, or engages in unprofessional conduct, or engages in "negligence, fraud, or deception in connection with services he or she is licensed to provide pursuant to this chapter."

Of course, most of those violations require a "finding" that they have occurred "as determined by the Board." The various mental health professional licensing bodies, however, seem to perceive their responsibility as pretty much limited to ensuring educational credentials, and apparently believe that responsibility for how practitioners interact with the court system is the ***court's*** responsibility.

The egregious negligence – and worse – detailed above has been reported to the licensing authorities of both "professionals" involved, but nothing seen to date indicates that those bodies have any particular interest in looking out for the safety of children or others subjected to such processes. I'm not holding my breath waiting for the relevant licensing authorities to do . . . anything.

## VII. FAMILY COURT ADMINISTRATION LIKEWISE DUCKS RESPONSIBILITY

As noted above, FMC asserts that it has no "resources" to allocate to such non-core functions as verifying that the people it places on its "approved" list have any information, training, or experience in the tasks advertised (nevertheless any common sense).

Court administration, informed of the history and problem, responded that "we are not in a position to police providers that meet the minimum qualifications to provide services to the family court" – even if those "minimum qualifications" are self-declared and totally un-reviewed.

In other words, parties and counsel are entirely on their own, and should not expect any ***attempt*** by the judiciary at assistance in ensuring that clients and their children are receiving competent MPH services.

## VIII. MINIMUM QUALIFICATIONS AND TRAINING THAT SHOULD BE REQUIRED

Failing to read the controlling court orders, failing to follow them once read, placing innocents directly into harm's way, ignoring obvious safety issues arising during services, and directing people not to speak to their own lawyers without obtaining "permission" from therapists to do so are all unfathomable displays of arrogance and ignorance.

As a general matter, psychologists and other MHPs interacting with the court system seem to be

unaware of the very limited roles they are to actually play in the court process. They seem oblivious to the legal, ethical, and common sense requirements and limitations of duties when acting as "parenting coordinators" and "reunification therapists."

While inability to comprehend court orders is probably not fixable, unwillingness to ***obey*** them is susceptible to being addressed. Before ***any*** MHP is permitted "appointment" by court order to any formal role in addressing parties before the court, they should be required to obtain a minimal level of instruction as to the relevant law, rules, and orders governing their appointment, and demonstrate adequate comprehension of the rules governing their appointed tasks.

An outline suggesting such a minimum course of instruction has been created and circulated. It includes some basic Constitutional principles, such as the priority of the right to confer with counsel, and basic parameters of federal Constitutional law, such as the liberty interest and due process rights specified in *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (fit parents have a right to limit visitation of their children with third persons; between parents and judges, the parents should be the ones to choose whether to expose their children to certain people or ideas).

The suggested course also includes basic features of Nevada statutory law, including the relevant custodial factors under NRS 125.480, and at least an overview of NRS chapters 125, 125A, 125B, 125C, and 125D. Obviously relevant is the basic law regarding domestic violence and temporary protective orders, and the Nevada law of relocations.

Similarly, the law relating to MHPs and special masters, and limitations on the roles MHPs may play under guidelines promulgated by the APA, ABA, AAML, and others, are a given as to relevance. Deserving special mention are the details, and meaning, of the form appointment order. The distinction between "best interest" and "psychological best interest" apparently requires instruction.

Testing adequate to ensure not just exposure to, but comprehension of, these basic concepts seems like a more-than-necessary precaution. Those MHPs that do not want to learn anything about the law and court system are free to retain that ignorance – but they should not be referred ***anyone***, for any purpose.

## IX. CONCLUSIONS

Nevada obviously has a serious problem with the MHPs involved with the family court system. Judges need to do more – ***lots*** more – to control the MHPs appointed or referred for any tasks of any kind, with a particular eye toward curbing their outrageous assertions of alleged authority. At minimum, the form appointment order requires an overhaul to eliminate any implied invitation for megalomania.

In the meantime, every judge making a referral to any MHP for any service must make it clear that the MHP is to ***never, EVER*** gut, countermand, or ignore a court order. If they want to make recommendations, peachy, but they are to take ***no*** actions that could conceivably result in harm to anyone without a recommendation going to the court and counsel, being reviewed, and actually

obtaining a later order.

As to the apparently made-up "specialties" peppering the court "approved" list, such as "reunification therapist," all such referrals should cease, effective immediately, until someone actually establishes that there ***is*** a methodology that has a consensus of professional opinion as to validity and reliability sufficient to pass a *Daubert* challenge.

***All*** professionals hoping to have their name included on the "tell people to hire me" list should be adequately trained and experienced. Court administration should be ordered by the judges to figure out who to put in charge of such vetting, and get it done. Grandfathering should be eliminated, effective immediately. Whatever material, training, and methodology the professionals claim to be following for any surviving "specialties" should be made available for counsel to peruse so strong and weak points may be presented to judges ahead of time.

Until there is a much better vetting of the entire process, from "getting on the list" to completion of "therapy," and someone of responsibility is put in charge of making sure every single step in that process is valid (scientifically and legally), the court should not be exposing innocent parties (and their children) to it. At minimum, an immediate moratorium should be put on any further such referrals until some semblance of a safety-oriented and responsible protocol is established.

Will the court system actually do any of these things? It would appear that the "not my table" attitude has now been expressed by everyone in any position of responsibility, in or out of the court. Apparently, until there is media attention after a child is killed, no one involved perceives any priority, so until there are some dead kids on the deck, remedial action as to our processes will not even be talked about.

Given the level of negligence, incompetence, and obliviousness to ***obvious*** safety concerns identified above, that occurrence is a question of "when," not "if." At that juncture, this write-up will primarily be useful to provide questions for reporters, directed at those who could have – but chose not to – do anything about it.

## X. QUOTES OF THE ISSUE

"More good things in life are lost by indifference than ever were lost by active hostility."
– Robert Gordon Menzies.

"Litigation: A machine which you go into as a pig and come out of as a sausage."
– Ambrose Bierce, *The Devil's Dictionary*.

"Is life not a hundred times too short for us to stifle ourselves?"
– Friedrich Nietzsche.

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This legal note is from Marshal S. Willick, Esq., 3591 E. Bonanza Road, Ste 200, Las Vegas, NV 89110. If you are receiving these legal notes, and do not wish to do so, let me know by emailing this back to me with "Leave Me Alone" in the subject line. Please identify the email address at which you got the email. Your State would be helpful too. In the mean time, you could add this to your email blocked list. And, of course, if you want to tell me anything else, you can put anything you want to in the subject line. Thanks.

# Higgs v. State

Supreme Court of Nevada
January 14, 2010, Filed
No. 49883

**Reporter:** 222 P.3d 648; 2010 Nev. LEXIS 1; 126 Nev. Adv. Rep. 1

CHAZ HIGGS, Appellant, vs. THE STATE OF NEVADA, Respondent.

**Notice:**

**Subsequent History:** Habeas corpus proceeding at, Motion denied by Higgs v. Neven, 2011 U.S. Dist. LEXIS 31747 (D. Nev., Mar. 24, 2011)

**Prior History:** [**1] Appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge. Higgs v. State, 2009 Nev. LEXIS 1086 (Nev., May 19, 2009)

**Disposition:** Affirmed.

## Core Terms

succinylcholine, district court, expert witness testimony, tissue sample, toxicology report, motion for continuance, cross-examination, scientific, reliability, prejudiced, hallmark, abuse of discretion, trial judge, gatekeeping, urine, cause of death, urine sample, methodology, discovery, injection, flexible, toxicologist, incomplete, murder, site, succinylmonocholine, spoliation, proffered, backpack, missing

## Case Summary

### Procedural Posture

Defendant appealed the judgment of the Second Judicial District Court, Washoe County, Nevada, convicting him of first-degree murder for the death of his wife.

### Overview

Defendant, an experienced nurse, was married to the victim, a Nevada politician. The marriage had deteriorated. Defendant told a coworker that he was considering divorce, and they talked about a widely publicized case in which a husband killed his wife. Defendant told the coworker that if you wanted to "get rid of someone," you could just hit them with a little succinylcholine -- a paralytic drug. The next day, defendant's wife was found unresponsive; her urine sample tested positive for succinylcholine. Defendant was charged with murder. He was not prejudiced by the denial of his motion to continue the trial so that his expert could evaluate the FBI's toxicology report, because the State could prove the victim's cause of death with other circumstantial evidence. The district court did not err by allowing an employee from the FBI's toxicology department to testify as an expert witness. Defendant was not prejudiced by the State's failure to preserve a tissue sample from the injection site. The Supreme Court of Nevada found no plain error in the trial



Ex. 14

proceedings.

**Outcome**
The judgment of conviction was affirmed.

**LexisNexis® Headnotes**

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Continuances
Criminal Law & Procedure > Trials > Continuances
Criminal Law & Procedure > Trials > Continuances
Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Continuances

*HN1* The Supreme Court of Nevada reviews the district court's decision regarding a motion for continuance for an abuse of discretion. Each case turns on its own particular facts, and much weight is given to the reasons offered to the trial judge at the time the request for a continuance is made. The Supreme Court of Nevada has held that generally, a denial of a motion to continue is an abuse of discretion if it leaves the defense with inadequate time to prepare for trial. A denial of a motion to continue was an abuse of discretion if a defendant's request for a modest continuance to procure witnesses was not the defendant's fault. However, if a defendant fails to demonstrate that he was prejudiced by the denial of the continuance, then the district court's decision to deny the continuance is not an abuse of discretion.

Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination
Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation
Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation
Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation
Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation
Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination

*HN2* The Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.

