Legal Standards and Background Education for Mental Health Professional Outsourced Services Providers

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CONSTITUTIONAL PRINCIPLES

I. Basic parameters of federal constitutional law

A. *Troxel* (Constitutional right to raise & control associations of children)

B. Limits of *Troxel*

1. *Rennels & Hudson v. Jones*

2. NRS 125C.050 – third party visitation

3. NRS 125.480 possibilities of third party custody

C. Supremacy Clause Basics

D. Priority of right to confer with counsel; non-interference

1. *Gideon v. Wainwright*, 83 S. Ct. 792 ((1963) (such access, unimpaired and unimpeded, is guaranteed by the 14th Amendment);

2. *Morales v. Turman*, 326 F. Supp. 677 (E.D. Tex. 1971) (the right to confer with counsel of one's own choosing is ***fundamental***).

E. Other Rights?

1. Why should you care? Quasi-judicial immunity – and limitations.

2. What are they & how could MHP actions be asserted to violate them?

First Amendment – Establishment Clause, Free Exercise Clause; freedom of speech, of the press, and of assembly; right to petition

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Second Amendment – Militia (United States), Sovereign state, Right to keep and bear arms.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.[60]

Third Amendment – Protection from quartering of troops.

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Fourth Amendment – Protection from unreasonable search and seizure.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment – due process, double jeopardy, self-incrimination, eminent domain.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment – Trial by jury and rights of the accused; Confrontation Clause, speedy trial, public trial, right to counsel

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Seventh Amendment – Civil trial by jury.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Eighth Amendment – Prohibition of excessive bail and cruel and unusual punishment.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Ninth Amendment – Protection of rights not specifically enumerated in the Constitution.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Tenth Amendment – Powers of States and people.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

List of Exhibits:

1. *Troxel*
2. *Rennels*
3. *Hudson*
4. NRS 125C.050
5. NRS 125.480
6. Quick note re: Federal Preemption
7. Constitutional Law note re: Right to Counsel
8.

530 U.S. 57 (2000)

TROXEL et vir
v.
GRANVILLE

No. 99-138.

United States Supreme Court.

Argued January 12, 2000.
Decided June 5, 2000.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

O'Connor, J., announced the judgment of the Court and delivered an opinion, in which Rehnquist, C. J., and Ginsburg and Breyer, JJ., joined. Souter, J., *post,* p. 75, and Thomas, J., *post,* p. 80, filed opinions concurring in the judgment. Stevens, J., *post,* p. 80, Scalia, J., *post,* p. 91, and Kennedy, J., *post,* p. 93, filed dissenting opinions.

Mark D. Olson argued the cause for petitioners. With him on the briefs was *Eric Schnapper.*

Catherine W. Smith argued the cause for respondent. With her on the brief was *Howard M. Goodfriend.*[*]

60 *60 Justice O'Connor announced the judgment of the Court and delivered an opinion, in which The Chief Justice, Justice Ginsburg, and Justice Breyer join.

Section 26.10.160(3) of the Revised Code of Washington permits "[a]ny person" to petition a superior court for visitation rights "at any time," and authorizes that court to grant such visitation rights whenever "visitation may serve the best interest of the child." Petitioners Jenifer and Gary **Troxel** petitioned a Washington Superior Court for the right to visit their grandchildren, Isabelle and Natalie **Troxel**. Respondent Tommie Granville, the mother of Isabelle and Natalie, opposed the petition. The case ultimately reached the Washington Supreme Court, which held that § 26.10.160(3) unconstitutionally interferes with the fundamental right of parents to rear their children.

I

Tommie Granville and Brad **Troxel** shared a relationship that ended in June 1991. The two never married, but they had two daughters, Isabelle and Natalie. Jenifer and Gary **Troxel** are Brad's parents, and thus the paternal grandparents of Isabelle and Natalie. After Tommie and Brad separated in 1991, Brad lived with his parents and regularly brought his daughters to his parents' home for weekend visitation. Brad committed suicide in May 1993. Although the Troxels at first
61 continued to see Isabelle and Natalie on a regular basis after their son's death, Tommie Granville informed *61 the Troxels in October 1993 that she wished to limit their visitation with her daughters to one short visit per month. *In re Smith,* 137 Wash. 2d 1,6, 969 P. 2d 21, 23-24 (1998); *In re* ***Troxel,*** 87 Wash. App. 131, 133, 940 P. 2d 698, 698-699 (1997).

In December 1993, the Troxels commenced the present action by filing, in the Washington Superior Court for Skagit County, a petition to obtain visitation rights with Isabelle and Natalie. The Troxels filed their petition under two Washington statutes, Wash. Rev. Code §§ 26.09.240 and 26.10.160(3) (1994). Only the latter statute is at issue in this case. Section 26.10.160(3) provides: "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances." At trial, the Troxels requested two weekends of overnight visitation per month and two weeks of visitation each summer. Granville did not oppose visitation altogether, but instead asked the court to order one day of visitation per month with no overnight stay. 87 Wash. App., at 133-134, 940 P. 2d, at 699. In 1995, the Superior Court issued an oral ruling and entered a visitation decree ordering visitation one

weekend per month, one week during the summer, and four hours on both of the petitioning grandparents' birthdays. 137 Wash. 2d, at 6, 969 P. 2d, at 23; App. to Pet. for Cert. 76a—78a.

Granville appealed, during which time she married Kelly Wynn. Before addressing the merits of Granville's appeal, the Washington Court of Appeals remanded the case to the Superior Court for entry of written findings of fact and conclusions of law. 137 Wash. 2d, at 6, 969 P. 2d, at 23. On remand, the Superior Court found that visitation was in Isabelle's and Natalie's best interests:

> "The Petitioners [the Troxels] are part of a large, central, loving family, all located in this area, and the
62 Petitioners *62 can provide opportunities for the children in the areas of cousins and music.
>
> ". . . The court took into consideration all factors regarding the best interest of the children and considered all the testimony before it. The children would be benefitted from spending quality time with the Petitioners, provided that that time is balanced with time with the childrens' *[sic]* nuclear family. The court finds that the childrens' *[sic]* best interests are served by spending time with their mother and stepfather's other six children." App. 70a.

Approximately nine months after the Superior Court entered its order on remand, Granville's husband formally adopted Isabelle and Natalie. *Id.,* at 60a—67a.

The Washington Court of Appeals reversed the lower court's visitation order and dismissed the Troxels' petition for visitation, holding that nonparents lack standing to seek visitation under § 26.10.160(3) unless a custody action is pending. In the Court of Appeals' view, that limitation on nonparental visitation actions was "consistent with the constitutional restrictions on state interference with parents' fundamental liberty interest in the care, custody, and management of their children." 87 Wash. App., at 135, 940 P. 2d, at 700 (internal quotation marks omitted). Having resolved the case on the statutory ground, however, the Court of Appeals did not expressly pass on Granville's constitutional challenge to the visitation statute. *Id.,* at 138, 940 P. 2d, at 701.

The Washington Supreme Court granted the Troxels' petition for review and, after consolidating their case with two other visitation cases, affirmed. The court disagreed with the Court of Appeals' decision on the statutory issue and found that the plain language of § 26.10.160(3) gave the Troxels standing to seek visitation, irrespective of whether a custody action
63 was pending. 137 Wash. 2d, at 12, 969 P. *63 2d, at 26-27. The Washington Supreme Court nevertheless agreed with the Court of Appeals' ultimate conclusion that the Troxels could not obtain visitation of Isabelle and Natalie pursuant to § 26.10.160(3). The court rested its decision on the Federal Constitution, holding that § 26.10.160(3) unconstitutionally infringes on the fundamental right of parents to rear their children. In the court's view, there were at least two problems with the nonparental visitation statute. First, according to the Washington Supreme Court, the Constitution permits a State to interfere with the right of parents to rear their children only to prevent harm or potential harm to a child. Section 26.10.160(3) fails that standard because it requires no threshold showing of harm. *Id.,* at 15-20, 969 P. 2d, at 28-30. Second, by allowing "`any person' to petition for forced visitation of a child at `any time' with the only requirement being that the visitation serve the best interest of the child," the Washington visitation statute sweeps too broadly. *Id.,* at 20, 969 P. 2d, at 30. "It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a `better' decision." *Ibid.,* 969 P. 2d, at 31. The Washington Supreme Court held that "[p]arents have a right to limit visitation of their children with third persons," and that between parents and judges, "the parents should be the ones to choose whether to expose their children to certain people or ideas." *Id.,* at 21, 969 P. 2d, at 31. Four justices dissented from the Washington Supreme Court's holding on the constitutionality of the statute. *Id.,* at 23-43, 969 P. 2d, at 32-42.

We granted certiorari, 527 U. S. 1069 (1999), and now affirm the judgment.

II

The demographic changes of the past century make it difficult to speak of an average American family. The composition
64 of families varies greatly from household to household. While many children may have two married parents and *64

grandparents who visit regularly, many other children are raised in single-parent households. In 1996, children living with only one parent accounted for 28 percent of all children under age 18 in the United States. U. S. Dept. of Commerce, Bureau of Census, Current Population Reports, 1997 Population Profile of the United States 27 (1998). Understandably, in these single-parent households, persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing. In many cases, grandparents play an important role. For example, in 1998, approximately 4 million children—or 5.6 percent of all children under age 18—lived in the household of their grandparents. U. S. Dept. of Commerce, Bureau of Census, Current Population Reports, Marital Status and Living Arrangements: March 1998 (Update), p. *i* (1998).

The nationwide enactment of nonparental visitation statutes is assuredly due, in some part, to the States' recognition of these changing realities of the American family. Because grandparents and other relatives undertake duties of a parental nature in many households, States have sought to ensure the welfare of the children therein by protecting the relationships those children form with such third parties. The States' nonparental visitation statutes are further supported by a recognition, which varies from State to State, that children should have the opportunity to benefit from relationships with statutorily specified persons—for example, their grandparents. The extension of statutory rights in this area to persons other than a child's parents, however, comes with an obvious cost. For example, the State's recognition of an independent third-party interest in a child can place a substantial burden on the traditional parent-child relationship. Contrary to Justice Stevens' accusation, our description of state nonparental visitation statutes in these terms, of course, is not meant to suggest that "children are so much chattel." *Post,* at 89 (dissenting opinion). Rather, our terminology is
65 intended to highlight the fact that these *65 statutes can present questions of constitutional import. In this case, we are presented with just such a question. Specifically, we are asked to decide whether § 26.10.160(3), as applied to Tommie Granville and her family, violates the Federal Constitution.

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." *Washington* v. *Glucksberg,* 521 U. S. 702, 719 (1997). The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Id.,* at 720; see also *Reno* v. *Flores,* 507 U. S. 292, 301-302 (1993).

The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children— is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer* v. *Nebraska,* 262 U. S. 390, 399, 401 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in *Pierce* v. *Society of Sisters,* 268 U. S. 510, 534-535 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in *Pierce* that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.,* at 535. We returned to the subject in *Prince* v. *Massachusetts,* 321 U. S. 158 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in
66 the parents, whose primary *66 function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.,* at 166.

In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. See, *e. g., Stanley* v. *Illinois,* 405 U. S. 645, 651 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children `come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements' " (citation omitted)); *Wisconsin* v. *Yoder,* 406 U. S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); *Quilloin* v. *Walcott,* 434 U. S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); *Parham* v. *J. R.,* 442 U. S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor

children. Our cases have consistently followed that course"); *Santosky* v. *Kramer,* 455 U. S. 745, 753 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Glucksberg, supra,* at 720 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the `liberty' specially protected by the Due Process Clause includes the righ[t] . . . to direct the education and upbringing of one's children" (citing *Meyer* and *Pierce*)). In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.

67 *67 Section 26.10.160(3), as applied to Granville and her family in this case, unconstitutionally infringes on that fundamental parental right. The Washington nonparental visitation statute is breathtakingly broad. According to the statute's text, "*[a]ny person* may petition the court for visitation rights *at any time,* " and the court may grant such visitation rights whenever "visitation may serve *the best interest of the child.* " § 26.10.160(3) (emphases added). That language effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review. Once the visitation petition has been filed in court and the matter is placed before a judge, a parent's decision that visitation would not be in the child's best interest is accorded no deference. Section 26.10.160(3) contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, in the State of Washington a court can disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests. The Washington Supreme Court had the opportunity to give § 26.10.160(3) a narrower reading, but it declined to do so. See, *e. g.,* 137 Wash. 2d, at 5, 969 P. 2d, at 23 ("[The statute] allow[s] any person, at any time, to petition for visitation without regard to relationship to the child, without regard to changed circumstances, and without regard to harm"); *id.,* at 20, 969 P. 2d, at 30 ("[The statute] allow[s] `any person' to petition for forced visitation of a child at `any time' with the only requirement being that the visitation serve the best interest of the child").

68 *68 Turning to the facts of this case, the record reveals that the Superior Court's order was based on precisely the type of mere disagreement we have just described and nothing more. The Superior Court's order was not founded on any special factors that might justify the State's interference with Granville's fundamental right to make decisions concerning the rearing of her two daughters. To be sure, this case involves a visitation petition filed by grandparents soon after the death of their son—the father of Isabelle and Natalie—but the combination of several factors here compels our conclusion that § 26.10.160(3), as applied, exceeded the bounds of the Due Process Clause.

First, the Troxels did not allege, and no court has found, that Granville was an unfit parent. That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children. As this Court explained in *Parham:*

> "[O]ur constitutional system long ago rejected any notion that a child is the mere creature of the State and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations. . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children." 442 U. S., at 602 (alteration in original) (internal quotation marks and citations omitted).

Accordingly, so long as a parent adequately cares for his or her children (*i. e.,* is fit), there will normally be no reason for
69 the State to inject itself into the private realm of the family to further question the ability of that parent to make the *69 best decisions concerning the rearing of that parent's children. See, *e. g., Flores,* 507 U. S., at 304.

The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville's determination of her daughters' best interests. More importantly, it appears that the Superior Court applied exactly the opposite presumption. In reciting its oral ruling after the conclusion of closing arguments, the Superior

Court judge explained:

> "The burden is to show that it is in the best interest of the children to have some visitation and some quality time with their grandparents. I think in most situations a commonsensical approach [is that] it is normally in the best interest of the children to spend quality time with the grandparent, unless the grandparent, *[sic]* there are some issues or problems involved wherein the grandparents, their lifestyles are going to impact adversely upon the children. That certainly isn't the case here from what I can tell." Verbatim Report of Proceedings in *In re* ***Troxel***, No. 93-3—00650-7 (Wash. Super. Ct., Dec. 14, 19, 1994), p. 213 (hereinafter Verbatim Report).

The judge's comments suggest that he presumed the grandparents' request should be granted unless the children would be "impact[ed] adversely." In effect, the judge placed on Granville, the fit custodial parent, the burden of *disproving* that visitation would be in the best interest of her daughters. The judge reiterated moments later: "I think [visitation with the Troxels] would be in the best interest of the children and I haven't been shown it is not in [the] best interest of the children." *Id.,* at 214.

The decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit
70 parent will act in the best interest of his or her child. See *Parham, supra,* at 602. In that respect, the court's presumption *70 failed to provide any protection for Granville's fundamental constitutional right to make decisions concerning the rearing of her own daughters. Cf., *e. g.,* Cal. Fam. Code Ann. § 3104(e) (West 1994) (rebuttable presumption that grandparent visitation is not in child's best interest if parents agree that visitation rights should not be granted); Me. Rev. Stat. Ann., Tit. 19A, § 1803(3) (1998) (court may award grandparent visitation if in best interest of child and "would not significantly interfere with any parent-child relationship or with the parent's rightful authority over the child"); Minn. Stat. § 257.022(2)(a)(2) (1998) (court may award grandparent visitation if in best interest of child and "such visitation would not interfere with the parent-child relationship"); Neb. Rev. Stat. § 43-1802(2) (1998) (court must find "by clear and convincing evidence" that grandparent visitation "will not adversely interfere with the parent-child relationship"); R. I. Gen. Laws § 15-5—24.3(a)(2)(v) (Supp. 1999) (grandparent must rebut, by clear and convincing evidence, presumption that parent's decision to refuse grandparent visitation was reasonable); Utah Code Ann. § 30-5—2(2)(e) (1998) (same); *Hoff* v. *Berg,* 595 N. W. 2d 285, 291-292 (N. D. 1999) (holding North Dakota grandparent visitation statute unconstitutional because State has no "compelling interest in presuming visitation rights of grandparents to an unmarried minor are in the child's best interests and forcing parents to accede to court-ordered grandparental visitation unless the parents are first able to prove such visitation is not in the best interests of their minor child"). In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination.

72 *71 Finally, we note that there is no allegation that Granville ever sought to cut off visitation entirely. Rather, the present dispute originated when Granville informed the Troxels that she would prefer to restrict their visitation with Isabelle and Natalie to one short visit per month and special holidays. See 87 Wash. App., at 133, 940 P. 2d, at 699; Verbatim Report 12. In the Superior Court proceedings Granville did not oppose visitation but instead asked that the duration of any visitation order be shorter than that requested by the Troxels. While the Troxels requested two weekends per month and two full weeks in the summer, Granville asked the Superior Court to order only one day of visitation per month (with no overnight stay) and participation in the Granville family's holiday celebrations. See 87 Wash. App., at 133, 940 P. 2d, at 699; Verbatim Report 9 ("Right off the bat we'd like to say that our position is that grandparent visitation is in the best interest of the children. It is a matter of how much and how it is going to be structured") (opening statement by Granville's attorney). The Superior Court gave no weight to Granville's having assented to visitation even before the filing of any visitation petition or subsequent court intervention. The court instead rejected Granville's proposal and settled on a middle ground, ordering one weekend of visitation per month, one week in the summer, and time on both of the petitioning grandparents' birthdays. See 87 Wash. App., at 133-134, 940 P. 2d, at 699; Verbatim Report 216-221. Significantly, many other States expressly provide by statute that courts may not award visitation unless a parent has denied (or unreasonably denied) visitation to the concerned third party. See, *e. g.,* Miss. Code Ann. § 93-16-3(2)(a) (1994) (court

must find that "the parent or custodian of the child unreasonably denied the grandparent visitation rights with the child"); Ore. Rev. Stat. § 109.121(1)(a)(B) (1997) (court may award visitation if the "custodian of the child has denied the grandparent reasonable opportunity to visit the child"); R. I. Gen. Laws §§ 15-5— *72 24.3(a)(2)(iii)—(iv) (Supp. 1999) (court must find that parents prevented grandparent from visiting grandchild and that "there is no other way the petitioner is able to visit his or her grandchild without court intervention").

Considered together with the Superior Court's reasons for awarding visitation to the Troxels, the combination of these factors demonstrates that the visitation order in this case was an unconstitutional infringement on Granville's fundamental right to make decisions concerning the care, custody, and control of her two daughters. The Washington Superior Court failed to accord the determination of Granville, a fit custodial parent, any material weight. In fact, the Superior Court made only two formal findings in support of its visitation order. First, the Troxels "are part of a large, central, loving family, all located in this area, and the [Troxels] can provide opportunities for the children in the areas of cousins and music." App. 70a. Second, "[t]he children would be benefitted from spending quality time with the [Troxels], provided that that time is balanced with time with the childrens' *[sic]* nuclear family." *Ibid.* These slender findings, in combination with the court's announced presumption in favor of grandparent visitation and its failure to accord significant weight to Granville's already having offered meaningful visitation to the Troxels, show that this case involves nothing more than a simple disagreement between the Washington Superior Court and Granville concerning her children's best interests. The Superior Court's announced reason for ordering one week of visitation in the summer demonstrates our conclusion well: "I look back on some personal experiences . . . . We always spen[t] as kids a week with one set of grandparents and another set of grandparents, [and] it happened to work out in our family that [it] turned out to be an enjoyable experience. Maybe that can, in this family, if that is how it works out." Verbatim Report 220-221. As we have explained, the Due Process Clause
73 does not permit a State to infringe on the fundamental right *73 of parents to make child rearing decisions simply because a state judge believes a "better" decision could be made. Neither the Washington nonparental visitation statute generally —which places no limits on either the persons who may petition for visitation or the circumstances in which such a petition may be granted—nor the Superior Court in this specific case required anything more. Accordingly, we hold that § 26.10.160(3), as applied in this case, is unconstitutional.

Because we rest our decision on the sweeping breadth of § 26.10.160(3) and the application of that broad, unlimited power in this case, we do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect, we agree with Justice Kennedy that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best "elaborated with care." *Post,* at 101 (dissenting opinion). Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to
74 hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter.[*] See, *e. g., Fair-* *74 *banks* v. *McCarter,* 330 Md. 39, 49-50, 622 A. 2d 121, 126-127 (1993) (interpreting best-interest standard in grandparent visitation statute normally to require court's consideration of certain factors); *Williams* v. *Williams,* 256 Va. 19, 501 S. E. 2d 417, 418 (1998) (interpreting Virginia nonparental visitation statute to require finding of harm as condition precedent to awarding visitation).

Justice Stevens criticizes our reliance on what he characterizes as merely "a guess" about the Washington courts' interpretation of § 26.10.160(3). *Post,* at 82 (dissenting opinion). Justice Kennedy likewise states that "[m]ore specific guidance should await a case in which a State's highest court has considered all of the facts in the course of elaborating the protection afforded to parents by the laws of the State and by the Constitution itself." *Post,* at 102 (dissenting opinion). We respectfully disagree. There is no need to hypothesize about how the Washington courts *might* apply § 26.10.160(3) because the Washington Superior Court *did* apply the statute in this very case. Like the Washington Supreme Court, then,
75 we are presented with an actual visitation order and the reasons why the Superior Court believed *75 entry of the order was appropriate in this case. Faced with the Superior Court's application of § 26.10.160(3) to Granville and her family, the Washington Supreme Court chose not to give the statute a narrower construction. Rather, that court gave § 26.10.160(3) a literal and expansive interpretation. As we have explained, that broad construction plainly encompassed the Superior Court's application of the statute. See *supra,* at 67.

There is thus no reason to remand the case for further proceedings in the Washington Supreme Court. As Justice Kennedy recognizes, the burden of litigating a domestic relations proceeding can itself be "so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated." *Post,* at 101. In this case, the litigation costs incurred by Granville on her trip through the Washington court system and to this Court are without a doubt already substantial. As we have explained, it is apparent that the entry of the visitation order in this case violated the Constitution. We should say so now, without forcing the parties into additional litigation that would further burden Granville's parental right. We therefore hold that the application of § 26.10.160(3) to Granville and her family violated her due process right to make decisions concerning the care, custody, and control of her daughters.

Accordingly, the judgment of the Washington Supreme Court is affirmed.

It is so ordered.

Justice Souter, concurring in the judgment.

I concur in the judgment affirming the decision of the Supreme Court of Washington, whose facial invalidation of its own state statute is consistent with this Court's prior cases addressing the substantive interests at stake. I would say no more.
76 The issues that might well be presented by reviewing a decision addressing the specific application of the *76 state statute by the trial court, *ante,* at 68-73, are not before us and do not call for turning any fresh furrows in the "treacherous field" of substantive due process. Moore v. East Cleveland, 431 U. S. 494, 502 (1977) (opinion of Powell, J.).

The Supreme Court of Washington invalidated its state statute based on the text of the statute alone, not its application to any particular case.[1] Its ruling rested on two independently sufficient grounds: the failure of the statute to require harm to the child to justify a disputed visitation order, In re Smith, 137 Wash. 2d 1, 17, 969 P. 2d 21, 29 (1998), and the statute's authorization of "any person" at "any time" to petition for and to receive visitation rights subject only to a free-ranging best-interests-of-the-child standard, *id.,* at 20-21, 969 P. 2d, at 30-31. *Ante,* at 63. I see no error in the second reason, that because the state statute authorizes any person at any time to request (and a judge to award) visitation rights,
77 subject only to the State's particular bestinterests *77 standard, the state statute sweeps too broadly and is unconstitutional on its face. Consequently, there is no need to decide whether harm is required or to consider the precise scope of the parent's right or its necessary protections.

We have long recognized that a parent's interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment. See, *e. g.,* Meyer v. Nebraska, 262 U. S. 390, 399, 401 (1923); Pierce v. Society of Sisters, 268 U. S. 510, 535 (1925); Stanley v. Illinois, 405 U. S. 645, 651 (1972); Wisconsin v. Yoder, 406 U. S. 205, 232 (1972); Quilloin v. Walcott, 434 U. S. 246, 255 (1978); Parham v. J. R., 442 U. S. 584, 602 (1979); Santosky v. Kramer, 455 U. S. 745, 753 (1982); Washington v. Glucksberg, 521 U. S. 702, 720 (1997). As we first acknowledged in *Meyer,* the right of parents to "bring up children," 262 U. S., at 399, and "to control the education of their own" is protected by the Constitution, *id.,* at 401. See also Glucksberg, supra, at 761 (Souter, J., concurring in judgment).

On the basis of this settled principle, the Supreme Court of Washington invalidated its statute because it authorized a contested visitation order at the intrusive behest of any person at any time subject only to a best-interests-of-the-child standard. In construing the statute, the state court explained that the "any person" at "any time" language was to be read literally, 137 Wash. 2d, at 10-11, 969 P. 2d, at 25-27, and that "[m]ost notably the statut[e] do[es] not require the petitioner to establish that he or she has a substantial relationship with the child," *id.,* at 20-21, 969 P. 2d, at 31. Although the statute speaks of granting visitation rights whenever "visitation may serve the best interest of the child," Wash. Rev. Code § 26.10.160(3) (1994), the state court authoritatively read this provision as placing hardly any limit on a court's discretion to
78 award visitation rights. As the court understood it, the specific best-interests provision in the *78 statute would allow a court to award visitation whenever it thought it could make a better decision than a child's parent had done. See 137 Wash. 2d, at 20, 969 P. 2d, at 31 ("It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a `better' decision").[2] On that basis in part, the Supreme Court of Washington invalidated the State's own statute: "Parents have a right to limit visitation of their children with third persons."

Id., at 21, 969 P. 2d, at 31.

Our cases, it is true, have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child, but *Meyer'* s repeatedly recognized right of upbringing would be a sham if it failed to encompass the right to be free of judicially compelled visitation by "any party" at "any time" a judge believed he "could make a `better' decision"[3] than the objecting parent had done. The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character. Whether for good or for ill, adults not only influence but may indoctrinate children, and a choice about a child's social companions is not essentially different from the designation of the adults who will influence the child in school. Even a State's considered
79 judgment about the preferable political and religious character of schoolteachers is not entitled *79 to prevail over a parent's choice of private school. *Pierce, supra,* at 535 ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations"). It would be anomalous, then, to subject a parent to any individual judge's choice of a child's associates from out of the general population merely because the judge might think himself more enlightened than the child's parent.[4] To say the least (and as the Court implied in *Pierce*), parental choice in such matters is not merely a default rule in the absence of either governmental choice or the government's designation of an official with the power to choose for whatever reason and in whatever circumstances.

Since I do not question the power of a State's highest court to construe its domestic statute and to apply a demanding standard when ruling on its facial constitutionality,[5] see *Chicago* v. *Morales,* 527 U. S. 41, 55, n. 22 (1999) (opinion of Stevens, J.), this for me is the end of the case. I would simply affirm the decision of the Supreme Court of Washington that its statute, authorizing courts to grant visitation rights to any person at any time, is unconstitutional. I therefore respectfully concur in the judgment.

80 *80 Justice Thomas, concurring in the judgment.

I write separately to note that neither party has argued that our substantive due process cases were wrongly decided and that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision. As a result, I express no view on the merits of this matter, and I understand the plurality as well to leave the resolution of that issue for another day.[*]

Consequently, I agree with the plurality that this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case. Our decision in *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925), holds that parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them. The opinions of the plurality, Justice Kennedy, and Justice Souter recognize such a right, but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights. Here, the State of Washington lacks even a legitimate governmental interest—to say nothing of a compelling one—in second-guessing a fit parent's decision regarding visitation with third parties. On this basis, I would affirm the judgment below.

Justice Stevens, dissenting.

The Court today wisely declines to endorse either the holding or the reasoning of the Supreme Court of Washington. In my opinion, the Court would have been even wiser to deny certiorari. Given the problematic character of the trial court's
81 decision and the uniqueness of the Washington statute, there was no pressing need to review a State Supreme *81 Court decision that merely requires the state legislature to draft a better statute.

Having decided to address the merits, however, the Court should begin by recognizing that the State Supreme Court rendered a federal constitutional judgment holding a state law invalid on its face. In light of that judgment, I believe that we should confront the federal questions presented directly. For the Washington statute is not made facially invalid either because it may be invoked by too many hypothetical plaintiffs, or because it leaves open the possibility that someone may

be permitted to sustain a relationship with a child without having to prove that serious harm to the child would otherwise result.

I

In response to Tommie Granville's federal constitutional challenge, the State Supreme Court broadly held that Wash. Rev. Code § 26.10.160(3) (Supp. 1996) was invalid on its face under the Federal Constitution.[1] Despite the nature of this judgment, Justice O'Connor would hold that the Washington visitation statute violated the Due Process Clause of the Fourteenth Amendment only as applied. *Ante,* at 65, 67, 73 (plurality opinion). I agree with Justice Souter, *ante,* at 75-76, and n. 1 (opinion concurring in judgment), that this approach is untenable.

The task of reviewing a trial court's application of a state statute to the particular facts of a case is one that should be performed in the first instance by the state appellate courts. In this case, because of their views of the Federal Constitution, the Washington state appeals courts have yet to decide whether the trial court's findings were adequate
82 under the *82 statute.[2] Any as-applied critique of the trial court's judgment that this Court might offer could only be based upon a guess about the state courts' application of that State's statute, and an independent assessment of the facts in this case—both judgments that we are ill-suited and ill-advised to make.[3]

83 *83 While I thus agree with Justice Souter in this respect, I do not agree with his conclusion that the State Supreme Court made a definitive construction of the visitation statute that necessitates the constitutional conclusion he would draw.[4] As I read the State Supreme Court's opinion, *In re Smith,* 137 Wash. 2d 1, 19-20, 969 P. 2d 21, 30-31 (1998), its interpretation of the Federal Constitution made it unnecessary to adopt a definitive construction of the statutory text, or, critically, to decide whether the statute had been correctly applied in this case. In particular, the state court gave no content to the phrase, "best interest of the child," Wash. Rev. Code § 26.10.160(3) (Supp. 1996)—content that might well be gleaned
84 from that State's own statutes or decisional law employing the same phrase in different contexts, *84 and from the myriad other state statutes and court decisions at least nominally applying the same standard.[5] Thus, I believe that Justice Souter's conclusion that the statute unconstitutionally imbues state trial court judges with "`too much discretion in *every* case,' " *ante,* at 78, n. 3 (opinion concurring in judgment) (quoting *Chicago* v. *Morales,* 527 U. S. 41, 71 (1999) (Breyer, J., concurring)), is premature.

We are thus presented with the unconstrued terms of a state statute and a State Supreme Court opinion that, in my view, significantly misstates the effect of the Federal Constitution upon any construction of that statute. Given that posture, I
85 believe the Court should identify and correct the two flaws in the reasoning of the state court's majority opinion, *85 and remand for further review of the trial court's disposition of this specific case.

II

In my view, the State Supreme Court erred in its federal constitutional analysis because neither the provision granting "any person" the right to petition the court for visitation, 137 Wash. 2d, at 20, 969 P. 2d, at 30, nor the absence of a provision requiring a "threshold . . . finding of harm to the child," *ibid.,* provides a sufficient basis for holding that the statute is invalid in all its applications. I believe that a facial challenge should fail whenever a statute has "a `plainly legitimate sweep,' " *Washington* v. *Glucksberg,* 521 U. S. 702, 739-740, and n. 7 (1997) (Stevens, J., concurring in judgment).[6] Under the Washington statute, there are plainly any number of cases—indeed, one suspects, the most common to arise—in which the "person" among "any" seeking visitation is a once-custodial caregiver, an intimate relation, or even a genetic parent. Even the Court would seem to agree that in many circumstances, it would be constitutionally permissible for a court to award some visitation of a child to a parent or previous caregiver in cases of parental separation or divorce, cases of disputed custody, cases involving temporary foster care or guardianship, and so forth. As the statute plainly sweeps in a great deal of the permissible, the State Supreme Court majority incorrectly concluded that a statute authorizing "any person" to file a petition seeking visitation privileges would invariably run afoul of the Fourteenth Amendment.

86 The second key aspect of the Washington Supreme Court's holding—that the Federal Constitution requires a showing of actual or potential "harm" to the child before a court may *86 order visitation continued over a parent's objections—finds no support in this Court's case law. While, as the Court recognizes, the Federal Constitution certainly protects the parent-child relationship from arbitrary impairment by the State, see *infra* this page and 87-88, we have never held that the parent's liberty interest in this relationship is so inflexible as to establish a rigid constitutional shield, protecting every arbitrary parental decision from any challenge absent a threshold finding of harm.[7] The presumption that parental decisions generally serve the best interests of their children is sound, and clearly in the normal case the parent's interest is paramount. But even a fit parent is capable of treating a child like a mere possession.

Cases like this do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests. There is at a minimum a third individual, whose interests are implicated in every case to which the statute applies—the child.

87 It has become standard practice in our substantive due process jurisprudence to begin our analysis with an identification of the "fundamental" liberty interests implicated by the challenged state action. See, *e. g., ante,* at 65-66 (opinion of O'Connor, J.); *Washington* v. *Glucksberg,* 521 U. S. 702 (1997); *Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U. S. 833 (1992). My colleagues are of course correct to recognize that the right of a parent to maintain a relationship with his or her child is among the interests included *87 most often in the constellation of liberties protected through the Fourteenth Amendment. *Ante,* at 65-66 (opinion of O'Connor, J.). Our cases leave no doubt that parents have a fundamental liberty interest in caring for and guiding their children, and a corresponding privacy interest—absent exceptional circumstances—in doing so without the undue interference of strangers to them and to their child. Moreover, and critical in this case, our cases applying this principle have explained that with this constitutional liberty comes a presumption (albeit a rebuttable one) that "natural bonds of affection lead parents to act in the best interests of their children." *Parham* v. *J. R.,* 442 U. S. 584, 602 (1979); see also *Casey,* 505 U. S., at 895; *Santosky* v. *Kramer,* 455 U. S. 745, 759 (1982) (State may not presume, at factfinding stage of parental rights termination proceeding, that interests of parent and child diverge); see also *ante,* at 68-69 (opinion of O'Connor, J.).

Despite this Court's repeated recognition of these significant parental liberty interests, these interests have never been seen to be without limits. In *Lehr* v. *Robertson,* 463 U. S. 248 (1983), for example, this Court held that a putative biological father who had never established an actual relationship with his child did not have a constitutional right to notice of his child's adoption by the man who had married the child's mother. As this Court had recognized in an earlier case, a parent's liberty interests "`do not spring fullblown from the biological connection between parent and child. They require relationships more enduring.' " *Id.,* at 260 (quoting *Caban* v. *Mohammed,* 441 U. S. 380, 397 (1979)).

88 Conversely, in *Michael H.* v. *Gerald D.,* 491 U. S. 110 (1989), this Court concluded that despite both biological parenthood and an established relationship with a young child, a father's due process liberty interest in maintaining some connection with that child was not sufficiently powerful to overcome a state statutory presumption that the husband of the child's mother was the child's parent. As a result of the *88 presumption, the biological father could be denied even visitation with the child because, as a matter of state law, he was not a "parent." A plurality of this Court there recognized that the parental liberty interest was a function, not simply of "isolated factors" such as biology and intimate connection, but of the broader and apparently independent interest in family. See, *e. g., id.,* at 123; see also *Lehr,* 463 U. S., at 261; *Smith* v. *Organization of Foster Families For Equality & Reform,* 431 U. S. 816, 842-847 (1977); *Moore* v. *East Cleveland,* 431 U. S. 494, 498-504 (1977).

A parent's rights with respect to her child have thus never been regarded as absolute, but rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family. These limitations have arisen, not simply out of the definition of parenthood itself, but because of this Court's assumption that a parent's interests in a child must be balanced against the State's long-recognized interests as *parens patriae,* see, *e. g., Reno* v. *Flores,* 507 U. S. 292, 303-304 (1993); *Santosky* v. *Kramer,* 455 U. S., at 766; *Parham,* 442 U. S., at 605; *Prince* v. *Massachusetts,* 321 U. S. 158, 166 (1944), and, critically, the child's own complementary interest in preserving relationships that serve her welfare and protection, *Santosky,* 455 U. S., at 760.

89 While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established

familial or family-like bonds, 491 U. S., at 130 (reserving the question), it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.[8] At a minimum, our prior cases recognizing *89 that children are, generally speaking, constitutionally protected actors require that this Court reject any suggestion that when it comes to parental rights, children are so much chattel. See *ante,* at 64-65 (opinion of O'Connor, J.) (describing States' recognition of "an independent third-party interest in a child"). The constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child.[9]

This is not, of course, to suggest that a child's liberty interest in maintaining contact with a particular individual is to be treated invariably as on a par with that child's parents' contrary interests. Because our substantive due process case law
90 includes a strong presumption that a parent will act *90 in the best interest of her child, it would be necessary, were the state appellate courts actually to confront a challenge to the statute as applied, to consider whether the trial court's assessment of the "best interest of the child" incorporated that presumption. Neither would I decide whether the trial court applied Washington's statute in a constitutional way in this case, although, as I have explained, n. 3, *supra,* I think the outcome of this determination is far from clear. For the purpose of a facial challenge like this, I think it safe to assume that trial judges usually give great deference to parents' wishes, and I am not persuaded otherwise here.

But presumptions notwithstanding, we should recognize that there may be circumstances in which a child has a stronger interest at stake than mere protection from serious harm caused by the termination of visitation by a "person" other than a parent. The almost infinite variety of family relationships that pervade our ever-changing society strongly counsel against the creation by this Court of a constitutional rule that treats a biological parent's liberty interest in the care and supervision of her child as an isolated right that may be exercised arbitrarily. It is indisputably the business of the States, rather than a federal court employing a national standard, to assess in the first instance the relative importance of the conflicting
91 interests that give rise to disputes such as this.[10] Far from guaranteeing that *91 parents' interests will be trammeled in the sweep of cases arising under the statute, the Washington law merely gives an individual—with whom a child may have an established relationship—the procedural right to ask the State to act as arbiter, through the entirely well-known best-interests standard, between the parent's protected interests and the child's. It seems clear to me that the Due Process Clause of the Fourteenth Amendment leaves room for States to consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interests of the child.