Criminal Law & Procedure > Criminal Offenses > Homicide, Manslaughter & Murder > General Overview
Evidence > Types of Evidence > Circumstantial Evidence
Criminal Law & Procedure > Criminal Offenses > Homicide, Manslaughter & Murder > General Overview
Evidence > Types of Evidence > Circumstantial Evidence

*HN3* Cause of death can be shown by circumstantial evidence.

Criminal Law & Procedure > Trials > Continuances
Evidence > Types of Evidence > Circumstantial Evidence

*HN4* A denial of a motion to continue to allow the defense to investigate a report as to the cause of death is not prejudicial when the State could prove cause of death with other circumstantial evidence.

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence
Evidence > Weight & Sufficiency
Evidence > Burdens of Proof > Proof Beyond Reasonable Doubt
Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence
Evidence > Burdens of Proof > Proof Beyond Reasonable Doubt
Evidence > Weight & Sufficiency

***HN5*** In reviewing the sufficiency of the evidence, the Supreme Court of Nevada must decide whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Evidence > Admissibility > Expert Witnesses > Daubert Standard
Evidence > Admissibility > Expert Witnesses
Evidence > Admissibility > Expert Witnesses
Evidence > Admissibility > Expert Witnesses > Daubert Standard

***HN6*** The Daubert opinion determined that, functioning as a gatekeeper with respect to the admission of expert testimony, the judge may wish to consider whether the evidence at issue (1) has been tested, (2) has been subjected to peer review and publication, (3) has a known or potential error rate, and (4) has general or widespread acceptance.

Criminal Law & Procedure > Trials > Judicial Discretion
Criminal Law & Procedure > Trials > Judicial Discretion
Evidence > Admissibility > Expert Witnesses > Daubert Standard

***HN7*** The United States Supreme Court has made clear its mandate to allow district court judge's discretion to carry out their gatekeeping duties and to treat the Daubert factors as flexible.

Evidence > Admissibility > Expert Witnesses
Evidence > Admissibility > Expert Witnesses > Daubert Standard

***HN8*** To the extent that Daubert espouses a flexible approach to the admissibility of expert witness testimony, the Supreme Court of Nevada has held it is persuasive. But, to the extent that courts have construed Daubert as a standard that requires mechanical application of its factors, the Supreme Court of Nevada declines to adopt it. There is no reason to limit the factors that trial judges in Nevada may consider when determining expert witness testimony admissibility.

Evidence > Admissibility > Expert Witnesses

***HN9*** The Supreme Court of Nevada has identified the three overarching requirements for admissibility of expert witness testimony pursuant to Nev. Rev. Stat. § 50.275 as (1) qualification, (2) assistance, and (3) limited scope requirements.

Evidence > Admissibility > Expert Witnesses

***HN10*** See Nev. Rev. Stat. § 50.275.

Criminal Law & Procedure > Trials > Judicial Discretion
Evidence > Admissibility > Expert Witnesses

***HN11*** Whereas the federal rule mandates three additional conditions that trial judges should consider in evaluating expert witness testimony, the Nevada statute mandates no such requirements. Rather, Nev. Rev. Stat. § 50.275 provides general guidance and allows the trial judge discretion in deciding what factors are to be considered on a case-by-case basis. The Supreme Court of Nevada has outlined some factors that are useful in this inquiry, but repeatedly noted that the factors enumerated may not be equally applicable in every case. The benefit of this approach is twofold: first, it gives judges wide discretion to perform their gatekeeping duties; and, second, it creates an inquiry that is based more in legal, rather than scientific, principles.

Evidence > Admissibility > Expert Witnesses

***HN12*** Nev. Rev. Stat. § 50.275 provides the standard for admissibility of expert witness testimony in Nevada .

Evidence > ... > Testimony > Expert Witnesses > Qualifications
Evidence > ... > Testimony > Expert Witnesses > Qualifications

***HN13*** Among the factors the court may consider in determining an expert's qualifications are whether the expert has formal schooling, proper licensure, employment experience, and practical experience and specialized training.

Evidence > Admissibility > Expert Witnesses > Helpfulness
Evidence > Admissibility > Expert Witnesses
Evidence > Admissibility > Expert Witnesses > Daubert Standard
Evidence > Admissibility > Expert Witnesses > Helpfulness

***HN14*** Expert witness testimony will assist the trier of fact only when it is relevant and the product of reliable methodology. While each case turns upon varying factors, the Supreme Court of Nevada has articulated five factors to judge reliability of a methodology, instructing the district court to consider whether the proffered opinion is (1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subjected to peer review; (4) generally accepted in the scientific community; and (5) based more on particularized facts rather than assumption, conjecture, or generalization.

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors
Evidence > Inferences & Presumptions > Inferences
Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Use of Particular Evidence
Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Use of Particular Evidence
Evidence > Inferences & Presumptions > Inferences
Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

***HN15*** Even when missing evidence is not willfully destroyed, but rather is negligently destroyed, the party prejudiced by the loss of evidence is entitled to an adverse inference instruction.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process
Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview
Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process
Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview
Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

***HN16*** Due process requires the State to preserve material evidence. The State's failure to preserve material evidence can lead to dismissal of the charges if the defendant can show bad faith or connivance on the part of the government or that he was prejudiced by the loss of the evidence.

Criminal Law & Procedure > Trials > Jury Instructions > General Overview
Criminal Law & Procedure > Trials > Judicial Discretion
Criminal Law & Procedure > Trials > Jury Instructions > General Overview
Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

***HN17*** District courts have broad discretion to settle jury instructions. Appellate review is limited to inquiring whether there was an abuse of discretion or judicial error.

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > General Overview
Criminal Law & Procedure > ... > Standards of Review > Plain Error > General Overview

*HN18* When an error has not been preserved, the Supreme Court of Nevada employs plain-error review. An error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing actual prejudice or a miscarriage of justice.

**Counsel:** Law Office of David R. Houston and David R. Houston, Reno; Richard F. Cornell, Reno, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; Richard A. Gammick, District Attorney, and Terrence P. McCarthy, Deputy District Attorney, Washoe County, for Respondent.

Peter Chase Neumann, Reno, for Amicus Curiae Nevada Justice Association.

**Judges:** Hardesty, J. We concur: Parraguirre, C.J., Douglas, J., Gibbons, J.

**Opinion by:** HARDESTY

**Opinion**

**[*649]** BEFORE THE COURT EN BANC. [1]

By the Court, HARDESTY, J.:

In this appeal, appellant Chaz Higgs challenges his conviction of first-degree murder for the death of his wife, Kathy Augustine. Higgs asserts that his conviction should be overturned for the following reasons: (1) the district court abused its discretion when it denied his motion to continue the trial, (2) sufficient evidence does not support his conviction, (3) the district court abused its discretion when it admitted the testimony of the State's scientific **[**2]** expert, (4) the district court abused its discretion when it refused to give Higgs' proffered jury instruction regarding the spoliation of tissue samples, and (5) numerous alleged instances of plain error deprived him of a fair trial.

**[*650]** We note from the outset that we originally decided this appeal in an unpublished order filed on May 19, 2009. Amicus curiae Nevada Justice Association subsequently moved for publication of our disposition as an opinion. Cause appearing, we grant the motion and publish this opinion in place of our prior unpublished order. In so doing, we use this opportunity to reaffirm the standard for the admissibility of expert testimony in Nevada, as it is articulated by NRS 50.275. While Nevada's statute of admissibility tracks the language of its federal counterpart, Federal Rule of Evidence (FRE) 702, we see no reason to part with our existing legal standard. In so deciding, we decline Higgs' invitation to adopt the standard of admissibility set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Further, we reject the notion that our decision in *Hallmark v. Eldridge*, 124 Nev. 492, , 189 P.3d 646 (2008), adopted the standard set forth in **[**3]** *Daubert* inferentially. We conclude, therefore, that Higgs' challenge to the testimony of the State's scientific expert fails, as do all the other arguments he raises on appeal Therefore, we affirm.

*FACTS AND PROCEDURAL HISTORY*

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[1] The Honorable Kristina Pickering, Justice, did not participate in the decision of this matter.

In 2003, Higgs, an experienced nurse, and Augustine, a Nevada politician, married. By all accounts, the marriage had deteriorated by 2006. On July 7, 2006, Kim Ramey, a critical care nurse who worked with Higgs, had a conversation with Higgs about his relationship with Augustine. Higgs stated that they were having marital problems and that he intended to seek a divorce. Later that day, Higgs and Ramey had another conversation about a widely publicized case in which a husband killed his wife, shot the judge presiding over the couple's divorce, and fled to Mexico. Higgs commented during their conversation, "That guy did it wrong. If you want to get rid of someone, you just hit them with a little succs because they can't trace it [postmortem]." "Succs" referenced succinylcholine, a paralytic drug that is commonly used in emergency rooms.

In the early morning hours of July 8, 2006, Higgs called emergency personnel to the couple's home after he found Augustine unresponsive. [**4] The paramedics were able to restore Augustine's heartbeat, but she could not breathe on her own. Augustine was transported to a local hospital

Upon learning of Augustine's admittance, Ramey informed police about her previous conversation with Higgs. Ramey also informed a colleague who, in turn, informed Augustine's attending physician, Dr. Richard Ganchan, and told him to test for a succinylcholine level on Augustine.

Neither the paramedics nor the hospital staff administered any succinylcholine while treating Augustine. Hospital staff, however, obtained a urine sample for treatment purposes. On July 11, 2006, Augustine died after she was removed from life support.