Accordingly, I respectfully dissent.

Justice Scalia, dissenting.

In my view, a right of parents to direct the upbringing of their children is among the "unalienable Rights" with which the Declaration of Independence proclaims "all men . . . are endowed by their Creator." And in my view that right is also among the "othe[r] [rights] retained by the people" which the Ninth Amendment says the Constitution's enumeration of rights "shall not be construed to deny or disparage." The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts; and the Constitution's refusal to "deny or disparage" other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people. Consequently, while I would think it entirely compatible
92 with the commitment to representative *92 democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the State has *no power* to interfere with parents' authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.

Only three holdings of this Court rest in whole or in part upon a substantive constitutional right of parents to direct the upbringing of their children[1]—two of them from an era rich in substantive due process holdings that have since been repudiated. See *Meyer* v. *Nebraska,* 262 U. S. 390, 399, 401 (1923); *Pierce* v. *Society of Sisters,* 268 U. S. 510, 534-535 (1925); *Wisconsin* v. *Yoder,* 406 U. S. 205, 232-233 (1972). Cf. *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379 (1937) (overruling *Adkins* v. *Children's Hospital of D. C.,* 261 U. S. 525 (1923)). The sheer diversity of today's opinions

persuades me that the theory of unenumerated parental rights underlying these three cases has small claim to *stare decisis* protection. A legal principle that can be thought to produce such diverse outcomes in the relatively simple case before us here is not a legal principle that has induced substantial reliance. While I would not now overrule those earlier cases (that has not been urged), neither would I extend the theory upon which they rested to this new context.

Judicial vindication of "parental rights" under a Constitution that does not even mention them requires (as Justice Kennedy's opinion rightly points out) not only a judicially crafted definition of parents, but also—unless, as no one
93 believes, *93 the parental rights are to be absolute—judicially approved assessments of "harm to the child" and judicially defined gradations of other persons (grandparents, extended family, adoptive family in an adoption later found to be invalid, long-term guardians, etc.) who may have some claim against the wishes of the parents. If we embrace this unenumerated right, I think it obvious—whether we affirm or reverse the judgment here, or remand as Justice Stevens or Justice Kennedy would do—that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law. I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people.[2]

For these reasons, I would reverse the judgment below.

Justice Kennedy, dissenting.

The Supreme Court of Washington has determined that petitioners Jenifer and Gary **Troxel** have standing under state law to seek court-ordered visitation with their grandchildren, notwithstanding the objections of the children's parent, respondent Tommie Granville. The statute relied upon provides:

> "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances." Wash. Rev. Code § 26.10.160(3) (1994).

94 *94 After acknowledging this statutory right to sue for visitation, the State Supreme Court invalidated the statute as violative of the United States Constitution, because it interfered with a parent's right to raise his or her child free from unwarranted interference. *In re Smith,* 137 Wash. 2d 1, 969 P. 2d 21 (1998). Although parts of the court's decision may be open to differing interpretations, it seems to be agreed that the court invalidated the statute on its face, ruling it a nullity.

The first flaw the State Supreme Court found in the statute is that it allows an award of visitation to a nonparent without a finding that harm to the child would result if visitation were withheld; and the second is that the statute allows any person to seek visitation at any time. In my view the first theory is too broad to be correct, as it appears to contemplate that the best interests of the child standard may not be applied in any visitation case. I acknowledge the distinct possibility that visitation cases may arise where, considering the absence of other protection for the parent under state laws and procedures, the best interests of the child standard would give insufficient protection to the parent's constitutional right to raise the child without undue intervention by the State; but it is quite a different matter to say, as I understand the Supreme Court of Washington to have said, that a harm to the child standard is required in every instance.

Given the error I see in the State Supreme Court's central conclusion that the best interests of the child standard is never appropriate in third-party visitation cases, that court should have the first opportunity to reconsider this case. I would remand the case to the state court for further proceedings. If it then found the statute has been applied in an unconstitutional manner because the best interests of the child standard gives insufficient protection to a parent under the
95 circumstances of this case, or if it again declared the statute a nullity because the statute seems to allow any person *95 at all to seek visitation at any time, the decision would present other issues which may or may not warrant further review in this Court. These include not only the protection the Constitution gives parents against state-ordered visitation but also the extent to which federal rules for facial challenges to statutes control in state courts. These matters, however, should await some further case. The judgment now under review should be vacated and remanded on the sole ground that the harm ruling that was so central to the Supreme Court of Washington's decision was error, given its broad formulation.

Turning to the question whether harm to the child must be the controlling standard in every visitation proceeding, there is a beginning point that commands general, perhaps unanimous, agreement in our separate opinions: As our case law has developed, the custodial parent has a constitutional right to determine, without undue interference by the State, how best to raise, nurture, and educate the child. The parental right stems from the liberty protected by the Due Process Clause of the Fourteenth Amendment. See, *e. g.,* *Meyer* v. *Nebraska,* 262 U. S. 390, 399, 401 (1923); *Pierce* v. *Society of Sisters,* 268 U. S. 510, 534-535 (1925); *Prince* v. *Massachusetts,* 321 U. S. 158, 166 (1944); *Stanley* v. *Illinois,* 405 U. S. 645, 651-652 (1972); *Wisconsin* v. *Yoder,* 406 U. S. 205, 232-233 (1972); *Santosky* v. *Kramer,* 455 U. S. 745, 753— 754 (1982). *Pierce* and *Meyer,* had they been decided in recent times, may well have been grounded upon First Amendment principles protecting freedom of speech, belief, and religion. Their formulation and subsequent interpretation have been quite different, of course; and they long have been interpreted to have found in Fourteenth Amendment concepts of liberty an independent right of the parent in the "custody, care and nurture of the child," free from state intervention. *Prince, supra,* at 166. The principle exists, then, in broad formulation; yet courts must use considerable restraint, including careful
96 adherence to the incremental instruction *96 given by the precise facts of particular cases, as they seek to give further and more precise definition to the right.

The State Supreme Court sought to give content to the parent's right by announcing a categorical rule that third parties who seek visitation must always prove the denial of visitation would harm the child. After reviewing some of the relevant precedents, the Supreme Court of Washington concluded "`[t]he requirement of harm is the sole protection that parents have against pervasive state interference in the parenting process.' " 137 Wash. 2d, at 19-20, 969 P. 2d, at 30 (quoting *Hawk* v. *Hawk,* 855 S. W. 2d 573, 580 (Tenn. 1993)). For that reason, "[s]hort of preventing harm to the child," the court considered the best interests of the child to be "insufficient to serve as a compelling state interest overruling a parent's fundamental rights." 137 Wash. 2d, at 20, 969 P. 2d, at 30.

While it might be argued as an abstract matter that in some sense the child is always harmed if his or her best interests are not considered, the law of domestic relations, as it has evolved to this point, treats as distinct the two standards, one harm to the child and the other the best interests of the child. The judgment of the Supreme Court of Washington rests on that assumption, and I, too, shall assume that there are real and consequential differences between the two standards.

On the question whether one standard must always take precedence over the other in order to protect the right of the parent or parents, "[o]ur Nation's history, legal traditions, and practices" do not give us clear or definitive answers. *Washington* v. *Glucksberg,* 521 U. S. 702, 721 (1997). The consensus among courts and commentators is that at least through the 19th century there was no legal right of visitation; court-ordered visitation appears to be a 20thcentury
97 phenomenon. See, *e. g.,* 1 D. Kramer, Legal Rights of Children 124, 136 (2d ed. 1994); 2 J. Atkinson, Modern *97 Child Custody Practice § 8.10 (1986). A case often cited as one of the earliest visitation decisions, *Succession of Reiss,* 46 La. Ann. 347, 353, 15 So. 151, 152 (1894), explained that "the obligation ordinarily to visit grandparents is moral and not legal"—a conclusion which appears consistent with that of American common-law jurisdictions of the time. Early 20th-century exceptions did occur, often in cases where a relative had acted in a parental capacity, or where one of a child's parents had died. See *Douglass* v. *Merriman,* 163 S. C. 210, 161 S. E. 452 (1931) (maternal grandparent awarded visitation with child when custody was awarded to father; mother had died); *Solomon* v. *Solomon,* 319 Ill. App. 618, 49 N. E. 2d 807 (1943) (paternal grandparents could be given visitation with child in custody of his mother when their son was stationed abroad; case remanded for fitness hearing); *Consaul* v. *Consaul,* 63 N. Y. S. 2d 688 (Sup. Ct. Jefferson Cty. 1946) (paternal grandparents awarded visitation with child in custody of his mother; father had become incompetent). As a general matter, however, contemporary state-court decisions acknowledge that "[h]istorically, grandparents had no legal right of visitation," *Campbell* v. *Campbell,* 896 P. 2d 635, 642, n. 15 (Utah App. 1995), and it is safe to assume other third parties would have fared no better in court.

To say that third parties have had no historical right to petition for visitation does not necessarily imply, as the Supreme Court of Washington concluded, that a parent has a constitutional right to prevent visitation in all cases not involving harm. True, this Court has acknowledged that States have the authority to intervene to prevent harm to children, see, *e. g., Prince, supra,* at 168-169; *Yoder, supra,* at 233-234, but that is not the same as saying that a heightened harm to the child standard must be satisfied in every case in which a third party seeks a visitation order. It is also true that the law's
98 traditional presumption has been "that natural bonds of affection lead parents to act in the *98 best interests of their

children," *Parham* v. *J. R.*, 442 U. S. 584, 602 (1979); and "[s]imply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state," *id.,* at 603. The State Supreme Court's conclusion that the Constitution forbids the application of the best interests of the child standard in any visitation proceeding, however, appears to rest upon assumptions the Constitution does not require.

My principal concern is that the holding seems to proceed from the assumption that the parent or parents who resist visitation have always been the child's primary caregivers and that the third parties who seek visitation have no legitimate and established relationship with the child. That idea, in turn, appears influenced by the concept that the conventional nuclear family ought to establish the visitation standard for every domestic relations case. As we all know, this is simply not the structure or prevailing condition in many households. See, *e. g., Moore* v. *East Cleveland,* 431 U. S. 494 (1977). For many boys and girls a traditional family with two or even one permanent and caring parent is simply not the reality of their childhood. This may be so whether their childhood has been marked by tragedy or filled with considerable happiness and fulfillment.

Cases are sure to arise—perhaps a substantial number of cases—in which a third party, by acting in a caregiving role over a significant period of time, has developed a relationship with a child which is not necessarily subject to absolute parental veto. See *Michael H.* v. *Gerald D.,* 491 U. S. 110 (1989) (putative natural father not entitled to rebut state-law presumption that child born in a marriage is a child of the marriage); *Quilloin* v. *Walcott,* 434 U. S. 246 (1978) (best interests standard sufficient in adoption proceeding to protect interests of natural father who had not legitimated the child); see also *Lehr* v. *Robertson,* 463 U. S. 248, 261 (1983) ("`[T]he importance of the familial relationship, to the individuals
99 involved *99 and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children . . . as well as from the fact of blood relationship' " (quoting *Smith* v. *Organization of Foster Families For Equality & Reform,* 431 U. S. 816, 844 (1977), in turn quoting *Yoder,* 406 U. S., at 231-233)). Some pre-existing relationships, then, serve to identify persons who have a strong attachment to the child with the concomitant motivation to act in a responsible way to ensure the child's welfare. As the State Supreme Court was correct to acknowledge, those relationships can be so enduring that "in certain circumstances where a child has enjoyed a substantial relationship with a third person, arbitrarily depriving the child of the relationship could cause severe psychological harm to the child," 137 Wash. 2d, at 20, 969 P. 2d, at 30; and harm to the adult may also ensue. In the design and elaboration of their visitation laws, States may be entitled to consider that certain relationships are such that to avoid the risk of harm, a best interests standard can be employed by their domestic relations courts in some circumstances.

Indeed, contemporary practice should give us some pause before rejecting the best interests of the child standard in all third-party visitation cases, as the Washington court has done. The standard has been recognized for many years as a basic tool of domestic relations law in visitation proceedings. Since 1965 all 50 States have enacted a third-party visitation statute of some sort. See *ante,* at 73-74, n. (plurality opinion). Each of these statutes, save one, permits a court order to issue in certain cases if visitation is found to be in the best interests of the child. While it is unnecessary for us to consider the constitutionality of any particular provision in the case now before us, it can be noted that the statutes also include a variety of methods for limiting parents' exposure to third-party visitation petitions and for ensuring parental decisions are
100 given respect. Many States *100 limit the identity of permissible petitioners by restricting visitation petitions to grandparents, or by requiring petitioners to show a substantial relationship with a child, or both. See, *e. g.,* Kan. Stat. Ann. § 38-129 (1993 and Supp. 1998) (grandparent visitation authorized under certain circumstances if a substantial relationship exists); N. C. Gen. Stat. §§ 50-13.2, 50-13.2A, 50-13.5 (1999) (same); Iowa Code § 598.35 (Supp. 1999) (same; visitation also authorized for great-grandparents); Wis. Stat. § 767.245 (Supp. 1999) (visitation authorized under certain circumstances for "a grandparent, great grandparent, stepparent or person who has maintained a relationship similar to a parent-child relationship with the child"). The statutes vary in other respects—for instance, some permit visitation petitions when there has been a change in circumstances such as divorce or death of a parent, see, *e. g.,* N. H. Rev. Stat. Ann. § 458:17—d (1992), and some apply a presumption that parental decisions should control, see, *e. g.,* Cal. Fam. Code Ann. §§ 3104(e)—(f) (West 1994); R. I. Gen. Laws § 15-5—24.3(a)(2)(v) (Supp. 1999). Georgia's is the sole state legislature to have adopted a general harm to the child standard, see Ga. Code Ann. § 19-7— 3(c) (1999), and it did so only after the Georgia Supreme Court held the State's prior visitation statute invalid under the Federal and Georgia

Constitutions, see *Brooks v. Parkerson,* 265 Ga. 189, 454 S. E. 2d 769, cert. denied, 516 U. S. 942 (1995).

In light of the inconclusive historical record and case law, as well as the almost universal adoption of the best interests standard for visitation disputes, I would be hard pressed to conclude the right to be free of such review in all cases is itself "`implicit in the concept of ordered liberty.' " *Glucksberg,* 521 U. S., at 721 (quoting *Palko v. Connecticut,* 302 U. S. 319, 325 (1937)). In my view, it would be more appropriate to conclude that the constitutionality of the application of the best
101 interests standard depends on more specific factors. In short, a fit parent's right vis-à-vis a complete *101 stranger is one thing; her right vis-à-vis another parent or a *de facto* parent may be another. The protection the Constitution requires, then, must be elaborated with care, using the discipline and instruction of the case law system. We must keep in mind that family courts in the 50 States confront these factual variations each day, and are best situated to consider the unpredictable, yet inevitable, issues that arise. Cf. *Ankenbrandt v. Richards,* 504 U. S. 689, 703-704 (1992).

It must be recognized, of course, that a domestic relations proceeding in and of itself can constitute state intervention that is so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated. The best interests of the child standard has at times been criticized as indeterminate, leading to unpredictable results. See, *e. g.,* American Law Institute, Principles of the Law of Family Dissolution 2, and n. 2 (Tent. Draft No. 3, Mar. 20, 1998). If a single parent who is struggling to raise a child is faced with visitation demands from a third party, the attorney's fees alone might destroy her hopes and plans for the child's future. Our system must confront more often the reality that litigation can itself be so disruptive that constitutional protection may be required; and I do not discount the possibility that in some instances the best interests of the child standard may provide insufficient protection to the parent-child relationship. We owe it to the Nation's domestic relations legal structure, however, to proceed with caution.

It should suffice in this case to reverse the holding of the State Supreme Court that the application of the best interests of the child standard is always unconstitutional in thirdparty visitation cases. Whether, under the circumstances of this case, the order requiring visitation over the objection of this fit parent violated the Constitution ought to be reserved for further
102 proceedings. Because of its sweeping ruling requiring *102 the harm to the child standard, the Supreme Court of Washington did not have the occasion to address the specific visitation order the Troxels obtained. More specific guidance should await a case in which a State's highest court has considered all of the facts in the course of elaborating the protection afforded to parents by the laws of the State and by the Constitution itself. Furthermore, in my view, we need not address whether, under the correct constitutional standards, the Washington statute can be invalidated on its face. This question, too, ought to be addressed by the state court in the first instance.

In my view the judgment under review should be vacated and the case remanded for further proceedings.

[*] Briefs of *amici curiae* urging reversal were filed for the State of Washington et al. by *Christine O. Gregoire,* Attorney General of Washington, and *Maureen A. Hart,* Senior Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Mark Pryor* of Arkansas, *Bill Lockyer* of California, *Ken Salazar* of Colorado, *Earl I. Anzai* of Hawaii, *Carla J. Stovall* of Kansas, *Jeremiah W. (Jay) Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *John J. Farmer, Jr.,* of New Jersey, *Heidi Heitkamp* of North Dakota, *Betty D. Montgomery* of Ohio, and *Paul G. Summers* of Tennessee; for AARP et al. by *Rochelle Bobroff, Bruce Vignery,* and *Michael Schuster;* for Grandparents United for Children's Rights, Inc., by *Judith Sperling Newton* and *Carol M. Gapen;* for the National Conference of State Legislatures et al. by *Richard Ruda* and *James I. Crowley;* and for the Grandparent Caregiver Law Center of the Brookdale Center on Aging.

Briefs of *amici curiae* urging affirmance were filed for the American Academy of Matrimonial Lawyers by *Barbara Ellen Handschu* and *Sanford K. Ain;* for the American Center for Law and Justice by *Jay Alan Sekulow, Colby May, Vincent McCarthy,* and *John P. Tuskey;* for the American Civil Liberties Union et al. by *Matthew A. Coles, Michael P. Adams, Catherine Weiss,* and *Steven R. Shapiro;* for the Coalition for the Restoration of Parental Rights by *Karen A. Wyle;* for the Institute for Justice et al. by *William H. Mellor, Clint Bolick,* and *Scott G. Bullock;* for the Center for the Original Intent of the Constitution by *Michael P. Farris;* for the Christian Legal Society et al. by *Kimberlee Wood Colby, Gregory S. Baylor,* and *Carl H. Esbeck;* for the Lambda Legal Defense and Education Fund et al.by *Patricia M. Logue, Ruth E. Harlow,* and *Beatrice Dohrn;* for the Society of Catholic Social Scientists by *Stephen M. Krason* and *Richard W. Garnett;* and for Debra Hein by *Stuart M. Wilder.*

Briefs of*amici curiae* were filed for the Center for Children's Policy Practice & Research at the University of Pennsylvania by *Barbara Bennett Woodhouse;* for the Domestic Violence Project, Inc./Safe House (Michigan) et al. by *Anne L. Argiroff* and *Ann L. Routt;* for the National Association of Counsel for Children by *Robert C. Fellmeth* and *Joan Hollinger;* and for the Northwest Women's Law Center et al.

by *Cathy J. Zavis.*

[*] All 50 States have statutes that provide for grandparent visitation in some form. See Ala. Code § 30-3—4.1 (1989); Alaska Stat. Ann. § 25.20.065 (1998); Ariz. Rev. Stat. Ann. § 25-409 (1994); Ark. Code Ann. § 9-13-103 (1998); Cal. Fam. Code Ann. § 3104 (West 1994); Colo. Rev. Stat. § 19-1—117 (1999); Conn. Gen. Stat. § 46b—59 (1995); Del. Code Ann., Tit. 10, § 1031(7) (1999); Fla. Stat. § 752.01 (1997); Ga. Code Ann. § 19-7—3 (1991); Haw. Rev. Stat. § 571-46.3 (1999); Idaho Code § 32-719 (1999); Ill. Comp. Stat., ch. 750, § 5/607 (1998); Ind. Code § 31-17-5—1 (1999); Iowa Code § 598.35 (1999); Kan. Stat. Ann. § 38-129 (1993); Ky. Rev. Stat. Ann. § 405.021 (Baldwin 1990); La. Rev. Stat. Ann. § 9:344 (West Supp. 2000); La. Civ. Code Ann., Art. 136 (West Supp. 2000); Me. Rev. Stat. Ann., Tit. 19A, § 1803 (1998); Md. Fam. Law Code Ann. § 9-102 (1999); Mass. Gen. Laws § 119:39D (1996); Mich. Comp. Laws Ann. § 722.27b (West Supp. 1999); Minn. Stat. § 257.022 (1998); Miss. Code Ann. § 93-16-3 (1994); Mo. Rev. Stat. § 452.402 (Supp. 1999); Mont. Code Ann. § 40-9—102 (1997); Neb. Rev. Stat. § 43-1802 (1998); Nev. Rev. Stat. § 125C.050 (Supp. 1999); N. H. Rev. Stat. Ann. § 458:17—d (1992); N. J. Stat. Ann. § 9:2-7.1 (West Supp. 1999-2000); N. M. Stat. Ann. § 40-9—2 (1999); N. Y. Dom. Rel. Law § 72 (McKinney 1999); N. C. Gen. Stat. §§ 50-13.2, 50-13.2A (1999); N. D. Cent. Code § 14-09-05.1 (1997); Ohio Rev. Code Ann. §§ 3109.051, 3109.11 (Supp. 1999); Okla. Stat., Tit. 10, § 5 (Supp. 1999); Ore. Rev. Stat. § 109.121 (1997); 23 Pa. Cons. Stat. §§ 5311-5313 (1991); R. I. Gen. Laws §§ 15-5—24 to 15-5—24.3 (Supp. 1999); S. C. Code Ann. § 20-7—420(33) (Supp. 1999); S. D. Codified Laws § 25-4—52 (1999); Tenn. Code Ann. §§ 36-6—306, 36-6—307 (Supp. 1999); Tex. Fam. Code Ann. § 153.433 (Supp. 2000); Utah Code Ann. § 30-5—2 (1998); Vt. Stat. Ann., Tit. 15, §§ 1011-1013 (1989); Va. Code Ann. § 20-124.2 (1995); W. Va. Code §§ 48-2B-1 to 48-2B-7 (1999); Wis. Stat. §§ 767.245, 880.155 (1993-1994); Wyo. Stat. Ann. § 20-7—101 (1999).

[1] The Supreme Court of Washington made its ruling in an action where three separate cases, including the Troxels', had been consolidated. *In re Smith,* 137 Wash. 2d 1, 6-7, 969 P. 2d 21, 23-24 (1998). The court also addressed two statutes, Wash. Rev. Code § 26.10.160(3) (Supp. 1996) and former Wash. Rev. Code § 26.09.240 (1994), 137 Wash. 2d, at 7, 969 P. 2d, at 24, the latter of which is not even at issue in this case. See Brief for Petitioners 6, n. 9; see also *ante,* at 61. Its constitutional analysis discussed only the statutory language and neither mentioned the facts of any of the three cases nor reviewed the records of their trial court proceedings below. 137 Wash. 2d, at 13-21, 969 P. 2d, at 27-31. The decision invalidated both statutes without addressing their application to particular facts: "We conclude petitioners have standing but, *as written,* the statutes violate the parents' constitutionally protected interests. These statutes allow any person, at any time, to petition for visitation without regard to relationship to the child, without regard to changed circumstances, and without regard to harm." *Id.,* at 5, 969 P. 2d, at 23 (emphasis added); see also *id.,* at 21, 969 P. 2d, at 31 ("RCW 26.10.160(3) and former RCW 26.09.240 impermissibly interfere with a parent's fundamental interest in the care, custody and companionship of the child" (citations and internal quotation marks omitted)).

[2] As Justice O'Connor points out, the best-interests provision "contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge." *Ante,* at 67.

[3] Cf. *Chicago v. Morales,* 527 U. S. 41, 71 (1999) (Breyer, J., concurring in part and concurring in judgment) ("The ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications").

[4] The Supreme Court of Washington invalidated the broadly sweeping statute at issue on similarly limited reasoning: "Some parents and judges will not care if their child is physically disciplined by a third person; some parents and judges will not care if a third person teaches the child a religion inconsistent with the parents' religion; and some judges and parents will not care if the child is exposed to or taught racist or sexist beliefs. But many parents and judges will care, and, between the two, the parents should be the ones to choose whether to expose their children to certain people or ideas." 137 Wash. 2d, at 21, 969 P. 2d, at 31 (citation omitted).

[5] This is the pivot between Justice Kennedy's approach and mine.

[*] This case also does not involve a challenge based upon the Privileges and Immunities Clause and thus does not present an opportunity to reevaluate the meaning of that Clause.See *Saenz* v. *Roe,* 526 U. S. 489, 527-528 (1999) (Thomas, J., dissenting).

[1] The State Supreme Court held that, "as written, the statutes violate the parents' constitutionally protected interests." *In re Smith,* 137 Wash. 2d 1, 5, 969 P. 2d 21, 23 (1998).

[2] As the dissenting judge on the state appeals court noted, "[t]he trial court here was not presented with any guidance as to the proper test to be applied in a case such as this." *In re* ***Troxel,*** 87 Wash. App. 131, 143, 940 P. 2d 698, 703 (1997) (opinion of Ellington, J.). While disagreeing with the appeals court majority's conclusion that the state statute was constitutionally infirm, Judge Ellington recognized that despite this disagreement, the appropriate result would not be simply to affirm. Rather, because there had been no definitive guidance as to the proper construction of the statute, "[t]he findings necessary to order visitation over the objections of a parent are thus not in the record, and I would remand for further proceedings." *Ibid.*

[3] Unlike Justice O'Connor, *ante,* at 69-70, I find no suggestion in the trial court's decision in this case that the court was applying any presumptions at all in its analysis, much less one in favor of the grandparents. The first excerpt Justice O'Connor quotes from the trial court's ruling, *ante,* at 69, says nothing one way or another about *who* bears the burden under the statute of demonstrating "best interests." There is certainly no indication of a presumption *against* the parents' judgment, only a "`commonsensical' " estimation that, usually but not always, visiting with grandparents can be good for children. *Ibid.* The second quotation, "`I think [visitation] would be in the best interest of the children and I haven't been shown it is not in [the] best interest of the children,' " *ibid.,* sounds as though the judge has simply concluded, based on the evidence before him, that visitation in this case would be in the best interests of both girls. Verbatim Report of Proceedings in *In re* ***Troxel,*** No. 93-3—00650-7 (Wash. Super. Ct., Dec. 14, 1994), p. 214. These statements do not provide us with a definitive assessment of the law the court applied regarding a "presumption" either way. Indeed, a different impression is conveyed by the judge's very next comment: "That has to be balanced, of course, with Mr. and Mrs. Wynn [a.k.a. Tommie Granville], who are trying to put together a family that includes eight children, . . . trying to get all those children together at the same time and put together some sort of functional unit wherein the children can be raised as brothers and sisters and spend lots of quality time together." *Ibid.* The judge then went on to reject the Troxels' efforts to attain the same level of visitation that their son, the girls' biological father, would have had, had he been alive. "[T]he fact that Mr. **Troxel** is deceased and he was the natural parent and as much as the grandparents would maybe like to step into the shoes of Brad, under our law that is not what we can do. The grandparents cannot step into the shoes of adeceased parent, per say *[sic],* as far as whole gamut of visitation rights are concerned." *Id.,* at 215. Rather, as the judge put it, "I understand your desire to do that as loving grandparents. Unfortunately that would impact too dramatically on the children and their ability to be integrated into the nuclear unit with the mother." *Id.,* at 222-223.

However one understands the trial court's decision—and my point is merely to demonstrate that it is surely open to interpretation—its validity under the state statute as written is a judgment for the state appellate courts to make in the first instance.

[4] Justice Souter would conclude from the state court's statement that the statute "do[es] not require the petitioner to establish that he or she has a substantial relationship with the child," 137 Wash. 2d, at 21, 969 P. 2d, at 31, that the state court has "authoritatively read [the `best interests'] provision as placing hardly any limit on a court's discretion to award visitation rights," *ante,* at 77 (opinion concurring in judgment). Apart from the question whether one can deem this description of the statute an "authoritative" construction, it seems to me exceedingly unlikely that the state court held the statute unconstitutional because it believed that the "best interests" standard imposes "hardly any limit" on courts' discretion. See n. 5, *infra.*

[5] The phrase "best interests of the child" appears in no less than 10 current Washington state statutory provisions governing determinations from guardianship to termination to custody to adoption. See, *e. g.,* Wash. Rev. Code § 26.09.240(6) (Supp. 1996) (amended version of visitation statute enumerating eight factors courts may consider in evaluating a child's best interests); § 26.09.002 (in cases of parental separation or divorce "best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care"; "best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm"); § 26.10.100 ("The court shall determine custody in accordance with the best interests of the child"). Indeed, the Washington state courts have invoked the standard on numerous occasions in applying these statutory provisions—just as if the phrase had quite specific and apparent meaning. See, *e. g.,* *In re McDoyle,* 122 Wash. 2d 604, 859 P. 2d 1239 (1993) (upholding trial court "best interest" assessment in custody dispute); *McDaniels* v. *Carlson,* 108 Wash. 2d 299, 310, 738 P. 2d 254, 261 (1987) (elucidating "best interests" standard in paternity suit context). More broadly, a search of current state custody and visitation laws reveals fully 698 separate references to the "best interest of the child" standard, a number that, at a minimum, should give the Court some pause before it upholds a decision implying that those words, on their face, may be too boundless to pass muster under the Federal Constitution.

[6] It necessarily follows that under the far more stringent demands suggested by the majority in *United States* v. *Salerno,* 481 U. S. 739, 745 (1987) (plaintiff seeking facial invalidation "must establish that no set of circumstances exists under which the Act would be valid"), respondent's facial challenge must fail.

[7] The suggestion by Justice Thomas that this case may be resolved solely with reference to our decision in *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535 (1925), is unpersuasive. *Pierce* involved a parent's choice whether to send a child to public or private school. While that case is a source of broad language about the scope of parents' due process rights with respect to their children, the constitutional principles and interests involved in the schooling context do not necessarily have parallel implications in this family law visitation context, in which multiple overlapping and competing prerogatives of various plausibly interested parties are at stake.

[8] This Court has on numerous occasions acknowledged that children are in many circumstances possessed of constitutionally protected rights and liberties. See *Parham* v. *J. R.,* 442 U. S. 584, 600 (1979) (liberty interest in avoiding involuntary confinement); *Planned Parenthood of Central Mo.* v. *Danforth,* 428 U. S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights"); *Tinker* v. *Des Moines Independent Community School Dist.,* 393 U. S. 503, 506-507 (1969) (First Amendment right to political speech); *In re Gault,* 387 U. S. 1, 13 (1967) (due process rights in criminal proceedings).

[9] Cf., *e. g.*, *Wisconsin* v. *Yoder,* 406 U. S. 205, 244-246 (1972) (Douglas, J., dissenting) ("While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or an oceanographer. To do so he will have to break from the Amish tradition. It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. . . . It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny"). The majority's disagreement with Justice Douglas in that case turned not on any contrary view of children's interest in their own education, but on the impact of the Free Exercise Clause of the First Amendment on its analysis of schoolrelated decisions by the Amish community.

[10] See *Palmore* v. *Sidoti,* 466 U. S. 429, 431 (1984) ("The judgment of a state court determining or reviewing a child custody decision is not ordinarily a likely candidate for review by this Court"); cf. *Collins* v. *Harker Heights,* 503 U. S. 115, 128 (1992) (matters involving competing and multifaceted social and policy decisions best left to local decisionmaking); *Regents of Univ. of Mich.* v. *Ewing,* 474 U. S. 214, 226 (1985) (emphasizing our "reluctance to trench on the prerogatives of state and local educational institutions" as federal courts are ill-suited to "evaluate the substance of the multitude of academic decisions that are made daily by" experts in the field evaluating cumulative information). That caution is never more essential than in the realm of family and intimate relations. In part, this principle is based on long-established, if somewhat arbitrary, tradition in allocating responsibility for resolving disputes of various kinds in our federal system. *Ankenbrandt* v. *Richards,* 504 U. S. 689 (1992). But the instinct against over regularizing decisions about personal relations is sustained on firmer ground than mere tradition. It flows in equal part from the premise that people and their intimate associations are complex and particular, and imposing a rigid template upon them all risks severing bonds our society would do well to preserve.

[1] Whether parental rights constitute a "liberty" interest for purposes of procedural due process is a somewhat different question not implicated here. *Stanley* v. *Illinois,* 405 U. S. 645 (1972), purports to rest in part upon that proposition, see *id.,* at 651-652; but see *Michael H.* v. *Gerald D.,* 491 U. S. 110, 120-121 (1989) (plurality opinion), though the holding is independently supported on equal protection grounds, see *Stanley, supra,* at 658.

[2] I note that respondent is asserting only, *on her own behalf,* a substantive due process right to direct the upbringing of her own children, and is not asserting, *on behalf of her children,* their First Amendment rights of association or free exercise.I therefore do not have occasion to consider whether, and under what circumstances, the parent could assert the latter enumerated rights.

Cite as 127 Nev. ___, 257 P.3d 396 (Nev. Adv. Opn. No. 49, Aug. 4, 2011

Supreme Court of Nevada.

Audrey RENNELS, Appellant,
v.
Roger RENNELS and Jennifer Rennels, Respondents.
No. 53872. | Aug. 4, 2011. | Rehearing Denied Sept. 13, 2011. | Reconsideration En Banc Denied Nov. 15, 2011.

Reversed and remanded.

Attorneys and Law Firms

***397** Hutchison & Steffen, LLC, and Michael K. Wall, Las Vegas, for Appellant.

Law Office of Daniel Marks and Daniel Marks, Las Vegas, for Respondents.

BEFORE SAITTA, HARDESTY and PARRAGUIRRE, JJ.

Opinion

OPINION

By the Court, HARDESTY, J.:

Grandparents and other nonparents are typically not entitled to visitation with a minor child as a matter of right because there is a recognized presumption that a parent's desire to deny visitation is in the best interest of the child. However, pursuant to NRS 125C.050, a grandparent or other nonparent may be granted judicially approved visitation rights in some instances. The first issue presented in this appeal is whether the stipulated visitation order between a parent and a grandmother was a final decree entitled to res judicata protections. We conclude that it was, so we must next examine whether the parental presumption continues to apply when a parent seeks to modify or terminate a nonparent's judicially approved visitation rights with a minor child. We conclude that the parental presumption applies at the time of the court's initial determination of a nonparent's visitation rights. However, when, as in this case, a parent seeks to modify or terminate the judicially approved visitation rights of a nonparent, the parental presumption is no longer controlling.

***398** In so concluding, we adopt the two-prong test enunciated in *Ellis v. Carucci*, 123 Nev. 145, 150, 161 P.3d 239, 242 (2007), in circumstances where a party seeks to modify or terminate a nonparent's judicially approved visitation rights with a minor child, and we now hold that modification or termination of a nonparent's judicially approved visitation rights is only warranted upon a showing of a substantial change in circumstances that affects a child's welfare such that it is in the child's best interest to modify the existing visitation arrangement. *Id.* Applying the test to this case, we conclude that the district court failed to

Ex. 2

articulate any substantial change in circumstances before it terminated appellant's nonparent visitation rights with her granddaughter and, therefore, it is not in the best interests of the child to terminate visitation. Thus, we reverse.

FACTS

Respondent Roger Rennels and Martha Contreras were married in 1994 and had a child, Martina, in 1999. In 2001, the couple divorced, and Roger received sole custody of Martina. Approximately two months after Roger and Martha divorced, Roger and Martina resided with Roger's mother, appellant Audrey Rennels, in northern California. They lived with Audrey for five months, during which time Martina and Audrey enjoyed a close relationship. After living with Audrey, Roger and Martina moved to Texas. Martina and Audrey remained close after the move. Audrey also visited Roger and Martina in Texas several times, and Martina visited Audrey for several weeks in 2002. In July 2003, Roger and Martina moved to Las Vegas. Thereafter, Roger married his current wife, respondent Jennifer Rennels, and Jennifer adopted Martina in June 2006.

According to Audrey, Roger disapproved of the frequent contact between Martina and Audrey, and he stopped allowing Martina to see Audrey in June 2004. In response, Audrey sought court-ordered nonparental visitation pursuant to NRS 125C.050, which allows a nonparent to seek visitation rights. Roger opposed Audrey's petition and also filed a motion to dismiss or for summary judgment.

The district court conducted a hearing in December 2005 and denied the motion to dismiss, noting that an evidentiary hearing was required because there is a rebuttable presumption that granting nonparental visitation over a parent's objection is not in the child's best interest. Before the evidentiary hearing occurred, however, the parties reached a settlement of the visitation issues. Pursuant to this settlement, the parties prepared and submitted to the court a stipulation and order in which they agreed that "all pending issues" between them were resolved and specified a detailed visitation schedule for Audrey. The district court approved the stipulation and issued a visitation order effecting its provisions.

The visitation order included the appointment of a guardian ad litem and allowed Audrey to have four supervised visits with Martina per year. The guardian ad litem was instructed to select a psychologist, and Audrey, Roger, and Martina were required to undergo counseling with the selected psychologist. The supervised visitation requirement was to be reviewed every six months by the guardian ad litem and the psychologist to determine whether supervision was still necessary. Under the visitation order, if the guardian ad litem and the psychologist concluded that Audrey could have unsupervised visits, Roger would abide by that determination. The order also provided that, before involving the district court again, the parties would attempt to mediate any visitation disputes with the guardian ad litem.

The parties apparently followed the visitation order until 2008. During this time, the psychologist, Dr. John Paglini, gave generally favorable reports regarding Audrey and Martina's visits, and he ultimately recommended unsupervised visitation. However, Roger refused to allow unsupervised visits. In December 2008, three months after Dr. Paglini recommended unsupervised visits, Audrey filed a motion to compel Roger to comply with the visitation order. In her motion, Audrey asserted that she was entitled to unsupervised visits based on the visitation order and Dr. Paglini's recommendation. Roger and Jennifer

opposed Audrey's motion and, concurrently, filed a countermotion ***399** to terminate Audrey's visitation rights altogether. They argued that the district court failed to comply with *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (plurality opinion), which held that parents have a due process right to make child rearing decisions, and this creates a presumption that a parent's wishes are in the best interests of the child. *Id.* at 69–70, 120 S.Ct. 2054. In reply, Audrey argued that the district court complied with *Troxel*, and that the parties stipulated to a visitation schedule. She further contended that the stipulated visitation order was a final judgment and therefore res judicata principles applied.