The urine sample, which was an ante mortem sample, meaning it was taken from Augustine while she was alive, and the tissue samples, which were postmortem, were tested by the hospital's toxicologist and subsequently the coroner's laboratory. The hospital lab results of the urine sample tested positive for barbiturates. The coroner's office laboratory results showed no signs of any substances; however, since the laboratory had been ordered to look for succinylcholine, it sent specimens to the FBI for further testing. The urine [**5] sample tested positive for both succinylcholine and succinylmonocholine, [2] but the postmortem tissue samples showed no signs of any substance.

In September 2006, Higgs was arrested in Virginia. In December 2006, Higgs was formally charged with first-degree murder in connection with the death of Augustine. The State's theory of the case was that sometime on either July 7 or 8, 2006, Higgs murdered Augustine by administering a lethal dose of succinylcholine.

**[*651]** *Pretrial proceedings*

In December 2006, the parties stipulated to a trial date of July 2007. The district court appointed Chip Walls as Higgs' expert witness. Walls is one of the foremost experts on the subject of succinylcholine. The State sent the FBI toxicology report to Walls in December 2006. A month later, in January 2007, both parties stipulated to advance the trial date to June 2007.

In May 2007, District Court Judge Jerome Polaha, upon [**6] the stipulation of the parties, entered an order instructing the State to provide Higgs more information regarding the description of methodology and procedures used in the FBI's succinylcholine testing. The same month, Higgs filed a motion to continue the trial. He argued that Walls needed more time to evaluate

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[2] "[S]uccinylcholine is a very unstable compound that breaks down rapidly to produce succinylmonocholine, a less unstable compound that breaks down to form succinic acid and choline, which are naturally present in the human body." *Sybers v. State*, 841 So. 2d 532, 542 (Fla. Dist. Ct. App. 2003).

and verify the methodology utilized by the FBI laboratory because the FBI's test results were inconsistent. At the hearing on the motion to continue, defense counsel admitted that no one was to blame for the fact that Walls had not finished evaluating the FBI's test results. In fact, defense counsel stated that the parties had worked together to compile the list of materials set forth in Judge Polaha's discovery order. The district court denied the motion to continue the trial. In making the decision, the district court noted that the defense received the FBI toxicology report in early December 2006, some 24 weeks before the trial date, and only now was raising concerns. It further stated that Walls could indeed testify that, based on his scientific knowledge and expertise, he did not trust the validity of the FBI test results, if that were the case. Finally, the district court [**7] observed that the State had the burden of proof, not the defense, and therefore Higgs did not need to find an alternative theory to disprove the State's evidence.

On June 18, 2007, the first day of trial, the district court held a hearing on Higgs' motion in limine regarding scientific evidence and expert witness testimony. During that hearing, Higgs' expert witness, Walls, testified extensively regarding the FBI's toxicology report and the methodology used by its toxicologist, Madeline Montgomery. Walls stated that Montgomery exchanged information with him and answered all of his questions during a telephone call.

*The trial*

At trial, Ramey testified regarding her conversation with Higgs about succinylcholine and how he described it as a drug that could not be detected postmortem. The State further presented the testimony of various hospital staff, who testified as to the availability of succinylcholine to hospital personnel. Registered nurse and Higgs' former manager, Tina Carbone, testified that succinylcholine was stored on crash carts, [3] in rapid sequence intubation kits in emergency rooms, and in secured refrigerators alongside other drugs, such as etomidate, a short acting intravenous [**8] anesthetic agent. Marlene Swanbeck, a registered nurse working at the same hospital as Higgs, testified that while a nurse needed to type in a security code to get registered drugs like succinylcholine, once accessed, the nurse could take any other drug instead of, or in addition to, what the nurse listed he or she was taking and there would be no way of tracking such misuse.

Building on Swanbeck's testimony, the State offered evidence that it had found a vial of etomidate in a backpack in the master bedroom of Augustine and Higgs' home, yet there was no record of etomidate missing from hospital records. City of Reno police officer David Jenkins testified that he found the same backpack when executing an arrest warrant for Higgs in Virginia. Jenkins further testified that the backpack included a nursing book, with a bookmark at the page concerning the administration of succinylcholine, and a laminated 3″ x 5″ card with information concerning succinylcholine.

Dr. Steve Mashour, one of Augustine's attending physicians, testified that because succinylcholine was found in Augustine's ante mortem urine sample, the [**9] cause of death could be attributed to succinylcholine poisoning. Dr. Mashour explained that Augustine's routine tests showed no signs of a stroke or heart attack. The State presented two other witnesses, Dr. Stanley Thompson and Dr. [*652] Paul Katz, who similarly ruled out a heart attack or stroke as a cause of death. Both doctors opined that Augustine's death was consistent with succinylcholine poisoning.

Dr. Ellen Clark, a forensic pathologist who performed the autopsy on Augustine, testified that, in her opinion, Augustine died from succinylcholine toxicity. Dr. Clark also testified that if a

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[3] Generally, crash carts contain defibrillators and intravenous medications

nurse is good at delivering an injection, there will be no resulting bruise or large bloody track underneath the skin. She testified that the succinylcholine could have been injected into Augustine in such a manner that she would not be able to identify the injection site during an autopsy. Dr. Clark further testified that the autopsy did not reveal damage to Augustine's heart that would be reflective of a massive heart attack. As to the tissue sample, taken from what appeared to be a puncture wound, Dr. Clark explained that she could not be certain as to whether the area was an injection site or [**10] simply a needle mark. In sum, she could not confirm that the tissue sample was the site where the succinylcholine was administered.

With regard to the tissue sample, Dr. Paul Sohn, a pathologist who testified for Higgs, stated that his examination of the tissue sample and the photographs of the puncture wound led him to conclude that it was a fresh wound, barely 48 hours old. Dr. Sohn testified that it was not medically possible that this wound was 80 hours old (80 hours would have meant that the skin was punctured sometime on either July 7 or July 8, 2006, when the State theorized Higgs injected Augustine with succinylcholine). Dr. Sohn testified that he could not date the actual tissue sample because when he received it from the FBI it had been frozen, unfrozen, and frozen once again. Despite not being able to test the tissue sample himself, Dr. Sohn testified that he was certain that the wound site could not have been inflicted before Augustine arrived at the hospital.

Madeline Montgomery, the FBI toxicologist, testified as to the procedure and methodology of the bureau's succinylcholine testing. Montgomery testified that she had ongoing training in the field and had authored several [**11] publications and given numerous presentations on matters relevant to her field. Montgomery explained that the FBI laboratory in which she worked had dealt with succinylcholine in the past and had procedures in place for its testing. She testified that Augustine's urine sample was in a liquid state when she received it and that she refroze it to prevent degradation. Montgomery explained that succinylcholine is a very volatile chemical; it breaks down into succinylmonocholine in the body; the substance does not occur naturally in a living human; and she found succinylcholine and its breakdown product, succinylmonocholine, in Augustine's urine sample. She stated that she ran three separate urine tests on Augustine's urine sample and each test showed the presence of succinylcholine and succinylmonocholine. Montgomery testified that the tissue samples did not test positive for succinylcholine or succinylmonocholine. She explained that this was not surprising because the chemical is so unstable and body enzymes act upon it to break it down. Accordingly, Montgomery testified that it is unusual to find succinylcholine in tissue samples.

There was also evidence presented about the nature of [**12] Higgs and Augustine's marriage. Several witnesses confirmed that Higgs routinely referred to Augustine in derogatory terms. Paramedics who transported Augustine to the hospital testified that Higgs appeared unemotional, even reading the newspaper while in the ambulance. Other witnesses testified that Higgs appeared unemotional after his wife died. One friend testified about a particularly nasty phone call between Higgs and Augustine's mother following Augustine's death, during which Higgs strongly disparaged Augustine.

Higgs' strong dislike for his wife was further bolstered by the testimony of Linda Ramirez, a hospital employee who worked with Higgs. She testified that the two of them had a flirtatious relationship. Ramirez read one of Higgs' e-mails that he had sent to her in which he explained, "[I]t is my quest in life to drive this bitch [Augustine] crazy. . . . I have things in motion. . . . I will be free, and I will be with you."

The jury found Higgs guilty of first-degree murder. This appeal followed.

[*653] *DISCUSSION*

*Motion to continue the trial*

Higgs argues that the district court violated his rights under the Fifth, Sixth, and Fourteenth Amendments when it denied his motion to continue [**13] the trial. He asserts that his defense expert did not have adequate time to evaluate the conclusions of the FBI's toxicology report that confirmed the presence of succinylcholine in Augustine's urine. Specifically, he asserts that FBI toxicologist Montgomery defied the court order instructing her to provide discovery. Without the full FBI report, Higgs argues that his expert witness, Chip Walls, could not testify as to the validity of the FBI report and the defense could not adequately cross-examine Montgomery.

*HN1* "This court reviews the district court's decision regarding a motion for continuance for an abuse of discretion." *Rose v. State*, 123 Nev. 194, 206, 163 P.3d 408, 416 (2007). Each case turns on its own particular facts, and much weight is given to the reasons offered to the trial judge at the time the request for a continuance is made. *Zessman v. State*, 94 Nev. 28, 31, 573 P.2d 1174, 1177 (1978). This court has held that generally, a denial of a motion to continue is an abuse of discretion if it leaves the defense with inadequate time to prepare for trial. *See id.* In other instances, we have held that a denial of a motion to continue was an abuse of discretion if "a defendant's [**14] request for a modest continuance to procure witnesses . . . was not the defendant's fault." *Rose*, 123 Nev. at 206, 163 P.3d at 416. However, if a defendant fails to demonstrate that he was prejudiced by the denial of the continuance, then the district court's decision to deny the continuance is not an abuse of discretion. *Id.*

We conclude that the district court did not abuse its discretion when it denied Higgs' motion to continue the trial because Higgs has failed to demonstrate that he was prejudiced by the denial.