After hearing the parties' arguments on the motions, the district court denied Audrey's motion to compel Roger's compliance with the stipulated visitation order and terminated her visitation rights. The district court reasoned, in relevant part, that: (1) Audrey had no fundamental rights to visitation in light of the presumption that fit parents act in the best interest of the child, even with a prior visitation order in place; (2) acrimony between the parties had increased; and (3) continued visitation was not in Martina's best interest. This appeal followed.

DISCUSSION

In resolving this appeal, we must first determine whether the stipulated visitation order is a final order that precluded relitigation of Audrey's right to visitation with Martina. We then consider the proper standard for determining whether modification or termination of Audrey's judicially approved nonparental visitation rights was warranted.

Standard of review

[1] [2] [3] Generally, "[t]his court reviews the district court's decisions regarding custody, including visitation schedules, for an abuse of discretion," *Rivero v. Rivero*, 125 Nev. 410, 428, 216 P.3d 213, 226 (2009), because child custody matters rest in the trial court's sound discretion. *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). The district court's factual findings will not be set aside if supported by substantial evidence. *Ellis v. Carucci* 123 Nev. 145, 149, 161 P.3d 239, 242 (2007). However, "we will review a purely legal question ... de novo." *Waldman v. Maini*, 124 Nev. 1121, 1128, 195 P.3d 850, 855 (2008). Determining whether a stipulated visitation order is final is a question of law subject to de novo review.

The stipulated visitation order was final

[4] [5] There is strong public policy favoring the prompt agreement and resolution of matters related to the custody, care, and visitation of minor children. *See Rivero*, 125 Nev. at 429, 216 P.3d at 226–27 (recognizing that parties are free to contract regarding child custody and such agreements are generally enforceable); *Ellis*, 123 Nev. at 151, 161 P.3d at 243 (same). Therefore, we encourage voluntary resolution of these matters, and we will generally recognize the preclusive effect of such agreements if they are deemed final.[1] *See Castle v. Simmons*, 120 Nev. 98, 105, 86 P.3d 1042, 1047 (2004) (explaining that the "changed circumstances" factor, which is required to modify a primary physical custody arrangement, is based on res judicata principles); *see also Hopper v. Hopper*, 113 Nev. 1138, 1143–44, 946 P.2d 171, 174–75 (1997); *Mosley v. Figliuzzi*, 113 Nev. 51, 58, 930 P.2d 1110, 1114 (1997).

1 We recognize an exception to this rule when the moving party seeks to introduce evidence of domestic violence of which it was unaware at the time of the original custody decree. *Castle v. Simmons*, 120 Nev. 98, 105, 86 P.3d 1042, 1047 (2004). However, domestic violence is not at issue in this case.

[6] [7] An order is final if it "disposes of the issues presented in the case ... and leaves nothing for the future consideration of the court." *Valley Bank of Nevada v. Ginsburg*, 110 Nev. 440, 445, 874 P.2d 729, 733 (1994) (alteration in original) (internal quotations omitted). Finality is determined based on what the order "actually *does*, not what it is called." *Id.* In the family law context, the California Supreme Court has held that a "stipulated custody order is a final judicial custody determination ... if there is a clear, affirmative indication the parties intended such a result." ***400** *Montenegro v. Diaz*, 26 Cal.4th 249, 109 Cal.Rptr.2d 575, 27 P.3d 289, 295 (2001). It is irrelevant whether the order is the result of a stipulated agreement between the parties that is later judicially approved or it is achieved through litigation. *Id.* at 294. Instead, the relevant inquiry is whether the order fully resolved the issues between the parties.

[8] Once a final judgment is entered in a nonparental visitation matter, whether in a contested hearing or by stipulation, it has a preclusive effect on later litigation. *Ingram v. Knippers*, 72 P.3d 17, 22 (Okla.2003) ("A consent judgment is entitled to the same preclusive treatment as a contested judgment."). This serves to prevent parties from relitigating the same issues. *Id.*; *accord* *Rivero*, 125 Nev. at 431, 216 P.3d at 228; *Ellis*, 123 Nev. at 151, 161 P.3d at 243; *Castle*, 120 Nev. at 105, 86 P.3d at 1047; *Hopper*, 113 Nev. at 1143–44, 946 P.2d at 174–75; *Mosley*, 113 Nev. at 58, 930 P.2d at 1114.

Audrey's and Roger's actions, along with the specific language in the order, clearly demonstrate that they intended the stipulated visitation order to be final with regard to Audrey's visitation with Martina. The document signed by the parties and approved by the district court shows that the parties intended to resolve their visitation dispute through the order. For example, the parties introduced the terms of the stipulation by stating that "this matter, as well as all pending issues, shall be resolved with the following stipulations and agreements." The order memorializes the parties' agreement, sets forth the specific parameters for Audrey's visitation with Martina, and provides for modification of the visitation arrangements with the approval of the guardian ad litem and Dr. Paglini.

There is no indication that the parties intended the stipulated visitation order to be anything other than a final judgment, and neither party challenged the order for over two years. The parties also expressly intended to avoid further involvement with the district court as they stipulated to mediate any future disputes with the guardian ad litem. Only if they were unable to resolve the dispute through mediation with the guardian ad litem would the matter come back to the district court. Furthermore, as part of their stipulation, the parties vacated the evidentiary hearing that had been scheduled to resolve Audrey's visitation rights. Therefore, we conclude that the stipulated visitation order is a final judgment.

Because the stipulated visitation order in this case is a final judgment, it precludes relitigation of Audrey's right to visitation with Martina based on the same set of facts the district court already considered. Thus, we must next determine under what circumstances a nonparent's judicially approved visitation rights can be modified or terminated.[2] Specifically, we examine whether parents are entitled to the continued presumption that their desire to restrict visitation with a nonparent is in the best interest of the child when they seek to modify or terminate the judicially approved visitation rights of a nonparent. We conclude that parents are not entitled to this presumption when they seek to modify or terminate a judicially approved visitation arrangement, and we adopt the two-prong test from *Ellis* for assessing whether modifying or terminating court-ordered visitation is appropriate. 123 Nev. at 150, 161 P.3d at 242.

2 Roger maintains that there are differences between the nonparent visitation rights of grandparents and those of nongrandparents who have established a meaningful relationship with the child. However, all nonparents are similarly situated regarding custody and/or visitation because Nevada does not distinguish grandparents from other nonparents. *See* NRS 125C.050(2) (allowing any nonparent with whom a child has resided and has established a meaningful relationship to petition for reasonable visitation with the child).

The parental presumption

[9] [10] The United States Supreme Court has long recognized that "there is a presumption that fit parents act in the best interests of their children." *Troxel v. Granville*, 530 U.S. 57, 68, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (plurality opinion). Therefore, when a nonparent requests visitation with a child, courts "must accord at least some special weight" to the fit parents' wishes. *Id.* at 70, 120 S.Ct. 2054. Nevada's nonparent visitation statute also provides such deference to ***401** the parent, providing that after a parent has "denied or unreasonably restricted visits with the child, there is a rebuttable presumption that the [nonparent's] right to visitation ... is not in the best interests of the child." NRS 125C.050(4). NRS 125C.050(6) lists the threshold requirements for overcoming this presumption. The statute is silent on whether the same presumption applies when a parent seeks to modify or terminate visitation rights that the district court previously granted to a nonparent, but this court has previously determined that parents do not get the benefit of the presumption when nonparents obtain court-ordered custody of a child. *See Hudson v. Jones*, 122 Nev. 708, 713, 138 P.3d 429, 432 (2006). We now extend this holding to judicially approved nonparent visitation arrangements.

In *Hudson*, a grandmother obtained joint legal and primary physical custody of her grandchild after the child's mother was killed in a drive-by shooting related to the father's gang involvement. *Id.* at 709–10, 138 P.3d at 430. The court determined that the father was "an unfit parent and that sufficient extraordinary circumstances existed to overcome the parental preference." *Id.* at 710, 138 P.3d at 430. Ten years later, the father sought to modify the district court's order granting custody to the grandmother, contending that he had turned his life around and was fit to be a parent to his child. *Id.* The district court found that the father had indeed significantly changed his lifestyle. *Id.* Thus, the district court felt "bound to apply the parental preference presumption," and it granted the father's request to modify the custody arrangement with the child so that he would have sole legal and physical custody. *Id.*

We reversed the district court, holding that the parental presumption does not apply to a previously "litigated custody dispute" because "applying the parental preference to modifications would only 'weaken the substantial change requirement.' "[3] *Id.* at 713, 138 P.3d at 432 (quoting *C.R.B. v. C.C.*, 959 P.2d 375, 380 (Alaska 1998), *disagreed with on other grounds as stated in Evans v. McTaggart*, 88 P.3d 1078, 1085 (Alaska 2004)). We recognized that when there is a court-ordered custody arrangement, the nonparent has effectively rebutted the parental presumption, after which the child's need for stability becomes a paramount concern. *Id.* at 713–14, 138 P.3d at 432–33. Thus, we concluded that the same test should apply to requests to modify court-ordered parent-nonparent custody arrangements as to proposed modifications of parent-parent arrangements. *Id.* at 713, 138 P.3d at 432.

3 However, we held that the parental presumption continued to apply to temporary nonparent custody situations, such as temporary guardianships. *Hudson v. Jones*, 122 Nev. 708, 711–12, 138 P.3d 429, 431–32 (2006).

[11] We are persuaded that this rationale also applies to requests to modify or terminate judicially approved nonparent visitation.[4] When a nonparent obtains visitation through a court order or judicial approval, they have successfully overcome the parental presumption and are in the same position as a parent seeking to modify or terminate visitation. Declining to apply the parental presumption once the court has approved nonparental visitation not only gives deference to a court's order, but it also promotes the important policy goal of stability for the child. *Ellis*, 123 Nev. at 151, 161 P.3d at 243 (recognizing that stability is an important concern in making custody and visitation determinations); *In re V.L.K.*, 24 S.W.3d 338, 343 (Tex.2000) (stating that "modification suits raise additional policy concerns such as stability for the child and the need to prevent constant litigation in child custody cases"). If parents can unilaterally modify or terminate visitation with nonparents, with whom a child has had an ongoing relationship, and which exists because the court has adjudicated and approved a visitation schedule, the order would serve no legal or policy purpose. Thus, we adopt the test we enunciated in *Ellis* for modifying custody arrangements among parents and apply it to modifying or terminating judicially approved nonparent visitation rights. In *Ellis*, we concluded that "modification of primary physical custody is ***402** warranted only when (1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the child's best interest is served by the modification." 123 Nev. at 150, 161 P.3d at 242. In applying this test, the district court should evaluate the two prongs without regard to the parental preference.[5]

4 Pursuant to NRS 125A.045, child custody determinations include visitation and modifications of visitation.

5 Other jurisdictions generally agree that *Troxel*'s parental presumption applies to the initial determination regarding visitation but not to a request to modify or terminate that agreement. In *Albert v. Ramirez*, the Court of Appeals of Virginia held that a "judicially sanctioned consent decree" setting forth custody and visitation for a nonparent gave the nonparent rights that are not subject to the *Troxel* parental best interest presumption. 45 Va.App. 799, 613 S.E.2d 865, 869–70 (2005). Therefore, a parent who wishes to change or terminate a judicially approved agreement must first demonstrate a material change in circumstances. *Id.* at 870. To hold otherwise, the court noted, "would render all such custody decrees void and unenforceable." *Id.* at 869–70. Similarly, the Court of Appeals of New Mexico held that "*Troxel* does not shift the burden [of establishing cause] away from a parent who seeks to modify an existing order granting grandparent visitation." *Deem v. Lobato*, 136 N.M. 266, 96 P.3d 1186, 1191 (Ct.App.2004); *see also Ingram v. Knippers*, 72 P.3d 17, 22 (Okla.2003) ("While a fit parent contesting grandparental visitation is entitled to a presumption that the parent will act in the best interest of the child, ... a court will not modify a valid visitation order without the moving party first showing a substantial change of circumstances." (internal citation omitted)); *In Interest of Ferguson*, 927 S.W.2d 766, 768 (Tex.App.1996) (" '[W]hatever effect [the parental] presumption may have in an original custody action, it cannot control a suit to change custody.' " (quoting *Taylor v. Meek*, 154 Tex. 305, 276 S.W.2d 787, 790 (1955))).

The Ellis test

Substantial change in circumstances affecting the welfare of the child

[12] [13] The requirement that a party requesting modification or termination of a judicially approved visitation arrangement demonstrate a substantial change in circumstances affecting the welfare of the child " 'is based on the principle of res judicata' and 'prevents "persons dissatisfied with custody decrees [from filing] immediate, repetitive, serial motions until the right circumstances or the right judge allows them to achieve a different result, based on essentially the same facts." ' " *Ellis*, 123 Nev. at 151, 161 P.3d at 243 (alteration in original) (quoting *Castle v. Simmons*, 120 Nev. 98, 103–04, 86 P.3d 1042, 1046 (2004) (quoting *Mosley v. Figliuzzi*, 113 Nev. 51, 58, 930 P.2d 1110, 1114 (1997))). In assessing whether circumstances have sufficiently changed to modify visitation, "courts should not take the [analysis of this]

prong lightly." *Id.* While we do not address what constitutes changed circumstances sufficient enough to modify or terminate a nonparent's visitation rights, we note that the existence of some hostility between the parent and nonparent is insufficient because obviously some animosity exists between a nonparent and a parent when one party must resort to litigation to settle visitation issues. *See Mosley*, 113 Nev. at 58, 930 P.2d at 1114 (concluding generally that the fact that parents cannot get along will not justify modifying custody); *Poppe v. Ruocco*, 22 Misc.3d 942, 869 N.Y.S.2d 767, 773 (Fam.Ct.2008) (recognizing that it is obvious that animosity between the parties exists when a grandparent must seek legal means to obtain visitation rights).

Here, neither the parties nor the district court addressed changed circumstances before the court terminated Audrey's visitation rights. Nowhere in Roger's countermotion did he contend that any change in circumstances had occurred since the district court entered its stipulated visitation order that justified reevaluating Audrey's visitation with Martina. Similarly, the district court never made specific findings regarding changed circumstances, but instead afforded deference to the parental presumption pursuant to *Troxel* and found that continued visitation with Audrey would not be in Martina's best interest. The court failed to explain what circumstances had changed and instead summarily stated that "acrimony between the parties ... remains and rather than diminish it appears said acrimony has increased." Such acrimony between a parent and a nonparent, by itself, is insufficient to demonstrate changed circumstances.

The best interests of the child

[14] The second prong of the test follows the statutory requirement that, in child custody ***403** determinations, " 'the sole consideration of the court is the best interest of the child.' " *Ellis*, 123 Nev. at 151–52, 161 P.3d at 243 (quoting NRS 125.480(1)); NRS 125A.045(1), (2). In evaluating whether a parent's request to modify or terminate a nonparent's judicially approved visitation is in the best interest of the child, courts should consider "the factors set forth in NRS 125.480(4) as well as any other relevant considerations."[6] *Ellis*, 123 Nev. at 152, 161 P.3d at 243. In applying these factors, the district court must consider that "custodial stability is ... of significant concern when considering a child's best interest." *Id.* at 151, 161 P.3d at 243. Accordingly, we reverse the district court's order granting Roger's motion to terminate Audrey's visitation rights and remand this matter to the district court for further proceedings consistent with this opinion. The stipulated visitation order shall remain in full force and effect until such time as the district court modifies or terminates it in a manner consistent with this opinion. Pursuant to the stipulated visitation order, visitation was not to be altered without input from both the psychologist and the guardian ad litem. It appears from the record that the appointed guardian ad litem was not involved in this matter after her initial selection of Dr. Paglini as the psychologist who would counsel the parties.[7] On remand, the district court shall appoint a new guardian ad litem before evaluating whether Audrey's supervised nonparental visitation rights should be modified based on the stipulated order entered by the district court or terminated under the two-prong test we have enunciated in this opinion.

6 We recognize that the factors in NRS 125.480(4) apply specifically to custody of a minor child. These factors also provide guidelines for assessing the best interest of a child in the context of nonparent visitation, and the district court should apply them accordingly.

7 In a September 2008 letter, Dr. Paglini noted that there was no guardian ad litem with whom he could consult regarding his assessment of the parties.

We concur: SAITTA and PARRAGUIRRE, JJ.

Hudson v. Jones, 122 Nev. ___, 138 P.3d 429 (Adv. Opn. No. 61, July 13, 2006)
Grandmother was awarded custody of minor child after mother was killed in a drive-by shooting, and the father was adjudicated unfit, overcoming the parental preference. Ten years later, the father moved to modify custody, requesting sole legal and physical custody, and claiming that he had turned his life around was living a productive, law-abiding lifestyle. The district court interviewed the minor, who expressed a desire to live with her father, and granted the custody change, finding that it was bound to do so under the parental preference. The Supreme Court reversed, holding that when a non-parent is granted joint legal and primary physical custody of a child, the doctrine does not apply in any later modification motion, but that the same rules that would apply to such a motion between parents govern the outcome.

Ex.3

NRS 125C.050 Petition for right of visitation for certain relatives and other persons.

1. Except as otherwise provided in this section, if a parent of an unmarried minor child:

(a) Is deceased;

(b) Is divorced or separated from the parent who has custody of the child;

(c) Has never been legally married to the other parent of the child, but cohabitated with the other parent and is deceased or is separated from the other parent; or

(d) Has relinquished his or her parental rights or his or her parental rights have been terminated,

Ê the district court in the county in which the child resides may grant to the great-grandparents and grandparents of the child and to other children of either parent of the child a reasonable right to visit the child during the child's minority.

2. If the child has resided with a person with whom the child has established a meaningful relationship, the district court in the county in which the child resides also may grant to that person a reasonable right to visit the child during the child's minority, regardless of whether the person is related to the child.

3. A party may seek a reasonable right to visit the child during the child's minority pursuant to subsection 1 or 2 only if a parent of the child has denied or unreasonably restricted visits with the child.

4. If a parent of the child has denied or unreasonably restricted visits with the child, there is a rebuttable presumption that the granting of a right to visitation to a party seeking visitation is not in the best interests of the child. To rebut this presumption, the party seeking visitation must prove by clear and convincing evidence that it is in the best interests of the child to grant visitation.

5. The court may grant a party seeking visitation pursuant to subsection 1 or 2 a reasonable right to visit the child during the child's minority only if the court finds that the party seeking visitation has rebutted the presumption established in subsection 4.

6. In determining whether the party seeking visitation has rebutted the presumption established in subsection 4, the court shall consider:

(a) The love, affection and other emotional ties existing between the party seeking visitation and the child.

(b) The capacity and disposition of the party seeking visitation to:

Ex. 4

(1) Give the child love, affection and guidance and serve as a role model to the child;

(2) Cooperate in providing the child with food, clothing and other material needs during visitation; and

(3) Cooperate in providing the child with health care or alternative care recognized and permitted under the laws of this State in lieu of health care.

(c) The prior relationship between the child and the party seeking visitation, including, without limitation, whether the child resided with the party seeking visitation and whether the child was included in holidays and family gatherings with the party seeking visitation.

(d) The moral fitness of the party seeking visitation.

(e) The mental and physical health of the party seeking visitation.

(f) The reasonable preference of the child, if the child has a preference, and if the child is determined to be of sufficient maturity to express a preference.

(g) The willingness and ability of the party seeking visitation to facilitate and encourage a close and continuing relationship between the child and the parent or parents of the child as well as with other relatives of the child.

(h) The medical and other needs of the child related to health as affected by the visitation.

(i) The support provided by the party seeking visitation, including, without limitation, whether the party has contributed to the financial support of the child.

(j) Any other factor arising solely from the facts and circumstances of the particular dispute that specifically pertains to the need for granting a right to visitation pursuant to subsection 1 or 2 against the wishes of a parent of the child.

7. If the parental rights of either or both natural parents of a child are relinquished or terminated, and the child is placed in the custody of a public agency or a private agency licensed to place children in homes, the district court in the county in which the child resides may grant to the great-grandparents and grandparents of the child and to other children of either parent of the child a reasonable right to visit the child during the child's minority if a petition therefor is filed with the court before the date on which the parental rights are relinquished or terminated. In determining whether to grant this right to a party seeking visitation, the court must find, by a preponderance of the evidence, that the visits would be in the best interests of the child in light of the considerations set forth in paragraphs (a) to (i), inclusive, of subsection 6.

8. Rights to visit a child may be granted:

(a) In a divorce decree;

(b) In an order of separate maintenance; or

(c) Upon a petition filed by an eligible person:

(1) After a divorce or separation or after the death of a parent, or upon the relinquishment or termination of a parental right;

(2) If the parents of the child were not legally married and were cohabitating, after the death of a parent or after the separation of the parents of the child; or

(3) If the petition is based on the provisions of subsection 2, after the eligible person ceases to reside with the child.

9. If a court terminates the parental rights of a parent who is divorced or separated, any rights previously granted pursuant to subsection 1 also must be terminated, unless the court finds, by a preponderance of the evidence, that visits by those persons would be in the best interests of the child.

10. For the purposes of this section, "separation" means:

(a) A legal separation or any other separation of a married couple if the couple has lived separate and apart for 30 days or more and has no present intention of resuming a marital relationship; or

(b) If a couple was not legally married but cohabitating, a separation of the couple if the couple has lived separate and apart for 30 days or more and has no present intention of resuming cohabitation or entering into a marital relationship.

(Added to NRS by 1979, 326; A 1985, 586; 1987, 1193; 1991, 1176; 1999, 726; 2001, 2712)

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

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

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

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

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

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

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

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

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

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

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

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

(d) The level of conflict between the parents.

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

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

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

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

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

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

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

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

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

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

(b) Findings that the custody or visitation arrangement ordered by the court adequately protects the child and the parent or other victim of domestic violence who resided with the child.

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

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

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

(c) The likelihood of future injury;

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

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

Ê In such a case, if it is not possible for the court to determine which party is the primary

physical aggressor, the presumption created pursuant to subsection 5 applies to both parties. If it is possible for the court to determine which party is the primary physical aggressor, the presumption created pursuant to subsection 5 applies only to the party determined by the court to be the primary physical aggressor.

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

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

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

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

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

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

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

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

10. As used in this section:

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

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

(Added to NRS by 1981, 283; A 1991, 980, 1175; 1995, 330; 2005, 1678; 2009, 218, 222)

The place – and limits – of federal pre-emption in a family law analysis:

> In [*Rose v. Rose*, 481 U.S. 619, 625, 107 S. Ct. 2029, 95 L. Ed.2d 599 (1987)], the United States Supreme Court explained: "We have consistently recognized that 'the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.' [Citations.] 'On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has "*positively required by direct enactment*" that state law be pre-empted.' [Citations.] Before a state law governing domestic relations will be overridden, it 'must do "major damage" to "clear and substantial" federal interests.'" (Italics added.) Express preemption arises when Congress has explicitly stated its intent in statutory language.

But: *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728 (1981).

Boulter v. Boulter, 113 Nev. 74, 930 P.2d 112 (1997) Parties were divorced after marriage of 37 years. The decree merged a property settlement agreement signed by both parties, and required equalization of the Social Security payments received by each of them. Husband refused to apply for Social Security when he turned 65. Wife filed a motion. The district Court (Ames) held that there was no violation of federal law and that any ambiguity (apparently, as to whether payments were to begin at eligibility) should be construed against the Husband's attorney since he drafted the property settlement agreement.

The Supreme Court reversed. Under 42 U.S.C. 407(a) (1983), any state action is preempted by a conflicting federal law, such as the Social Security Act, under the Supremacy Clause (Article IV, Clause 2) of the United States Constitution. Citing various cases from around the country indicating that Social Security payments are "immune to adjustment" by state courts dividing property at divorce, and noting that certain spousal benefits are built in to the social security law itself, the Court noted the holding of the United States Supreme Court that section 407(a) imposes "a broad bar against the use of any legal process to reach all social security benefits," citing Philpott v. Essex County Welfare Bd., 409 U.S. 413, 417 (1973), and noting the holding of Hisquierdo v. Hisquierdo, 439 U.S. 572, 575-76 (1979), superseded in part by 45 U.S.C. 231m (1986). The Court then found that merging the property settlement agreement into the divorce decree constituted "state action."

The Court rejected the wife's argument that the agreement merely constituted an agreement between private individuals as to how to use Social Security proceeds once received (which is permissible), since it was actually a forbidden contract to transfer unpaid (future) benefits. For good measure, the Court ruled impermissible voluntary as well as involuntary transfers or assignments. Even a bank account consisting of benefit payments is exempt.

In its final word, however, the Court, having found the agreement to share the benefits unenforceable, remanded to the district court "with instructions to reconsider the property distribution to the parties, and the issue of attorney's fees and costs."

William and Mary Law Review

Volume 11 | Issue 3 Article 18

Constitutional Law - Right to Counsel - Not Limited to an Attorney - United States v. Tarlowski, 305 F. Supp. 112 (E.D.N.Y. 1969)

Robert B. Ingram

Ex. 7

Constitutional Law—Right to Counsel—Not Limited to an Attorney. *United States v. Tarlowski*, 305 F. Supp. 112 (E.D. N.Y. 1969).

During interrogation by special agents of the Internal Revenue Service for failure to file income tax returns, the agents conducting the investigation requested the defendant's accountant to leave. The agents led the defendant to believe that he could have his attorney present but not his accountant.[1]

The United States District Court for the Eastern District of New York granted defendant's motion to suppress the government's evidence on the ground that the denial of his accountant's assistance infringed upon the defendant's right of due process.[2]

The right to counsel as specifically incorporated in the sixth amendment, guarantees that a defendant may "have the Assistance of Counsel for his defense" in a criminal trial.[3] This right has protected an accused from being deprived of his life or liberty without the assistance of counsel during his trial.[4] The right to counsel is not limited to the sixth amendment, however, as the Supreme Court has recognized that the presence or absence of counsel at the trial is included in the *hearing* requirement which, along with *notice*, constitutes the basic elements of due process.[5] Thus, because of the nature of our adversary system, the complexity of legal proceedings, and the considerable forces of government that are arrayed against the defendant, the right to counsel has become one of the elements of due process of law under the fifth amendment.[6]

Originally limited to the presence of an attorney at trial,[7] the right to counsel has expanded, first under the sixth amendment, then under the fifth amendment, to the pretrial interrogation period. In *Escobedo v. Illinois*,[8] the Court stated that ". . . the right to use counsel at the

1. United States v. Tarlowski, 305 F. Supp. 112, 115 (E.D. N.Y. 1969).

2. "[A]n invasion of the individual's right to determine the conditions under which he will deal with agents of the federal government when under criminal investigation, as is present here, can be considered to be nothing less than a denial of liberty without due process of law." *Id.* at 123.

3. U.S. Const. amend. VI.

4. Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938); Powell v. Alabama, 287 U.S. 45, 69 (1932).

5. Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

6. Comment, *The Continuing Expansion of the Right to Counsel*, 41 U. Colo. L. Rev. 473, 478 (1969). *See also* Gideon v. Wainwright, 372 U.S. 335 (1963).

7. Johnson v. Zerbst, 304 U.S. 458 (1938).

8. 378 U.S. 478 (1964).

formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination." [9] In *Miranda v. Arizona*, the Court guaranteed the due process and self incrimination privileges to a defendant by establishing procedural safeguards and standards under which incriminating statements may be used at trial.[10]

> Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if defendant so desired.[11]

Throughout the development of the doctrine of right to counsel, however, whether under the sixth, fifth, or fourteenth amendment, the courts have assumed that the counsel with whom the defendant may consult would be an attorney. *Miranda*,[12] *Escobedo*,[13] and more recent cases[14] equate the definition of counsel with the defendant's attorney.[15] Moreover, the term "counsel" as used in relation to constitutional guarantees of federal or state governments has been construed as a duly licensed attorney.[16] One departure from that limitation was *United States ex rel. Caminito v. Murphy*,[17] where the court stated that the defendant's confession was not voluntary where he was denied access to relatives or friends.

In *United States v. Tarlowski*, the district court found that histori-

9. *Id.* at 487.

10. 384 U.S. 436 (1966).

11. *Id.* at 470.

12. Miranda v. Arizona, 384 U.S. 436 (1966).

13. Escobedo v. Illinois, 378 U.S. 478 (1964).

14. *See* United States v. Wade, 388 U.S. 218 (1967). In *Wade*, the defendant was denied the presence of his counsel during a "line-up" identification. The Court held that the absence of his attorney at this crucial stage of the proceedings denied the defendant's sixth amendment rights because of the inherently suggestive nature of an identification proceeding and the possibility of suggestive control by the police investigators over the witnesses. *Id.* at 224-25.

15. "[T]hat he has the right to the presence of an attorney . . . ." Miranda v. Arizona, 384 U.S. 436, 444 (1966); "the accused must be permitted to consult with his lawyer." Escobedo v. Illinois, 378 U.S. 478, 492 (1964).

16. People v. Cox, 12 Ill. 2d 265, 146 N.E.2d 19 (1957). This principle has been applied where the defendant's counsel was delinquent in paying his bar association dues. McKinzie v. Ellis, 287 F.2d 549 (5th Cir. 1961).

17. 222 F.2d 698 (2d Cir. 1955).

cally all persons have "the right to associate with others of one's own choice at any time . . ." and that right is protected by the fifth amendment.[18] If, therefore, the federal agent limits a person's freedom of association, "this constitutes an invasion of the liberties guaranteed by the due process clause . . ." of the fifth amendment.[19] Through the right of association, *Tarlowski* has expanded the doctrine of right to counsel to include the presence of an accountant during a tax investigation. This approach, however, overlooks the conflict between accountants and attorneys in the federal tax field.[20] In all probability, the presence of an accountant to advise and protect his client from his ignorance during a criminal investigation would be the unauthorized practice of law.[21] Notwithstanding, through the doctrine of right of association, a court has recognized that the right to counsel cannot be filled solely by attorneys and that other advisors must fill this need.[22]

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18. 305 F. Supp. at 121.

19. *Id.* at 123.

20. Austin, *Relations Between Lawyers and Certified Public Accountants in Income Tax Practice*, 36 IOWA L. REV. 227 (1950).

> The public conflict . . . between two great professions over their respective functions in one of their fields of common interest—federal income taxation—has been as fruitless and injurious as it has been unedifying. . . . It has produced strife where there should be peace; accusation, distrust and suspicion where there should be understanding; recrimination . . . where there should be only cordial cooperation and harmony.

Id. at 227. *See also* E. Griswold, *We Can Stop the Lawyer-Accountant Conflict over Tax Practice Now: Four Recommendations*, 2 J. TAXATION 130 (1955); Comment, *Relations Between Lawyers and Certified Public Accountants in Federal Tax Practice*, 15 ALA. L. REV. 517 (1963).

21. Agran v. Shapiro, 127 Cal. 2d 807, 273 P.2d 619 (1954).

22. The legal profession and legal education have not caught up with the doctrine of right to counsel. There are not enough affordable lawyers to fulfill its promise. Even if such lawyers were available, they would not be intellectually prepared to render the type of legal service most appropriate for many of the non-trial stages of the criminal continuum. . . . Furthermore, the profession must give more consideration to the use of para-professionals to render routine legal service in the criminal justice continuum.

> These are the challenges of the doctrine of right to counsel.

Steele, *The Doctrine of Right to Counsel: Its Impact on the Administration of Criminal Justice and the Legal Profession*, 23 Sw. L.J. 488, 523 (1969).

FAMILY LAW OVERVIEW

Applicable Statutes – 125A, 125B, 125C

Main factor:

"Best Interest Standard" 125.480

> NRS 125.480 **Best interests of child; preferences; presumptions when court determines parent or person seeking custody is perpetrator of domestic violence or has committed act of abduction against child or any other child.**
>
> 1. In determining custody of a minor child in an action brought under this chapter, the sole consideration of the court is the best interest of the child. If it appears to the court that joint custody would be in the best interest of the child, the court may grant custody to the parties jointly.
>
> 4. In determining the best interest of the child, the court shall consider and set forth its specific findings concerning, among other things:
>
> > (a) The wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his or her custody.
> > (b) Any nomination by a parent or a guardian for the child.
> > (c) Which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent.
> > (d) The level of conflict between the parents.
> > (e) The ability of the parents to cooperate to meet the needs of the child.
> > (f) The mental and physical health of the parents.
> > (g) The physical, developmental and emotional needs of the child.
> > (h) The nature of the relationship of the child with each parent.
> > (i) The ability of the child to maintain a relationship with any sibling.
> > (j) Any history of parental abuse or neglect of the child or a sibling of the child.
> > (k) Whether either parent or any other person seeking custody has engaged in an act of domestic violence against the child, a parent of the child or any other person residing with the child.
> > (l) Whether either parent or any other person seeking custody has committed any act of abduction against the child or any other child.
>
> 5. Except as otherwise provided in subsection 6 or NRS 125C.210, a determination by the court after an evidentiary hearing and finding by clear and convincing evidence that either parent or any other person seeking custody has engaged in one or more acts of domestic violence against the child, a parent of the child or any other person residing with the child creates a rebuttable presumption that sole or joint custody of the child by the perpetrator of the domestic violence

is not in the best interest of the child. Upon making such a determination, the court shall set forth:

(a) Findings of fact that support the determination that one or more acts of domestic violence occurred; and
(b) Findings that the custody or visitation arrangement ordered by the court adequately protects the child and the parent or other victim of domestic violence who resided with the child.

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

(a) All prior acts of domestic violence involving either party;
(b) The relative severity of the injuries, if any, inflicted upon the persons involved in those prior acts of domestic violence;
(c) The likelihood of future injury;
(d) Whether, during the prior acts, one of the parties acted in self-defense; and
(e) Any other factors which the court deems relevant to the determination.

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

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

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

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

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

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

10. As used in this section:

(a) "Abduction" means the commission of an act described in NRS 200.310 to 200.340, inclusive, or 200.359 or a law of any other jurisdiction that prohibits the same or similar conduct.
(b) "Domestic violence" means the commission of any act described in NRS 33.018.

Two Types of Custody

State Policy – NRS 125.460

NRS 125.460 State policy. The Legislature declares that it is the policy of this State:

1. To ensure that minor children have frequent associations and a continuing relationship with both parents after the parents have become separated or have dissolved their marriage; and

2. To encourage such parents to share the rights and responsibilities of child rearing.

Legal Custody – Statute and Definition:

NRS 125.465

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

a. Each parent will consult and cooperate with the other in substantial questions relating to religious upbringing, education programs, significant changes in social environment, and health care of the child.

b. Each parent will have access to medical and school records pertaining to their child and be permitted to independently consult with any and all professionals involved with them.

c. All schools, health care providers, day care providers, and counselors will be selected by the parents jointly. In the event the Parties cannot agree to the selection of a school, the child will be maintained in the present school pending mediation and/or further order of the court.

d. Each parent will be empowered to obtain emergency health care for the child without the consent of the other parent. Each parent will notify the other parent as soon as reasonably possible as to any illness requiring medial attention, or any emergency involving the child.

5. Each parent will provide the other parent, upon receipt, with any information concerning the well-being of the child, including, but not limited to, copies of report cards; school meeting notices; vacation schedules; class notices of activities involving the child; samples of school work; order forms for school pictures; all communications from health care providers and the names, addresses, and telephone numbers of all schools, health care providers, regular day care providers, and counselors.

6. Each parent will advise the other parent of school, athletic, religious, and social events in which the child participate, and each aggress to so notify the other parent within a reasonable time after first learning of the future occurrence of any such event as to allow the other parent to make arrangements to attend the event if he or she chooses to do so. Both parents may participate in all such activities with the child, including, but not limited to, such activities as open house, ceremonies, school carnivals, and any other events involving the child.

7. Each parent will provide the other parent with the address and telephone number at which the minor child reside, and to notify the other parent within ten (10) days prior to any change of address and provide the telephone number of such address change as soon as it is assigned.

8. Each parent will provide the other parent with a travel itinerary and, whenever reasonably possible, telephone numbers at which the child can be reached whenever the child will be away from the parent's home for a period of one (1) night or more.

9. Each parent will encourage liberal communication between the child and the other parent. Each parent will be entitled to reasonable telephone communication with the child; and each parent agrees he or she will not unreasonably interfere with the child's right to privacy during such telephone conversation.

10. Neither parent will interfere with the right of the child to transport their clothing and personal belongings freely between the parents respective homes.

11. The parents agree to communicate directly with each other regarding the needs and well being of the child, and each parent further agrees not to use the child to communicate with the other parent regarding parental issues. The parents agree to use self control and to not verbally or physically abuse each other in the presence of the minor child.

12. Neither parent will disparage the other in the presence of the child, nor will either parent make any comment of any kind that would demean the other parent in the eyes of the child. Additionally, each parent agrees to instruct their respective family and friends to make no disparaging remarks regarding the other parent in the presence of the child. The parents will take all action necessary to prevent such disparaging remarks from being made in the presence of the child, and will report to each other in the event such disparaging remarks are made.

Physical Custody

Joint – Rivero vs. Rivero, Nev.

The implications of Rivero on custody is probably the most significant to understand.

40/60 split. What is 40/60? How to determine?

Primary – Time share is disproportionate.

Primary vs. Joint – Effect of Legal Custody.

Modification of Custody

Rivero

Under Rivero – The actual defacto arrangement of the Parties is adopted. **Scary premise under modification.** Look back over one year. **What is one year?**

Holding in Rivero - According to Rivero vs. Rivero, the Court is to look at the actual timeshare to which the Parties have utilized without taking into consideration the terms or agreement contained in the Decree of Divorce. Pursuant to Rivero, without counting hours the Court is to look at and determine if there is a minimum of a 40/60 timeshare split over the past year. Court's have varied with regards to what they determine to be a 40/60 split and the Supreme Court has yet to clarify the issue. If the Court does not determine there is an actual 40/60 split, the Court is to modify the custodial terminology to the de facto arrangement.

Joint to Primary – Truax – Best Interest Standard

Truax vs. Truax, 110 Nev.437, 874 P.2d 10 (1994) – The modification is in the best interest of the minor child. 125.480

Primary to Joint/Primary – Ellis vs. Carucci

Moving Party is requesting a change in custody under the holding in Ellis v. Carucci, 123 Nev. Adv. Op. No. 18 (2007), which requires Moving Party to establish a substantial change in circumstances affecting the welfare of the child and the modification serves the best interest of the minor child pursuant to NRS 125.480 (4) which states as follows:

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

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

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

(d) The level of conflict between the parents.

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

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

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

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

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

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

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

In addition, the moving Party must still establish a material change in circumstances. The basis for the revised standard for change is custody is based upon changes in the statute which occurred after the holding in Murphy.

Importance of McMonigle

In McMonigle v. McMonigle, 110 Nev. 1407, 887 P. 2d 742 (1994), the Nevada Supreme Court held a moving Party in a change of custody action must show circumstances have been substantially altered **since the last custodial order.** Reality: only look at events since the last custodial order.

Ten (10) years after the holding in McMonigle, the Nevada Supreme Court again ruled on pre-divorce evidence, specifically evidence of domestic violence. In **Castle v. Simmons,** 120 Nev. 98, 86 P. 2d 1042 (2004), the Nevada Supreme Court held when seeking to modify custody, the District Court may consider evidence of domestic violence which was not known to a Party or the Court, or the extent of which was not known, prior to the last custodial order. As such, the holding in Castle overrules, in part, the holding in McMonigle by specifically allowing the District Court to consider acts of domestic violence regardless of when the domestic violence occurred.

Make-up Visitation

Effects if no make up visitation.

Domestic Violence

With respect to Temporary Protective Orders, the Courts are guided and obtain jurisdiction to act in these matters pursuant to EDCR 5.22, NRS 33.020 and NRS 33.018.

EDCR 5.22, states in relevant part as follows:

(a) This rule governs all requests for temporary and extended protection orders against domestic violence under NRS 33.017 et seq.
(b) The standard of proof for the issuance of a temporary (TPO) or extended protection order pursuant to NRS 33.020(1) is "to the satisfaction of the court." This contemplates the lesser standards than a preponderance of the evidence and is equivalent to a reasonable cause or probable causes standard.
(g) The Court may appoint one or more full-time or part-time family diversion masters to alternate domestic violence commissioners. Interim orders signed by the domestic violence commissioner are effective upon issuance subject to approvals by the assigned

district court judge. A duly appointed domestic violence commissioner has the authority to:

(1) Review applications for temporary and extended protective orders against domestic violence.
(2) Schedule and hold contempt hearings for alleged violations of temporary and extended protection orders; recommend a finding or contempt; and recommend and recommend the appropriate sanction subject to approval by the assigned district court judge.
(3) Recommend a sanction upon a finding of contempt in the presence of the court subject to approval of the assigned district court judge.
(4) Issue, extend or dissolve protection orders against domestic violence under NRS 33.030.
(5) Perform other duties as directed by the assigned district court judge.

NRS 33.018 Acts which constitute domestic violence.

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

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

2. As used in this section, "dating relationship" means frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement. The term does not include a casual relationship or an ordinary association between persons in a business or social context.
(Added to NRS by 1985, 2283; A 1995, 902; 1997, 1808; 2007, 82, 1275)

NRS 33.020 Requirements for issuance of temporary and extended orders; availability of court; court clerk to inform protected party upon transfer of information to Central Repository.

1. If it appears to the satisfaction of the court from specific facts shown by a verified application that an act of domestic violence has occurred or there exists a threat of domestic violence, the court may grant a temporary or extended order. A temporary or extended order must not be granted to the applicant or the adverse party unless the applicant or the adverse party has requested the order and has filed a verified application that an act of domestic violence has occurred or there exists a threat of domestic violence.

2. The court may require the applicant or the adverse party, or both, to appear before the court before determining whether to grant the temporary or extended order.

3. A temporary order may be granted with or without notice to the adverse party. An extended order may only be granted after notice to the adverse party and a hearing on the application. A hearing on an application for an extended order must be held within 45 days after the date on which the application for the extended order is filed.

4. The court shall rule upon an application for a temporary order within 1 judicial day after it is filed.

5. If it appears to the satisfaction of the court from specific facts communicated by telephone to the court by an alleged victim that an act of domestic violence has occurred and the alleged perpetrator of the domestic violence has been arrested and is presently in custody pursuant to NRS 171.137, the court may grant a temporary order. Before approving an order under such circumstances, the court shall confirm with the appropriate law enforcement agency that the applicant is an alleged victim and that the alleged perpetrator is in custody. Upon approval by the court, the signed order may be transmitted to the facility where the alleged perpetrator is in custody by electronic or telephonic transmission to a facsimile machine. If such an order is received by the facility holding the alleged perpetrator while the alleged perpetrator is still in custody, the order must be personally served by an authorized employee of the facility before the alleged perpetrator is released. The court shall mail a copy of each order issued pursuant to this subsection to the alleged victim named in the order and cause the original order to be filed with the court clerk on the first judicial day after it is issued.

6. In a county whose population is 52,000 or more, the court shall be available 24 hours a day, 7 days a week, including nonjudicial days and holidays, to receive communications by telephone and for the issuance of a temporary order pursuant to subsection 5.

7. In a county whose population is less than 52,000, the court may be available 24 hours a day, 7 days a week, including nonjudicial days and holidays, to receive communications by telephone and for the issuance of a temporary order pursuant to subsection 5.

8. The clerk of the court shall inform the protected party upon the successful transfer of information concerning the registration to the Central Repository for Nevada Records of Criminal History as required pursuant to NRS 33.095.

Impact of a TPO in reality –

TPO must be read carefully as restrictions may vary.

No contact with applicant, even if applicant has the children

Not allowed at children's school

Exchanges of the children

Change in custody ramifications

Inability to carry a firearm.

Difference between TPO and Behavioral Order

TPO – Criminal in nature – violations = arrest

Behavioral Order – Family Court Order – Civil in nature not criminal. Violations = civil contempt.

Ramifications related to custody

Exhibit A

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

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

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

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

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

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

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

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

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

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

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

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

(d) The level of conflict between the parents.

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

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

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

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

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

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

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

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

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

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

(b) Findings that the custody or visitation arrangement ordered by the court adequately protects the child and the parent or other victim of domestic violence who resided with the child.

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

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

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

(c) The likelihood of future injury;

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

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

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

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

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

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

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

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

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

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

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

10. As used in this section:

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

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

(Added to NRS by 1981, 283; A 1991, 980, 1175; 1995, 330; 2005, 1678; 2009, 218, 222)

Exhibit B

Cite as: Rivero v. Rivero

125 Nev. Adv. Op. No. 34

August 27, 2009

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 46915

MICHELLE RIVERO,

Appellant,

vs.

ELVIS RIVERO,

Respondent.

Petition for rehearing of Rivero v. Rivero, 124 Nev. Adv. Op. No. 84, 195 P.3d 328 (2008), appeal from a district court post-divorce decree order modifying a joint child custody award. Eighth Judicial District Court, Family Court Division, Clark County; Stefany Miley, Judge.

Rehearing denied; opinion withdrawn; affirmed in part, reversed in part, and remanded.

PICKERING, J., dissented in part.

Steinberg Law Group and Brian J. Steinberg and Jillian M. Tindall, Las Vegas, for Appellant.

Bruce I. Shapiro, Ltd., and Bruce I. Shapiro, Henderson, for Respondent.

Fahrendorf, Viloria, Oliphant & Oster, LLP, and Raymond E. Oster, Reno, for Amicus Curiae State Bar of Nevada, Family Law Section.

BEFORE THE COURT EN BANC.

OPINION

By the Court, GIBBONS, J.:

We previously issued an opinion in this case on October 30, 2008, affirming in part, reversing in part, and remanding. Respondent Elvis Rivero's petition for rehearing followed. We then ordered answers to the petition from appellant Michelle Rivero and amicus curiae, the State Bar of Nevada Family Law Section.

We will consider rehearing when we have overlooked or misapprehended material facts or questions of law or when we have overlooked, misapplied, or failed to consider legal authority directly controlling a dispositive issue in the appeal. NRAP 40(c)(2). Having considered the petition and answers thereto in light of this standard, we conclude that rehearing is not warranted. Therefore, we deny the petition for rehearing. Although we deny rehearing, we withdraw our October 30, 2008, opinion and issue this opinion in its place.

Ms. Rivero and Mr. Rivero stipulated to a divorce decree that provided for "joint physical custody" of their minor child, with Ms. Rivero having the child five days each week and Mr. Rivero having the child two days each week. The decree awarded no child support. Less than two months after entry of the divorce decree, Ms. Rivero brought a motion to modify child support. The district court dismissed the motion. Less than one year later, Ms. Rivero brought a motion to modify child custody and support. The district court ordered that the decree would remain in force, with the parties having joint custody of their child and neither party receiving child support. The district court deferred ruling on the motion to modify custody and ordered the parties to mediation to devise a timeshare plan.

Ms. Rivero then requested that the district court judge recuse herself. When the judge refused to recuse herself, Ms. Rivero moved to disqualify her. The Chief Judge of the Eighth Judicial District Court denied Ms. Rivero's motion for disqualification, concluding that it lacked merit. The district court later awarded Mr. Rivero attorney fees for having to defend Ms. Rivero's disqualification motion.

At the court-ordered mediation, the parties were unable to reach a timeshare agreement. Following mediation, after a hearing, the district court modified the custody arrangement from a five-day, two-day split to an equal timeshare. Ms. Rivero appeals.

We are asked to resolve several custody and support issues on appeal. Preliminarily, the parties dispute the definition of joint physical custody. Additionally, Ms. Rivero challenges the following district court rulings: (1) the court's determination that the parties had joint physical custody, (2) the court's modification of the custody arrangement, (3) the court's denial of her motion for child support, (4) the district court judge's refusal to recuse herself and the chief judge's denial of Ms. Rivero's motion for disqualification, and (5) the court's award of attorney fees to Mr. Rivero for defending against Ms. Rivero's disqualification motion.

Initially, to address the definition of joint physical custody, we define legal custody, including sole legal custody and joint legal custody. We then define physical custody, including joint physical custody and primary physical custody. In defining joint physical custody, we adopt a definition that focuses on minor children having frequent associations and a continuing relationship with both parents and parents sharing the rights and responsibilities of child rearing. Consistent with the recommendation of the Family Law Section, this joint physical custody definition requires that each party have physical custody of the child at least 40 percent of the time. We then address the district court's rulings.

First, we address the district court's finding that the parties had a joint physical custody arrangement. In reaching our conclusion, we clarify that parties may enter into custody agreements and create their own custody terms and definitions. The courts may enforce such agreements as contracts. However, once the parties move the court to modify the custody agreement, the court must use the terms and definitions under Nevada law. In this case, the district court properly disregarded the parties' definition of joint physical custody in the divorce decree and applied Nevada law in determining that an equal timeshare was appropriate. Although it reached the proper conclusion, the district court abused its discretion by failing to set forth specific findings of fact to support its determination.

Second, we conclude that the district court abused its discretion by modifying the custody timeshare arrangement without making specific findings of fact that the modification was in the child's best interest.

Third, we conclude that the district court abused its discretion by denying Ms. Rivero's motion to modify child support without making any factual findings to justify its decision. We also clarify the circumstances under which a district court may modify a child support order. Under NRS Chapter 125B and our caselaw, a court has authority to modify a child support order upon a finding of a change in circumstances since the prior order. Also, in accordance with the Family Law Section's suggestion, we withdraw the Rivero formula for calculating child support.

Fourth, we conclude that the district court judge properly refused to recuse herself, and the chief judge properly denied Ms. Rivero's motion for disqualification. The record contains no evidence that the district court judge had personal bias against either of the parties.

Fifth and finally, we conclude that the district court abused its discretion by awarding Mr. Rivero attorney fees as a sanction for Ms. Rivero's disqualification motion because the district court made no determination whether the motion was frivolous, and no evidence supports the sanction.

FACTS AND PROCEDURAL HISTORY

Ms. Rivero filed a complaint for divorce, and the parties eventually reached a settlement. The district court entered a divorce decree incorporating the parties' agreement. The parties agreed to joint physical custody of the child, with Ms. Rivero having physical custody five days each week and Mr. Rivero having physical custody for the remaining two days. The divorce decree also reflected the parties' agreement that neither party was obligated to pay child support.

Less than two months after entry of the divorce decree, Ms. Rivero moved the court to modify the decree by awarding her child support. The district court dismissed her motion. Less than one year later, Ms. Rivero moved the district court for primary physical custody and child support. She alleged that Mr. Rivero did not spend time with the child, that instead his elderly mother took care of the child, and that he did not have suitable living accommodations for the child. Ms. Rivero also argued that she had de facto primary custody because she cared for the child most of the time. Mr. Rivero countered that Ms. Rivero denied him visitation unless he provided food, clothes, and money and denied him overnight visitation once he became engaged to another woman. Mr. Rivero requested that the district court enforce the 5/2 timeshare in the divorce decree, or, alternatively, order a 50/50 timeshare.

The district court held a custody hearing, during which the parties presented contradictory testimony regarding how much time Mr. Rivero actually spent with the child. The district court ruled that the matter did not warrant an evidentiary hearing. The district court further found that the use of the term joint physical custody in the divorce decree did not accurately reflect the timeshare arrangement that the parties were actually practicing, in which Ms. Rivero seemed to have physical custody most of the time. As a result, the court denied Ms. Rivero's motion for child support, found that the parties had joint physical custody, and ordered the parties to mediation to establish a more equal timeshare plan to reflect a joint physical custody arrangement.

After the mediation, but before the next district court hearing, Ms. Rivero served a subpoena on Mr. Rivero's employer for his employment records. The district court granted Mr. Rivero's motion to quash the subpoena, explaining that under the divorce decree, each party had joint physical custody, neither party owed child support, and the only pending issue was whether the parties could agree on a timeshare plan. Ms. Rivero then argued that the district court should reopen the child support issue and allow relevant discovery.

When the district court refused, Ms. Rivero requested that the district court judge recuse herself. The district court judge denied the request. Ms. Rivero then moved to disqualify the district court judge, alleging that the judge did not seriously consider the facts or the law because she was biased based on the parties' physical appearance. Mr. Rivero opposed the motion and moved for attorney fees. The district court judge submitted an affidavit in which she swore that she was unbiased. After considering Ms. Rivero's motion to disqualify the district court judge, the supporting affidavits, and Mr. Rivero's opposition, the chief judge denied the motion. She did not conduct a hearing, and Ms. Rivero did not file a reply. The chief judge concluded that Ms. Rivero's claims appeared to rely on "prior adverse rulings of the judge" and that "[r]ulings and actions of a judge during the course of official judicial proceedings do not establish legally cognizable grounds for disqualification." Thus, the chief judge found that Ms. Rivero's motion was without merit.

At a subsequent hearing, the district court granted Mr. Rivero's motion for attorney fees, noting that Ms. Rivero's disqualification motion was without merit.

During the same hearing, the district court also addressed the custody timeshare arrangement because the parties had been unable to reach an agreement in mediation. Although the divorce decree provided Ms. Rivero with custody five days each week and Mr. Rivero with custody two days each week, the district court concluded that the parties actually intended an equal timeshare. The district court noted that it was "just trying to find a middle ground" between what the divorce decree provided and what the parties actually wanted regarding a custody timeshare. Further, the court found that the decree's order for joint physical custody was inconsistent with the decree's timeshare arrangement because the decree's five-day, two-day timeshare did not constitute joint physical custody. In its order, the district court concluded that the parties intended joint physical custody and ordered an equal timeshare.

The district court found that Ms. Rivero did not have de facto primary physical custody. Therefore, the court determined that an evidentiary hearing was unnecessary because it was not changing primary custody to joint custody, but was modifying a joint physical custody arrangement.

Ms. Rivero appeals, challenging the district court's order denying her motion for child support, the order denying her motion to disqualify the district court judge, and the order modifying the custody timeshare and awarding Mr. Rivero attorney fees.[1]

DISCUSSION

In order to clarify the definition of joint physical custody, we first address the definition of legal custody. Physical and legal custody involve separate legal rights and control separate factual scenarios. Therefore, we discuss both legal and physical custody to clarify the distinctions.

After defining both joint physical custody and primary physical custody, we apply those definitions to the issues on appeal. These issues include the district court's custody modification and its denial of Ms. Rivero's motion to modify child support.

Finally, we address Ms. Rivero's motions for recusal and disqualification, and the district court's award of attorney fees to Mr.

Rivero arising from those motions.

The Family Law Section requests that this court define all types of legal and physical custody to create a continuum in which it is clear where one type of custody ends and another begins. It argues that such definitions will provide much needed clarity and certainty in child custody law. Our discussion of child custody involves two distinct components of custody: legal custody and physical custody. The term "custody" is often used as a single legal concept, creating ambiguity. NRS 125.460, NRS 125.490 (using the term "joint custody"). To emphasize the distinctions between these two types of custody and to provide clarity, we separately define legal custody, including joint and sole legal custody, and then we define physical custody, including joint physical and primary physical custody.

I. Legal custody

Legal custody involves having basic legal responsibility for a child and making major decisions regarding the child, including the child's health, education, and religious upbringing. Mack v. Ashlock, 112 Nev. 1062, 1067, 921 P.2d 1258, 1262 (1996) (Shearing, J., concurring); Hearing on S.B. 188 Before the Senate Judiciary Comm., 61st Leg. (Nev., Feb. 12, 1981). Sole legal custody vests this right with one parent, while joint legal custody vests this right with both parents. Mack, 112 Nev. at 1067, 921 P.2d at 1262 (Shearing, J. concurring); Cal. Fam. Code §§ 3003, 3006 (West 2004)[2] (defining sole and joint legal custody). Joint legal custody requires that the parents be able to cooperate, communicate, and compromise to act in the best interest of the child. See Mosley v. Figliuzzi, 113 Nev. 51, 60-61, 930 P.2d 1110, 1116 (1997) (stating that if disagreement between parents affects the welfare of the child, it could defeat the presumption that joint custody is in the best interest of the child and warrant modifying a joint physical custody order); Hearing on S.B. 188 Before the Assembly Judiciary Comm., 61st Leg. (Nev., Apr. 2, 1981) (discussing that joint legal custody requires agreement between the parents). In a joint legal custody situation, the parents must consult with each other to make major decisions regarding the child's upbringing, while the parent with whom the child is residing at that time usually makes minor day-to-day decisions. See Mack, 112 Nev. at 1067, 921 P.2d at 1262 (Shearing, J., concurring) (discussing that the parents can bring unresolved disputes before the court); Hearing on S.B. 188 Before the Senate Judiciary Comm., 61st Leg. (Nev., Feb. 12, 1981) (comments of Senator Wagner and Senator Ashworth) (discussing that both parents are involved with making major decisions regarding the children, and if they cannot agree, the courts will settle their disputes); Fenwick v. Fenwick, 114 S.W.3d 767, 777-78 (Ky. 2003) (explaining that in a joint legal custody arrangement, the parents confer on all major decisions, but the parent with whom the child is residing makes the minor day-to-day decisions), superseded by statute on other grounds as stated in Fowler v. Sowers, 151 S.W.3d 357, 359 (Ky. Ct. App. 2004), overruled on other grounds by Frances v. Frances, 266 S.W.3d 754, 756-57 (Ky. 2008), and Pennington v. Marcum, 266 S.W.3d 759, 768 (Ky. 2008).

Joint legal custody can exist regardless of the physical custody arrangements of the parties. NRS 125.490(2); Mack, 112 Nev. at 1067, 921 P.2d at 1262 (Shearing, J. concurring). Also, the parents need not have equal decision-making power in a joint legal custody situation. Fenwick, 114 S.W.3d at 776. For example, one parent may have decision-making authority regarding certain areas or activities of the child's life, such as education or healthcare. Id. If the parents in a joint legal custody situation reach an impasse and are unable to agree on a decision, then the parties may appear before the court "on an equal footing" to have the court decide what is in the best interest of the child. Mack, 112 Nev. at 1067, 921 P.2d at 1262 (Shearing, J., concurring); Fenwick, 114 S.W.3d at 777 n.24.

II. Physical custody

Physical custody involves the time that a child physically spends in the care of a parent. During this time, the child resides with the parent and that parent provides supervision for the child and makes the day-to-day decisions regarding the child.[3] Parents can share joint physical custody, or one parent may have primary physical custody while the other parent may have visitation rights. See Ellis v. Carucci, 123 Nev. 145, 147, 161 P.3d 239, 240 (2007) (describing the mother as having primary physical custody and the father as having liberal visitation); Barbagallo v. Barbagallo, 105 Nev. 546, 549, 779 P.2d 532, 534 (1989) (discussing primary and secondary custodians); Cal. Fam. Code §§ 3004, 3007 (West 2004) (defining joint and sole physical custody).

The type of physical custody arrangement is particularly important in three situations. First, it determines the standard for modifying physical custody.[4] Second, it requires a specific procedure if a parent wants to move out of state with the child. Potter v. Potter, 121 Nev. 613, 618, 119 P.3d 1246, 1249 (2005). Third, the type of physical custody arrangement affects the child support award. Barbagallo, 105 Nev. at 549, 779 P.2d at 534. Because the physical custody arrangement is crucial in making these determinations, the district courts need clear custody definitions in order to evaluate the true nature of parties' agreements. Absent direction from the Legislature, we define joint physical custody and primary physical custody in light of existing Nevada law.

A. Joint physical custody

Ms. Rivero and the Family Law Section assert that this court should clarify the definition of joint physical custody to determine whether it requires a specific timeshare agreement. The Family Law Section suggests that we define joint physical custody by requiring that each parent have physical custody of the child at least 40 percent of the time. In accordance with this suggestion, and for the reasons set forth below, we clarify Nevada's definition of joint physical custody pursuant to Nevada statutes and caselaw and create parameters to clarify which timeshare arrangements qualify as joint physical custody.

Although Nevada law suggests that joint physical custody approximates an equal timeshare, to date, neither the Nevada

Legislature nor this court have explicitly defined joint physical custody or specified whether a specific timeshare is required for a joint physical custody arrangement. See Potter, 121 Nev. at 619 n.16, 119 P.3d at 1250 n.16 (declining to address the issue of whether joint physical custody requires a particular timeshare); Barbagallo, 105 Nev. at 548, 779 P.2d at 534 (noting that, in 1987, when it enacted the child support formula, the Legislature declined to define primary physical custody according to a particular timeshare). In fact, even the terminology is inconsistent. This court has used the following phrases to describe situations where both parents have physical custody: shared custodial arrangements, joint physical custody, equal physical custody, shared physical custody, and joint and shared custody. See Wesley v. Foster, 119 Nev. 110, 113, 65 P.3d 251, 253 (2003) (discussing shared custodial arrangements); Wright v. Osburn, 114 Nev. 1367, 1368, 970 P.2d 1071, 1072 (1998) (using the terms joint physical custody, equal physical custody, and shared physical custody); Barbagallo, 105 Nev. at 547-48, 779 P.2d at 533-34 (utilizing the terms joint or shared custody). Given the various terms used to describe joint physical custody and the lack of a precise definition and timeshare requirement, we now define joint physical custody and the timeshare required for such arrangements.

1. Defining joint physical custody

"In determining custody of a minor child . . . the sole consideration of the court is the best interest of the child." NRS 125.480 (1). The Legislature created a presumption that joint legal and joint physical custody are in the best interest of the child if the parents so agree. NRS 125.490(1). The policy of Nevada is to advance the child's best interest by ensuring that after divorce "minor children have frequent associations and a continuing relationship with both parents . . . and [t]o encourage such parents to share the rights and responsibilities of child rearing." NRS 125.460. To further this policy, the Legislature adopted the statutes that now comprise NRS Chapter 125 to educate and encourage parents regarding joint custody arrangements, encourage parents to cooperate and work out a custody arrangement before going to court to finalize the divorce, ensure the healthiest psychological arrangement for children, and minimize the adversarial, winner-take-all approach to custody disputes. Mosley, 113 Nev. at 63-64, 930 P.2d at 1118; Hearing on S.B. 188 Before the Senate Judiciary Comm., 61st Leg. (Nev., Feb. 12, 1981) (Senator Wagner's comments) (discussing parents reaching an agreement before coming to court); Hearing on S.B. 188 Before the Assembly Judiciary Comm., 61st Leg. (Nev., Apr. 2, 1981) (summary of supporting information) (enumerating flaws in the old statute).

Although NRS Chapter 125 does not contain a definition of joint physical custody, the legislative history regarding NRS 125.490 reveals the Legislature's understanding of its meaning. Joint physical custody is "[a]warding custody of the minor child or children to BOTH PARENTS and providing that physical custody shall be shared by the parents in such a way to ensure the child or children of frequent associations and a continuing relationship with both parents."[5] Hearing on S.B. 188 Before the Assembly Judiciary Comm., 61st Leg. (Nev., Apr. 2, 1981) (summary of supporting information). This does not include divided or alternating custody, where each parent acts as a sole custodial parent at different times, or split custody, where one parent is awarded sole custody of one or more of the children and the other parent is awarded sole custody of one or more of the children. Id.

2. The timeshare required for joint physical custody

The question then remains, what constitutes joint physical custody to ensure the child frequent associations and a continuing relationship with both parents? Our law presumes that joint physical custody approximates a 50/50 timeshare. See Wesley, 119 Nev. at 112-13, 65 P.3d at 252-53 (discussing shared custody arrangements and equal timeshare); Wright, 114 Nev. at 1368, 970 P.2d at 1071-72 (discussing joint physical custody and equal timeshare). This court has noted that the public policy, as stated in NRS 125.490, is that joint custody is presumably in the best interest of the child if the parents agree to it and that this policy encourages equally shared parental responsibilities. Mosley, 113 Nev. at 60-61 & n.4, 930 P.2d at 1116 & n.4.

Although joint physical custody must approximate an equal timeshare, given the variations inherent in child rearing, such as school schedules, sports, vacations, and parents' work schedules, to name a few, an exactly equal timeshare is not always possible. Therefore, there must be some flexibility in the timeshare requirement. The question then becomes, when does a timeshare become so unequal that it is no longer joint physical custody? Courts have grappled with this question and come to different conclusions. For example, this court has described a situation where the children live with one parent and the other parent has every- other-weekend visitation as primary physical custody with visitation, even when primary custody was changed for one month out of the year and the other parent would revert back to weekend visitations. Metz v. Metz, 120 Nev. 786, 788-89, 101 P.3d 779, 781 (2004). In Wright, 114 Nev. at 1368, 970 P.2d at 1071, this court described an arrangement where the parents had the children on a rotating weekly basis as joint physical custody.

Similarly, the California Court of Appeal has held that "[physical] custody one day per week and alternate weekends constitutes liberal visitation, not joint [physical] custody." People v. Mehaisin, 124 Cal. Rptr. 2d 683, 687 (Ct. App. 2002). Likewise, when the mother has temporary custody and the father has visitation for a one-month period, the parties do not have joint physical custody. Id. at 685, 687. Rather, the father has a period of visitation, and the mother has sole physical custody thereafter. Id. at 687. Just as Nevada has defined joint physical custody as requiring an equal timeshare, the California Court of Appeal noted that joint physical custody includes situations in which the children split their time living with each parent and spend nearly equal time with each parent. Id. Some jurisdictions have adopted bright-line rules regarding the timeshare requirements for joint physical custody so that anything too far removed from a 50/50 timeshare cannot be considered joint physical custody.[6]

We conclude that, consistent with legislative intent and our caselaw, in joint physical custody arrangements, the timeshare must be approximately 50/50. However, absent legislative direction regarding how far removed from 50/50 a timeshare may be and still

constitute joint physical custody, the law remains unclear. Therefore, to approximate an equal timeshare but allow for necessary flexibility, we hold that each parent must have physical custody of the child at least 40 percent of the time to constitute joint physical custody. We acknowledge that the Legislature is free to alter the timeshare required for joint physical custody, but we adopt this guideline to provide needed clarity for the district courts. This guideline ensures frequent associations and a continuing relationship with both parents. If a parent does not have physical custody of the child at least 40 percent of the time, then the arrangement is one of primary physical custody with visitation. We now address how the courts should calculate the 40-percent timeshare.

We note that our dissenting colleague's reliance on Barbagallo v. Barbagallo, 105 Nev. 546, 779 P.2d 534 (1989), for the proposition that this court should not adopt the 40-percent timeshare requirement, is misplaced. In Barbagallo, this court noted that the Legislature had considered adopting specific timeshare requirements for determining which parent would pay child support in a joint physical custody arrangement but declined to do so. Id. at 548, 779 P.2d at 534. Thus, Barbagallo was declining to mathematically define child custody for the purpose of creating new child support calculations. Notably, this opinion does not alter or adopt any child support formulas, but rather reaffirms the child support calculations in Barbagallo, 105 Nev. 546, 779 P.2d 534, and Wright, 114 Nev. 1367, 970 P.2d 1071, which were in effect before this case. Prior to this opinion, Barbagallo, 105 Nev. at 549, 779 P.2d at 534-35, established how to calculate child support when one parent has primary physical custody, and Wright, 114 Nev. at 1368-69, 970 P.2d at 1072, established the calculation when the parents share joint physical custody. This opinion clarifies what arrangements constitute primary and joint physical custody so that parties, attorneys, and district courts readily know which child support calculation to apply. Thus, this opinion does not adopt new custody definitions for the purpose of formulating new child support calculations. Rather, it is based on this court's precedent and clarifies custody definitions so that courts can fairly and consistently apply the Barbagallo and Wright formulas that predated this opinion.

Our dissenting colleague also argues that the Legislature should be creating the custody definitions set out in this opinion. The issues in this case and the Family Law Section's amicus curiae brief demonstrate that there are gaps in the law. However, despite these gaps, attorneys must still advise their clients, public policy still favors settlement, and parties are still entitled to consistent and fair resolution of their disputes. To resolve the issues on appeal and ensure consistent and fair application of the law by district courts, this court has attempted to fill some of these gaps by defining the various types of child custody.

This court has previously created predictability for litigants to fill such a gap in the law in Malmquist v. Malmquist, 106 Nev. 231, 792 P.2d 372 (1990). In Malmquist, this court adopted a standard formula for district courts to apply "to apportion the community and separate property shares in the appreciation of a separate property residence obtained with a separate property loan prior to marriage." Id. at 238, 792 P.2d at 376. This court noted that although the district courts can make equitable determinations in individual cases, "the aggregate result becomes unfair when similarly situated persons receive disparate returns on their home investments." Id. The same reasoning applies here. District courts can use their discretion to make fair determinations in individual child custody cases. However, this becomes unfair when different parties similarly situated obtain different results. Such unreliable outcomes also make it difficult for attorneys to advise their clients and for parties to settle their disputes. Therefore, the timeshare requirement that this opinion establishes is both necessary to ensure consistent and fair application of the law and proper under this court's precedent.

3. Calculating the timeshare

The district court should calculate the time during which a party has physical custody of a child over one calendar year. Each parent must have physical custody of the child at least 40 percent of the time, which is 146 days per year. Calculating the timeshare over a one-year period allows the court to consider weekly arrangements as well as any deviations from those arrangements such as emergencies, holidays, and summer vacation. In calculating the time during which a party has physical custody of the child, the district court should look at the number of days during which a party provided supervision of the child, the child resided with the party, and during which the party made the day-to-day decisions regarding the child. The district court should not focus on, for example, the exact number of hours the child was in the care of the parent, whether the child was sleeping, or whether the child was in the care of a third-party caregiver or spent time with a friend or relative during the period of time in question.

Therefore, absent evidence that joint physical custody is not in the best interest of the child, if each parent has physical custody of the child at least 40 percent of the time, then the arrangement is one of joint physical custody.

B. Defining primary physical custody

We now discuss primary physical custody to contrast it with joint physical custody and to clarify its definition. A parent has primary physical custody when he or she has physical custody of the child subject to the district court's power to award the other parent visitation rights. See, e.g., Ellis, 123 Nev. at 147, 161 P.3d at 240. The focus of primary physical custody is the child's residence. The party with primary physical custody is the party that has the primary responsibility for maintaining a home for the child and providing for the child's basic needs. See Barbagallo, 105 Nev. at 549, 779 P.2d at 534 (discussing primary custodians and custodial parents in the context of child support); see Tenn. Code Ann. § 36-6-402(4) (2005) (defining "primary residential parent" as the parent with whom the child resides for more than 50 percent of the time). This focus on residency is consistent with NRS 125C.010, which requires that a court, when ordering visitation, specify the "habitual residence" of the child. Thus, the determination of who has primary physical custody revolves around where the child resides.

Primary physical custody arrangements may encompass a wide array of circumstances. As discussed above, if a parent has physical custody less than 40 percent of the time, then that parent has visitation rights and the other parent has primary physical custody. Likewise, a primary physical custody arrangement could also encompass a situation where one party has primary physical custody and the other party has limited or no visitation. See Metz, 120 Nev. at 788-89, 101 P.3d at 781 (describing a primary physical custody situation where the nonprimary physical custodian had visitation every other weekend).

III. Custody modification

Having determined what constitutes joint physical custody and primary physical custody, we now consider whether the district court abused its discretion in determining that the parties had joint physical custody when their divorce decree described a 5/2 custodial timeshare but labeled the arrangement as joint physical custody.

This court reviews the district court's decisions regarding custody, including visitation schedules, for an abuse of discretion. Wallace v. Wallace, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). District courts have broad discretion in child custody matters, but substantial evidence must support the court's findings. Ellis, 123 Nev. at 149, 161 P.3d at 241-42. Substantial evidence "is evidence that a reasonable person may accept as adequate to sustain a judgment." Id. at 149, 161 P.3d at 242.

Ms. Rivero contends that the district court abused its discretion by construing the term "joint physical custody" in the divorce decree to mean an equal timeshare, when the parties defined joint physical custody in the divorce decree as a 5/2 timeshare. She also argues that the district court abused its discretion in finding that she and Mr. Rivero had joint physical custody of their child because she asserts that she had de facto primary physical custody of the child.

We conclude that the district court properly disregarded the parties' definition of joint physical custody because the district court must apply Nevada's physical custody definition—not the parties' definition. We also conclude that the district court abused its discretion by not making specific findings of fact to support its decision that the custody arrangement constituted joint physical custody and that modification of the divorce decree was in the best interest of the child.

A. Custody agreements

We now address the modification of custody agreements. We conclude that the terms of the parties' custody agreement will control except when the parties move the court to modify the custody arrangement. In custody modification cases, the court must use the terms and definitions provided under Nevada law.[7]

Parties are free to contract, and the courts will enforce their contracts if they are not unconscionable, illegal, or in violation of public policy. See D.R. Horton, Inc. v. Green, 120 Nev. 549, 558, 96 P.3d 1159, 1165 (2004) (citing unconscionablility as a limitation on enforceability of a contract); NAD, Inc. v. Dist. Ct., 115 Nev. 71, 77, 976 P.2d 994, 997 (1999) (stating "parties are free to contract in any lawful matter"); Miller v. A & R Joint Venture, 97 Nev. 580, 582, 636 P.2d 277, 278 (1981) (discussing public policy as a limitation on enforceability of a contract). Therefore, parties are free to agree to child custody arrangements and those agreements are enforceable if they are not unconscionable, illegal, or in violation of public policy. However, when modifying child custody, the district courts must apply Nevada child custody law, including NRS Chapter 125C and caselaw. NRS 125.510(2) (discussing modification of a joint physical custody order); Ellis, 123 Nev. at 150, 161 P.3d at 242 (discussing modification of a primary physical custody order). Therefore, once parties move the court to modify an existing child custody agreement, the court must use the terms and definitions provided under Nevada law, and the parties' definitions no longer control. In this case, Ms. Rivero moved the district court to modify the decree. Therefore, the district court properly disregarded the parties' definition of joint physical custody.

B. The district court's determination that the parties' custody arrangement was joint physical custody and its modification of the custody arrangement

When considering whether to modify a physical custody agreement, the district court must first determine what type of physical custody arrangement exists because different tests apply depending on the district court's determination. A modification to a joint physical custody arrangement is appropriate if it is in the child's best interest. NRS 125.510(2). In contrast, a modification to a primary physical custody arrangement is appropriate when there is a substantial change in the circumstances affecting the child and the modification serves the child's best interest. Ellis, 123 Nev. at 150, 161 P.3d at 242.

Under the definition of joint physical custody discussed above, each parent must have physical custody of the child at least 40 percent of the time. This would be approximately three days each week. Therefore, the district court properly found that the 5/2 timeshare included in the parties' divorce decree does not constitute joint physical custody. The district court must then look at the actual physical custody timeshare that the parties were exercising to determine what custody arrangement is in effect.

The district court summarily determined that Mr. and Ms. Rivero shared custody on approximately an equal time basis. Based on this finding, the district court determined that it was modifying a joint physical custody arrangement, and therefore, Ms. Rivero, as the moving party, had the burden to show that modifying the custody arrangement was in the child's best interest. NRS 125.510(2);

Truax v. Truax, 110 Nev. 437, 438-39, 874 P.2d 10, 11 (1994). However, the district court did not make findings of fact supported by substantial evidence to support its determination that the custody arrangement was, in fact, joint physical custody. Ellis, 123 Nev. at 149, 161 P.3d at 241-42. Therefore, this decision was an abuse of discretion.

Moreover, the district court abused its discretion by modifying the custody agreement to reflect a 50/50 timeshare without making specific findings of fact demonstrating that the modification was in the best interest of the child.

Specific factual findings are crucial to enforce or modify a custody order and for appellate review. Accordingly, on remand, the district court must evaluate the true nature of the custodial arrangement, pursuant to the definition of joint physical custody described above, by evaluating the arrangement the parties are exercising in practice, regardless of any contrary language in the divorce decree. The district court shall then apply the appropriate test for determining whether to modify the custody arrangement and make express findings supporting its determination.

IV. Child support

Ms. Rivero argues that the district court erred in denying her motion for child support by not reviewing the parties' affidavits of financial condition and noting the discrepancies in the parties' incomes.[8] We conclude that the district court abused its discretion in denying Ms. Rivero's motion for child support because it did not make specific findings of fact supported by substantial evidence. In reaching our conclusion, we first address the circumstances under which the district court may modify a child support order and discuss the calculation of child support in primary physical custody and joint physical custody arrangements.

A. Modifying a child support order

An ambiguity has arisen in our caselaw regarding when the district court has the authority to modify a child support order. Therefore, we take this opportunity to clarify that the district court only has authority to modify a child support order upon finding that there has been a change in circumstances since the entry of the order and the modification is in the best interest of the child. In so doing, we look to NRS Chapter 125B and our caselaw.

1. Modification of a child support order requires a change in circumstances

As with custody cases, the requirement of changed circumstances in child support cases prevents parties "[from filing] immediate, repetitive, serial motions until the right circumstances or the right judge allows them to achieve a different result, based on essentially the same facts." Ellis, 123 Nev. at 151, 161 P.3d at 243 (internal quotations omitted). Therefore, a court cannot modify a child support order if the predicate facts upon which the court issued the order are substantially unchanged. Mosley v. Figliuzzi, 113 Nev. 51, 58-59, 930 P.2d 1110, 1114-15 (1997) (discussing custody orders). Also, the modification must be in the best interest of the child. NRS 125B.145(2)(b).