By defense counsel's own admission, there was no explanation for the delay in asking for more information regarding the FBI's toxicology report. Higgs' expert witness, Chip Walls, had approximately six months to question, evaluate, and determine whether additional information about the toxicology report would be necessary for his consideration. During the hearing on the motion to continue, the State explained that Walls had received the toxicology report on December 7, 2006, yet Higgs failed to ask for additional information about the report until May 2007. In regard to the delay, defense counsel stated, "The fault, unfortunately, really doesn't lie anywhere." Defense counsel, [**15] Walls, the State, and Montgomery *all worked together* to compile the list of materials, which constituted part of the discovery order signed by Judge Polaha. In addition, Montgomery spoke to Walls on the phone. Walls later testified that during that phone conversation, the two exchanged information and Montgomery answered his questions. Walls admitted that he could have asked Montgomery more specific questions and she would have answered them, but he chose not to ask additional questions. Walls confirmed that he and Montgomery exchanged information and all that was left was for him "to complete [his] thoughts with her." The additional information that Montgomery compiled for Walls had to be cleared by the FBI's attorneys before it could be sent to Walls. Accordingly, we conclude that there is no evidence in the record supporting Higgs' contention that Montgomery violated the district court's discovery order. Rather, substantial evidence on the record shows that Montgomery was cooperative with the defense.

We further observe that on the morning of June 18, 2007, before the beginning of the trial, Walls testified extensively during a motion-in-limine hearing regarding expert witness testimony. [**16] He testified about succinylcholine in general and the difficulties of testing the substance, as well as the problems with testing urine samples for succinylcholine. Walls' testimony was thoughtful and thorough; he explained the aspects of the FBI testing he agreed with and the aspects he ques-

tioned. Perhaps most importantly, Walls testified that while he had some reservations regarding the FBI's methodology, he agreed with the findings of Montgomery's toxicology report.

[*654] Higgs does not offer any reason why Walls did not testify at trial as he did at the hearing on the motion in limine. However, Walls' testimony during the motion-in-limine hearing supplied to Higgs the discovery necessary to conduct an effective cross-examination of Montgomery. *See* Pantano v. State, 122 Nev. 782, 790, 138 P.3d 477, 482 (2006) (observing that ***HN2*** "'the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish'" (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986))). Moreover, by defense counsel's own statements at the continuance hearing, Walls had known for weeks that the FBI [**17] lab machine that Montgomery had used had malfunctioned at one point. The evidence on the record shows that the discovery available to Higgs at the time of trial met constitutional guarantees of an opportunity to effectively cross-examine Montgomery, and therefore, we conclude that Higgs was not prejudiced by the district court's denial of the motion to continue.

We also note that Higgs had a number of other opportunities before trial to seek a continuance because he needed more time to evaluate the toxicology report. The district court held several pretrial hearings on other motions during which Higgs could have again asked for more time. Specifically, the district court held a hearing on June 8, 2007, to confirm the trial date, during which Higgs' defense counsel expressly stated, "We'll be ready on June 18th."

We make a final observation with regard to the motion to continue. It was based on the defense's need for more time to investigate evidence relating to the cause of death. This court has held that ***HN3*** cause of death can be shown by circumstantial evidence. West v. State, 119 Nev. 410, 416, 75 P.3d 808, 812 (2003). ***HN4*** A denial of a motion to continue to allow the defense to investigate [**18] a report as to the cause of death is not prejudicial when the State could prove cause of death with other circumstantial evidence. Even if Higgs had more time to investigate the FBI toxicology report, it would not change the fact that the State had enough circumstantial evidence to prove Augustine's cause of death.

We therefore conclude that the district court did not abuse its discretion when it denied Higgs' motion to continue the trial because Higgs fails to demonstrate that any prejudice resulted from the denial.

*Sufficiency of the evidence*

Higgs argues that the evidence presented at trial does not support a conviction of first-degree murder. We disagree.

***HN5*** In reviewing the sufficiency of the evidence, we must decide "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Rose v. State, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007) (quoting Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998)). We conclude that there was sufficient evidence to support Higgs' conviction.

The State presented testimony establishing that Augustine's death [**19] was not the result of natural causes but, rather, was the result of succinylcholine poisoning. Attending physician Dr. Mashour testified that routine tests at the hospital showed no signs of a stroke or heart attack. He testified that because succinylcholine was found in Augustine's ante mortem urine sample, succinylcholine poisoning was the likely cause of death. Two other physicians, Dr. Thompson

and Dr. Katz, similarly testified that Augustine's death was a result of succinylcholine poisoning. In addition, Dr. Clark, the forensic pathologist who performed the autopsy on Augustine, also testified that in her opinion the cause of death was succinylcholine toxicity. She further testified that the drug could have been injected in such a manner as to go undetected. Dr. Clark testified that the autopsy revealed that Augustine's heart showed no signs of disease that would cause a massive heart attack. FBI toxicologist Montgomery explained that she found succinylcholine and its breakdown product, succinylmonocholine, in Augustine's urine sample. Montgomery testified that all three tests she ran on the urine sample tested positive for **[*655]** the presence of succinylcholine and succinylmonocholine. **[**20]** She further stated that it is not unusual that the drug was not present in Augustine's tissue sample because it is such a volatile chemical that the body acts quickly to break it down. The State also presented evidence that Augustine was not administered any succinylcholine at the hospital.

The State also presented evidence establishing that Higgs killed Augustine. Ramey testified that the day before Augustine was found unconscious, she had a conversation with Higgs during which he commented on a local murder trial saying, "That guy did it wrong. If you want to get rid of somebody, you just hit them with a little succs." Ramey testified that Higgs then made a gesture mimicking giving a person an injection. She further testified that Higgs explained to her that succinylcholine could not be detected postmortem. In addition to Ramey's testimony, the State presented circumstantial evidence of Higgs' access to succinylcholine. The substance is just one of the resources available to hospital staff like Higgs, who is an experienced nurse. Testimony established that succinylcholine is generally stored on crash carts, in emergency rooms, and in secured refrigerators, and while one needs a security **[**21]** code to access the refrigerated drugs, once accessed, additional drugs can be taken from the secured refrigerator without notice.

To build its theory that, as an experienced nurse, Higgs could easily obtain succinylcholine as well as other drugs, the State offered the testimony of Officer Jenkins. Officer Jenkins testified that when he executed the search warrant at the Higgs/Augustine home, he found the drug etomidate in a backpack in the master bedroom. Officer Jenkins stated that he collected the vial of etomidate, but did not take the backpack. Officer Jenkins testified that later, when executing the arrest warrant in Hampton, Virginia, the same backpack was in Higgs' possession and he collected it. He explained that this time the backpack contained a nursing book with a bookmark at the page concerning the administration of succinylcholine and a laminated 3" x 5" card with information concerning succinylcholine. Additionally, the State presented evidence that there was no hospital record of a missing vial of etomidate--even though a vial had indeed been found in the backpack in Higgs' home--establishing that drugs can be taken out of secured locations without notice.

The State also **[**22]** presented evidence of the deteriorated relationship between Higgs and Augustine. Witnesses testified that Higgs regularly used derogatory terms when referring to Augustine, he strongly disparaged his wife to Augustine's mother just days after Augustine's death, and he appeared unemotional throughout the ordeal. Additionally, Ramirez testified as to the flirtatious relationship that she had with Higgs and read from one of his e-mails in which Higgs stated that he wanted to drive Augustine crazy, he had plans in motion, and he would soon be free to be with Ramirez.

We conclude that, in addition to the medical evidence and the FBI toxicology report, there was other significant evidence presented to the jury--namely, Higgs' deteriorating relationship with his wife, his access to the succinylcholine, and his own comments to Ramey--that was sufficient for any rational trier of fact to find the essential elements of first-degree murder beyond a reasonable doubt.

*Expert testimony*

Higgs next contends that the district court abused its discretion when it allowed Montgomery to testify about the presence of succinylcholine in Augustine's urine. In so doing, he does not contend that the district court [**23] was incorrect in admitting the testimony under Nevada law. Rather, Higgs invites this court to adopt the standard of admissibility for expert testimony established in **Frye** v. United States, 293 F. 1013 (D.C. Cir. 1923), or *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), under which he asserts that Montgomery's testimony was inadmissible. Because the admissibility of expert witness testimony post-*Daubert* has resulted in considerable confusion and controversy, we determine it is necessary to revisit the opinion, its history, and its trajectory.

[*656] Before *Daubert*, the seminal case for expert witness testimony was **Frye**. In **Frye**, the Court of Appeals of the District of Columbia (now known as the United States Court of Appeals for the District of Columbia Circuit) held that an expert opinion based on a scientific technique is inadmissible unless the technique has "gained general acceptance in the particular field in which it belongs." 293 F. at 1014.

In *Daubert*, the United States Supreme Court concluded that **Frye**'s "austere standard" was "incompatible" with the Federal Rules of Evidence. 509 U.S. at 589. In concluding that the general acceptance test of **Frye** had been "displaced" [**24] by the Federal Rules of Evidence, *id.*, the Supreme Court interpreted the Federal Rules as a means of liberalizing the admission of expert witness testimony, stating that:

> . . . a rigid general acceptance requirement would be at odds with the liberal thrust of the Federal Rules and their general approach of relaxing the traditional barriers to opinion testimony.

*Id.* at 588 (internal quotation marks omitted).