The Legislature has specified when a court will review a child support order. A court must review a support order, if requested by a party or legal guardian, every three years. NRS 125B.145(1)(b). The court may also review a support order upon a showing of changed circumstances. NRS 125B.145. Because the term "may" is discretionary, the district court has discretion to review a support order based on changed circumstances but is not required to do so. Fourchier v. McNeil Const. Co., 68 Nev. 109, 122, 227 P.2d 429, 435 (1951). However, a change of 20 percent or more in the obligor parent's gross monthly income requires the court to review the support order. NRS 125B.145(4). Although these provisions indicate when the review of a support order is mandatory or discretionary, they do not require the court to modify the order upon the basis of these mandatory or discretionary reviews.

The district court has authority to modify a support order if there has been a factual or legal change in circumstances since it entered the order. Since its enactment of the statutes that today comprise NRS Chapter 125B, the Legislature has allowed modification of child support orders upon changed circumstances. 1987 Nev. Stat., ch. 813, § 3, at 2267. Nevada law also requires the district court, when adjusting the child support amount, to consider the factors in NRS 125B.070 and NRS 125B.080(9). 1987 Nev. Stat., ch. 813, § 3, at 2268. We have specified that even equitable adjustments to support awards must be based on the NRS 125B.080(9) factors. Khaldy v. Khaldy, 111 Nev. 374, 376-77, 892 P.2d 584, 585 (1995). Therefore, when considering a modification motion, the district court will always consider the same factual circumstances—those specified in NRS 125B.070 and 125B.080(9). In evaluating whether the factual circumstances have changed, the district court may consider facts that were previously unknown to the court or a party, even if the facts predate the support order at issue. See Castle v. Simmons, 120 Nev. 98, 103-06, 86 P.3d 1042, 1046-48 (2004) (holding that a parent may present evidence of child abuse that occurred before the entry of the last child custody order because of the presumption that physical custody with an abusive parent is not in the best interest of the child). Thus, modification is not warranted unless a change has occurred regarding the factual considerations under NRS 125B.070 or 125B.080(9). See Mosley, 113 Nev. at 58, 930 P.2d at 1114 (requiring a substantial change in circumstances to modify a joint custody order).

The Legislature has specified other scenarios under which a court may modify a support order. These scenarios are examples of changes in circumstances that warrant modification of a support order. For example, inaccurate or falsified financial information that results in an inappropriate support award is a ground for modification of the award. NRS 125B.080(2). After a child support order has

been entered, any subsequent modification must be based on changed circumstances except (1) pursuant to a three-year review under NRS 125B.145(1), (2) pursuant to mandatory annual adjustments of the statutory maximums under NRS 125B.070(3), or (3) pursuant to adjustments by the Division of Welfare and Supportive Services under NRS 425.450. NRS 125B.080(3).

Under NRS 125B.145(1), the district court must review the support order if three years have passed since its entry. The district court must then consider the best interests of the child and determine whether it is appropriate to modify the order. NRS 125B.145(2)(b). Modification is appropriate if there has been a factual or legal change in circumstances since the district court entered the support order. Upon a finding of such a change, the district court can then modify the order consistent with NRS 125B.070 and 125B.080. Id. Therefore, although a party need not show changed circumstances for the district court to review a support order after three years, changed circumstances are still required for the district court to modify the order.

Each of these three situations, which the Legislature has specified as warranting modification of a support order, is grounded in a change in a party's factual circumstances. NRS 125B.145(4) expressly states that the district court may review a child support order "at any time on the basis of changed circumstances." Specifically, the new child support order must be supported by factual findings that a change in support is in the child's best interest and the modification or adjustment of the award must comply with the requirements of NRS 125B.070 and NRS 125B.080. See NRS 125B.145(2)(b). Moreover, under NRS 125B.080(9), the court is mandated to consider 12 different factors when considering whether to adjust a child support award, thereby requiring the moving party to show a change in factual circumstances that may justify a modification or adjustment to an existing child support order.

2. Scott v. Scott

Ms. Rivero cites to Scott v. Scott, 107 Nev. 837, 840, 822 P.2d 654, 656 (1991), for the proposition that a court can modify a child support order according to the statutory formula without a finding of changed circumstances. In Scott, this court stated that "[a] child support award can be modified in accordance with the statutory formula, regardless of a finding of changed circumstances." 107 Nev. at 840, 822 P.2d at 656 (relying on Parkinson v. Parkinson, 106 Nev. 481, 483 & n.1, 796 P.2d 229, 231 & n.1 (1990)). As shown above, a change in circumstances is required to modify an existing child support order. Thus, the statement made in Scott, that changed circumstances is not required, is incorrect. Therefore, to the extent that Scott conflicts with this clarification, we disaffirm that case on that point for two reasons.

First, Scott's holding was based on changed factual circumstances. In Scott, the custodial parent moved the district court for modification of the child support order in accordance with NRS 125B.070, seeking the statutory maximum of the noncustodial parent's gross monthly income, including any overtime pay. 107 Nev. at 839, 822 P.2d at 655. Six months later, the district court modified the child support order, finding that the custodial parent's loss of a roommate constituted a "substantial change of circumstances." Id. The district court, however, deviated down from the statutory maximum based on the fact that the noncustodial parent had remarried and was responsible for two additional children. Id. at 840, 822 P.2d at 656. The noncustodial parent appealed on the basis that there was not a "substantial change of circumstances justifying modification of the child support award." Id. at 840, 822 P.2d at 656.

Without explaining that a custodial parent has the right to obtain child support in accordance with the statutory formula, as noted in footnote 1 in Parkinson, 106 Nev. at 483, 796 P.2d at 231, the Scott court expanded this rule to suggest that any child support award can be modified regardless of a change in circumstances. 107 Nev. at 840, 822 P.2d at 656. The Scott court, however, went on to consider whether the district court abused its discretion when it deviated from the statutory formula when it considered several factors enumerated in NRS 125B.080(9) to reduce the noncustodial parent's support obligation. Id. at 840-41, 822 P.2d at 656. The Scott court concluded that the district court did not abuse its discretion, but the rationale is unclear. Id. It is unclear whether the Scott court determined that the district court properly found a change in circumstances or properly determined child support under NRS 125B.070 and NRS 125B.080(9). However, regardless of the rationale, to the extent that Scott suggests that changed circumstances are not necessary to modify a support order, it misstates the law.

Second, in relying on Parkinson, the Scott court erroneously expanded the comment made in footnote 1 in Parkinson, 106 Nev. at 483 & n.1, 796 P.2d at 231 & n.1. In that footnote, the Parkinson court mischaracterized the holding in Perri v. Gubler, 105 Nev. 687, 782 P.2d 1312 (1989). Parkinson, 106 Nev. at 483 & n.1, 796 P.2d at 231 & n.1. In Perri, the father had custody of the children and the parties agreed that the mother would not pay child support to the father. 105 Nev. at 688, 782 P.2d 1313. Upon the father's motion, the district court modified the decree to require the mother to pay child support to the father. Id. The Perri court reversed, concluding that because the father provided inaccurate financial information to the district court, the district court would be unable to find that the father's circumstances had changed to warrant a modification of the support order. Id. This court's decision was correct under Nevada caselaw and under the newly amended NRS 125B.080(3), requiring changed circumstances to modify a support order when the parties did not stipulate to the support. 1989 Nev. Stat., ch. 405, § 14, at 859; see Harris v. Harris, 95 Nev. 214, 216 & n.2, 591 P.2d 1147, 1148 & n.2 (1979) (interpreting former NRS 125.140(2) as allowing courts to modify child custody and support awards to accommodate changes in circumstances after entry of the order). Although the Perri court did not cite to NRS 125B.080(3), it properly reasoned that because the father had provided inaccurate financial information, he had not adequately proven any changed circumstances warranting modification of the support decree. Perri, 105 Nev. at 688, 782 P.2d at 1313.

However, the Parkinson court disavowed Perri insofar as it required a showing of changed circumstances to modify a support order. Parkinson, 106 Nev. at 483 & n.1, 796 P.2d at 231 & n.1. The Parkinson court cited to NRS 125B.080(1)(b) and (3) to support this proposition. Id. We conclude that the Parkinson court misread NRS 125B.080(1)(b) and (3). At the time of the Parkinson decision,

as it does now, NRS 125B.080(1)(b) required courts to apply the statutory formula regarding any motion to modify child support filed after July 1, 1987. 1989 Nev. Stat., ch. 405, § 14, at 859. NRS 125B.080(3) stated that once a court had established a support order pursuant to the statutory formula, "any subsequent modification of that support must be based upon changed circumstances." 1989 Nev. Stat., ch. 405, § 14, at 859. The plain language of the statute at the time required changed circumstances to modify an existing support order that was properly ordered pursuant to the statutory formula. Thus, we now disaffirm the footnote in Parkinson, 106 Nev. at 483 & n.1, 796 P.2d at 231 & n.1, which states a party may seek modification of a support order without changed circumstances. Accordingly, Scott's reliance on this proposition is also erroneous. 107 Nev. at 840, 822 P.2d at 656.

In conclusion, we retreat from Parkinson and Scott to the extent that they may be read to allow a court to modify an existing child support order without a change in circumstances since the court issued the order.

Having clarified the circumstances under which a district court may modify a child support order, we note that this case is an example of the immediate and repetitive motions that can plague the district court, even after the parties have stipulated to child support. Less than two months after the district court entered the parties' divorce decree, in which they agreed that neither party would receive child support, Ms. Rivero moved the court for child support. Then she did so again, 11 months later. Such constant relitigation of a court order, especially one to which the parties stipulate, is pointless absent a change in the circumstances underlying the initial order.

B. Calculating child support

The Family Law Section suggests that we reformulate the Rivero child support formula set forth in our prior opinion in this case. It notes that the formula assumes a parent contributes to the financial support of the child by merely spending time with the child and shifts the focus of custody disputes to child support rather than the best interest of the child. Consistent with these points, we withdraw the Rivero formula and reaffirm the statutory formulas and the formulas under Barbagallo and Wright. Because joint physical custody requires a near-equal timeshare, we conclude it is unnecessary to utilize a third formula for cases of joint physical custody with an unequal timeshare.

1. Calculating child support in cases of primary physical custody

In cases where one party has primary physical custody and the other has visitation rights, Barbagallo v. Barbagallo, 105 Nev. 546, 779 P.2d 532 (1989), controls. Under these circumstances, the court applies the statutory formulas and the noncustodial parent pays the custodial parent support. Id. at 548, 779 P.2d at 534. The court may use the factors under NRS 125B.080(9) to deviate from the formulas. The Barbagallo court cited "standard of living and circumstances of the parents" and the "earning capacity of the parents" as the most important of these factors.[9] Id. at 551, 779 P.2d at 536. Under the current version of NRS 125B.080, this focus on the financial circumstances of the parties is reflected in several factors, including: "the relative income of both parents," the cost of health care and child care, "[a]ny public assistance paid to support the child," "expenses related to the mother's pregnancy and confinement," visitation transportation costs in some circumstances, and "[a]ny other necessary expenses for the benefit of the child." NRS 125B.080 (9). All the other statutory factors, such as the amount of time a parent spends with a child, are of lesser weight. Barbagallo, 105 Nev. at 551, 779 P.2d at 536.

We have noted that joint physical custody increases the total cost of raising the child. Id. at 549-50, 779 P.2d at 535. As the Family Law Section notes, the amount of time that a parent spends with a child might, but does not necessarily, reduce the cost of raising the child to the custodial parent. Id. The amount of time spent with the child, along with the other lesser-weighted factors in 125B.080(9), can serve as a basis for the district court to modify a support award, upon a showing by the secondary custodian that payment of the statutory formula amount would be unfair or unjust given his or her "substantial contributions of a financial or equivalent nature to the support of the child." Id. at 552, 779 P.2d at 536. This approach remains unchanged by the adoption of the new definition of joint physical custody because it only applies to situations in which one party has primary physical custody and the other has visitation rights.

2. Calculating child support in cases of joint physical custody

In cases where the parties have joint physical custody, the Wright v. Osburn formula determines which parent should receive child support. 114 Nev. 1367, 1368-69, 970 P.2d 1071, 1072 (1998). We take this opportunity to note that Wright overrules Barbagallo's application of the statutory child support formulas in joint physical custody cases. Barbagallo directs the court to identify a primary and secondary custodian and order the secondary custodian to pay the primary custodian child support in accordance with the appropriate formula. 105 Nev. at 549, 779 P.2d at 534-35. This is no longer the law.

Rather, under Wright, child support in joint physical custody arrangements is calculated based on the parents' gross incomes. Id. at 1368-69, 970 P.2d at 1072. Each parent is obligated to pay a percentage of their income, according to the number of children, as determined by NRS 125B.070(1)(b). The difference between the two support amounts is calculated, and the higher-income parent is obligated to pay the lower-income parent the difference. Id. The district court may adjust the resulting amount of child support using the NRS 125B.080(9) factors. Id. The purposes of the Wright formula are to adjust child support to equalize the child's standard of living between parents and to provide a formula for consistent decisions in similar cases. Id.

The Wright formula also remains unchanged by the new definition of joint physical custody. When the parties have joint physical custody, as defined above, the Wright formula applies, subject to adjustments pursuant to the statutory factors in NRS 125B.080(9). Under the new definition of joint physical custody, there could be a slight disparity in the timeshare. The biggest disparity would be a case in which one party has physical custody of the child 60 percent of the time and the other has physical custody of the child 40 percent of the time. Still, maintaining the lifestyle of the child between the parties' households is the goal of the Wright formula, and the financial circumstances of the parties remain the most important factors under NRS 125B.080(9). Wright, 114 Nev. at 1368, 970 P.2d at 1072; Wesley v. Foster, 119 Nev. 110, 113, 65 P.3d 251, 253 (2003); Barbagallo, 105 Nev. at 551, 779 P.2d at 536. Thus, in a joint physical custody situation, if a party seeks a reduction in child support based on the amount of time spent with the child, the party must prove that payment of the full statutory amount of child support is unfair or unjust, given that party's substantial contributions to the child's support. Barbagallo, 105 Nev. at 552, 779 P.2d at 536.

C. The district court's denial of Ms. Rivero's motion for child support

Here, in denying Ms. Rivero child support, the district court relied on the divorce decree, in which the parties agreed that neither would receive child support.

This court reviews the district court's decisions regarding child support for an abuse of discretion. Wallace v. Wallace, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). Parents have a duty to support their children. NRS 125B.020. When a district court deviates from the statutory child support formula, it must set forth specific findings of fact stating the basis for the deviation and what the support would have been absent the deviation. NRS 125B.080(6). Even if the record reveals the district court's reasoning for the deviation, the court must expressly set forth its findings of fact to support its decision. Jackson v. Jackson, 111 Nev. 1551, 1553, 907 P.2d 990, 992 (1995).

In this case, the district court erred by not making specific findings of fact regarding whether Ms. Rivero was entitled to receive child support under NRS Chapter 125B and explaining any deviations from the statutory formulas. Therefore, we reverse the district court's denial of Ms. Rivero's motion for child support. On remand, as discussed above, the district court may only modify the divorce decree upon finding a change in circumstances since the entry of the decree, and must calculate child support pursuant to either Barbagallo or Wright, as appropriate.

V. Ms. Rivero's motions for recusal and disqualification

Ms. Rivero asserts that the district court abused its discretion when the district court judge refused to recuse herself and when the chief judge denied Ms. Rivero's motion to disqualify the judge. According to Ms. Rivero, the district court abused its discretion in not allowing her to file a reply to Mr. Rivero's opposition to the motion to disqualify and by not permitting her to argue the merits at a hearing. We disagree because Ms. Rivero did not prove legally cognizable grounds supporting an inference of bias, and therefore, summary dismissal of the motion was proper.

This court gives substantial weight to a judge's decision not to recuse herself and will not overturn such a decision absent a clear abuse of discretion. Goldman v. Bryan, 104 Nev. 644, 649, 764 P.2d 1296, 1299 (1988), abrogated on other grounds by Halverson v. Hardcastle, 123 Nev. 245, 266, 163 P.3d 428, 443 (2007). A judge is presumed to be unbiased, and "the burden is on the party asserting the challenge to establish sufficient factual grounds warranting disqualification." Id. at 649, 764 P.2d at 1299. A judge cannot preside over an action or proceeding if he or she is biased or prejudiced against one of the parties to the action. NRS 1.230(1). To disqualify a judge based on personal bias, the moving party must allege bias that "'stem[s] from an extrajudicial source and result[s] in an opinion on the merits on some basis other than what the judge learned from his participation in the case.'" In re Petition to Recall Dunleavy, 104 Nev. 784, 790, 769 P.2d 1271, 1275 (1988) (quoting United States v. Beneke, 449 F.2d 1259, 1260-61 (8th Cir. 1971)). "[W]here the challenge fails to allege legally cognizable grounds supporting a reasonable inference of bias or prejudice," a court should summarily dismiss a motion to disqualify a judge. Id. at 789, 769 P.2d at 1274.

In this case, Ms. Rivero alleged that the district court judge was biased in favor of Mr. Rivero because he is an attractive man and was biased against Ms. Rivero because she is an attractive woman. Ms. Rivero also alleged that the judge was determined to rule only for Mr. Rivero and that the judge was not interested in hearing the case on the merits. The only evidence of these allegations are statements in Ms. Rivero's motion to disqualify and her attorney's affidavit. The hearing transcripts do not reveal any bias on the district court judge's part. Thus, Ms. Rivero has not established legally cognizable grounds for disqualification. Id. Accordingly, we conclude that the district court judge did not abuse her discretion when she refused to recuse herself. We also conclude that the chief judge properly denied Ms. Rivero's motion to disqualify the district court judge without considering a reply from Ms. Rivero or holding a hearing on the motion because Ms. Rivero did not establish legally cognizable grounds for an inference of bias. Therefore, summary dismissal of the motion was proper.[10] Id.

VI. The district court's award of attorney fees to Mr. Rivero

In addition to denying Ms. Rivero's disqualification motion, the district court awarded Mr. Rivero attorney fees arising from defending against the motion. Ms. Rivero argues that the district court abused its discretion when it awarded Mr. Rivero attorney fees because Ms. Rivero had a reasonable basis to move for the district court judge's disqualification. Ms. Rivero also contends that NRS

1.230, which prohibits punishment for contempt if a party alleges that a judge should be disqualified, prohibits an award of attorney fees under NRS 18.010 and sanctions under EDCR 7.60 and NRCP 11. We disagree that the contempt prohibition of NRS 1.230(4) prohibits attorney fees as a sanction for filing a frivolous motion to disqualify a judge. However, we conclude that the district court abused its discretion in awarding attorney fees because substantial evidence does not support the sanction.

A. Contempt prohibition of NRS 1.230(4)

Under NRS 1.230(4), "[a] judge or court shall not punish for contempt any person who proceeds under the provisions of this chapter for a change of judge in a case." Contempt preserves the authority of the court, punishes, enforces parties' rights, and coerces. Warner v. District Court, 111 Nev. 1379, 1382-83, 906 P.2d 707, 709 (1995). On the other hand, the district court's discretion to award attorney fees as a sanction under NRS 18.010(2)(b), for bringing a frivolous motion, promotes the efficient administration of justice without undue delay and compensates a party for having to defend a frivolous motion.

In this case, the district court did not state the basis for the attorney fees sanction but found that Ms. Rivero's motion to disqualify was meritless. It appears that the district court sanctioned Ms. Rivero to compensate Mr. Rivero for having to defend a frivolous motion, which is explicitly allowed under NRS 18.010(2)(b). This is not akin to the district court holding Ms. Rivero in contempt for simply requesting a change of judge, which is prohibited under NRS 1.230(4). Therefore, the contempt prohibition of NRS 1.230(4) does not apply. Although the contempt provision of NRS 1.230(4) does not prevent the district court from awarding attorney fees as a sanction pursuant to NRS 18.010(2)(b), we conclude that the district court abused its discretion in awarding attorney fees in this case for the reasons discussed below.

B. Attorney fees sanction for filing a frivolous motion

This court reviews the district court's award of attorney fees for an abuse of discretion. Miller v. Wilfong, 121 Nev. 619, 622, 119 P.3d 727, 729 (2005). The district court may award attorney fees as a sanction under NRS 18.010(2)(b), NRCP 11, and EDCR 7.60 (b) if it concludes that a party brought a frivolous claim. The district court must determine if there was any credible evidence or reasonable basis for the claim at the time of filing. Semenza v. Caughlin Crafted Homes, 111 Nev. 1089, 1095, 901 P.2d 684, 687-88 (1995) (discussing NRS 18.010(2)(b)). Although a district court has discretion to award attorney fees as a sanction, there must be evidence supporting the district court's finding that the claim or defense was unreasonable or brought to harass. Id.

Here, the district court did not explain in its order the basis for awarding Mr. Rivero attorney fees and only noted in its summary order that Ms. Rivero's motion to disqualify the district court judge was without merit. Although Ms. Rivero did not prevail on the motion, and it may have been without merit, that alone is insufficient for a determination that the motion was frivolous, warranting sanctions. Nothing in the record indicates that the district court attempted to determine if there was any credible evidence or a reasonable basis for Ms. Rivero's motion to disqualify. Because the chief judge did not hold a hearing or make findings of fact, no evidence demonstrates that Ms. Rivero's motion was unreasonable or brought to harass. Therefore, we conclude that the district court abused its discretion in sanctioning Ms. Rivero with attorney fees for her motion to disqualify. Thus, we reverse and remand the district court's order granting an award of attorney fees to Mr. Rivero to the district court for further proceedings consistent with this opinion.

CONCLUSION

We conclude that the district court abused its discretion when it determined, without making specific findings of fact, that the parties had joint physical custody and when it modified the custody arrangement set forth in the divorce decree. We therefore reverse and remand this matter to the district court for further proceedings, including a new custody determination pursuant to the definition of joint physical custody clarified in this opinion.

We further conclude that the district court abused its discretion in denying Ms. Rivero's motion to modify child support because it did not set forth specific findings of fact to justify deviating from the statutory child support formulas. We therefore reverse and remand this matter to the district court for further proceedings to calculate child support and modify the decree if modification is proper under the standard set forth in this opinion.

We further conclude that the district court judge properly refused to recuse herself, and the chief judge properly denied Ms. Rivero's motion for disqualification. We therefore affirm the district court's orders regarding the recusal and disqualification.

Finally, we conclude that the district court abused its discretion when it awarded Mr. Rivero attorney fees in relation to Ms. Rivero's motion to disqualify the district court judge. We therefore reverse and remand this matter to the district court for further proceedings consistent with this opinion.

HARDESTY, C.J., PARRAGUIRRE, DOUGLAS, CHERRY, and SAITTA, JJ., concur.

**********FOOTNOTES**********

[1] Given the importance of the definition of joint physical custody, this court invited the Family Law Section of the Nevada State Bar (Family Law Section) to file an amicus curiae brief regarding the issue.

[2] The Nevada Legislature relied on California family law statutes in adopting NRS 125.460 and 125.490, regarding joint custody. Hearing on S.B. 188 Before the Senate Judiciary Comm., 61st Leg. (Nev., Feb. 12, 1981). Although out-of-state law is not controlling, we look to it as instructive and persuasive. As always, even if this court relies on out-of-state law, Nevada law still controls in interpreting the decisions of this court.

[3] See Idaho Code Ann. § 32-717B(2) (2006) (discussing joint physical custody regarding the "time in which a child resides with or is under the care and supervision of" the parties); Iowa Code Ann. § 598.1(4) (West 2001) (discussing joint physical custody as involving shared parenting time, maintaining a home for the child, and physical care rights); Taylor v. Taylor, 508 A.2d 964, 967 (Md. 1986) (defining physical custody as involving providing a home and making day-to-day decisions regarding the child); Mass. Ann. Laws ch. 208 § 31 (LexisNexis 2003) (describing shared physical custody as involving the child residing with and being under the supervision of each parent); Mo. Ann. Stat. § 452.375(1)(3) (West 2003) (discussing residence and supervision in the context of joint legal custody); 23 Pa. Cons. Stat. Ann. § 5302 (West 2001) (defining physical custody as "[t]he actual physical possession and control of a child").

[4] The court may modify joint physical custody if it is in the best interest of the child. NRS 125.510(2); Potter v. Potter, 121 Nev. 613, 618, 119 P.3d 1246, 1249 (2005). However, to modify a primary physical custody arrangement, the court must find that it is in the best interest of the child and that there has been a substantial change in circumstances affecting the welfare of the child. Ellis, 123 Nev. at 150, 161 P.3d at 242.

[5] Other states define joint physical custody similarly, focusing on the child's continuing contact and relationship with both parents. Cal. Fam. Code § 3004 (West 2004); Haw. Rev. Stat. § 571-46.1 (2006); Idaho Code Ann. § 32-717B(2) (2006); Mass. Ann. Laws ch. 208, § 31 (LexisNexis 2003); Miss. Code Ann. § 93-5-24(5)(c) (2004); Mo. Ann. Stat. § 452.375(1)(3) (West 2003); 23 Pa. Cons. Stat. Ann. § 5302 (West 2001); Mamolen v. Mamolen, 788 A.2d 795, 799 (N.J. Super. Ct. App. Div. 2002).

[6] See, e.g., Okla. Stat. Ann. tit. 43, § 118(10) (West 2001) (requiring each parent to have physical custody for more than 120 nights each year for shared physical custody); Tenn. Code Ann. § 36-6-402(4) (2005) (defining "primary residential parent" as "the parent with whom the child resides more than 50 percent (50%) of the time"); Miller v. Miller, 568 S.E.2d 914, 918 (N.C. Ct. App. 2002) (explaining that joint physical custody requires that each parent have custody for at least one-third of the year).

[7] Ms. Rivero also challenges the district court's decision not to hold an evidentiary hearing regarding child custody. Because we reverse and remand on the custody issue on other grounds, we do not reach this argument.

[8] Ms. Rivero also challenges the district court's denial of her discovery of Mr. Rivero's employment records for purposes of calculating child support. Because we reverse and remand on the support issue on other grounds, we do not reach this argument.

[9] While the Barbagallo court cited to the NRS 125B.080(8) factors, NRS 125B.080 has since been renumbered such that these factors are now located in NRS 125B.080(9). 1989 Nev. Stat., ch. 405, § 14, at 860.

[10] Ms. Rivero argues that the chief judge abused her discretion because she prevented her from filing a reply brief. However, Ms. Rivero provides no citations to the record indicating that the chief judge refused to allow Ms. Rivero to file a reply brief, nor does Ms. Rivero cite to any authority requiring the chief judge to allow her to file a reply brief. NRAP 28(a)(8)(A); NRAP 28(e)(1).

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

I respectfully dissent. While I agree that this case presents an opportunity to establish helpful precedent, I disagree with the majority's assessment of the record facts and the law that should apply to them.

This appeal grows out of a stipulated divorce decree. Two family court judges upheld the decree's stipulation for joint physical custody. The only modification either judge made was to adjust the child's residential timeshare arrangement slightly. After taking testimony from the parents, both of whom work, the second judge determined that the parents' days off differed perfectly. Thus, each parent could have the child while the other was at work, minimizing the time the child had to spend in day care, if a one-day adjustment to the residential timeshare was made.

I do not find in the original stipulated decree the inflexible 5/2 timeshare the majority does. After providing for "joint legal custody and joint physical care, custody and control" of the parties' daughter, the original decree provided for the father to have the child "each Sunday at 7 p.m. until Tuesday at 9:00 p.m. in addition to any time agreed on by the Parties." (Emphasis added.) The residential timeshare, as adjusted, provided for the father to have the child from "Sunday at 1 p.m. until Wednesday at 2 p.m."—thus adding a day

to the father's allotted two days and two hours per week but deleting the provision giving him such additional "time agreed on by the Parties" (who were having trouble agreeing to anything). The second family court judge made an express, on-the-record finding that, as adjusted, the residential timeshare arrangement was consistent with the stipulated decree's provision for joint physical custody—and in the child's best interest. The timeshare adjustment also obviated the mother's argument that the court should not have approved the stipulated decree's provision for a Wright-based offset, by which the parties had voluntarily agreed neither would pay child support to the other.

This strikes me as a sensible, maybe even Solomon-like solution. Instead of upholding the family court's exercise of sound discretion, however, the majority reverses and remands these parents to the family court for more litigation. On remand, the family court is directed to establish the exact percentage of time the child has spent with each parent over the course of the past year;[1] to then apply a newly announced 40-percent formula on which joint physical custody and future child support will depend; and thereafter to enter formal findings, beyond those stated in the decree and in open court, respecting these and other matters.

I submit that this result and the underlying formula the majority adopts are contrary to statute and case precedent. The family court interpreted its decree in a way that was fair, supported by the record, and consistent with applicable law. A sounder result would be to recognize the distinction other courts have drawn between true custody modification and residential timeshare adjustments and support the family court's sound exercise of discretion as to the latter in this case.

DISCUSSION

The formulaic approach is inconsistent with Nevada law

I have a threshold concern with court-mandated formulas, in general, and with the 40-percent joint physical custody formula the majority adopts in this case, in particular, to determine child support and relocation disputes. A legislature has the capacity to debate social policy and to enact, amend, and repeal laws as experience and society dictate. Courts do not. The law courts apply is precedent-driven, or has its origin in statute or constitutional mandate. It is not only that judges tend to be innumerate, or that court-adopted formulas are of suspect provenance—though both are so—it is that laws adopted by judges are difficult to change if they do not work out. Because courts decide individual questions in individual cases, a bad rule of law can take a long time to return to a court; meanwhile, reliance interests counseling against changing that law are built. As the controversy over the original opinion and its withdrawal and replacement in this case suggest, establishing formulas is ordinarily best left to the Legislature.

More specifically troubling, the formulaic approach the majority adopts in this case is inconsistent with the approach the Nevada Legislature in fact chose to take. Thus, in 1987 the Nevada Legislature considered and rejected a proposal that would have established a 40-percent "joint physical custody" timeshare test and tied it to a corollary child support formula. A.B. 424, 64th Leg. (Nev. 1987), discussed in Barbagallo v. Barbagallo, 105 Nev. 546, 548, 779 P.2d 532, 534 (1989). Instead of a mathematical formula, the 1987 Legislature adopted the multifactored approach to determining support found in today's NRS 125B.080. Id. Based on this history, in 1989 this court held that it is "inappropriate for the courts to adopt their own formulas when the mathematical approach to adjusting the formula in joint custody cases has been considered and rejected by the legislature." Barbagallo, 105 Nev. at 550 n.2, 779 P.2d at 535 n.2 (as amended by 786 P.2d 673 (1990)).

The point is not whether a formulaic approach is good policy, providing helpful bright-line rules; or bad policy, creating a hostile "on the clock" mentality inconsistent with truly cooperative joint parenting. On this, reasonable policymakers differ, as the foreign state statutes catalogued, ante at p. 14 n.5 and p. 16 n.6, reflect. The point is that percentage time/support formulas are for the Legislature to evaluate, not for the court to establish by fiat.

The 40-percent joint physical custody test the majority adopts today, when tied, as intended, to eligibility for a child support offset under Wright v. Osburn, 114 Nev. 1367, 970 P.2d 1071 (1998), creates law indistinguishable from that Barbagallo says courts should abjure.[2] As a near-contemporaneous judicial interpretation of a controlling statutory scheme, Barbagallo should control. See Neal v. United States, 516 U.S. 284, 294-95 (1996) (giving "great weight to stare decisis in the area of statutory construction" because the legislature "is free to change this Court's interpretation of its legislation"; the Legislature, not the courts, "has the responsibility for revising its statutes"; and "[w]ere we to alter our statutory interpretations from case to case, [the Legislature] would have less reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair") (internal quotation omitted).

The family court's interpretation of its decree was sound

The stipulated decree was not irreconcilably inconsistent with joint physical custody

At its heart, this case asks how we should interpret the parties' stipulated divorce decree. Historically, this court defers to a trial court's interpretation of its own decrees. "It is the province of the trial court to construe its judgments and decrees." Grenz v. Grenz, 78 Nev. 394, 401, 374 P.2d 891, 895 (1962). Further, "[w]here a judgment is susceptible of two interpretations, that one will be adopted which renders it the more reasonable, effective and conclusive, and which makes the judgment harmonize with the facts and law of the case and be such as ought to have been rendered." Aseltine v. District Court, 57 Nev. 269, 273, 62 P.2d 701, 702 (1936) (internal

quotation omitted).

Both family court judges acknowledged the tension between the stipulated decree's joint physical custody provision and its original residential timeshare provision. They resolved the tension by giving priority to the parties' overarching agreement to share joint legal and physical custody. The elasticity in the original timeshare provision, which gave the father such additional time "as agreed to by the Parties" beyond his specifically allotted time, makes this reading fair. It gives effect to all of the stipulated decree's provisions, and it is consistent with the parties' apparent intent and their frank, on-the-record admissions that neither believed the other was a bad parent, their dispute being mainly over money and scheduling.

The family court judges' reading of the stipulated decree also comports with NRS 125.490, which states: "There is a presumption, affecting the burden of proof, that joint custody would be in the best interest of a minor child if the parents have agreed to an award of joint custody." See NRS 125.480(1) and (3)(a) (stating preference for orders awarding joint custody and providing that "[i]f it appears to the court that joint custody would be in the best interest of the child, the court may grant custody to the parties jointly"; statement of reasons required only if joint custody denied). The parents here "agreed to an award of joint custody" and the family court judge specifically stated on the record that she found that the timeshare, as adjusted, was in the child's best interest because it maximized the child's time with each parent instead of at day care. Remanding for further findings regarding custody thus seems unnecessary.

The mother did not establish a basis to modify child support

Nor do I find a basis in the record to remand for further findings as to support. While not elaborate, the decree specified the applicable statutory percentage and stipulated that the parties were agreeing to a downward deviation and the basis therefor. It read:

> The parties' respective obligation of child support for the parties' said minor child should are [sic] hereby offset and neither party is ordered to pay to the other child support; that this represents a deviation from the statutory child support formula as set forth in NRS 125B.070 (which states that child support for one child shall be eighteen percent (18%) of the non-custodial parent's income), based on the parties' joint legal and physical custody arrangement, pursuant to NRS 125B.080, subsection (9)(j). Each party shall jointly pay for the support and care of the parties' minor child.

In addition, the stipulated decree obligated the father to pay for the child's health insurance at a cost of $80 per month and to contribute $50 per month to an education fund for her, controlled by the child's mother.

As the majority notes, the mother filed successive motions to modify support. In connection with the first motion to modify support, the court minutes reflect that the mother reaffirmed what was represented in the stipulated decree—that "the parties [stipulated to] share joint custody," and that "the parties' incomes are similar." Both motions to modify relied on the alleged inconsistency between the agreement for joint physical custody and the timeshare provision. But read in conformity with the presumption in NRS 125.490, the stipulated decree was not irreconcilably inconsistent with joint physical custody. Further, any theoretical inconsistency was eliminated when the second judge modified the residential timeshare by substituting "Wednesday" for such additional time "as agreed on by the Parties," establishing a 4/3 timeshare that falls within the majority's 40-percent rule. Because neither of the underlying motions in this case identified a basis for modifying support besides the asserted lack of true joint physical custody timeshare agreement, further proceedings and findings, beyond those the original decree stated to justify its downward deviation, are unwarranted.[3]

Adjusting a residential timeshare in a joint physical custody arrangement is appropriate when in the child's best interest

An agreement to share joint physical custody, interpreted in light of the child's best interest, should determine the appropriate residential timeshare, not the reverse. Citing Wright, 114 Nev. at 1368, 970 P.2d at 1071-72, and Wesley v. Foster, 119 Nev. 110, 112-13, 65 P.3d 251, 252-53 (2003), the majority states that "[o]ur law presumes that joint physical custody approximates a 50/50 timeshare." I do not read these cases as that definitive—much less as supporting the majority's holding that a residential timeshare arrangement that works out to a child spending less than 40 percent of his or her time with one parent over the course of a year automatically invalidates a presumptively valid agreement for joint physical custody. As we recognized in Mosley, 113 Nev. at 54, 930 P.2d at 1112, a decree can validly establish joint physical custody even though the timeshare contemplated at the outset is not a 50/50 (or even a 60/40) arrangement, but one that will require fine-tuning over time.

Joint physical custody may ideally signify something approaching a 50/50 timeshare. However, I am concerned that our judicially mandated 40-percent formula will prove unsatisfactory, especially when used, as intended, to determine support and relocation disputes. Lives change and a child's time is divided, not just between his or her parents, but among friends, school or day care, extended family, sports, and other pursuits. Practical questions seem certain to scuff the bright-line rule—questions like how to count hours the child spends with people besides either parent, or which parent to credit for time the child spends pursuing activities both parents support. Of greater concern, making child support, relocation, and custody determinations depend on parents keeping logs of the number of hours each year a child spends with one parent or the other (leaving aside the calculation and credit questions) detracts from the type of true co-parenting our statutes try to promote. See NRS 125.460; NRS 125.490; see also In re Marriage of Birnbaum, 260 Cal. Rptr. 210, 214-15 (Ct. App. 1989) (dismissing as a "popular misconception" the idea "that joint physical custody means the children spend exactly one-half their time with each parent"; noting that "[p]arents' demands for equal amounts of a child's time [can] constitute a disservice to the child"; and that, while "[i]n some cases the nature of the relationship between the parents may necessitate

this kind of inflexibility[u]sually it is temporary, and when the former spouses have adjusted to their new and limited relationship . . . mathematical exactitude of time is no longer necessary"); Rutter's, California Practice Guide to Family Law, § 7:358 (2009) (noting that "[a] joint custody order does not mean the child must equally split all of his or her time between the parents"); see also Mosley, 113 Nev. at 60, 930 P.2d at 1116 (noting that "NRS 125.460 dictates the public policy of this state in child custody matters [which is] that the best interests of children are served by frequent associations and a continuing relationship with both parents and by a sharing of parental rights and responsibilities of child rearing") (internal citations omitted).

This case invites us to distinguish between adjusting parents' residential timeshare and formal proceedings to modify custody in the stipulated joint physical custody setting. California Family Code section 3011, like NRS 125.490(1), states a "presumption affecting the burden of proof" that agreements providing for joint custody are in a child's best interest. Addressing joint physical custody agreements, several intermediate California courts have exhorted "parents [to] understand that successful joint physical custody depends upon the quality of the parenting relationship, not the allocation of time." In re Marriage of Birnbaum, 260 Cal. Rptr. 210, 216 (Ct. App. 1989); see Enrique M. v. Angelina V., 18 Cal. Rptr. 3d 306, 313 (Ct. App. 2004) (citation omitted).

Both Birnbaum and Enrique M. recognize that disputes over the details of residential timeshare arrangements in cases involving joint physical custody are best settled by the parents, not the courts. Enrique M., 18 Cal. Rptr. 3d at 314 (noting that such adjustments are "not on a par with a request to change physical custody from sole to joint custody, or vice versa"). Thus, they refuse to fuel these disputes by expanding them into full blown custody proceedings, or reviewing them on appeal as if that is what they involve. If the parents cannot agree on the child's schedule, the family court should be held to "possess[ ] the broadest possible discretion in adjusting co-parenting residential arrangements involved in joint physical custody." Birnbaum, 260 Cal. Rptr. at 216. This rule fosters the policy presuming joint custody to be in a child's best interests and may even "obviate the need for costly and time-consuming litigation to change custody, which may itself be detrimental to the welfare of minor children because of the uncertainty, stress, and even ill will that such litigation tends to generate." Enrique M., 18 Cal. Rptr. 3d at 313 (internal quotation omitted).

The dispute underlying this case is not identical to those presented in Birnbaum and Enrique M., since it concerned time spent in day care, and child support, not school choice and residence during the school year. But the underlying principle is similar: When parties have agreed to joint physical custody, absent a showing that some other arrangement is in the child's best interest, courts should try to make that agreement succeed. In my estimation, we do the parties and their child a disservice by remanding this case for more litigation, instead of affirming the family court.

CONCLUSION

In sum, I would uphold the district court's order as consistent with Nevada statutes that presumptively favor joint custody, especially agreed-upon joint custody, and require that before a joint custody decree is modified, it must be shown that the child's best interest requires the modification. As district courts have broad discretion in deciding custody and support, so long as the policies set by statute are applied, the district court properly adjusted the parties' timeshare agreement and declined to modify the child support obligation to which the parties agreed.

With the exception of the portion of the opinion affirming the order denying disqualification of the family court judge, therefore, I respectfully dissent.

**********FOOTNOTES**********

[1] The formulaic approach is especially problematic where, as here, the family court directs a highly specific timeshare. If the parties have abided by the timeshare directed, they will meet the court's formula and joint physical custody will be established under the formula. If they haven't, we will be incentivizing disregard of a court order and argument over whose fault the departure was. The family court's approach seems preferable, in that it encourages self-determination by enforcing the parties' agreed-upon decree and attempting to interpret it consistently with applicable law and the child's best interest.

[2] The majority justifies its adoption of a 40-percent test for joint physical custody as providing needed clarity in parental relocation as well as child support offset cases. Ante at p. 12, citing Potter v. Potter, 121 Nev. 613, 618, 119 P.3d 1246, 1249 (2005). Relocation is not an issue here because the stipulated decree provided that if either party moved away from Las Vegas, joint legal custody would continue but primary physical custody would shift to the mother, with liberal visitation, including full summers, for the father. If anything, the decree's relocation provision shows that the parties knew how to distinguish between joint and primary physical custody and meant what they said—an assumption that finds further support in the fact that each had experienced counsel in fashioning the stipulated decree.

[3] In her reply in support of the motion to disqualify, the mother argued that the father had enjoyed an increase in income that independently justified modifying child support. While this would have been a proper basis to modify support, NRS 125B.145(4), the family court could not consider it since this basis was not raised in either motion to modify, both of which predated the motion to

disqualify and the reply in support thereof, where these arguments first emerged. Cf. Mosley v. Figliuzzi, 113 Nev. 51, 61, 930 P.2d 1110, 1116 (1997) (holding parties entitled to a written motion and advance notice of the alleged grounds before a custody modification order is entered). Now that the original decree is more than three years old, the mother is entitled to have its provisions respecting child support reviewed in any event, NRS 125B.145(1), but that is not the basis for reversal and remand.

Exhibit C

Ellis v. Carucci
123 Nev. ___, 161 P.3d 239 (Adv. Opn. No. 18, June 28, 2007).

A modification of primary physical custody is warranted only when the party seeking a modification proves there has been a substantial change in circumstances affecting the welfare of the child and the child's best interest is served by the modification (overruling *Murphy v. Murphy*, 84 Nev. 710, 447 P.2d 664).

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 43925

MELINDA ELLIS,
Appellant,
vs.
RODERIC A. CARUCCI,
Respondent.

Appeal from a district court order modifying child custody. Second Judicial District Court, Family Court Division, Washoe County; Deborah Schumacher, Judge.
Affirmed.

Karla K. Butko, Verdi, for Appellant.
Jack Sullivan Grellman, Reno, for Respondent.

BEFORE THE COURT EN BANC.

OPINION
By the Court, PARRAGUIRRE, J.:

In this appeal, we consider the circumstances under which a district court may modify primary physical custody of a minor child. In the past, this court has applied the two-prong test established in Murphy v. Murphy to determine when a modification of primary physical custody is appropriate.[1] Under the Murphy test, a modification is "warranted only when: (1) the circumstances of the parents have been materially altered; and (2) the child's welfare would be substantially enhanced by the change."[2] After Murphy was decided in 1968, however, the Legislature overhauled Nevada's child custody laws to focus solely on the best interest of the child.[3] In light of this legislative shift, we take this opportunity to revisit the Murphy test and now conclude that a modification of primary physical custody is warranted only when (1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the modification serves the best interest of the child. Applying the revised standard to this case, we perceive no abuse of discretion on the part of the district court in its decision to modify primary physical custody. Accordingly, we affirm the district court's order.

FACTS AND PROCEDURAL HISTORY

In December 2000, respondent Roderic Carucci and appellant Melinda Ellis stipulated to a decree of divorce. This decree incorporated a paternity and child custody agreement between the parties and provided that Carucci and Ellis would share joint legal custody of their daughter, Geena, with Ellis having primary physical custody and Carucci having liberal visitation.

Carucci files a motion to modify custody

In March 2004, Carucci filed a motion to modify primary physical custody, arguing that the circumstances warranted a change in custody because, among other things, Geena's school performance was in decline. After Carucci filed a second emergency motion to modify custody, the district court set the matter for a hearing.

At the hearing, Bridgett Banta, Geena's elementary school teacher, testified that Geena, an exceptionally bright student, performed very well during the first two quarters of the school year but had struggled during the third and fourth quarters. Banta explained, for example, that Geena's weekly progress reports between December 2003 and March 2004 included several notations indicating that Geena had failed to turn in homework and had been talking in class. Banta also testified that Geena's school performance had dropped significantly because she was not applying herself as she had in the past. According to Banta, Geena did not complete her assignments and refused to revise her work when Banta requested that Geena do so.

Banta further testified that she often discussed Geena's academic performance with Carucci because he regularly inquired about her progress, but, by contrast, Banta had very little contact with Ellis. In summary, Banta concluded that Geena's school performance had deteriorated and that she needed more encouragement from both parents.

Following Banta's testimony, the district court noted that it had concerns about Geena's school performance but

concluded that the circumstances did not justify an emergency change in custody. As a result, the district court scheduled the matter for an evidentiary hearing. The parties agreed to perpetuate Banta's testimony so that she would not need to testify again. In addition, the parties stipulated that Dr. Joann Lippert would conduct a family evaluation and submit a report to the district court.

The evidentiary hearing on Carucci's motion took place in July 2004, with Dr. Lippert, Carucci, and Ellis testifying.[4] Dr. Lippert testified regarding Geena's strong attachment to both of her parents and her desire to maintain a relationship with each of them. She also recommended that Carucci and Ellis share physical custody of Geena. In making her recommendation, Dr. Lippert noted that Geena's best interest would be served if both of her parents were actively involved in their daughter's education and were able to provide Geena with assistance and guidance.

Carucci testified that he met with Banta at least once every two weeks to discuss Geena's progress in school and frequently communicated with Banta through e-mail. Separately, Carucci asserted that because he and his new wife emphasize education, he believed they could best assist Geena in her studies.

Similarly, Ellis testified that she and her new husband often assisted Geena with her homework. Ellis also claimed that Geena's mood and academic performance had begun to decline in January 2004, and Ellis believed this decline was due to increased stress from her parents' ongoing custody disputes.

The district court grants Carucci's motion to modify custody

Following the evidentiary hearing, the district court entered a written order granting Carucci's motion to modify primary physical custody. In its order, the court determined that joint physical custody was in Geena's best interest and thus modified the custody arrangement so that Carucci and Ellis would alternate week-long custody of their daughter. The district court stated that Geena's school performance was the key substantial issue litigated and concluded that Banta's testimony that Geena's academic achievement had significantly slipped constituted sufficient evidence of changed circumstances to warrant a modification. The district court further concluded that Carucci was the parent most involved in Geena's education and, as a result, a modified arrangement allowing Carucci to become her joint physical custodian would serve Geena's best interest. In reaching its conclusion, the district court felt constrained by the Murphy test and found that, in this instance, the child's best interest was paramount. Ellis appealed the court's order.

DISCUSSION

On appeal, Ellis contends that the district court abused its discretion by granting Carucci's motion to modify primary physical custody of their daughter because the evidence does not demonstrate a change in circumstances or that the modification would be in their daughter's best interest. We disagree.

Standard of review

We have repeatedly recognized the district court's broad discretionary powers to determine child custody matters, and we will not disturb the district court's custody determinations absent a clear abuse of discretion.[5] However, the district court must have reached its conclusions for the appropriate reasons.[6] In reviewing child custody determinations, we will not set aside the district court's factual findings if they are supported by substantial evidence,[7] which is evidence that a reasonable person may accept as adequate to sustain a judgment.[8]

Modification of child custody

In Nevada, when a district court determines the custody of a minor child, "the sole consideration of the court is the best interest of the child."[9] Under NRS 125.480(4), "[i]n determining the best interest of the child, the court shall consider and set forth its specific findings concerning, among other things . . . (g) The physical, developmental and emotional needs of the child." Although "the court may . . . [a]t any time modify or vacate its order" upon "the application of one of the parties,"[10] because numerous courts have documented the importance of custodial stability in promoting the developmental and emotional needs of children,[11] we acknowledge that courts should not lightly grant applications to modify child custody.

We first recognized the importance of custodial stability in Murphy v. Murphy, where we concluded that "change of custody is warranted only when: (1) the circumstances of the parents have been materially altered; and (2) the child's welfare would be substantially enhanced by the change."[12] Since then, this court has consistently applied the Murphy test in determining whether the district court has properly granted a motion to modify primary physical custody. While the underlying premise behind the Murphy standard, which aims to promote stability by discouraging the frequent relitigation of custody disputes, still applies today, we conclude that the Murphy standard unduly limits courts in their determination of whether a custody modification is in the best interest of the child.[13] This is so, at least in part, because Murphy was decided in 1968, more than a decade before the Nevada Legislature amended NRS 125.480 and 125.510 to identify the "best interest of the child" as the primary concern in custody determinations. Accordingly, we take this opportunity to revisit the Murphy standard and now conclude that a modification of primary physical custody is warranted only when (1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the child's best interest is served by the modification.[14] Under this revised test, the party seeking a modification of custody bears the burden of satisfying both prongs.[15]

In reaching our conclusion, we overrule Murphy to the extent that it required a change in "the circumstances of the parents" alone, without regard to a change in the circumstances of the child or the family unit as a whole. We note, however, that under the revised test, there must still be a finding of a substantial change in circumstances. While the Murphy test is too restrictive because it improperly focuses on the circumstances of the parents and not the child, custodial stability is still of significant concern when considering a child's best interest. The "changed circumstances" prong of the revised test serves the important purpose of guaranteeing stability unless circumstances have changed to such an extent that a modification is appropriate. In determining whether the facts warrant a custody modification, courts should not take the "changed

circumstances" prong lightly. Moreover, any change in circumstances must generally have occurred since the last custody determination because the "changed circumstances" prong "is based on the principle of res judicata" and "prevents 'persons dissatisfied with custody decrees [from filing] immediate, repetitive, serial motions until the right circumstances or the right judge allows them to achieve a different result, based on essentially the same facts.'"[16]

The second prong of the revised test acknowledges the legislative mandate that when making a child custody determination, "the sole consideration of the court is the best interest of the child,"[17] and not whether "the child's welfare would be substantially enhanced"[18] by the modification. This revision is significant because a modification of custody may serve a child's best interest even if the modification does not substantially enhance the child's welfare. In making a determination as to whether a modification of custody would satisfy the "best interest" prong of the revised test, courts should look to the factors set forth in NRS 125.480(4) as well as any other relevant considerations.

Ellis's arguments against modification

On appeal, Ellis contends that substantial evidence does not support the district court's decision to modify custody. The district court concluded that the testimony of Geena's second-grade teacher, Bridgett Banta, demonstrated a sufficient decline in Geena's academic performance to constitute a substantial change in circumstances affecting her welfare. In addition, the district court found that the modification serves Geena's best interest by allowing her father more time to be involved in her education.

Substantial change in circumstances

At the hearing on Carucci's emergency motion to modify custody, Banta testified that Geena's academic preparation and performance had slipped while in Ellis's primary care. Banta based her opinion of Geena's academic performance on a daily in-class observation of Geena's declining effort and preparation. Although the evidence concerning the seriousness of Geena's academic problems was conflicting, we leave witness credibility determinations to the district court and will not reweigh credibility on appeal.[19]

While this case presents a close question, Banta's testimony constitutes substantial evidence in support of the district court's finding that a change in circumstances affecting Geena's welfare warranted a modification of child custody. We perceive no abuse of discretion on the district court's part in determining that Geena's documented 4-month slide in academic performance constituted a substantial change in circumstances.

Child's best interest

Ellis also argues that Carucci presented no evidence demonstrating that a modification of custody was in Geena's best interest. Ellis's argument, however, disregards Banta's and Carucci's testimony regarding Carucci's involvement with Geena's education. As the district court acknowledged, "the evidence clearly portrayed Mr. Carucci as the parent most connected to and involved with Geena's school, even as the non-custodial parent." Moreover, Dr. Lippert testified that Geena's best interest would be served if both of her parents were actively involved in their daughter's education and were able to provide Geena with assistance and guidance. Because parental involvement in a child's education is certainly in the child's best interest, we conclude that substantial evidence supports the district court's finding that a modification granting Geena's father joint physical custody served her best interest.

CONCLUSION

A modification of primary physical custody is warranted only when (1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the modification would serve the child's best interest. In this case, the testimony before the district court regarding Geena's decline in school performance supports the court's conclusion that both of these elements were satisfied. Thus, the district court did not abuse its discretion when it determined that a modification of custody was warranted. Accordingly, we affirm the judgment of the district court.[20]

MAUPIN, C.J., GIBBONS, HARDESTY, DOUGLAS, CHERRY and SAITTA, JJ., concur.

**********FOOTNOTES**********

[1] 84 Nev. 710, 711, 447 P.2d 664, 665 (1968).

[2] Id.

[3] See, e.g., NRS 125.480(1).

[4] Dr. Lippert testified telephonically over Ellis's objection.

[5] Rico v. Rodriguez, 121 Nev. 695, 701, 120 P.3d 812, 816 (2005) (quoting Primm v. Lopes, 109 Nev. 502, 504, 853 P.2d 103, 104 (1993)).

[6] Id.; Sims v. Sims, 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993).

[7] Rico, 121 Nev. at 701, 120 P.3d at 816.

[8] Williams v. Williams, 120 Nev. 559, 566, 97 P.3d 1124, 1129 (2004).

[9] NRS 125.480(1).

[10] NRS 125.510(1)(b).

[11] See, e.g., In re Stephanie M., 867 P.2d 706, 718 (Cal. 1994) ("In any custody determination, a primary consideration in determining the child's best interest is the goal of assuring stability and continuity."); Delzer v. Winn, 491 N.W.2d 741, 744 (N.D. 1992) ("Maintaining stability and continuity in the child's life is a very compelling consideration when determining child custody . . . . This is especially true when modification of custody is sought."); Westphal v. Westphal, 457 N.W.2d 226, 229 (Minn. Ct. App. 1990) (Minnesota law reflects "a settled policy view that stability of custody is usually in the child's best interest"); Everett v. Everett, 433 So. 2d 705, 708 (La. 1983) ("Stability and continuity must be considered in determining

what is in the best interest of the child."); see also Guardianship of N.S., 122 Nev. 305, 313, 130 P.3d 657, 662 (2006) (concluding that the district court's analysis in the placement of a child should focus on whether the proposed plan will provide a stable, safe and healthy environment for the child).

[12] 84 Nev. 710, 711, 447 P.2d 664, 665 (1968).

[13] See NRS 125.480.

[14] See id.; Selvey v. Selvey, 102 P.3d 210, 214 (Wyo. 2004) ("A party seeking modification of the custody provision of a divorce decree bears the burden of demonstrating that: (1) a material and substantial change of circumstances affecting the child's welfare has occurred since the entry of the initial divorce decree, and (2) a modification is in the child's best interests."); Evans v. Evans, 530 S.E.2d 576, 578-79 (N.C. Ct. App. 2000) ("Once the custody of a minor child is determined by a court, that order cannot be altered until it is determined (1) that there has been a substantial change in circumstances affecting the welfare of the child; and (2) a change in custody is in the best interest of the child." (citations omitted)); accord Walker v. Walker, 184 S.W.3d 629, 632 (Mo. Ct. App. 2006) (discussing Mo. Ann. Stat. § 452.410.1 and concluding that in proceedings to modify child custody "[t]he burden is on the moving party to prove a substantial change has occurred and that a modification of custody is in the best interests of the minor children"); Collins and Collins, 51 P.3d 691, 693 (Or. Ct. App. 2002) (recognizing that because modifications of custody are disruptive to a child's life, "the party moving for the change [must] demonstrate that (1) a change in circumstances has occurred since the most recent custodial order, and that (2) the modification will serve the best interests of the child"); McKinnie v. McKinnie, 472 N.W.2d 243, 244 (S.D. 1991) ("As a general rule, a parent seeking a change of custody must show 1) a substantial change of circumstances, and 2) that the welfare and best interests of the child require modification."); see also Pecore v. Pecore, 824 N.Y.S.2d 690, 692 (App. Div. 2006) ("It is well settled that '[a] modification of an established custodial arrangement will be granted only after a showing of a substantial change in circumstances warranting a change in order to [safeguard] the best interests of the child'" (internal quotation marks omitted)).

[15] See 2 Jeff Atkinson, Modern Child Custody Practice § 10-3 (2d ed. 2006); Larson v. Larson, 350 N.W.2d 62, 63 (S.D. 1984).

[16] Castle v. Simmons, 120 Nev. 98, 103-04, 86 P.3d 1042, 1046 (2004) (quoting Mosley v. Figliuzzi, 113 Nev. 51, 58, 930 P.2d 1110, 1114 (1997)). We note that there is at least one set of facts under which the "changed circumstances" prong does not apply: as we recently explained in Castle v. Simmons, a district court may consider evidence of domestic abuse that occurred before a previous custody determination, but which was unknown to the moving party or the court at the time of the prior determination. Id. at 105, 86 P.3d at 1047. Our decision today does not affect this exception to the "changed circumstances" prong of the custody modification test.

The parties do not raise, and we do not address, whether a party seeking modification of child custody must satisfy the "changed circumstances" prong when the original arrangement was based on an agreement of the parties. See Larson, 350 N.W.2d at 63.

[17] NRS 125.480(1).

[18] Murphy, 84 Nev. at 711, 447 P.2d at 665.

[19] Castle, 120 Nev. at 103, 86 P.3d at 1046.

[20] We have considered Ellis's remaining arguments and we conclude that they are without merit.

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Exhibit D

Cite as Truax v. Truax, 110 Nev. 437, 874 P.2d 10 (1994)

John Thomas TRUAX, Appellant,
v.
Rita TRUAX, Now Known as Rita Briley, Respondent.

No. 24176.

Supreme Court of Nevada.

May 19, 1994.

Carol Menninger, Las Vegas, for appellant.

Dickerson, Dickerson, Lieberman & Consul, Las Vegas, for respondent.

OPINION

PER CURIAM:[1]

The litigants have been fighting over the custody of their three children for the past several years. This fight has been the stage for a myriad of allegations, formal charges, and official court battles. As of 1991, the parents were subject to a "shared" or joint physical custody order of the district court.

In December 1991, Rita petitioned the domestic relations referee to commission a court-appointed special advocate ("CASA") to investigate evidence of child abuse. Rita claimed that her son was being physically abused by John Thomas Truax's (Thomas) daughter from a prior marriage. A CASA was assigned and conducted an examination of all three children.

To the agreement of both parties, the referee held an evidentiary hearing to consider the CASA's evaluations and other expert testimony. At that hearing, three experts presented exhaustive testimony regarding their respective examinations of the "familial" relationship.

The referee found that the best interests of the children would be served by vesting Rita with primary physical custody and affording Thomas visitation rights. The referee agreed with the testimony and recommendations of the CASA; the joint custody order was working to the detriment of the children, and there was evidence that the litigant's son was being mistreated while at Thomas' home. After considering Thomas' objections, the district court adopted the referee's findings.

Thomas appeals, claiming that the child custody referee applied the wrong legal standard when

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[1]This appeal was previously dismissed in an unpublished order of this court. Pursuant to a request from Judge Marren of the Family Court, we issue this opinion in place of our order dismissing appeal filed December 22, 1993.

considering a modification of joint custody. He also argues that the district court abused its discretion by adopting the referee's findings and recommendations. We disagree with both contentions and affirm the district court's order.

NRS 125.510(2) specifically describes when a joint custody arrangement may be revisited and modified by the court:

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

(Emphasis added.) Thomas disregards this language and mistakenly cites Murphy v. Murphy, 84 Nev. 710, 447 P.2d 664 (1968), for the proposition that the court can only modify custody where circumstances are materially altered and a change would substantially enhance the children's welfare.

This argument fails for two reasons. First, Thomas did not preserve this argument for appeal. Failing to object in the district court level, we cannot consider the merits of Thomas' contentions. Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983-84 (1981) (aside from general jurisdiction, issues not objected to at trial court are waived for appeal). Second, Murphy is inapplicable to the instant case. The decision was handed down in 1968, well before NRS 125.510(2) was enacted by the Nevada Legislature in 1981. See 1981 Nev.Stat., ch. 148 at 283-84. Moreover, Murphy only describes when a modification to a primary custody agreement is warranted. In view of these simple facts and the plain language of NRS 125.510(2), we conclude that the referee properly applied the best interests of the child standard in the instant case.

Thomas' second claim of error does not fare any better than his first. Consistent with Nevada statutes and pertinent case law, trial courts are vested with broad discretion concerning child custody matters. NRS 125.510; Rooney v. Rooney, 109 Nev. 540, 853 P.2d 123 (1993). This court will not disturb a lower court's findings absent a clear abuse of that discretion. Gilbert v. Warren, 95 Nev. 296, 594 P.2d 696 (1979); Culbertson v. Culbertson, 91 Nev. 230, 533 P.2d 768 (1975).

Thomas asserts that the district court abused its discretion by improperly discounting the testimony of Dr. Elizabeth Richitt. He points out that Dr. Richitt had spent far more time interviewing and dealing with the three children than did the CASA. He then asserts that Dr. Richitt's opinions about "coaching" and "parental alienation syndrome" should not have been disregarded by the referee. In other words, Thomas is claiming that the CASA was duped by the three children, and thus, the CASA's testimony was skewed in favor of Rita.

Thomas is simply rehashing trial court argument. It is the referee's prerogative, as the arbiter of fact, to decide which testimony is most credible. Roggen v. Roggen, 96 Nev. 687, 615 P.2d 250 (1980). There is nothing in the record that indicates that the referee abused its discretion in exercising this prerogative.

The CASA reported that each child claimed they were being left unsupervised with Thomas'

daughter from a prior marriage, in clear violation of a prior court order. Each child also claimed that this same individual was physically abusive on several occasions. This testimony is corroborated by the severe bite mark inflicted on the litigants' son. In addition, the CASA opined that the joint custody arrangement was detrimental to the children's well-being and required some type of modification. Finally, all these findings were consistent with Dr. Lewis Etcoff's evaluations (a third testifying expert). Dr. Etcoff agreed with the CASA's testimony and determined that there was no evidence of parental alienation syndrome.

Considering all the evidence and testimony contained in the record, we conclude that the trial court did not abuse its discretion by adopting the referee's findings.

Therefore, we affirm the order of the district court.

Exhibit E

NRS 125.460 State policy. The Legislature declares that it is the policy of this State:

1. To ensure that minor children have frequent associations and a continuing relationship with both parents after the parents have become separated or have dissolved their marriage; and

2. To encourage such parents to share the rights and responsibilities of child rearing.

(Added to NRS by 1981, 283)—(Substituted in revision for NRS 125.132)

EXHIBIT F

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

(Added to NRS by 1993, 1425)

Exhibit G

SUSAN L. MCMONIGLE, Appellant, vs. ROBERT M. MCMONIGLE, Respondent.
110 Nev. 1407; 887 P.2d 742; 1994 Nev. LEXIS 168
No. 25296
December 22, 1994, FILED
SUPREME COURT OF NEVADA
Rose, C.J. Steffen, J. Young, J. Springer, J. Shearing, J.

1. Disposition
Reversed and remanded.

Counsel Marshal S. Willick, Las Vegas, for Appellant.
Woodburn & Wedge and James W. Erbeck, Las Vegas, for Respondent.

Opinion

Editorial Information: Prior History

Appeal from a district court order changing child custody. Eighth Judicial District Court, Clark County; Frances-Ann Fine, Judge.

{110 Nev. 1408} {887 P.2d 743} *OPINION*

PER CURIAM:

On March 2, 1992, appellant Susan Grandgeorge (Susan), then Susan McMonigle, and respondent Robert McMonigle (Robert) were divorced. The district court ordered primary custody of their one child, Mari, to Susan.

On March 17, 1993, Robert filed a motion to modify custody. The same day an ex parte restraining order gave him custody of Mari pending a hearing. On March 23, 1993, an initial hearing left the restraining order unchanged. In June, 1993, the district court gave Robert temporary custody. After a seven-day hearing which stretched from September 7 to October 6, 1993, the court awarded Robert permanent custody of Mari. Susan appealed.

We now reverse the order changing custody because the district judge improperly based her decision in large part on irrelevant evidence.

Once primary custody has been established, a court can consider changing custody only if "(1) the circumstances of the parents have been materially altered; and (2) the child's welfare would be substantially enhanced by the change." Murphy v. Murphy, 84 Nev. 710, 711, 447 P.2d 664, 665 (1968). "The moving party in a custody proceeding must show that circumstances . . . have substantially changed *since* the most recent custodial order. . . . Events that took place before that proceeding [are] inadmissible to establish a change of circumstances." Stevens v. Stevens, 107 Ore. App. 137, 810 P.2d 1334, 1336 (Or. Ct. App. 1991) (citations omitted).

The district court set forth the *Murphy* standard in its final order, but did not explicitly specify the circumstances it found altered. However, it is clear that some of the circumstances it considered were not appropriate under *Murphy*.

During the long evidentiary hearing in this case, the district court received extensive testimony and numerous exhibits relating to the period before March 2, 1992, the date of the divorce judgment and thus the last custody order prior to Robert's motion to modify custody. The court apparently realized this evidence was not relevant and stated in its final order that it had not addressed matters prior to the last custody order. Nevertheless, it expressly based its decision in large part on some of this evidence.

First, and most important, the district court improperly considered Susan's move to Kansas City and continued residence there. The court stated in its order that "any activities with respect to {110 Nev. 1409} [Susan] which occurred prior to [her] move to Kansas City were disregarded." Thus, the court considered the move itself to be within its purview. However, Susan moved to Kansas City in November, 1991, before the final divorce judgment. In fact, that judgment noted that she had already moved and therefore ordered her to share Robert's travel expenses for visitation. Accordingly, consideration of Susan's relocation was improper under *Murphy*.

Second, the district court found it improper that Susan did not provide Robert with "certain reports" concerning Mari. This finding apparently refers to reports generated in Santa Barbara in 1990, about which extensive testimony and argument were {887 P.2d 744} heard. Again, consideration of this evidence was improper under *Murphy*.

It is harmless error if a court incorrectly admits evidence which does not affect the substantial rights of the parties. NRCP 61. Also, this court has held that "where inadmissible evidence has been received by the court, sitting without a jury, and there is other substantial evidence upon which the court based its findings, the court will be presumed to have disregarded the improper evidence." Dep't of Highways v. Campbell, 80 Nev. 23, 33, 388 P.2d 733, 738 (1964).

Whether there was other substantial evidence in this case is arguable but need not be decided because the court below, instead of disregarding inadmissible evidence, expressly relied on it in reaching its decision. Susan's substantial rights were adversely affected most notably by the court's preoccupation throughout the proceedings with her living in Kansas City. In fact, the court would have allowed Susan to retain shared primary custody *but for* the fact she lived out of state. The court stated in its temporary order of June 28, 1993: "If [Susan] moves to Las Vegas, there could be shared primary physical custody." In its final order it stated: "If both parents had resided in Clark County, Nevada, this decision would be an easy one. An award of joint legal and joint physical custody to both parents would permit a check and balance system to insure the needs of this magical child are met."

Since the district court considered Susan fit, absent the irrelevant fact that she lived outside Nevada, to share primary custody of Mari, we reverse and remand with instructions that primary custody be restored to Susan.

Rose, C.J.

Steffen, J.

Young, J.

Springer, J.

Shearing, J.

Exhibit H

5.22 Rule .Domestic violence; protection orders.

This rule governs all requests for temporary and extended protection orders against domestic violence under (a) NRS 33.017 et seq.

The standard of proof for the issuance of a temporary (TPO) or extended protection order pursuant to (b) NRS 33.020(1) is "to the satisfaction of the court." This contemplates a lesser standard than a preponderance of the evidence and is equivalent to a reasonable cause or probable cause standard.

Due to the exigent nature of the TPO, the application and order for the extension of the TPO must be served no later than 24 hours prior to the scheduled hearing date. (c)

An application requesting an extended protection order must be based upon an affidavit setting forth specific facts within the affiant's personal knowledge which justify the issuance of such an order. (d)

If the application for an extended protection order contains a request for spousal or child support, the applicant must file a financial affidavit on a form approved by the court. (e)

No extended protection order may be renewed beyond the statutory maximum period nor may a new extended protection order be granted based upon the filing of a new application which does not contain a new and distinct factual basis for the issuance of an order. (f)

The court may appoint one or more full-time or part-time family division masters and alternates to serve as domestic violence commissioners. Interim orders signed by the domestic violence commissioner are effective upon issuance subject to approval by the assigned district court judge. A duly-appointed domestic violence commissioner has the authority to: (g)

Review applications for temporary and extended protection orders against domestic violence. (1)

Schedule and hold contempt hearings for alleged violations of temporary and extended protection orders; recommend a finding of contempt; and recommend the appropriate sanction subject to approval by the assigned district court judge. (2)

Recommend a sanction upon a finding of contempt in the presence of the court subject to approval of the assigned district court judge. (3)

Issue, extend, mod (4)ify, or dissolve protection orders against domestic violence under NRS 33.030.

Perform other duties as directed by the assigned district court judge. (5)

A Family Division Master or domestic violence alternate shall have the power to issue TPO's against domestic violence pursuant to (h) NRS 33.020(5). However, any emergency temporary protection order issued by telephone by a Family Division Master or domestic violence alternate, under this section, must be set for hearing within one week of issuance by the Family Division Master or domestic violence alternate on the court's calendar.

The interim orders, modifications or dissolutions, and recommendations pursuant to decision by the domestic violence commissioner shall be in full force and effect until further order of the assigned district court judge irrespective of any post decision motion which may be filed between the rendering of the decision and further order of the court. (i)

In determining whether or not to issue an ex parte TPO pursuant to (j) NRS 33.020, the assigned district court judge or the domestic violence commissioner may take steps to verify the written information provided by the applicant. This verification may include contacting Child Protective Services to determine whether a case is under investigation by that agency and involving either party. Child Protective Services or other agencies may be requested to attend the protection order hearing. Prior domestic violence history of either party may also be researched using criminal justice resources.

When a TPO case and a domestic case have been filed, the domestic violence commissioner will hear the extended protection order matter and related issues, unless a motion has been filed in the domestic case. After a motion is filed and heard by the assigned judge of record, all subsequent protection order filings and all other issues will be heard by that judge until final determination of the domestic case. After the final resolution of the domestic case, the judge of record will determine whether to hear any subsequent protection order filings. (k)

If a domestic case is active, an interim order made by the domestic violence commissioner, other than the protection order determination, will remain in effect for 60 days subject to approval by the assigned judge of record. If there has not been a domestic case filed, **any** interim order may remain in effect for the life of the protection order unless a subsequent modification is made by the assigned judge.

Exception: When a motion is filed in a domestic case **after** the initial TPO has been granted and a hearing has already been set in the TPO court, the domestic violence commissioner may make interim orders on "emergency" matters at the time set for the extended protection order hearing.

Exception: The domestic violence commissioner must bring all TPO cases to the attention of the assigned judge of record before taking any action. The assigned judge may then decide to hear **any** temporary protection order or extended protection order matter. The assigned judge may also direct that the domestic violence commissioner hear any temporary protection order or extended protection order matter and related issues, if there has been little or no recent activity in the domestic case.

The assigned district court judge or domestic violence commissioner may, pursuant to its discretion, waive the requirements of Rule 5.02 sua sponte or at the request (l) of either party.

A party may object to the domestic violence commissioner's recommendation, in whole or in part, by filing a written objection within 10 days after the decision in the matter. (m)

If the objecting party was not present at the hearing, the 10 day objection period will begin upon the written or personal service of the extended protection order on that party. (1)

The domestic violence commissioner's recommendation would remain in effect until the objection is heard. A copy of the written objection must be served on the other party. If the other party's address is confidential, service may be made on the protection order office for service on the other party. At the hearing on the objection, the assigned district court judge will review the matter and set aside only those recommendations that are found to be "clearly erroneous." (2)

The applicant may be ordered to pay all costs and fees incurred by the adverse party if by clear and convincing evidence it is proven that the applicant knowingly filed a false or intentionally misleading affidavit. (n)

[Amended; effective August 21, 2000.]

Exhibit 1

NRS 33.020 Requirements for issuance of temporary and extended orders; availability of court; court clerk to inform protected party upon transfer of information to Central Repository.

1. If it appears to the satisfaction of the court from specific facts shown by a verified application that an act of domestic violence has occurred or there exists a threat of domestic violence, the court may grant a temporary or extended order. A temporary or extended order must not be granted to the applicant or the adverse party unless the applicant or the adverse party has requested the order and has filed a verified application that an act of domestic violence has occurred or there exists a threat of domestic violence.

2. The court may require the applicant or the adverse party, or both, to appear before the court before determining whether to grant the temporary or extended order.

3. A temporary order may be granted with or without notice to the adverse party. An extended order may only be granted after notice to the adverse party and a hearing on the application. A hearing on an application for an extended order must be held within 45 days after the date on which the application for the extended order is filed.

4. The court shall rule upon an application for a temporary order within 1 judicial day after it is filed.

5. If it appears to the satisfaction of the court from specific facts communicated by telephone to the court by an alleged victim that an act of domestic violence has occurred and the alleged perpetrator of the domestic violence has been arrested and is presently in custody pursuant to NRS 171.137, the court may grant a temporary order. Before approving an order under such circumstances, the court shall confirm with the appropriate law enforcement agency that the applicant is an alleged victim and that the alleged perpetrator is in custody. Upon approval by the court, the signed order may be transmitted to the facility where the alleged perpetrator is in custody by electronic or telephonic transmission to a facsimile machine. If such an order is received by the facility holding the alleged perpetrator while the alleged perpetrator is still in custody, the order must be personally served by an authorized employee of the facility before the alleged perpetrator is released. The court shall mail a copy of each order issued pursuant to this subsection to the alleged victim named in the order and cause the original order to be filed with the court clerk on the first judicial day after it is issued.

6. In a county whose population is 52,000 or more, the court shall be available 24 hours a day, 7 days a week, including nonjudicial days and holidays, to receive communications by telephone and for the issuance of a temporary order pursuant to subsection 5.

7. In a county whose population is less than 52,000, the court may be available 24 hours a day, 7 days a week, including nonjudicial days and holidays, to receive communications by telephone and for the issuance of a temporary order pursuant to subsection 5.

8. The clerk of the court shall inform the protected party upon the successful transfer of information concerning the registration to the Central Repository for Nevada Records of Criminal History as required pursuant to NRS 33.095.

(Added to NRS by 1979, 946; A 1985, 2286; 1993, 810; 1995, 902; 1997, 1808; 1999, 1372; 2001, 1214; 2011, 1138)

Exhibit J

NRS 33.018 Acts which constitute domestic violence.

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

(a) A battery.

(b) An assault.

(c) Compelling the other person by force or threat of force to perform an act from which the other person has the right to refrain or to refrain from an act which the other person has the right to perform.

(d) A sexual assault.

(e) A knowing, purposeful or reckless course of conduct intended to harass the other person. Such conduct may include, but is not limited to:

(1) Stalking.

(2) Arson.

(3) Trespassing.

(4) Larceny.

(5) Destruction of private property.

(6) Carrying a concealed weapon without a permit.

(7) Injuring or killing an animal.

(f) A false imprisonment.

(g) Unlawful entry of the other person's residence, or forcible entry against the other person's will if there is a reasonably foreseeable risk of harm to the other person from the entry.

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

(Added to NRS by 1985, 2283; A 1995, 902; 1997, 1808; 2007, 82, 1275)

Exhibit K

APPO

DISTRICT COURT,
FAMILY DIVISION,
CLARK COUNTY, NEVADA

_____,
Applicant,

Case No. T_____

vs.

_____,
Adverse Party.

APPLICATION FOR A TEMPORARY AND/OR EXTENDED ORDER FOR PROTECTION AGAINST DOMESTIC VIOLENCE

Applicant states the following facts under penalty of perjury:

Applicant Date of Birth: _____ Adverse Party Date of Birth: _____

1. My relationship to the Adverse Party is (for example, current/former husband, current/former wife, current/former boyfriend, current/former girlfriend, father, mother ,brother, sister, etc.):

_____.

☐ Length of relationship: _____.

☐ Have you ever lived together? Yes or No _____. If so, how long? _____.

☐ Are you living together now? Yes or No _____.

☐ Date of Separation: _____.