After rejecting **Frye** and recognizing the more relaxed standard of the Federal Rules, the High Court explained that any analysis pursuant to FRE 702 must focus on two overarching issues: the expert testimony's relevance and reliability. *Id.* at 589. The majority then stated that it was appropriate for it to make "some general observations" about the inquiry into relevance and reliability of expert witness testimony. *Id.* at 593. Before discussing factors that it determined may bear on the issues of relevance and reliability, the majority emphasized that the factors discussed were neither exhaustive nor applicable in every case. [4] *Id.* at 593. Indeed, the Supreme Court expressly stated that "[m]any factors will bear on the inquiry, and we do not presume to set out a definitive checklist [**25] or test," *id.*, and called the inquiry into admissibility a "flexible one." *Id.* at 594. It characterized the trial judge's role to determine whether the proferred testimony met the criterion of admissibility as that of a gatekeeper. *Id.* at 597. Thus, while the Supreme Court interpreted FRE 702 as the gate leading toward admissibility, it placed numerous factors, albeit "flexible" ones, upon the opening of the gate and cast the trial judge in the role of gatekeeper.

In his dissent, Chief Justice Rehnquist was critical of the majority's decision to provide lower court's with such elaborate factors:

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[4] In sum, ***HN6*** the *Daubert* opinion determined that, functioning as a gatekeeper with respect to the admission of expert testimony, the judge may wish to consider whether the evidence at issue (1) has been tested, (2) "has been subjected to peer review and publication," (3) has a known or potential error rate, and (4) has general or widespread acceptance. *Daubert*, 509 U.S. at 593-94.

> Questions arise simply from reading this part of the Court's opinion, and countless more questions will surely arise when hundreds of district judges try to apply its teaching to particular offers of expert testimony. Does **[**26]** all of this *dicta* apply to an expert seeking to testify on the basis of technical or other specialized knowledge--the other types of expert knowledge to which Rule 702 applies--or are the general observations limited only to scientific knowledge?

*Id.* at 600 (Rehnquist, C.J., dissenting) (internal quotation marks omitted). Chief Justice Rehnquist was concerned that the factors would be applied strictly notwithstanding the majority's statements against such application, would cause confusion, and would force judges to become "amateur scientists." *Id.* at 601.

After *Daubert,* the Supreme Court had the opportunity to consider the issue of expert witness testimony again in *General Electric Co. v. Joiner,* 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997), and later in *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). First, in *General Electric Co. v. Joiner,* the Supreme Court held that the proper appellate review of a trial court's decision to admit or exclude expert witness testimony was for an abuse of discretion. 522 U.S. at 143. **[*657]** In so holding, the Supreme Court noted that the appellate court "failed to give the trial court the deference that is the hallmark of abuse-of-discretion review." *Id.* In sum, *Joiner* highlighted **[**27]** the trial judge's discretion in determining expert witness testimony *post-Daubert.*

Following *Joiner,* the U.S. Supreme Court extended its holding in *Daubert* to include all expert testimony, rather than just scientific. *Kumho Tire Co. v. Carmichael,* 526 U.S. at 141. While it expanded *Daubert* to include more expert testimony, the Court was careful to note that in so doing, it was vesting *more* discretion in the trial judge and *not* mandating strict adherence to *Daubert's* admissibility factors:

> The conclusion, in our view, is that we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert,* nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue.
>
> *Daubert* itself is not to the contrary. It made clear that its list of factors was meant to be helpful, not definitive. Indeed, those factors do not all necessarily apply even in every instance in which the reliability of scientific testimony is challenged. It might not be surprising in a particular case, for example, that a claim made by a scientific witness has **[**28]** never been the subject of peer review, for the particular application at issue may never previously have interested any scientist. Nor, on the other hand, does the presence of *Daubert's* general acceptance factor help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.

*Id.* at 150-51.

Thus, in *Kumho, **HN7*** the U.S. Supreme Court made clear its mandate in *Daubert:* allow district court judge's discretion to carry out their gatekeeping duties and treat the *Daubert* factors as flexible. Notwithstanding the mandate for a flexible standard, lower courts have applied *Daubert* in a rigid manner. *See, e.g., U.S. v. McCaleb,* 552 F.3d 1053, 1060-61 (9th Cir. 2009) (explaining that the *Daubert* factors are flexible, but using only the *Daubert* factors in evaluating whether the district court abused its discretion when allowing testimony of a forensic chemist); *see also U.S. v. Baines,* 573 F.3d 979, 985-87 (10th Cir. 2009) (explaining that the *Daubert* factors are flex-

ible, but then engaging in a strict application of the *Daubert* factors in its review of trial [**29] court's decision on expert witness testimony); *Carrier v. City of Amite*, 6 So. 3d 893, 898 (1st Cir. 2009) (holding that lower court committed legal error because it did not conduct an evaluation of the *Daubert* factors); *In re Scrap Metal Antitrust Litigation*, 527 F.3d 517, 529 (6th Cir. 2008) (explaining that the *Daubert* factors are flexible, but then using the *Daubert* factors to define threshold question of reliability); *Ruffin v. Shaw Industries, Inc.*, 149 F.3d 294, 297 -300 (4th Cir. 1998) (determining that proffered expert opinion testimony was not admissible because it did not meet all the *Daubert* factors). States that have adopted the *Daubert* standard for admissibility appear to engage in similar application, remarking on the standard's flexibility, yet applying it restrictively. *See, e.g., Independent Fire Ins. Co. v. Sunbeam Corp.*, 755 So. 2d 226, 234 (La. 2000) (in adopting the *Daubert* standard, court noted that it was also adopting the factors set forth in *Daubert).*

It is this type of application of the *Daubert* factors that Chief Justice Rehnquist cautioned against and that leads us to decline to adopt the so-called *Daubert* standard. Our rejection of *Daubert* is based on the [**30] resulting application of the doctrine and underscores Chief Justice Rehnquist's concerns regarding the dicta in the majority's decision. It is not what the majority stated in *Daubert* that we take issue with, but rather the subsequent rigid application of the enumerated factors.

Indeed, ***HN8*** to the extent that *Daubert* espouses a flexible approach to the admissibility of expert witness testimony, this court has held it is persuasive. Hallmark v. Eldridge, 124 Nev. 492, , 189 P.3d 646, 650 (2008). But, to the extent that courts have construed *Daubert* as a standard that requires mechanical **[*658]** application of its factors, we decline to adopt it. We see no reason to limit the factors that trial judges in Nevada may consider when determining expert witness testimony admissibility, As evidenced by the amicus brief filed by the Nevada Justice Association, *Hallmark* appears to have been interpreted as an inferential adoption of *Daubert.* While in our view *Hallmark* demonstrates an adherence to Nevada's standard for admissibility of expert testimony, we concede that the language in that decision may be misleading. Specifically, the decision states that this court has construed NRS 50.275 to track FRE 702, [**31] and then explains that *Daubert* is persuasive authority. Hallmark, 124 Nev. at 492, , 189 P.3d at 650. It is reasonable to construe this portion as an endorsement, if not adoption, of *Daubert.* For that, we are critical of the decision. *Hallmark* was not intended to cause confusion and cast doubt on the standard of expert witness testimony in Nevada. To the contrary, the opinion was meant to clarify the rule that in NevadaNRS 50.275 is the blueprint for the admissibility of expert witness testimony.

In *Hallmark,* we stated that *Daubert* and federal court decisions discussing it "may provide persuasive authority." Hallmark, 124 Nev. at 492, , 189 P.3d at 650. We did not, however, and do not today, adopt the *Daubert* standard as a limitation on the factors that a trial judge in Nevada may consider. We expressly reject the notion that our decision in Hallmark inferentially adopted *Daubert* or signaled an intent by this court to do so.

A close reading of *Hallmark* is helpful. This court concluded that the district court abused its discretion in allowing the expert testimony of a biochemical engineer. 124 Nev. at , 189 P.3d at 652. In so doing, we summarized Nevada's jurisprudence regarding expert [**32] witness testimony pursuant to NRS 50.275. 124 Nev. at , 189 P.3d at 650-52. ***HN9*** We identified the three overarching requirements for admissibility of expert witness testimony pursuant to NRS 50.275 as (1) qualification, (2) assistance, and (3) limited scope requirements. 124 Nev. at , 189 P.3d at 650. This court then identified factors to be considered under each requirement. 124 Nev. at , 189 P.3d at 650-52. We were careful to note that the list of factors was not exhaus-

tive, and we recognized that every factor may not be applicable in every case and would likely be accorded varying weight from case to case. *Id.* at , 189 P.3d at 651-52. It is worth noting that we supported our conclusion by citing to Nevada cases, not federal.