☐ We have child(ren) TOGETHER: Yes or No _____. If yes, where and with whom are these child(ren) living? _____.

2. My address is: ☐ CONFIDENTIAL, (If confidential do not write address here)

or, if not confidential list _____

City_____ County _____ State _____ Zip Code _____

Phone _____.

I ☐ own ☐ rent this residence. Lease/title is held in all the following name(s):

_____

I have been living in this residence for _____.

3. Adverse Party's address is: _____

City _____ County _____ State _____ Zip Code _____

Phone:_____ .

Adverse Party has been living in this residence for _____.

4. My employment is: ☐ CONFIDENTIAL, (If confidential do not write address here)
or, if not confidential, state place of employment _____
Address: _____
City _____ County _____ State _____ Zip Code _____
Phone _____

5. Adverse Party's employment is: _____
Address: _____
City _____ County _____ State _____ Zip Code _____
Phone _____

6. (a) The name(s) and dates of birth of minor child(ren) who I am the parent of, or who live in my home, are as follows:

NAME(first and last)	Date of Birth	APPLICANT'S CHILD (YES/NO)	ADVERSE PARTY'S CHILD (YES/NO)	WHO CHILD LIVES WITH
1.		Check one Yes ☐ No ☐	Check one Yes ☐ No ☐	
2.		Check one Yes ☐ No ☐	Check one Yes ☐ No ☐	
3.		Check one Yes ☐ No ☐	Check one Yes ☐ No ☐	
4.		Check one Yes ☐ No ☐	Check one Yes ☐ No ☐	
5.		Check one Yes ☐ No ☐	Check one Yes ☐ No ☐	

(b) Have you or the Adverse Party ever been awarded custody of the minor child(ren) that you have in common by Court order? ☐ Yes ☐ No

Who was awarded custody? ☐ Applicant ☐ Adverse Party

By what Court? _____ Case No. _____

7. Please check the appropriate box, IF YOU or the ADVERSE PARTY has ever filed a case in any Court for ☐ Divorce, ☐ Custody, ☐ Paternity, ☐ Child Support, ☐ Guardianship, ☐ Order for Protection, ☐ Stalking/Harassment Order. Please indicate when and where the case was filed, and list the case numbers. _____

_____

_____

_____

_____

8. Has CHILD PROTECTIVE SERVICES (CPS) ever been contacted regarding any member of the household in the past year? ☐ Yes ☐ No. Is CPS currently involved with this family? ☐ Yes ☐ No.
If yes to the question, give details, including the caseworker's name: _____

_____

_____

_____

_____

_____

9. ☐ I have been or reasonably believe I will become a victim of domestic violence committed by the Adverse Party.

☐ My child(ren) have been or are in danger of being a victim of domestic violence committed by the Adverse Party.

In the following space, state the facts which support your application. Be as specific as you can, starting with the most recent incident. Include the approximate dates of domestic violence, how long it has gone on, and whether law enforcement or medical personnel have been involved.

Please do not write on the backs of any pages.

10. Have YOU ever been arrested or charged with domestic violence, or any other crime committed against your spouse, partner, or child(ren)? ☐ Yes ☐ No. If yes, WHEN and where? _____

_____

_____

11. To your knowledge, has the **ADVERSE PARTY** ever been arrested or charged with domestic violence, or any other crime committed against his/her spouse, partner, or child(ren)? ☐ Yes ☐ No. If yes, WHEN and where? _____

_____

_____

12. ☐ An emergency exists, and I need a TEMPORARY ORDER FOR PROTECTION AGAINST DOMESTIC VIOLENCE issued immediately without notice to the Adverse Party to avoid irreparable injury or harm. I request that it include the following relief (please check all the choices that apply to you):

☐ (a) Prohibit the Adverse Party, either directly or through an agent, from threatening, physically injuring or harassing me and/or my minor child(ren).

☐ (b) Prohibit the Adverse Party from any contact with me whatsoever.

☐ (c) Exclude the Adverse Party from my residence and order the Adverse Party to stay at least 100 yards away from my residence.

☐ (d) Obtain law enforcement assistance to ☐ accompany me to the following residence, _____, or ☐ to accompany the Adverse Party, to the following residence, _____ to obtain personal property.

☐ (e) Grant temporary custody of the minor child(ren) to me.

☐ (f) Order that custody, visitation, and support of the minor child(ren) remain as ordered in the Decree of Divorce/Order entered in Case Number _____ in the _____ Judicial District Court of the State of _____.

☐ (g) Order the Adverse Party to stay at least 100 yards away from the minor child(ren)'s school, or day care, located at ☐ CONFIDENTIAL, (If confidential do not write address here) or, if not confidential list 1._____Address: _____

City _____ County _____ State___ Zip Code _____

2._____

Address: _____

City _____ County _____ State ___ Zip Code _____

3._____

Address: _____

City _____ County _____ State ___ Zip Code _____

☐ (h) Order the Adverse Party to stay at least 100 yards away from my place of employment.

☐ (i) Order the Adverse Party to stay at least 100 yards away from places which I or my minor child(ren) frequent regularly: ☐ CONFIDENTIAL, (If confidential do not write address here) or, if not confidential list 1._____

Address: _____

City _____ County _____ State ____ Zip Code _____

2._____

Address: _____

City _____ County _____ State ____ Zip Code _____

3._____

Address: _____

City _____ County _____ State ____ Zip Code _____

☐ (j) I further request the following other conditions: _____

_____

_____

_____

_____

_____

IF YOU WISH TO APPLY FOR A HEARING FOR AN EXTENDED ORDER FOR PROTECTION COMPLETE THE FOLLOWING INFORMATION

13. ☐ I request the Court hold a hearing for an EXTENDED ORDER FOR PROTECTION AGAINST DOMESTIC VIOLENCE (which could be in effect for up to one year), and at that hearing the Court issue an Extended Order for Protection Against Domestic Violence and that it include the following relief (please check all the choices that apply to you):

☐ (a) Prohibit the Adverse Party, either directly or through an agent, from threatening, physically injuring or harassing me and/or my minor child(ren)I

☐ (b) Prohibit the Adverse Party from any contact with me whatsoever.

☐ (c) Exclude the Adverse Party from my residence and order the Adverse Party to stay at least 100 yards away from my residence.

☐ (d) Grant temporary custody of the minor child(ren) to me.

☐ (e) Grant the Adverse Party visitation with the minor child(ren).

☐ (f) Order the Adverse Party to pay support and maintenance of the minor child(ren). (You may be required to file an affidavit of financial condition prior to the hearing.)

☐ (g) Order the Adverse Party to pay the rent or make payments on a mortgage or pay towards my support and maintenance.

☐ (h) Order that custody, visitation, and support of the minor child(ren) remain as ordered in the Decree of Divorce/Order entered in Case Number _____ In the _____ Court of the State of _____.

☐ (i) Order the Adverse Party to stay at least 100 yards away from the minor child(ren)'s school, or day care, located at: ☐ CONFIDENTIAL, (If confidential, do not write address here) or, if not confidential list 1. _____ Address: _____ City _____ _____ County _____ State ____ Zip Code_____

2._____

Address: _____

City _____ County _____ State ____ Zip Code_____

3._____

Address: _____

City _____ County _____ State ____ Zip Code_____

☐ (j) Order the Adverse Party to stay at least 100 yards away from my place of employment.

☐ (k) Order the Adverse Party to stay at least 100 yards away from places which I or my minor child(ren) frequent regularly: ☐ CONFIDENTIAL, (If confidential do not write address here) or, if not confidential list 1. _____ Address: _____ City _____ _____ County _____ State ____ Zip Code_____

2._____

Address: _____

City _____ County _____ State ____ Zip Code_____

3._____

Address: _____

City _____ County _____ State ____ Zip Code_____

☐ (l) I further request the following other conditions: _____

_____

_____

_____

_____

_____

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAW OF THE STATE OF NEVADA THAT I HAVE READ THE STATEMENTS CONTAINED IN THIS APPLICATION, KNOW THE CONTENTS THEREOF, AND BELIEVE THEM TO BE TRUE AND CORRECT

DATED _____.

_____
Signature of Applicant

_____
Applicant's Name (Please Print)

SUBSCRIBED and SWORN before me

this _____ day of _____, _____.

_____
NOTARY PUBLIC

Application taken by _____

Exhibit L

Pursuant to NRS 125.510(6), the Parties are hereby put on notice of the following:

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

The State of Nevada, United States of America, is the habitual residence of the minor child of the Parties hereto. The Parties are also put on notice that the terms of the Hague Convention of October 25, 1980, adopted by the 14th Session of the Hague Conference on Private International Law apply if a parent abducts or wrongfully retains a child in a foreign country. The Parties are also put on notice of the following provisions in NRS 125.510(8):

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

> (a) The Parties may agree, and the court shall include in the order for custody of the child, that the United States is the country of habitual residence of the child for the purposes of applying the terms of the Hague Convention as set forth in subsection 7.
> (b) Upon motion of one of the Parties, the court may order the parent to post a bond if the court determines that the parent poses an imminent risk of wrongfully removing or concealing the child outside of the country of habitual residence. The bond must in an amount determined by the court and may be used only to pay for the cost of locating the child and returning him to his habitual residence if the child is wrongfully removed from or concealed outside the country of habitual residence. The fact that a parent has significant commitments in a foreign country does not create a presumption that the parent poses an imminent risk of wrongfully removing or concealing the child.

The Parties are also put on notice of the following provision of NRS 125C.200:

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

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

The Parties are further put on notice that they are subject to the provisions of NRS 31A and 125.450 regarding the collection of delinquent child support payments.

The Parties are further put on notice that either Party may request a review of child support pursuant to NRS 125B.145.

The Parties shall submit the information required in NRS 125B.055, NRS 125.130 and NRS 125.230 on a separate form to the Court and the Welfare Division of the Department of Human Resources within ten (10) days from the date the Decree in this matter is filed. Such information shall be maintained by the Clerk in a confidential manner and not part of the public record. The Parties shall update the information filed with the Court and the Welfare Division of the Department of Human Resources within ten (10) days should any of that information become inaccurate.

Exhibit M

BEHAVIOR ORDER

The behavior order shall be defined as:

1. No abusive telephone calls to either Party.
2. No name calling.
3. No foul language.
4. Avoid conflicts/contacts with the other Party's "significant other."
5. Do not use child as a weapon against the other parent.
6. No harassment at places of employment.
7. No copies of letters to anyone associated with the Parties.
8. No phone calls to other people associated with the other Party.
9. Focus to remain on best interest of the child.
10. Maintain respect toward the other Parties relatives and friends.
11. Advise friends/relatives/significant others not to disparage, criticize or harass the other Party.
12. Child custody exchanges/visitation/etc., shall be done in a civil law abiding manner and reasonably close to the time specified by the Court.
13. No threats of violence or harm to any other Party/relative/friends/significant others of other Party.

FINANCIAL FAMILY LAW ISSUES

1. **THE BASICS OF CHILD SUPPORT**
   - **a. Statutory Authority**
     - i. NRS 125B.070
       - (1) GMI, percentages
       - (2) Presumptive Maximum Amount Schedule
     - ii. NRS 125B.080
       - (1) Agreements regarding child support
       - (2) *Fernandez*
       - (3) Deviation Factors
     - iii. NRS 125B.085
       - (1) Medical support
   - **b. Primary Physical Custody**
     - i. NRS 125B.070 and NRS 125B.080
   - **c. Joint Physical Custody**
     - i. Wright v. Osburn - Offsetting system
     - ii. Wesley v. Foster - Offset first, cap second
   - **d. Multiple Family Cases**
     - i. Two theories - varies by department
   - **e. Modification**
     - i. NRS 125B.145
     - ii. *Rivero v. Rivero*

2. **THE BASICS OF ALIMONY**
   - a. **Temporary**
     - i. NRS 125.040
   - b. **Statutory Authority**
     - i. NRS 125.150
       - (1) Setting aside separate property
       - (2) Factors
       - (3) Rehabilitative
       - (4) Modification

3. **THE BASICS OF COMMON CUSTODY TAX ISSUES**
   - **a. Publication 504 (partial)**
     - i. Dependent Exemption
     - ii. Children of divorced or separated parents
     - iii. Head of Household

Exhibits:

1. NRS 125B.070 - 085
2. Presumptive Maximum Amounts of Child Support
3. *Fernandez v. Fernandez*
4. *Wright v. Osburn*
5. *Wesley v. Foster*
6. NRS 125.040
7. NRS 125.150
8. IRS Publication 504 (2011) - partial

NRS 125B.070 Amount of payment: Definitions; adjustment of presumptive maximum amount based on change in Consumer Price Index.

1. As used in this section and NRS 125B.080, unless the context otherwise requires:

(a) "Gross monthly income" means the total amount of income received each month from any source of a person who is not self-employed or the gross income from any source of a self-employed person, after deduction of all legitimate business expenses, but without deduction for personal income taxes, contributions for retirement benefits, contributions to a pension or for any other personal expenses.

(b) "Obligation for support" means the sum certain dollar amount determined according to the following schedule:

(1) For one child, 18 percent;

(2) For two children, 25 percent;

(3) For three children, 29 percent;

(4) For four children, 31 percent; and

(5) For each additional child, an additional 2 percent,

of a parent's gross monthly income, but not more than the presumptive maximum amount per month per child set forth for the parent in subsection 2 for an obligation for support determined pursuant to subparagraphs (1) to (4), inclusive, unless the court sets forth findings of fact as to the basis for a different amount pursuant to subsection 6 of NRS 125B.080.

2. For the purposes of paragraph (b) of subsection 1, the presumptive maximum amount per month per child for an obligation for support, as adjusted pursuant to subsection 3, is:

INCOME RANGE If the Parent's Gross Monthly Income Is at Least		But Less Than	PRESUMPTIVE MAXIMUM AMOUNT The Presumptive Maximum Amount the Parent May Be Required to Pay per Month per Child Pursuant to Paragraph (b) of Subsection 1 Is
$0	-	$4,168	$500
4,168	-	6,251	550
6,251	-	8,334	600
8,334	-	10,418	650
10,418	-	12,501	700
12,501	-	14,583	750

If a parent's gross monthly income is equal to or greater than $14,583, the presumptive maximum amount the parent may be required to pay pursuant to paragraph (b) of subsection 1 is $800.

3. The presumptive maximum amounts set forth in subsection 2 for the obligation for support must be adjusted on July 1 of each year for the fiscal year beginning that day and ending June 30 in a rounded dollar amount corresponding to the percentage of increase or decrease in the Consumer Price Index (All Items) published by the United States Department of Labor for the preceding calendar year. On April 1 of each year, the Office of Court Administrator shall determine the amount of the increase or decrease required by this subsection, establish the adjusted amounts to take effect on July 1 of that year and notify each district court of the adjusted amounts.

4. As used in this section, "Office of Court Administrator" means the Office of Court Administrator created pursuant to NRS 1.320.

(Added to NRS by 1987, 2267; A 1991, 1334; 2001, 1865; 2003, 101, 342)

NRS 125B.080 Amount of payment: Determination. Except as otherwise provided in NRS 425.450:

1. A court of this State shall apply the appropriate formula set forth in NRS 125B.070 to:

(a) Determine the required support in any case involving the support of children.

(b) Any request filed after July 1, 1987, to change the amount of the required support of children.

2. If the parties agree as to the amount of support required, the parties shall certify that the amount of support is consistent with the appropriate formula set forth in NRS 125B.070. If the amount of support deviates from the formula, the parties must stipulate sufficient facts in accordance with subsection 9 which justify the deviation to the court, and the court shall make a written finding thereon. Any inaccuracy or falsification of financial information which results in an inappropriate award of support is grounds for a motion to modify or adjust the award.

3. If the parties disagree as to the amount of the gross monthly income of either party, the court shall determine the amount and may direct either party to furnish financial information or other records, including income tax returns for the preceding 3 years. Once a court has established an obligation for support by reference to a formula set forth in NRS 125B.070, any subsequent modification or adjustment of that support, except for any modification or adjustment made pursuant to subsection 3 of NRS 125B.070 or NRS 425.450 or as a result of a review conducted pursuant to subsection 1 of NRS 125B.145, must be based upon changed circumstances.

4. Notwithstanding the formulas set forth in NRS 125B.070, the minimum amount of support that may be awarded by a court in any case is $100 per month per child, unless the court makes a written finding that the obligor is unable to pay the minimum amount. Willful underemployment or unemployment is not a sufficient cause to deviate from the awarding of at least the minimum amount.

5. It is presumed that the basic needs of a child are met by the formulas set forth in NRS 125B.070. This presumption may be rebutted by evidence proving that the needs of a particular child are not met by the applicable formula.

6. If the amount of the awarded support for a child is greater or less than the amount which would be established under the applicable formula, the court shall:

(a) Set forth findings of fact as to the basis for the deviation from the formula; and

(b) Provide in the findings of fact the amount of support that would have been established under the applicable formula.

7. Expenses for health care which are not reimbursed, including expenses for medical, surgical, dental, orthodontic and optical expenses, must be borne equally by both parents in the absence of extraordinary circumstances.

8. If a parent who has an obligation for support is willfully underemployed or unemployed to avoid an obligation for support of a child, that obligation must be based upon the parent's true potential earning capacity.

9. The court shall consider the following factors when adjusting the amount of support of a child upon specific findings of fact:

(a) The cost of health insurance;

(b) The cost of child care;

(c) Any special educational needs of the child;

(d) The age of the child;

(e) The legal responsibility of the parents for the support of others;

(f) The value of services contributed by either parent;

(g) Any public assistance paid to support the child;

(h) Any expenses reasonably related to the mother's pregnancy and confinement;

(i) The cost of transportation of the child to and from visitation if the custodial parent moved with the child from the jurisdiction of the court which ordered the support and the noncustodial parent remained;

(j) The amount of time the child spends with each parent;

(k) Any other necessary expenses for the benefit of the child; and

(l) The relative income of both parents.

(Added to NRS by 1987, 2267; A 1989, 859; 1991, 1334; 1993, 486; 1997, 2295; 2001, 1866)

NRS 125B.085 Order for support to include provision regarding medical support for child.

1. Except as otherwise provided in NRS 125B.012, every court order for the support of a child issued or modified in this State on or after June 2, 2007, must include a provision specifying that one or both parents are required to provide medical support for the child and any details relating to that requirement.

2. As used in this section, "medical support" includes, without limitation, coverage for health care under a plan of insurance that is reasonable in cost and accessible, including, without limitation, the payment of any premium, copayment or deductible and the payment of medical expenses. For the purpose of this subsection:

(a) Payments of cash for medical support or the costs of coverage for health care under a plan of insurance are "reasonable in cost" if:

(1) In the case of payments of cash for medical support, the cost to each parent who is responsible for providing medical support is not more than 5 percent of the gross monthly income of the parent; or

(2) In the case of the costs of coverage for health care under a plan of insurance, the cost of adding a dependent child to any existing coverage for health care or the difference between individual and family coverage, whichever is less, is not more than 5 percent of the gross monthly income of the parent.

(b) Coverage for health care under a plan of insurance is "accessible" if the plan:

(1) Is not limited to coverage within a geographical area; or

(2) Is limited to coverage within a geographical area and the child resides within that geographical area.

PRESUMPTIVE MAXIMUM AMOUNTS (PMA) OF CHILD SUPPORT
EFFECTIVE JULY 1, 2012 - JUNE 30, 2013

NRS 125B.070

PMA increased 3% pursuant to the Consumer Price Index (all items) increase in Calendar Year 2011 (December - December) as published by the U.S. Department of Labor
http://www.bls.gov/cpi/#tables

INCOME RANGE			PRESUMPTIVE MAXIMUM AMOUNT (PMA)
If the Parent's Gross Monthly Income is at Least		*But Less Than*	*The PMA the Parent May Be Required to Pay per Month per Child Pursuant to Paragraph (b) of Subsection 1 is*
$0	-	$4,235	$649
$4,235	-	$6,351	$714
$6,351	-	$8,467	$781
$8,467	-	$10,585	$844
$10,585	-	$12,701	$909
$12,701	-	$14,816	$973
$14,816	-	No Limit	$1,040

The PMA are calculated and published by the Administrative Office of the Courts on or before April 1 of each year in accordance with the provisions of NRS 125B.070 (3). Please contact Deanna Bjork at (775) 684-1708 if you have any questions on how the amounts were calculated. Contact your district court if yo have questions on how the amounts are applied based on circumstances.

Historical PMA are available on the Nevada Judiciary's website at www.nevadajudiciary.us. Type in the word "presumptive" after selecting the "search" option, which is found at the bottom of the website.

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IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY FERNANDEZ,
Appellant,
vs.
JENNIFER FERNANDEZ, N/K/A JENNIFER ROTHMAN,
Respondent.

No. 51423

Appeal from a district court post-decree order denying appellant's motion to modify child support. Eighth Judicial District Court, Family Court Division, Clark County; Cheryl B. Moss, Judge.

Reversed and remanded.

Radford J. Smith, Chtd., and Radford J. Smith, Henderson,
for Appellant.

Lemons Grundy & Eisenberg and Robert Eisenberg, Reno; Ecker & Kainen, Chtd., and Andrew L. Kynaston, Las Vegas,
for Respondent.

BEFORE PARRAGUIRRE, C.J., DOUGLAS and PICKERING, JJ.

OPINION

By the Court, PICKERING, J.:

This is an appeal by the father of minor children from an order denying a motion to modify child support under NRS 125B.145. The trial court held that it was "not bound" by NRS 125B.145 because the parties "previously agreed in a stipulation and order modifying the Decree of Divorce that neither party [would] seek modification of child support." In the trial court's view, this made the child support order nonmodifiable, so

2/24/10: Corrected per letter to publishers. CS

10-03076

long as the father had "sufficient means (assets and/or income) to meet the agreed upon child support obligations."

The motion to modify alleged that the father's monthly gross income had dropped more than 80 percent, to the point his child support obligation exceeded it. The mother's circumstances, meanwhile, had improved to the extent that her assets and gross monthly income equaled or outmatched his. Declining to apply NRS Chapter 125B's modification provisions to these facts was error. Stipulated or not, the obligation the father sought to modify was incorporated and merged into the decree as an enforceable child support order. State and federal statutes give child support orders super-legal reach. Because children's needs and parents' circumstances can change unpredictably over the life of a child support order, NRS Chapter 125B provides for their periodic review and modification—up or down—as changed circumstances dictate. The statutory scheme does not admit a child support order that cannot be modified based on a material change in circumstances.

The father's motion presented facts that, if true, qualified for relief. He did not need to wait until he was missing court-ordered child support payments or in financial peril before being heard under NRS 125B.145 and its related statutes, NRS 125B.070 and NRS 125B.080. We therefore reverse and remand.

I.

The parties had two children during their brief marriage, which ended in a joint petition for divorce that was granted in August 1998. At the time they divorced, the couple owned two houses free and clear and had no community debt of consequence. They worked in the securities industry, he as a day trader and she in administrative support; both held series 7 (general securities representative) licenses.

The original divorce decree divided the houses and other property between the couple and awarded them joint legal custody of the children, giving primary physical custody to the mother. In addition to alimony, the decree obligated the father to provide health insurance and to pay any uncovered medical expenses for the children, to pay for a housekeeper and either a nanny or day care, and to pay child support of $3,000 per month. Although it stated the child support was "consistent with the provisions of NRS 125B.070," in fact the award exceeded NRS 125B.070's presumptive maximum.[1] Since it did, the decree should have included findings as to the bases for the upward deviation, but didn't.

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[1]NRS 125B.070 and NRS 125B.080 set presumptive limits on child support, keyed to the number of children and the obligor parent's gross monthly income, with a $100 minimum and $800 maximum per child per month, adjusted to the Consumer Price Index. NRS ~~125B.070(b)(5)~~ 125B.070(1)(b) or requires that a support order that departs from the formula requires "findings of fact as to the basis for a different amount pursuant to subsection 6 of NRS 125B.080," which provides:

> If the amount of the awarded support for a child is greater or less than the amount which would be established under the applicable formula, the court shall:
>
> (a) Set forth findings of fact as to the basis of the deviation from the formula; and
>
> (b) Provide in the findings of fact that amount of support that would have been established under the applicable formula.

NRS 125B.080(9) lists the permitted factors for deviating from NRS 125B.070's guidelines.

Roughly a year later, in July 1999, the trial court approved a stipulation and order to modify the decree. The modification increased the father's monthly child support obligation from $3,000 to $4,000, to take effect two years later, in July 2001, and continue until the younger child reached age 18. It also added a provision requiring the father to pay for "private elementary (including preschool and kindergarten) and secondary school at a mutually agreed upon private school in Las Vegas, Nevada." The modified decree recited that the increased "child support obligation is consistent with the provisions of NRS 125B.070 and NRS 125B.080(9)." Again, it didn't include findings to explain the bases for awarding more support than the presumptive statutory guideline amounts.[2]

Another year passed in which the parties tried but failed at reconciliation. In June 2000, they returned with a new stipulation and order, which the court approved, again modifying the divorce decree. This stipulation and order replaced the mother's primary physical custody of the children with joint physical custody in both parents. Although it left the amount of the child support obligation unchanged,[3] it was this stipulation and order that purportedly made the child support obligation nonmodifiable, stating that both parties "voluntarily waive any right they may have pursuant to Chapter 125B of the Nevada Revised Statutes to

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[2]The parties' respective appellate attorneys did not represent them in the trial court when the original decree was entered and later modified.

[3]If the change from primary physical custody with the mother to joint physical custody with both parents affected the presumptive child support obligation as calculated under the guidelines in NRS 125B.070 and NRS 125B.080, see Wright v. Osborn, 114 Nev. 1367, 1368-69, 970 P.2d 1071, 1072 (1998), and therefore the amount by which the support ordered deviated from the guidelines, this wasn't stated.

seek a modification to [father's] child support obligation to [mother]." The waiver was absolute, with one exception: If the mother relocated outside of Nevada with the children without the father's consent, the father could seek to modify support.[4]

The father filed the motion to modify underlying this appeal in 2007. The trial court declined to review the motion under NRS 125B.145. Instead, it ordered a limited hearing to address whether the waiver made the child support order nonmodifiable.

At the hearing, the trial court heard testimony from the father and reviewed current affidavits of financial condition from both parents. Acknowledging that the father's and mother's financial pictures had inverted since child support had been set, the trial court found that, "based on each [party's] purported current income, were the Court to apply the child support formula set forth in NRS 125B.070, . . . neither party would be obligated to pay child support to the other." Even so, the trial court denied the father's motion to modify. It held that "the child support provisions of the [decree and its stipulated modifications] shall not be disturbed by the Court based upon the waivers of the parties set forth therein and upon the fact that [the father] still has the ability to pay said amount from his currently held assets." Elaborating, it decreed that "the Court is not bound by the provision of NRS 125B.145 where the parties

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[4]The trial judge sua sponte struck this condition as contrary to public policy. On appeal, the mother offers to have the condition reinstated if this will defeat the father's argument that this removed part of the consideration for agreeing to waive statutory modification rights. Because we conclude the stipulation's waiver provision is unenforceable, we do not address this aspect of it separately.

have previously agreed in a stipulation and order modifying the Decree of Divorce that neither party will seek modification of child support."

Because it found the child support order nonmodifiable, the trial court did not fully hear or make findings on the alleged bases for statutory modification. We likewise make no findings, but for purposes of assessing whether they merited further proceedings, we accept arguendo the following proffered facts as true: By 2007, when the father filed the motion to modify, his child support obligations amounted to $80,000 a year ($48,000 in monthly child support payments, $30,000 per year in private school tuition, plus insurance and uncovered medical expenses). In his banner years in the stock market (1995-2001), the father had earned sums ranging from $500,000 in the late 1990s to more than $4,000,000 in 2001. He began losing heavily in the market in 2002. With an adverse report already on his industry record, his losses eventually cost him the leverage needed to trade at the high levels he had. By 2007, he no longer traded and was earning $3,000 a month selling cars, plus interest of like amount on retained assets. The lavish second home he'd bought in Malibu had been sold, and the lion's share of his wealth had gone to retire margin debt. Last but not least, he had remarried, then either divorced or separated, and had a new child to support.

On the mother's side, she had remarried too. Although she no longer worked outside the home, her 2007 affidavit of financial condition showed passive and earned income equal to the father's, taking into account her new husband's earnings. Her household also had an additional child to support, her stepson.

The parties had comparable net worth. Each had recently sold the home s/he had received in the divorce. With the proceeds from these

sales, both had mostly liquid net assets of between $1,000,000 and $1,500,000, hers being somewhat higher than his.

II.

This appeal presents the question of whether parents can, by stipulation, eliminate or abridge a trial court's statutory authority to review and modify a child support order. The mother maintains, as she did in the trial court, that the parties' agreement to nonmodifiable child support should be upheld as a matter of contract law and equity, based on her part performance. In her view, public policy has no place in the analysis when a nonmodifiability provision is invoked to prohibit downward, as opposed to upward, modification of child support.

The father sees the issue differently. In his view, when the parties incorporated the support agreement into the decree, it ceased being a matter of private contract and became a judicially imposed obligation, at which point the statutory modification provisions apply, notwithstanding the parties' agreement to the contrary.[5] He emphasizes

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[5]The mother does not dispute that the child support order and its stipulated modifications, including its provision waiving the right to seek modification, were incorporated and merged into the decree. This dispositively distinguishes Renshaw v. Renshaw, 96 Nev. 541, 543, 611 P.2d 1070, 1071 (1980), which was prosecuted "solely [as a] breach of contract action" and upheld a contract term for nonmodifiable support in a case in which the agreement was "neither incorporated in nor merged in the judgment and decree of the trial court." See Day v. Day, 80 Nev. 386, 395 P.2d 321 (1964) (a spousal support agreement is merged into the divorce decree and loses its character as an independent agreement unless both the agreement and decree direct the agreement's survival) (distinguishing Ballin v. Ballin, 78 Nev. 224, 371 P.2d 32 (1962)). Whether and to what extent the "merger" distinction drawn in cases like Renshaw is supportable under modern child support statutes has been

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that the statutes do not distinguish between upward and downward deviations from the formula amounts, nor do they expressly permit parties to stipulate to nonmodifiable child support orders. Relying on NRS 125B.145(1)(b), he urges that the award should have been modified to conform to the formulas in NRS 125B.070 and NRS 125B.080 without regard to changed circumstances, since more than three years had passed since the award's last review; failing that, he urges that he demonstrated sufficient change in circumstances to warrant modification.

The father has the better side of the argument on modifiability. While Rivero v. Rivero, 125 Nev. ___, ___, 216 P.3d 213, 229 (2009), forecloses the father's contention that the mere passage of time entitles him to modification without regard to changed circumstances, his primary argument—that the stipulation waiving the right to seek modification of a support order for changed circumstances as provided in NRS 125B.080(3) and NRS 125B.145(4) is unenforceable—is correct. We conclude that so long as the statutory criteria for modification are met, a "trial court always has the power to modify an existing child support order, either upward or downward, notwithstanding the parties' agreement to the contrary." In re Marriage of Alter, 89 Cal. Rptr. 3d 849, 852 (Ct. App. 2009).

A.

Nevada's child support statutes do not directly address whether parents can stipulate to a nonmodifiable child support order.

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questioned, Mazza v. Hollis, 947 A.2d 1177, 1180-81 (D.C. 2008), but that issue is not before the court.

However, they inarguably establish that child support involves more than private contract. By law, "[t]he parents of a child . . . have a duty to provide the child necessary maintenance, health care, education and support." NRS 125B.020(1). This duty "is discharged by complying with a court order for support or with the terms of a judicially approved settlement." NRS 125B.120(1). A trial court in a marital dissolution action has jurisdiction to determine custody and support of the parents' minor children, NRS 125.510; NRS 125B.080, and to award child support even though the parents have agreed none should be paid. Atkins v. Atkins, 50 Nev. 333, 336-37, 259 P. 288, 288-89 (1927) (citing Nev. Rev. Laws § 5840 (1912), a precursor to NRS 125.510), partial abrogation recognized in Lewis v. Hicks, 108 Nev. 1107, 1111-12, 843 P.2d 828, 831 (1992).

Although parents often stipulate to an appropriate child support order, even agreed-upon child support orders must be calculated and reviewed under the statutory child support formula and guidelines in NRS 125B.070 and NRS 125B.080. Thus, NRS 125B.080(2) provides that, if parents agree to a child support order, they "shall certify that the amount of support is consistent with the appropriate formula set forth in NRS 125B.070." "[I]f the amount of support deviates from the formula, the parties must stipulate sufficient facts in accordance with [NRS 125B.080(9)] which justify the deviation to the court, and the court shall make a written finding thereon." NRS 125B.080(2). The factors listed in NRS 125B.080(9) as permitting deviation—whether "greater or less than [the formula] amount," NRS 125B.080(6)—are exclusive, not illustrative. Anastassatos v. Anastassatos, 112 Nev. 317, 320, 913 P.2d 652, 654 (1996); Lewis, 108 Nev. at 1111, 843 P.2d at 831.

The trial court has continuing jurisdiction over its child support orders. See NRS 125.510(1)(b) (once having determined custody, a trial court may "[a]t any time modify or vacate" its support and custody orders). NRS 125B.145(4) declares that "[a]n order for the support of a child may be reviewed at any time on the basis of changed circumstances" and adds that a change of 20 percent or more in a child support obligor's gross monthly income "shall be deemed to constitute changed circumstances requiring a review for modification of the order for the support of a child."[6] (Emphases added.) Further, upon the request of a parent or legal guardian, "[a]n order for the support of a child must . . . be reviewed by the court at least every 3 years . . . to determine whether the order should be modified or adjusted." NRS 125B.145(1)(b) (emphasis added). Finally, NRS 125B.145(2)(b) specifies that, "[i]f the court . . . [h]as jurisdiction to modify the order and, taking into account the best interests of the child, determines that modification or adjustment of the order is appropriate, the court shall enter an order modifying or adjusting the previous order for support in accordance with the requirements of NRS 125B.070 and 125B.080." (Emphasis added.)

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[6]The provision equating a 20-percent change in income with "changed circumstances" was added to NRS 125B.145 in 2003. 2003 Nev. Stat., ch. 96, § 2, at 546. Although the amendment postdated the stipulated order in this case, it applies to the motion to modify, since it clarified an existing statute, Norman J. Singer and J.D. Shambie Singer, 1A Sutherland Statutory Construction § 22.34 (7th ed. 2009), and is being invoked prospectively, to child support payments not yet due when the motion to modify was filed. See Ramacciotti v. Ramacciotti, 106 Nev. 529, 532, 795 P.2d 988, 990 (1990).

Although Nevada child support laws contain plain language applying their formula and guideline provisions to parents who stipulate to court-ordered child support, the modification statutes say nothing about whether parties can stipulate around them or, indeed, about parental agreements at all. Had the Legislature wanted to give parents the option of agreeing to a decree providing for nonmodifiable child support, it could have easily provided an exception to NRS 125B.145, as Connecticut did with its support modification statute. See Amodio v. Amodio, 743 A.2d 1135, 1143 (Conn. App. Ct. 2000) (discussing Conn. Gen. Stat. § 46b-86(a), which provides for modification based on changed circumstances "unless and to the extent that the decree precludes modification"). It didn't. Instead, the Nevada Legislature enacted the broadly unqualified modification statutes excerpted above. Because a child support order affects the child's interests, as much or more than the parents', we are disinclined to find that a parent can waive the modification statutes' protections. We thus interpret the modification statutes to mean what they say, with no implied judicial exceptions. The purport of these statutes, as their unqualified language suggests, is that "the jurisdiction of the court never ends in a support matter, as long as the child is supposed to be getting support. If there is a significant change in circumstances in the parties' relative earning capacity, that can always be brought back to the court, and should be." Hearing on A.B. 3 Before the Senate Comm. on Judiciary, 65th Leg. (Nev., May 10, 1989) (Assemblyman Robert Sader's testimony).

Most courts agree that, absent a contrary statutory directive, public policy prevents a court from enforcing a purportedly nonmodifiable child support order, even if the parties stipulate to it. See Armstrong v.

Armstrong, 544 P.2d 941, 943 (Cal. 1976) ("When a child support agreement is incorporated in a child support order, the obligation created is deemed court-imposed rather than contractual, and the order is subsequently modifiable despite the agreement's language to the contrary"); Phillips v. Phillips, 186 P.2d 102, 103 (Kan. 1947) (parties cannot by agreement oust the court of its continuing statutory jurisdiction over child support by agreeing to a nonmodifiable child support order); Grimes v. Grimes, 621 A.2d 211, 213-14 (Vt. 1992) (canvassing cases and holding unenforceable as a matter of public policy "parental agreements prohibiting or limiting the power of the court to modify child support in the future"); Frisch v. Henrichs, 736 N.W.2d 85, 101 (Wis. 2007) ("stipulation, which set a ceiling on child support and prevented modification in the level of child support, is not enforceable and offends public policy"); Lang v. Lang, 252 So. 2d 809, 812 (Fla. Dist. Ct. App. 1971) (public policy prohibits a nonmodifiable child support order); In re Marriage of Rife, 878 N.E.2d 775, 787 (Ill. App. Ct. 2007) (support modification statute's plain language preserved the court's authority to modify child-related provisions of the judgment, precluding any agreement to waive the right to seek child support adjustments).[7]

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[7]Although not precisely on point, we recognized as much in Willerton v. Bassham, 111 Nev. 10, 25-27, 889 P.2d 823, 832-33 (1995), which concerned whether a stipulated judgment in a paternity suit prevented later judicial modification of the support adjudication. Rejecting the argument that the finality of stipulated judgments made the agreed-upon support obligation nonmodifiable, the court held that "the state has a compelling interest in seeing that any provisions for the support of a child incorporated in . . . settlement agreements are modifiable." Id. at 24, 889 P.2d at 832. The court characterized NRS

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The mother invites us to distinguish between the children's and the parents' interests. She concedes that public policy may prohibit a ceiling on child support, since parents cannot contract away a child's right to increased support if the child's needs require it. However, she argues for a different rule where a support obligor seeks a downward adjustment in child support based on changed parental circumstances. Reasoning that more support will always serve a child's interests better than less, she urges that public policy supports nonmodification agreements when applied to preclude downward modification, no matter the impact on the obligor parent who, after all, agreed to the order in the first place.