We see nothing unclear about our decision to adhere to state law, while looking at federal jurisprudence for guidance--when *needed.* Sister states, including Indiana, Tennessee, New Hampshire, and California have employed the same reasoning: rejecting an adoption of *Daubert,* applying state law admissibility standards, and looking at federal authority for guidance. *See Ingram v. State,* 699 N.E.2d 261, 262 (Ind. 1998) (explaining that in determining reliability, **[**33]** while many factors have been identified, there is no particular standard); *see also McDaniel v. CSX Transp., Inc.,* 955 S.W.2d 257, 265 (Tenn. 1997) ("Although we do not expressly adopt *Daubert,* the non-exclusive list of factors . . . are useful . . . ."); *State v. Hungerford,* 142 N.H. 110, 697 A.2d 916, 922 (N.H. 1997) (declining to adopt *Daubert,* but noting that state evidence code, caselaw from other jurisdictions, as well as *Daubert,* were helpful considerations in determining the admissibility of expert witness testimony); *People v. Leahy,* 8 Cal. 4th 587, 34 Cal. Rptr. 2d 663, 882 P.2d 321, 327 (Cal. 1994) (declining to adopt *Daubert,* yet explaining that inquiry into general acceptance entails analysis of the relevancy of the proffered testimony (relevancy being a staple of the *Daubert* inquiry)). What *Hallmark* and similar cases from sister jurisdictions demonstrate is that whether dealing with scientific or nonscientific expert testimony, there is the inevitable overlap of factors gatekeepers will consider, mainly relevancy and reliability. By not adopting the *Daubert* standard as a limitation on judges' considerations with respect to the admission of expert testimony, we give Nevada trial judges wide discretion, within the parameters **[**34]** of NRS 50.275, to fulfill their gatekeeping duties. We determine that the framework provided by NRS 50.275 sets a degree of regulation upon admitting expert witness testimony, **[*659]** without usurping the trial judge's gatekeeping function.

Consider the differences between NRS 50.275 and FRE 702. ***HN10*** NRS 50.275 states:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge.

FRE 702 contains similar language, but with additional conditions, which were added in response to the *Daubert* trilogy *(Daubert, Joiner,* and *Kumho):*

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness **[**35]** has applied the principles and methods reliably to the facts of the case.

***HN11*** Whereas the federal rule mandates three additional conditions that trial judges should consider in evaluating expert witness testimony, the Nevada statute mandates no such requirements. Rather, NRS 50.275 provides general guidance and allows the trial judge discretion in deciding what factors are to be considered on a case-by-case basis. In *Hallmark,* we outlined some factors that are useful in this inquiry, but repeatedly noted that the factors enumerated "may not be equally applicable in every case." 124 Nev. at , 189 P.3d at 651, 652. We determine that the benefit of our approach is twofold: first, it gives judges wide discretion to perform their gatekeeping duties; and, second, it creates an inquiry that is

based more in legal, rather than scientific, principles.

In Nevada, the qualification, assistance, and limited scope requirements are based on legal principles. The requirements ensure reliability and relevance, while not imposing upon a judge a mandate to determine scientific falsifiability and error rate for each case. [5] In sum, *Daubert*, as any other case decided by the U.S. Supreme Court, is looked [**36] upon favorably by this court. We do not, however, adopt the *Daubert* standard as a limitation on the factors considered for admissibility of expert witness testimony. We hold that ***HN12*** NRS 50.275 provides the standard for admissibility of expert witness testimony in Nevada.

With those principles in mind, we now turn to whether the district court abused its discretion in allowing Montgomery to testify as an expert witness. We first consider whether Montgomery was qualified to testify as an expert witness. ***HN13*** Among the factors the court may have considered in determining Montgomery's qualifications were whether she had formal schooling, proper licensure, employment experience, and practical experience and specialized training. *See Hallmark*, 124 Nev. at , 189 P.3d at 650-51.

Montgomery had a science degree, was employed with the FBI's toxicology department, and had acquired specialized knowledge and training with regard to succinylcholine testing. Accordingly, we conclude that the district court acted within its discretion when it found that Montgomery met the qualification requirement.

[*660] Next, we consider whether Montgomery's testimony assisted the jury to understand the evidence or to determine a fact in issue. We have explained that ***HN14*** expert witness testimony "will assist the trier of fact only when it is relevant and the product of reliable methodology." *Id.* at , 189 P.3d at 651 [**38] (citations omitted). While each case turns upon varying factors, as discussed above, in *Hallmark*, we articulated five factors to judge reliability of a methodology, instructing the district court to consider whether the proffered opinion is

> (1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subjected to peer review; (4) generally accepted in the scientific community (not always determinative); and (5) based more on particularized facts rather than assumption, conjecture, or generalization.

*Id.* at , 189 P.3d at 651-52 (citations omitted).

We conclude that the district court did not abuse its discretion when it found that Montgomery's testimony would assist the jury. Montgomery is part of a small group of toxicologists in the country with experience in testing for succinylcholine. In addition, she had ongoing training in the field, and had authored dozens of publications and given numerous presentations on matters relevant

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[5] A widely cited study involving 400 state court trial judges gives credence to these concerns. In response to questions regarding the *Daubert* factors, the judges' responses showed a lack of understanding:

> . . . only 4% could provide an explanation that demonstrated a clear understanding of the testing and falsifiability factor; while a startling 35% of the judges gave answers which were unequivocally wrong. Similarly, only 4% demonstrated a clear understanding of "error rate," 86% gave answers best classified as equivocal, and 10% gave clearly wrong answers. Concerning peer review, the majority of the judges clearly understood the concept, while 10% clearly did not

Michel F. Baumeister and Dorothea M. Capone, *Admissibility Standards As Politics--The Imperial Gate Closers Arrive!!!*, 33 Seton Hall L. Rev. 1025, 1040-41 (2003) (citing Sophia Gatowski et al., *Asking the Gatekeepers: Results of a National Survey of Judges on* [**37] *Judging Expert Evidence in a Post-Daubert World*, 25 Law & Hum. Behav. 433 (2001))

to her field. Montgomery's work was testable although it is unclear whether it had been tested. The record does not contain evidence as to whether Montgomery's work had been subject to peer review. And, while it is unclear **[**39]** the scope of acceptance that Montgomery's methodology has in the scientific community, Walls testified in the pretrial hearings that he did not take issue with her methodology or results. While the testing methodology used by Montgomery did not meet all the *Hallmark* factors for assessing reliability, those factors may be afforded varying weights and may not apply equally in every case. It is up to the district court judge to make the determination regarding the varying factors as he or she is the gatekeeper--not this court. In this case, we determine that the district court acted within its discretion when it found that Montgomery's testimony would assist the jury in understanding the evidence and determining a fact in issue.

Lastly, we consider whether the district court correctly determined that Montgomery's testimony met the limited scope requirement. We conclude that it did because Montgomery's testimony consisted almost entirely of the highly particularized facts of testing Augustine's tissue and urine samples for succinylcholine. She explained the testing procedures for succinylcholine and the drug's volatile nature. Accordingly, Montgomery's testimony was limited to matters within **[**40]** the scope of her knowledge. In sum, as Montgomery had scientific and specialized knowledge, her testimony assisted the jury in understanding succinylcholine, and it was limited to her knowledge and expertise, we conclude that the district court did not abuse its discretion when it allowed Montgomery to testify.

*Jury instructions regarding spoliation of evidence*

Higgs contends that the district court abused its discretion when it refused to give Higgs' proffered spoliation instruction regarding the State's alleged failure to properly preserve evidence of an injection site tissue sample from Augustine's body. Higgs urges this court to apply the spoliation rule set forth in *Bass-Davis v. Davis*, 122 Nev. 442, 452-53, 134 P.3d 103, 109-10 (2006), to criminal cases. In *Bass-Davis*, a civil case, this court determined that ***HN15*** even when missing evidence is not willfully destroyed, but rather is negligently destroyed, the party prejudiced by the loss of evidence is entitled to an "adverse inference instruction." *Id.*

We reject Higgs' suggestion that we extend the spoliation rule set forth in *Bass-Davis* to criminal cases. This court has articulated the rule for failure to preserve evidence in criminal **[**41]** cases, and we see no reason to depart from that standard.

***HN16*** "Due process requires the State to preserve material evidence." *Steese v. State*, 114 Nev. 479, 491, 960 P.2d 321, 329 (1998). The State's failure to preserve material evidence can lead to dismissal of the **[*661]** charges "if the defendant can show 'bad faith or connivance on the part of the government' or 'that he was prejudiced by the loss of the evidence.'" *Daniels v. State*, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998) (quoting *Howard v. State*, 95 Nev. 580, 582, 600 P.2d 214, 215-16 (1979). Moreover, ***HN17*** district courts have "broad discretion to settle jury instructions." *Cortinas v. State*, 124 Nev. , , 195 P.3d 315, 319 (2008). Our review is, therefore, limited to inquiring whether there was an abuse of discretion or judicial error. *Id.*

In the present case, Higgs proffered three different adverse inference jury instructions regarding spoliation of evidence. He asserted that the jury instructions were necessary because the State inadequately inspected and preserved the tissue sample from an injection site on Augustine's body. We disagree.

The district court properly rejected Higgs' proffered jury instructions because there was no evidence **[**42]** that the State acted in bad faith, and Higgs failed to show he was prejudiced by the

State's failure to preserve the tissue sample. First, Higgs does not argue that the State acted in bad faith, but that it was negligent in its preservation of the tissue sample. With no issue raised as to bad faith, nor any evidence supporting such a determination, we need only consider if Higgs was prejudiced by the spoliation.

We determine that Higgs was not prejudiced by the spoliation of the tissue sample because the State did not benefit from its failure to preserve the evidence. *See* Sanborn v. State, 107 Nev. 399, 408, 812 P.2d 1279, 1286 (1991) (in holding that defendant was prejudiced by State's failure to preserve the evidence, the court explained that the State's case was "buttressed by the absence of [the] evidence"). The State's forensic toxicologist, Dr. Clark, admitted that she could not confirm that the tissue sample was from the site at which the succinylcholine was administered. More importantly, the defense's forensic toxicologist, Dr. Sohn, testified that while he could not retest the tissue sample to date it, he did examine it microscopically. He stated that his microscopic examination, **[**43]** along with the autopsy pictures of the site led him to conclude--with medical certainty--that the wound could not have been inflicted before Augustine was admitted to the hospital. The failure to preserve the tissue sample prevented Dr. Sohn from dating the tissue sample, not from forming a medical conclusion in support of Higgs' defense that he did not inject his wife with succinylcholine. Accordingly, Higgs was not prejudiced by the State's failure to preserve the tissue sample from the injection site.

*Accumulation of plain error*

Higgs argues that a "prodigious" amount of plain error occurred during trial. Higgs asserts 11 instances of alleged plain error, although he does not fully brief the instances in detail and admits that counsel did not object to any of the 11 alleged instances of plain error. The 11 claims of error are as follows: (1) during Ramey's testimony, she described Higgs as a "player" and testified that she thought he was a "liar"; (2) Ramey testified that when she learned that Augustine had died, she thought Higgs had killed Augustine; (3) during Higgs' testimony, the trial was delayed due to his second suicide attempt; on cross-examination, the State asked Higgs **[**44]** whether some people might think that his during-trial suicide attempt was a ploy for sympathy and demonstrated consciousness of guilt; (4) during the same cross-examination, the State asked Higgs what motive Ramey would have to make up her testimony; (5) during the same cross-examination, the State asked Higgs if he disagreed with Dr. Clark's testimony, and Higgs said he did; (6) State witness Michelle Ene, Augustine's executive assistant, testified that Higgs told her that he and Augustine had worked out their differences the night before Augustine was found dead; Ene testified that she "didn't believe that for one minute" and was suspicious that Higgs may have had something to do with Augustine's death and that he "might have murdered her"; (7) Nancy Vinnek, one of Augustine's best friends, testified in the rebuttal case that Augustine frequently described Higgs as a "Doctor Jeckyll and a Mr. Hyde"; [6] (8) **[*662]** during closing arguments, the State noted that Ramey was a good witness; (9) during closing arguments, the State noted that Higgs could not explain why Ramey would testify as she did, and that Dr. Richard Sehar, a State witness, who ordered the test to check for succinylcholine **[**45]** levels in Augustine's body, had testified that he believed Ramey's testimony; (10) the State argued that Higgs admitted that his toxicologist, Walls, did not disagree with the FBI's conclusion that succinylcholine was in Augustine's urine; and (11) during closing argument, the State said, "I know the defendant doesn't have the burden . . . but he doesn't have a leash on him that prevents him from doing any of these things either."

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[6] We note that Higgs misstates Ramey's testimony. Ramey testified, "And I [Ramey] would frequently describe [Higgs] to [Augustine] as a Dr. Jekyll and a Mr. Hyde." Therefore, it was Ramey who described Higgs as a Dr. Jekyll and Mr. Hyde, not Augustine.

*HN18* "When an error has not been preserved," as is the case here because Higgs failed to object to any of the instances of alleged error, "this court employs plain-error review." *Valdez v. State*, 124 Nev. , , 196 P.3d 465, 477 (2008). Pursuant to our plain-error review standard, "an error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" *Id.* (quoting [**46] *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)).

We have reviewed each of Higgs' claims of error and conclude that Higgs has failed to demonstrate how any of the alleged errors affected his substantial rights by causing actual prejudice or a miscarriage of justice. We conclude Higgs' plain-error argument is without merit.

Accordingly, we affirm the judgment of conviction.

/s/ Hardesty, J.

Hardesty

We concur:

/s/ Parraguirre, C.J.

Parraguirre

/s/ Douglas, J.

Douglas

/s/ Gibbons, J.

Gibbons

**Concur by:** CHERRY; SAITTA

**Dissent by:** CHERRY; SAITTACHERRY; SAITTA

**Dissent**

CHERRY, J., concurring in part and dissenting in part:

I concur with the majority's rejection of the invitation to adopt the standard of admissibility set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), but I would reverse the judgment of conviction, because I conclude that the denial of Higgs' motion to continue the trial resulted in violation of his due process rights.

Higgs' motion to continue the trial was based upon the fact that his expert, Chip Walls, did not have adequate time to evaluate the conclusion of the FBI toxicology report. The conclusion of the report, that succinylcholine was found in Augustine's urine, formed the basis of the [**47] State's theory of the case.

If ever a continuance of the trial date should have been granted, the instant case cries out for that type of relief. Can it be said that there was any earth-shattering reason to proceed to a trial on a murder charge when discovery was incomplete and the FBI toxicology report lacked being a finished product?

At the time of the initial arraignment, December 22, 2006, appellant waived the statutory time to be brought to trial. Accordingly, the judge set the trial for July 16, 2007. Subsequently, the trial was moved up to June 18, 2007, per stipulation and order.

When a problem with discovery developed, appellant filed a motion to continue the trial date, which the State opposed.

A hearing on the motion to continue trial was held on May 25, 2007. Even though the defense presented information that defense expert Walls had insufficient information to evaluate Ms. Montgomery's data and results properly, and insufficient information to give expert testimony at the trial on behalf of appellant, the court denied the continuance, ruling that the defense expert was free to testify that he did not trust the validity of the materials received from the FBI.

An excellent statement **[**48]** of the due process analysis is contained in *Ungar v. Sarafite:*

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled **[*663]** to defend without counsel. Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.

376 U.S. 575, 589, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964) (citations omitted).

In this case, there simply is nothing concrete in the record indicating why this case, having been set for trial six months after the arraignment, could not have been set out further.

This court reviews a district court's decision with regard to a motion to continue for an abuse of discretion. *Rose v. State*, 123 Nev. 194, 206, 163 P.3d 408, 416 (2007). While each case turns on its own circumstances, **[**49]** this court has long recognized the cornerstone principle of due process, that "[a]ccuseds have the right to be informed of the nature and cause of the accusation against them and must be afforded a reasonable opportunity to obtain witnesses in their favor." *Zessman v. State*, 94 Nev. 28, 31, 573 P.2d 1174, 1177 (1978) (citing *Cole v. Arkansas*, 333 U.S. 196, 68 S. Ct. 514, 92 L. Ed. 644 (1948)).

In determining whether denial of the defendant's request for continuance violates due process, "the focus must be on the need for the continuance and the prejudice resulting from its denial." *Manlove v. Tansy*, 981 F.2d 473, 476 (10th Cir. 1992) (affirming grant of habeas relief--denial of continuance denied potentially crucial evidence to defendant). So, for example, there would be no denial of due process if discrediting Ms. Montgomery hypothetically would have made no difference to the outcome of this case. *See Padgett v. O'Sullivan*, 65 F.3d 72, 75 (7th Cir. 1995). Similarly, if Mr. Walls hypothetically were merely a cumulative witness, Higgs would not be able to establish a due process violation. *See Foots v. State of LA.*, 793 F.2d 610, 611 (5th Cir. 1986).

However, if the failure to grant a continuance impinges on the defendant's **[**50]** rights to compulsory process and the defendant loses critical impeaching or supporting witnesses as a result, his due process rights are violated. *See State v. Timblin*, 254 Mont. 48, 834 P.2d 927, 929 (Mont. 1992) (citing *Singleton v. Lefkowitz*, 583 F.2d 618, 625 (2d Cir. 1978) (conviction reversed)); *March v. State*, 105 N.M. 453, 734 P.2d 231, 234 (N.M. 1987) (conviction reversed).

The majority concludes that Higgs failed to demonstrate that he was prejudiced by the denial. I disagree. I conclude that Higgs was prejudiced because his expert, Walls, one of the country's few experts on succinylcholine, did not testify at trial. While it is true that the defense had the toxicology report in its possession for 24 weeks, Walls did not believe the State had sent a complete report. Walls stated that the packet was incomplete and did not include backup data or documentation. The full report was the crux of the State's case against Higgs. Therefore, pursuant to *Zessman*, Higgs had the right to be informed of the nature of the accusation against him, including the complete FBI toxicology report. The lack of information not only affected Higgs' ability to obtain witnesses in his favor, it affected his ability to cross-examine **[**51]** the State's expert witness, Madeline Montgomery.

Why should a defense attorney be forced into a position of cross-examining an expert witness when the expert report is incomplete? If the district court's decision to deny the appellant's motion to continue the trial date is upheld by this court, it would allow incomplete discovery to be used to the detriment of a criminal defendant and appear to be a blatant denial of due process of law. Just because defense counsel cross-examined the State's expert witness during the motion in limine does not indicate that defense counsel had sufficient information in the long run to place his defense expert on the stand at trial in light of an incomplete toxicology report. *See* Zessman, 94 Nev. at 32, 573 P.2d at 1177 (citing *O'Brien v. State*, 88 Nev. 488, 500 P.2d 693 (1972)).

**[*664]** This court has observed that a defendant's right to discovery is tangentially related to the right of confrontation. *See* Stamps v. State, 107 Nev. 372, 376, 812 P.2d 351, 354 (1991). Here, I conclude that in order for Higgs' counsel to have prepared an effective cross-examination of Montgomery regarding the succinylcholine found in Augustine's urine, Higgs should have been afforded **[**52]** more time. The continuance would have allowed Walls time to evaluate Montgomery's technique and conclusions, and to draw his own inferences. While Walls had the packet from the FBI toxicology lab for months before the trial, I note that it was not until the district court issued an order directing the State to provide Higgs with the FBI toxicology report that the State sent the report to the defense. Moreover, Walls stated that the packet the FBI sent was incomplete and that significant data was missing. Walls felt the FBI packet was missing important information about the verification process, such as backup data. This was vital information for Walls because during the testing of Augustine's urine for succinylcholine, one of the FBI's testing machines had malfunctioned. Given the volatile nature of succinylcholine and the fact that there were questions regarding the preservation of the urine and tissue sample, I conclude that due process required that Higgs be given more time to prepare what was arguably the most important piece of evidence. I am not persuaded by the majority's argument that Higgs could have effectively presented his arguments regarding the FBI toxicology report by **[**53]** merely cross-examining Montgomery. An effective cross-examination itself requires time and preparation. Likewise, because of the incomplete information provided to Walls by the State, Walls did not, and would not, testify for the defense at trial. The lack of expert testimony on behalf of Higgs was nothing less than devastating to the defense effort.

For the reasons set forth above, I dissent and would reverse the judgment based on the fact that the district court abused its discretion when it denied Higgs' motion to continue.

/s/ Cherry, J.

Cherry

SAITTA, J., concurring in part and dissenting in part:

I concur in the majority's rejection of the invitation to adopt the standard of admissibility set

forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), but I would reverse the judgment of conviction, because I conclude that the denial of Higgs' motion to continue the trial resulted in a violation of his due process rights.

Higgs' motion to continue the trial was based upon the fact that his expert, Chip Walls, did not have adequate time to evaluate the conclusion of the FBI toxicology report. The conclusion of the report, that succinylcholine was found in Augustine's **[**54]** urine, formed the basis of the State's theory of the case.

This court reviews a district court's decision with regard to a motion to continue for an abuse of discretion. *Rose v. State*, 123 Nev. 194, 206, 163 P.3d 408, 416 (2007). While each case turns on its own circumstances, this court has long recognized the cornerstone principle of due process, that "[a]ccuseds have the right to be informed of the nature and cause of the accusation against them and must be afforded a reasonable opportunity to obtain witnesses in their favor." *Zessman v. State*, 94 Nev. 28, 31, 573 P.2d 1174, 1177 (1978) (citing *Cole v. Arkansas*, 333 U.S. 196, 68 S. Ct. 514, 92 L. Ed. 644 (1948)).

The majority concludes that Higgs failed to demonstrate that he was prejudiced by the denial. I disagree. I conclude that Higgs was prejudiced because his expert, Walls, one of the country's few experts on succinylcholine, did not testify at trial. While it is true that the defense had the toxicology report in its possession for 24 weeks, Walls did not believe the State had sent a complete report. Walls stated that the packet was incomplete and did not include backup data or documentation. The full report was the crux of the State's case against Higgs. **[**55]** Therefore, pursuant to *Zessman*, Higgs had the right to be informed of the nature of the accusation against him, including the complete FBI toxicology report. The lack of information not only affected Higgs' ability to **[*665]** obtain witnesses in his favor, it affected his ability to cross-examine the State's expert witness, Madeline Montgomery.

This court has observed that a defendant's right to discovery is tangentially related to the right of confrontation. *See Stamps v. State*, 107 Nev. 372, 376, 812 P.2d 351, 354 (1991). Here, I conclude that in order for Higgs' counsel to have prepared an effective cross-examination of Montgomery regarding the succinylcholine found in Augustine's urine, Higgs should have been afforded more time. The continuance would have allowed Walls time to evaluate Montgomery's technique and conclusions, and to draw his own inferences. While Walls had the packet from the FBI toxicology lab for months before the trial, I note that it was not until the district court issued an order directing the State to provide Higgs with the FBI toxicology report that the State sent the report to the defense. Moreover, Walls stated that the packet the FBI sent was incomplete and that **[**56]** significant data was missing. Walls felt the FBI packet was missing important information about the verification process, such as backup data. This was vital information for Walls because during the testing of Augustine's urine for succinylcholine, one of the FBI's testing machines had malfunctioned. Given the volatile nature of succinylcholine and the fact that there were questions regarding the preservation of the urine and tissue samples, I find that due process required that Higgs be given more time to prepare what was arguably the most important piece of evidence. I am not persuaded by the majority's argument that Higgs could have effectively presented his arguments regarding the FBI toxicology report by merely cross-examining Montgomery. An effective cross-examination itself requires time and preparation.

For the reasons set forth above, I dissent and would reverse the judgment based on the fact that the district court abused its discretion when it denied Higgs' motion to continue.

/s/ Saitta, J.

Saitta

# SOCIAL STUDIES, PSYCHOLOGICAL EVALUATIONS, CHILD CUSTODY EVALUATIONS – WHAT'S IN A NAME?

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Dallas

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# USE AND ABUSE OF MENTAL HEALTH EXPERTS AFTER *DAUBERT*

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28th ANNUAL ADVANCED FAMILY LAW COURSE
August 5-8, 2002
Dallas, Texas
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CHAPTER 5

# *Daubert/Lanigan* Issues

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**Melissa B. Tearney**

NRS 432B.220 Persons required to make report; when and to whom reports are required; any person may make report; report and written findings if reasonable cause to believe death of child caused by abuse or neglect. [Effective January 1, 2012.]

1. Any person who is described in subsection 4 and who, in his or her professional or occupational capacity, knows or has reasonable cause to believe that a child has been abused or neglected shall:

(a) Except as otherwise provided in subsection 2, report the abuse or neglect of the child to an agency which provides child welfare services or to a law enforcement agency; and

(b) Make such a report as soon as reasonably practicable but not later than 24 hours after the person knows or has reasonable cause to believe that the child has been abused or neglected.

2. If a person who is required to make a report pursuant to subsection 1 knows or has reasonable cause to believe that the abuse or neglect of the child involves an act or omission of:

(a) A person directly responsible or serving as a volunteer for or an employee of a public or private home, institution or facility where the child is receiving child care outside of the home for a portion of the day, the person shall make the report to a law enforcement agency.

(b) An agency which provides child welfare services or a law enforcement agency, the person shall make the report to an agency other than the one alleged to have committed the act or omission, and the investigation of the abuse or neglect of the child must be made by an agency other than the one alleged to have committed the act or omission.

3. Any person who is described in paragraph (a) of subsection 4 who delivers or provides medical services to a newborn infant and who, in his or her professional or occupational capacity, knows or has reasonable cause to believe that the newborn infant has been affected by prenatal illegal substance abuse or has withdrawal symptoms resulting from prenatal drug exposure shall, as soon as reasonably practicable but not later than 24 hours after the person knows or has reasonable cause to believe that the newborn infant is so affected or has such symptoms, notify an agency which provides child welfare services of the condition of the infant and refer each person who is responsible for the welfare of the infant to an agency which provides child welfare services for appropriate counseling, training or other services. A notification and referral to an agency which provides child welfare services pursuant to this subsection shall not be construed to require prosecution for any illegal action.

4. A report must be made pursuant to subsection 1 by the following persons:

(a) A physician, dentist, dental hygienist, chiropractor, optometrist, podiatric physician, medical examiner, resident, intern, professional or practical nurse, physician assistant licensed pursuant to chapter 630 or 633 of NRS, perfusionist, psychiatrist, psychologist, marriage and family therapist, clinical professional counselor, clinical alcohol and drug abuse counselor, alcohol and drug abuse counselor, clinical social worker, music therapist, athletic trainer, advanced emergency medical

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technician or other person providing medical services licensed or certified in this State.

(b) Any personnel of a hospital or similar institution engaged in the admission, examination, care or treatment of persons or an administrator, manager or other person in charge of a hospital or similar institution upon notification of suspected abuse or neglect of a child by a member of the staff of the hospital.

(c) A coroner.

(d) A member of the clergy, practitioner of Christian Science or religious healer, unless the person has acquired the knowledge of the abuse or neglect from the offender during a confession.

(e) A social worker and an administrator, teacher, librarian or counselor of a school.

(f) Any person who maintains or is employed by a facility or establishment that provides care for children, children's camp or other public or private facility, institution or agency furnishing care to a child.

(g) Any person licensed to conduct a foster home.

(h) Any officer or employee of a law enforcement agency or an adult or juvenile probation officer.

(i) An attorney, unless the attorney has acquired the knowledge of the abuse or neglect from a client who is or may be accused of the abuse or neglect.

(j) Any person who maintains, is employed by or serves as a volunteer for an agency or service which advises persons regarding abuse or neglect of a child and refers them to persons and agencies where their requests and needs can be met.

(k) Any person who is employed by or serves as a volunteer for a youth shelter. As used in this paragraph, "youth shelter" has the meaning ascribed to it in NRS 244.427.

(l) Any adult person who is employed by an entity that provides organized activities for children.

5. A report may be made by any other person.

6. If a person who is required to make a report pursuant to subsection 1 knows or has reasonable cause to believe that a child has died as a result of abuse or neglect, the person shall, as soon as reasonably practicable, report this belief to an agency which provides child welfare services or a law enforcement agency. If such a report is made to a law enforcement agency, the law enforcement agency shall notify an agency which provides child welfare services and the appropriate medical examiner or coroner of the report. If such a report is made to an agency which provides child welfare services, the agency which provides child welfare services shall notify the appropriate medical examiner or coroner of the report. The medical examiner or coroner who is notified of a report

pursuant to this subsection shall investigate the report and submit his or her written findings to the appropriate agency which provides child welfare services, the appropriate district attorney and a law enforcement agency. The written findings must include, if obtainable, the information required pursuant to the provisions of subsection 2 of NRS 432B.230.

(Added to NRS by 1985, 1371; A 1987, 2132, 2220; 1989, 439; 1993, 2229; 1999, 3526; 2001, 780, 1150; 2001 Special Session, 37; 2003, 910, 1211; 2005, 2031; 2007, 1503, 1853, 3084; 2009, 2996; 2011, 791, 1097, effective January 1, 2012)NRS 432B.220 Persons required to make report; when and to whom reports are required; any person may make report; report and written findings if reasonable cause to believe death of child caused by abuse or neglect. [Effective January 1, 2012.]

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