There are multiple problems with this argument, including a threshold one: The stipulated order here was general; it did not just set a floor on child support, but also a ceiling. Both parents gave up the right to seek modification—upward or downward—no matter whose circumstances changed, be it the mother's, the father's, or the children's. Enforcing the stipulation against the father's request for downward modification sanctions its enforcement against the mother seeking upward modification. The promises were inseparably paired "corresponding equivalents," which takes partial enforcement off the table. See Restatement (Second) of Contracts § 184 cmt. a (1981); Grace McLane Giesel, 15 Corbin on Contracts § 89.6 (rev. ed. 2003).

More fundamentally, neither our statutes nor public policy supports the argument that more court-ordered child support is always

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Chapter 125B's modification provisions as "protections" that cannot be waived or avoided by agreement. Id. at 26, 889 P.2d at 833.

better for the child than less. The formula and guideline statutes are not designed to produce the highest award possible but rather a child support order that is adequate to the child's needs, fair to both parents, and set at levels that can be met without impoverishing the obligor parent or requiring that enforcement machinery be deployed. See Barbagallo v. Barbagallo, 105 Nev. 546, 551, 779 P.2d 532, 536 (1989) ("what really matters" under the formula and guideline statutes "is whether the children are being taken care of as well as possible under the financial circumstances in which the two parents find themselves"), partially overruled on other grounds by Wright v. Osburn, 114 Nev. 1367, 1368-69, 970 P.2d 1071, 1072 (1998), as recognized in Rivero v. Rivero, 125 Nev. ___, ___, 216 P.3d 213, 232 (2009). This is evident in NRS 125B.080(6), which requires findings to support deviations from the formula—whether the deviation "is greater or less" than the guideline amount; and in NRS 125B.145(4), which defines "changed circumstances" for modification review purposes as "a change of 20 percent or more in the gross monthly income" of the support obligor, whether the 20-percent change was up or down.

The statutes do not equate the child's best interests with perpetuating a supererogatory support order the obligor parent can no longer meet. Our child support statutes, like those in sister states, recognize that

> parents' circumstances are subject to adversities out of their control. A serious accident, catastrophic illness, or a flagging economy and the hard times that go along with it, can all interpose a reversal of fortune that would make it impossible to satisfy a pre-set level of child support. In such a situation, it would not be in a child's best interest to force the parent into a level

> of debt he or she has no ability to pay. . . . We conclude, therefore, that the court always has the power to modify a child support order, upward or downward, regardless of the parents' agreement to the contrary.

In re Marriage of Alter, 89 Cal. Rptr. 3d 849, 858 (Ct. App. 2009) (emphasis added). Accord Grimes v. Grimes, 621 A.2d 211, 214 (Vt. 1992) ("There is a practical side to this issue [since a] clearly excessive child support order may lead . . . to collection difficulties and periodic returns to court"; "[a] support amount that, on paper, appears generous to the children becomes illusory if, for reasons related to the excessive size of the payments, collection must be coerced on a regular basis."); Krieman v. Goldberg, 571 N.W.2d 425, 432 (Wis. Ct. App. 1997) (to "subject a payor parent to an unreviewable stipulation for child support could jeopardize the payor parent's financial future, may have detrimental effects on the parent/child relationship and in this way would ultimately not serve the best interests of the child").

Parents of course are free to—and often do—provide support to their children in sums greater than the statutes require. But this case involves a child support order, enforceable by contempt and intended by both parents to satisfy their legal obligations of support. When agreed-upon support is incorporated into a decree, it becomes a court order. Court-ordered child support is "not a fixed obligation but one that is subject to readjustment as circumstances may direct, and the court's power of adjustment is not limited to changes in the children's favor." Riemer v. Riemer, 73 Nev. 197, 199, 314 P.2d 381, 383 (1957). "There is no merit in th[e] contention" that a nonmodifiable child support obligation serves the child's best interests where, as here, the obligor parent's changed circumstances allegedly make the award unreasonable. Id.

The trial court created its own modification standard when it justified its decision by the fact that the father still had assets he could use to pay child support, even if the support obligation exceeded his gross income. The parents' relative financial means may play a legitimate role in determining the amount of an original or modified support award. Lewis v. Hicks, 108 Nev. 1107, 1114 n.4, 843 P.2d 828, 833 n.4 (1992). However, the modification statutes do not support the exhaustion-of-assets test the trial court fashioned for determining whether to allow modification. The test the trial court fashioned is closer to the "undue hardship" standard in the enforcement statutes, see NRS 125B.140(2)(c) ~~125B.140(c)(2)~~, than the changed circumstances standard in the modification statutes. Although the trial court has discretion in how it applies the child support statutes, it commits legal error when it misinterprets or fails to follow the statutes as written, which is what occurred here. Id. at 1112, 843 P.2d at 831.

B.

Because the trial court erred in declaring the modification statutes not applicable to the father's motion, we reverse and remand for proceedings under NRS 125B.145(4), NRS 125B.070, and NRS 125B.080. Two final issues remain. First, the mother maintains that her part performance of the nonmodifiability stipulation estops the father from contesting its enforceability. We disagree. The property settlement between the parties was concluded and the support obligations were set before the stipulation and order waiving modification rights was entered. The promises that were exchanged—by which the parties reciprocally waived the right to seek modification—were corresponding equivalents that can't be separated. See Restatement (Second) of Contracts § 184

(1979). In these circumstances, estoppel is not available to resurrect a contract right public policy invalidates. Krieman, 571 N.W.2d at 430-32.

The second issue concerns the scope of the proceedings on remand. This case was briefed before Rivero v. Rivero, 125 Nev. ___, 216 P.3d 213 (2009), was decided. Rivero states that, "although a party need not show changed circumstances for the district court to review a support order after three years, changed circumstances are still required for the district court to modify the order." Id. at ___, 216 P.3d at 229 (emphases added). This language forecloses the father's argument that NRS 125B.145(1)(b) entitles him to have the child support order modified to conform to NRS 125B.070 and NRS 125B.080, simply because more than three years passed since its last review.[8] To prevail on his modification motion on remand, Rivero requires the father to demonstrate changed circumstances. Id. Because the parties did not stipulate facts to justify deviating from the formulas and the court did not specify findings to support the initial or modified child support order, opting instead to just recite compliance with NRS 125B.070 and NRS 125B.080(9), the bases for the historical deviation from the formula amounts will have to be reconstructed, unless the father's alleged change in income, which appears to satisfy NRS 125B.145(4), is proved. See supra note 6.

[8]NRS 125B.145(1)'s provision for review of child support orders every three years was added to meet federal mandates, see 42 U.S.C. § 666(a)(10). Other states have interpreted their comparable periodic review statutes as not requiring changed circumstances for modification. Allen v. Allen, 930 A.2d 1013 (Me. 2009); see also NRS 125B.080(3).

In their supplemental briefs addressing Rivero, the parties express confusion over its emphasis on NRS 125B.145(2)(b), which refers to the trial court "taking into account the best interests of the child [in] determin[ing] that modification or adjustment of the order is appropriate." Rivero, 125 Nev. at ___, 216 P.3d at 229. The same public policy considerations that lead us to reject the argument that a downward modification cannot be in the child's best interest answer this concern. Unlike the custody setting, in which NRS 125.480(1) makes the best interest of the child "the sole consideration," in the support setting the parents' and the child's best interests are interwoven. NRS 125B.145(2)'s reference to "taking into account the best interests of the child" originated in the same set of federal mandates that, in 1997, led to the adoption of NRS 125B.145(1)'s three-year review provision and was a direct lift from 42 U.S.C. § 666(10)(A)(i). Hearing on A.B. 401 Before the Assembly Comm. on Judiciary, 69th Leg., Ex. C (Nev., May 13, 1997) (Leg. Counsel Bureau Report, Background Information Regarding the Federal Welfare Reform Law and Child Support Enforcement, Attachment B). It did not change the preexisting legislative judgment that, if changed circumstances merit modification, revising the award to conform to the formula guidelines presumptively meets the child's needs. See NRS 125B.080(5); NRS 125B.145(4) (formerly NRS 125B.145(2)). The child's best interest, in the support setting, is tied to the goal of the support statutes generally, which is to provide fair support, as defined in NRS 125B.070 and 125B.080, in keeping with both parents' relative financial means. Lewis, 108 Nev. at 1114 n.4, 843 P.2d at 833 n.4 (citing Barbagallo, 105 Nev. at 551 n.4, 779 P.2d at 536 n.4). The child's best interest is not served by perpetuating a support order that the

obligor parent's changed circumstances may make unreasonable, especially when, as alleged here, the receiving parent's financial circumstances have materially improved. We therefore reverse and remand for further proceedings consistent herewith.

Pickering, J.

We concur:

Parraguirre, C. J.

Douglas, J.

Supreme Court of Nevada.

WRIGHT v. OSBURN

Sandra D. WRIGHT, f/k/a Sandra Osburn, Appellant, v. David L. OSBURN, Respondent.

No. 28714.

-- December 30, 1998

Bruce I. Shapiro, Ltd., Las Vegas, for appellant.Laura Wightman FitzSimmons, Las Vegas, for respondent.

OPINION

Sandra D. Wright and David L. Osburn were married in April 1982 and divorced in March 1996. They had three children: Robert, born February 1984; Lindsay, born October 1986; and Alexandra, born July 1989. At the time of their marriage, Sandra and David were attending Brigham Young University. In 1983, Sandra obtained a degree in design and David obtained a degree in business and finance. After graduating, Sandra worked while David obtained his masters degree in business administration. Sandra became a full-time homemaker in 1984 after the birth of their first child. David was employed by Bank of America, where he remained at the time of trial. David also teaches accounting at the community college.

The district court awarded the parties joint legal and physical custody of their three children, with physical custody of the children rotated weekly. The district court ordered David to pay Sandra $100 per month per child for child support and $500 per month for five years in rehabilitative spousal support but denied an award for attorney fees. Sandra appeals those portions of the order regarding child support, spousal support and attorney fees.

The child support ordered by the district court was the minimum specified under NRS 125B.070(1), despite the fact that the evidence showed that David's monthly income was

$5,177 per month, while Sandra's income was $1,600 per month. While the district court articulated the necessity of "attempt [ing] to maintain comparable lifestyles for the children between the parents' respective households" when the parents have joint physical custody, its order is at odds with this goal.

In Barbagallo v. Barbagallo, 105 Nev. 546, 779 P.2d 532 (1989), this court discussed the difficulty of fairly allocating child support responsibilities between divorced parents with disparate incomes who share equal physical custody of their children. Unfortunately, Barbagallo did not choose to follow the guidance set forth by the legislature in NRS Chapter 125B as to how the child support responsibilities should be allocated when parents share physical custody equally. The result has been that decisions of the district courts vary widely on similar facts.

This court now returns to the language in NRS Chapter 125B for determining the appropriate allocation of child support in shared physical custody arrangements. In NRS 125B.020 and NRS 125B.070, the legislature set forth an objective standard with regard to the support of minor children. These measures, when read together, require each parent to provide a minimum level of support for his or her children, specified by the legislature as a percentage of gross income, depending on the number of children and absent special circumstances. NRS 125B.020 and 125B.070. This requirement is independent of the custody arrangements. Therefore, when custody is shared equally, the determination of who receives child support payments and the amount of that payment can be determined as follows: Calculate the appropriate percentage of gross income for each parent; subtract the difference between the two and require the parent with the higher income to pay the parent with the lower income that difference. In this case, with three children, we would take twenty-nine percent of $1,600, Sandra's monthly income, and twenty-nine percent of $5,177, David's monthly income and subtract the difference. In this case, David would be required to pay Sandra $1,037 each month. This approach embodies the legislative enactment, and provides the uniformity and predictability which was the legislative aim. Of course, the district court also has the option to adjust the amount of the award where special circumstances exist. See NRS 125B.080(9).

Regarding the award of spousal support, the legislature has failed to set forth an objective standard for determining the appropriate amount. Absent such a standard, there appears to be a disparity in the awards for spousal support on similar facts even greater than for child support. In Sprenger v. Sprenger, 110 Nev. 855, 859, 878 P.2d 284, 287 (1994), this court set forth factors for the district court to consider in its determination, but the weight to be given each of the factors is left to the discretion of the district court.

In this case, the district court awarded Sandra rehabilitative spousal support of $500 per month for five years. She had earned a degree in design years ago, but she had not worked in the field for the thirteen years of their marriage. In fact, at the time of the divorce she was employed as a secretary. Sandra had been a homemaker and primary caretaker for the parties' three children during their marriage. She enabled David to obtain an advanced degree and establish a career. David purchased a large home after the divorce, but Sandra was unable to do so and lives in an apartment. It appears very

unlikely that in five years, Sandra will be able to earn an income that will enable her to either maintain the lifestyle she enjoyed during the marriage or a lifestyle commensurate with, although not necessarily equal to, that of David, at least until she remarries or her financial circumstances substantially improve. Id . at 860, 878 P.2d at 287. Considering the relevant factors for determining an appropriate spousal support award outlined in Sprenger, it does not appear that the district court's award was "just and equitable," having regard to the conditions in which the parties will be left by the divorce. See NRS 125.150(1)(a). Therefore, we conclude that the district court abused its discretion in ordering spousal support of only $500 per month for five years.

The disparity in income is also a factor to be considered in the award of attorney fees. It is not clear that the district court took that factor into consideration.

For the foregoing reasons, we reverse those portions of the district court's decree setting child support, spousal support and denying attorney fees and remand this case to the district court for reevaluation of child support, spousal support and attorney fees.

I dissent. I would affirm the judgment of the trial court.

My main objection to the majority opinion is that it unfairly and improvidently conjures out of thin air a new child support formula to be applied in cases of joint, equal custody. I say "thin air" because the court states no basis in law or reason [1] for the carelessly-concocted, "split-the-difference" formula that is adopted here, namely: "Calculate the appropriate percentage of gross income for each parent; subtract the difference between the two and require the parent with the higher income to pay the parent with the lower income that difference."

The mother and father of these three children share physical custody jointly and equally. The father earns more than the mother. To give the children the benefit of the father's greater earnings, the trial court correctly followed Barbagallo v. Barbagallo, 105 Nev. 546, 779 P.2d 532 (1989), and required the father to pay to the mother $300.00 per month to make up for the difference. The district court decided, properly, in my opinion, that under the circumstances of this case and under the various NRS 125B.080 factors referred to in Barbagallo that the payment of $100.00 per child would be fair and just in this case. By inventing its own child-support formula, this court will be requiring the father to pay over $1,000.00 per month, almost twice as much as any other legislatively-adopted formula that I have been able to locate.[2] Although I am deeply concerned about the unfairness suffered by this father, what is of most concern to me now is the unfairness that will be suffered by virtually every joint custodian who has greater earning power than the other joint custodian. Once the word gets out that an excessive, judicially-imposed formula is going to be unexceptionably applied to the joint custodian with the greater income, I fear that it will deter parents from entering into joint custody arrangements. Most joint custodial parents would not object to paying child support to the parent earning less income, but after a certain point the child support becomes more of a subsidy to the payee parent than it is a benefit to the children. As things stand, unless the legislature acts to create a reasonable formula to be applied in joint custody cases, I am afraid that

today's ruling will give great pause to the parent who earns more money than the other before agreeing to accept joint custody. I think that this is detrimental to the best interests of Nevada's children.

The district court did not go beyond the bounds of its discretion in deciding this case, and I would affirm the trial court's judgment.

FOOTNOTES

1. As I read the majority opinion, its reasoning seems to be that the legislature favors "requir[ing] each parent to provide a minimum level of support for his or her children, specified by the legislature as a percentage of gross income." The legislature has not provided a formula in cases of joint physical custody; therefore, reasons the majority, in the absence a legislative percentage-of-income formula, this court "should make the determination of . the appropriate percentage." I disfavor the court's enacting a percentage formula of this kind because to do so properly involves taking into account many difficult social issues and policy-setting functions, functions that can be suitably carried out only by the legislative branch of government. It is not the invasion of the legislative prerogative that disturbs me most about this case, however, it is the slipshod, by -guess-and-by-golly way that the court has gone about enacting a new child support formula.

2. The main point that I am trying to make in this dissenting opinion is that if the court is going to legislate it should do so in a measured and fair way. The court should have examined the various legislative formulas that have been adopted in these kinds of cases and selected the optimal approach to be adopted in this state. As things stand, the court did not even pretend to do this.There are many legal and policy matters that must be taken into consideration in the formulation of standards for child support payments that must be made by one parent to another. Most states have adopted one of two approaches, the "income sharing" approach or the Massachusetts approach, sometimes called the "marginal expenditure" model. In adopting a child support model, legislatures necessarily weigh the question of fairness to the child support obligor against the objective of providing adequately for the child. Another consideration is avoiding any shocking disproportion between the standard of living of a child and either of his parents. Formulas cannot be reasonably enacted by legislature or court without giving serious attention to the various alternatives available.The following is an example of how a rationally-devised formula might work in a joint custody case. If the marginal expenditure model were employed, child support payments in this case would be computed as follows: The total statutory child support obligation of both parents would first be calculated ($5,177.00 + $1,600.00 = $6,777.00 x 29% = $1,965.00). The marginal expenditure method adjusts for the additional costs of two households by an arbitrary increase of 50%; thus $1,965.00 plus 50% of $1,965.00 ($982.00) = $2,947.00, calculated as the total child support expenditure of both households. Half of $2,948.00, or $1,474.00, is required in each household. Of the total income of the two parties, the husband earns 69% and the wife earns 31%. Of the $1,474.00 needed in the wife's home, the husband must contribute 69%; thus the husband must pay $1,017.00. Of the

$1,474.00 needed in the husband's home, the wife must pay 31% or $457.00. Setting off these two obligations results in the husband's owing to the wife the difference between $1,017.00 and $457.00 or $560.00 per month. The arbitrary formulation adopted by the majority is grossly unfair to this obligor and to all joint custody obligors in the future.

SHEARING, J.

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

Supreme Court of Nevada.

WESLEY v. FOSTER

Cassandra WESLEY, Appellant, v. Anthony FOSTER, Respondent.

No. 38639.

-- March 21, 2003

Before SHEARING, LEAVITT and BECKER, JJ.

David J. Roger, District Attorney, and Beth E. Ford, Deputy District Attorney, Clark County, for Appellant.Anthony Foster, Henderson, in Proper Person.

OPINION

In this appeal, we examine whether the statutory presumptive maximum for child support, as provided in NRS 125B.070,[1] should be applied to the support obligation before, or after, application of the calculation set forth in Wright v. Osburn [2] for shared custodial arrangements. We conclude that the Wright calculation should be performed before application of the presumptive maximum support obligation.

FACTS AND PROCEDURAL HISTORY

In 1995, Cassandra Wesley and Anthony Foster had a child out of wedlock. Shortly thereafter, paternity was established and child support was set.

On November 15, 2000, Wesley requested a three-year review and modification of child support, pursuant to NRS 125B.145(1)(b); a hearing was conducted. Foster's gross monthly income was determined to be $5,417. Wesley's gross monthly income was determined to be $1,417. The hearing master calculated the appropriate percentage of each parent's income, subtracted Wesley's obligation from Foster's, pursuant to Wright, and then applied the statutory presumptive maximum (the cap), as provided by NRS 125B.070(1)(b).

Shortly thereafter, Foster filed an objection to the hearing master's recommendation and order, arguing that the child support court's decision was clearly erroneous because the cap should have been applied before performing the Wright calculation. Following a hearing, the district court agreed with Foster's approach and reset his support obligation.

Wesley appealed the district court's ruling, contending that in shared custody arrangements, the cap should be applied after the Wright calculations. We now take this opportunity to clarify our ruling in Wright.

DISCUSSION

NRS 125B.020(1) provides that parents have a duty to support their children. NRS 125B.070(1)(b) provides a formula for calculating child support based on a percentage "of a parent's gross monthly income, but not more than $500 per month per child . unless the court sets forth findings of fact as to the basis for a different amount pursuant to subsection 6 of NRS 125B.080." These two statutes, taken together, set forth an objective standard for establishing child support.[3]

In Wright, this court established a formula for determining which parent receives child support and the amount of support in situations where custody is shared equally.[4] The district court must "[c]alculate the appropriate percentage of gross income for each parent; subtract the difference between the two and require the parent with the higher income to pay the parent with the lower income that difference."[5] In Wright, we did not specifically address the question of when application of the statutory presumptive maximum should occur.[6]

The Wright offset should take place before, not after, application of the cap. This conclusion supports "the general philosophy of NRS 125B.070, which is to make sure adequate monthly support is paid to our children."[7]

As we have previously stated, the fixed child-care expenses incurred by each parent are usually not appreciably diminished as a result of shared custody.[8] "The sad reality that must be faced is that the desirable sharing of custody responsibilities by [another] custodian in joint custody situations has the inevitable result of increasing total child-related expenses."[9] Nonetheless, we must still attempt to maintain the comparable lifestyle of the child between the parents' households.[10]

In this case, there is a disparity in the gross monthly income of the two parents. Consistent with our holding in Wright, Wesley's percentage of gross monthly income should first be subtracted from Foster's percentage of gross monthly income.[11] Then, after this offset is made, the cap should be applied.[12] "Of course, the district court also has the option to adjust the amount of the award where special circumstances exist."[13]

CONCLUSION

We hold that in shared custodial arrangements, the Wright offset should be applied prior to application of the statutory cap. The district court erred by applying the cap prior to performing the offset. Accordingly, we reverse the order of the district court and remand this case for further proceedings consistent with this opinion.

FOOTNOTES

1. The version of NRS 125B.070 that applies in this opinion is the statute in effect through June 30, 2002, providing a presumptive maximum of $500 per month per child. The new version of the statute, effective July 1, 2002, provides a different presumptive maximum amount to each income range, ranging from a presumptive maximum amount of $500 to $800. The new statute also requires that the income range and maximum amounts be adjusted on July 1 of each year based upon the increase or decrease in the Consumer Price Index.

2. 114 Nev. 1367, 970 P.2d 1071 (1998).

3. See Wright, 114 Nev. at 1368, 970 P.2d at 1072.

4. Id. at 1368-69, 970 P.2d at 1072.

5. Id. at 1369, 970 P.2d at 1072.

6. See id. In Wright, we applied the applicable percentage to each parent's gross income and subtracted the lower obligation from the higher obligation. The father's obligation was $1 over the presumptive maximum before subtracting the mother's obligation.

7. Garrett v. Garrett, 111 Nev. 972, 976, 899 P.2d 1112, 1115 (1995) (Rose, J., dissenting).

8. Barbagallo v. Barbagallo, 105 Nev. 546, 549, 779 P.2d 532, 535 (1989).

9. Id.

10. See Wright, 114 Nev. at 1368, 970 P.2d at 1072.

11. 18% of $1,417.00 = $255.06. 18% of $5,417.00 = $975.06. Applying the offset, $975.06 minus $255.06 = $720.00, Foster's child support obligation prior to application of the cap.

12. The version of NRS 125B.070 in effect at the time of the petition for modification provided a $500 cap. Therefore, Foster's obligation for support payments to Wesley is $500 per month.

13. Wright, 114 Nev. at 1369, 970 P.2d at 1072 (citing NRS 125B.080(9)).

PER CURIAM.

NRS 125B.145 Review and modification of order for support: Request for review; jurisdiction; notification of right to request review.

1. An order for the support of a child must, upon the filing of a request for review by:

(a) 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 the district attorney has jurisdiction in the case; or

(b) A parent or legal guardian of the child,

⬌ be reviewed by the court at least every 3 years pursuant to this section to determine whether the order should be modified or adjusted. Each review conducted pursuant to this section must be in response to a separate request.

2. If the court:

(a) Does not have jurisdiction to modify the order, the court may forward the request to any court with appropriate jurisdiction.

(b) Has jurisdiction to modify the order and, taking into account the best interests of the child, determines that modification or adjustment of the order is appropriate, the court shall enter an order modifying or adjusting the previous order for support in accordance with the requirements of NRS 125B.070 and 125B.080.

3. The court shall ensure that:

(a) Each person who is subject to an order for the support of a child is notified, not less than once every 3 years, that the person may request a review of the order pursuant to this section; or

(b) An order for the support of a child includes notification that each person who is subject to the order may request a review of the order pursuant to this section.

4. An order for the support of a child may be reviewed at any time on the basis of changed circumstances. For the purposes of this subsection, a change of 20 percent or more in the gross monthly income of a person who is subject to an order for the support of a child shall be deemed to constitute changed circumstances requiring a review for modification of the order for the support of a child.

5. As used in this section:

(a) "Gross monthly income" has the meaning ascribed to it in NRS 125B.070.

(b) "Order for the support of a child" means such an order that was issued or is being enforced by a court of this State.

NRS 125.040 Orders for support and cost of suit during pendency of action.

1. In any suit for divorce the court may, in its discretion, upon application by either party and notice to the other party, require either party to pay moneys necessary to assist the other party in accomplishing one or more of the following:

(a) To provide temporary maintenance for the other party;

(b) To provide temporary support for children of the parties; or

(c) To enable the other party to carry on or defend such suit.

2. The court may make any order affecting property of the parties, or either of them, which it may deem necessary or desirable to accomplish the purposes of this section. Such orders shall be made by the court only after taking into consideration the financial situation of each of the parties.

3. The court may make orders pursuant to this section concurrently with orders pursuant to NRS 125.470.

NRS 125.150 Alimony and adjudication of property rights; award of attorney's fee; subsequent modification by court. Except as otherwise provided in NRS 125.155 and unless the action is contrary to a premarital agreement between the parties which is enforceable pursuant to chapter 123A of NRS:

1. In granting a divorce, the court:

(a) May award such alimony to the wife or to the husband, in a specified principal sum or as specified periodic payments, as appears just and equitable; and

(b) Shall, to the extent practicable, make an equal disposition of the community property of the parties, except that the court may make an unequal disposition of the community property in such proportions as it deems just if the court finds a compelling reason to do so and sets forth in writing the reasons for making the unequal disposition.

2. Except as otherwise provided in this subsection, in granting a divorce, the court shall dispose of any property held in joint tenancy in the manner set forth in subsection 1 for the disposition of community property. If a party has made a contribution of separate property to the acquisition or improvement of property held in joint tenancy, the court may provide for the reimbursement of that party for his or her contribution. The amount of reimbursement must not exceed the amount of the contribution of separate property that can be traced to the acquisition or improvement of property held in joint tenancy, without interest or any adjustment because of an increase in the value of the property held in joint tenancy. The amount of reimbursement must not exceed the value, at the time of the disposition, of the property held in joint tenancy for which the contribution of separate property was made. In determining whether to provide for the reimbursement, in whole or in part, of a party who has contributed separate property, the court shall consider:

(a) The intention of the parties in placing the property in joint tenancy;

(b) The length of the marriage; and

(c) Any other factor which the court deems relevant in making a just and equitable disposition of that property.

➥ As used in this subsection, "contribution" includes, without limitation, a down payment, a payment for the acquisition or improvement of property, and a payment reducing the principal of a loan used to finance the purchase or improvement of property. The term does not include a payment of interest on a loan used to finance the purchase or improvement of property, or a payment made for maintenance, insurance or taxes on property.

3. Except as otherwise provided in NRS 125.141, whether or not application for suit money has been made under the provisions of NRS 125.040, the court may award a reasonable attorney's fee to either party to an action for divorce if those fees are in issue under the pleadings.

4. In granting a divorce, the court may also set apart such portion of the husband's separate property for the wife's support, the wife's separate property for the husband's support or the separate property of either spouse for the support of their children as is deemed just and equitable.

5. In the event of the death of either party or the subsequent remarriage of the spouse to whom specified periodic payments were to be made, all the payments required by the decree must cease, unless it was otherwise ordered by the court.

6. If the court adjudicates the property rights of the parties, or an agreement by the parties settling their property rights has been approved by the court, whether or not the court has retained jurisdiction to modify them, the adjudication of property rights, and the agreements settling property rights, may nevertheless at any time thereafter be modified by the court upon written stipulation signed and acknowledged by the parties to the action, and in accordance with the terms thereof.

7. If a decree of divorce, or an agreement between the parties which was ratified, adopted or approved in a decree of divorce, provides for specified periodic payments of alimony, the decree or agreement is not subject to modification by the court as to accrued payments. Payments pursuant to a decree entered on or after July 1, 1975, which have not accrued at the time a motion for modification is filed may be modified upon a showing of changed circumstances, whether or not the court has expressly retained jurisdiction for the modification. In addition to any other factors the court considers relevant in determining whether to modify the order, the court shall consider whether the income of the spouse who is ordered to pay alimony, as indicated on the spouse's federal income tax return for the preceding calendar year, has been reduced to such a level that the spouse is financially unable to pay the amount of alimony the spouse has been ordered to pay.

8. In addition to any other factors the court considers relevant in determining whether to award alimony and the amount of such an award, the court shall consider:

(a) The financial condition of each spouse;

(b) The nature and value of the respective property of each spouse;

(c) The contribution of each spouse to any property held by the spouses pursuant to NRS 123.030;

(d) The duration of the marriage;

(e) The income, earning capacity, age and health of each spouse;

(f) The standard of living during the marriage;

(g) The career before the marriage of the spouse who would receive the alimony;

(h) The existence of specialized education or training or the level of marketable skills attained by each spouse during the marriage;

(i) The contribution of either spouse as homemaker;

(j) The award of property granted by the court in the divorce, other than child support and alimony, to the spouse who would receive the alimony; and

(k) The physical and mental condition of each party as it relates to the financial condition, health and ability to work of that spouse.

9. In granting a divorce, the court shall consider the need to grant alimony to a spouse for the purpose of obtaining training or education relating to a job, career or profession. In addition to any other factors the court considers relevant in determining whether such alimony should be granted, the court shall consider:

(a) Whether the spouse who would pay such alimony has obtained greater job skills or education during the marriage; and

(b) Whether the spouse who would receive such alimony provided financial support while the other spouse obtained job skills or education.

10. If the court determines that alimony should be awarded pursuant to the provisions of subsection 9:

(a) The court, in its order, shall provide for the time within which the spouse who is the recipient of the alimony must commence the training or education relating to a job, career or profession.

(b) The spouse who is ordered to pay the alimony may, upon changed circumstances, file a motion to modify the order.

(c) The spouse who is the recipient of the alimony may be granted, in addition to any other alimony granted by the court, money to provide for:

(1) Testing of the recipient's skills relating to a job, career or profession;

(2) Evaluation of the recipient's abilities and goals relating to a job, career or profession;

(3) Guidance for the recipient in establishing a specific plan for training or education relating to a job, career or profession;

(4) Subsidization of an employer's costs incurred in training the recipient;

(5) Assisting the recipient to search for a job; or

(6) Payment of the costs of tuition, books and fees for:

(I) The equivalent of a high school diploma;

(II) College courses which are directly applicable to the recipient's goals for his or her career; or

(III) Courses of training in skills desirable for employment.

11. For the purposes of this section, a change of 20 percent or more in the gross monthly income of a spouse who is ordered to pay alimony shall be deemed to constitute changed circumstances requiring a review for modification of the payments of alimony. As used in this subsection, "gross monthly income" has the meaning ascribed to it in NRS 125B.070.

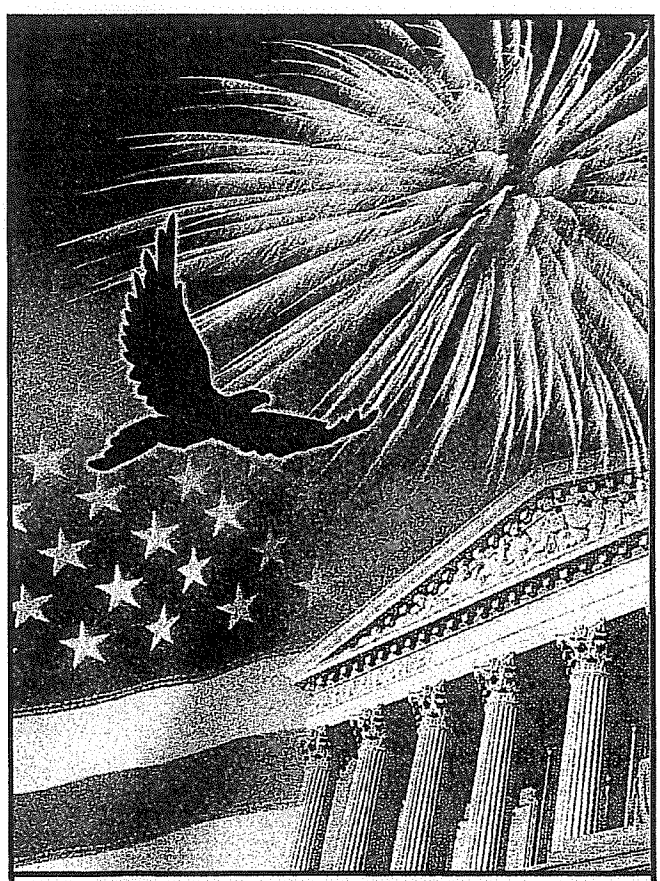
[Part 25:33:1861; A 1939, 18; 1943, 117; 1949, 54; 1943 NCL § 9463]—(NRS A 1961, 401; 1975, 1588; 1979, 1821; 1989, 744, 1005; 1993, 240, 2550; 1995, 1968; 1999, 2023; 2003, 544; 2007, 2479)

Department of the Treasury
Internal Revenue Service

Publication 504
Cat. No. 15006I

Divorced or Separated Individuals

For use in preparing
2011 Returns



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Jan 17, 2012

Contents

Future Developments

The IRS has created a page on IRS.gov for information about Publication 504, at *www.IRS.gov/pub504*. Information about any future developments affecting Publication 504 (such as legislation enacted after we release it) will be posted on that page.

Reminders

Relief from joint liability. In some cases, one spouse may be relieved of joint liability for tax, interest, and penalties on a joint tax return. For more information, see *Relief from joint liability* under *Married Filing Jointly*.

Social security numbers for dependents. You must include on your tax return the taxpayer identification number (generally the social security number) of every person for whom you claim an exemption. See *Exemptions for Dependents* under *Exemptions*, later.

Individual taxpayer identification number (ITIN). The IRS will issue an ITIN to a nonresident or resident alien who does not have and is not eligible to get a social security number (SSN). To apply for an ITIN, file Form W-7, Application for IRS Individual Taxpayer Identification Number, with the IRS. It takes about 6 to 10 weeks to get an ITIN. The ITIN is entered wherever an SSN is requested on a tax return. If you are required to include another person's SSN on your return and that person does not have and cannot get an SSN, enter that person's ITIN.

Change of address. If you change your mailing address, be sure to notify the Internal Revenue Service. You can use Form 8822, Change of Address. Mail it to the Internal Revenue Service Center for your old address. (Addresses for the Service Centers are on the back of the form.)

Change of name. If you change your name, be sure to notify the Social Security Administration using Form SS-5, Application for a Social Security Card.

Change of withholding. If you have been claiming a withholding exemption for your spouse, and you divorce or legally separate, you must give your employer a new Form W-4, Employee's Withholding Allowance Certificate, within 10 days after the divorce or separation showing the correct number of exemptions.

Photographs of missing children. The Internal Revenue Service is a proud partner with the National Center for Missing and Exploited Children. Photographs of missing children selected by the Center may appear in this publication on pages that would otherwise be blank. You can help bring these children home by looking at the photographs and calling 1-800-THE-LOST (1-800-843-5678) if you recognize a child.

Introduction

This publication explains tax rules that apply if you are divorced or separated from your spouse. It covers general filing information and can help you choose your filing status. It also can help you decide which exemptions you are entitled to claim, including exemptions for dependents.

The publication also discusses payments and transfers of property that often occur as a result of divorce and how you must treat them on your tax return. Examples include alimony, child support, other court-ordered payments, property settlements, and transfers of individual retirement arrangements. In addition, this publication also explains deductions allowed for some of the costs of obtaining a divorce and how to handle tax withholding and estimated tax payments.

The last part of the publication explains special rules that may apply to persons who live in community property states.

Comments and suggestions. We welcome your comments about this publication and your suggestions for future editions.

You can write to us at the following address:

Internal Revenue Service
Individual and Specialty Forms and Publications Branch
SE:W:CAR:MP:T:I
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Tax questions. If you have a tax question, check the information available on IRS.gov or call 1-800-829-1040. We cannot answer tax questions sent to either of the above addresses.

Useful Items

You may want to see:

Publications

- ❑ **501** Exemptions, Standard Deduction, and Filing Information
- ❑ **544** Sales and Other Dispositions of Assets
- ❑ **555** Community Property
- ❑ **590** Individual Retirement Arrangements (IRAs)
- ❑ **971** Innocent Spouse Relief

Form (and Instructions)

- ❑ **8332** Release/Revocation of Release of Claim to Exemption for Child by Custodial Parent
- ❑ **8379** Injured Spouse Allocation
- ❑ **8857** Request for Innocent Spouse Relief

See *How To Get Tax Help* near the end of this publication for information about getting publications and forms.

Filing Status

Your filing status is used in determining whether you must file a return, your standard deduction, and the correct tax. It may also be used in determining whether you can claim certain other deductions and credits. The filing status you

can choose depends partly on your marital status on the last day of your tax year.

Marital status. If you are unmarried, your filing status is single or, if you meet certain requirements, head of household or qualifying widow(er). If you are married, your filing status is either married filing a joint return or married filing a separate return. For information about the single and qualifying widow(er) filing statuses, see Publication 501.

For federal tax purposes, a marriage means only a legal union between a man and a woman as husband and wife. The word "spouse" means a person of the opposite sex who is a husband or a wife.

Unmarried persons. You are unmarried for the whole year if either of the following applies.

- You have obtained a final decree of divorce or separate maintenance by the last day of your tax year. You must follow your state law to determine if you are divorced or legally separated.

  Exception. If you and your spouse obtain a divorce in one year for the sole purpose of filing tax returns as unmarried individuals, and at the time of divorce you intend to remarry each other and do so in the next tax year, you and your spouse must file as married individuals.

- You have obtained a decree of annulment, which holds that no valid marriage ever existed. You must file amended returns (Form 1040X, Amended U.S. Individual Income Tax Return) for all tax years affected by the annulment that are not closed by the statute of limitations. The statute of limitations generally does not end until 3 years after the due date of your original return. On the amended return you will change your filing status to single, or if you meet certain requirements, head of household.

Married persons. You are married for the whole year if you are separated but you have not obtained a final decree of divorce or separate maintenance by the last day of your tax year. An interlocutory decree is not a final decree.

Exception. If you live apart from your spouse, under certain circumstances, you may be considered unmarried and can file as head of household. See *Head of Household*, later.

Married Filing Jointly

If you are married, you and your spouse can choose to file a joint return. If you file jointly, you both must include all your income, exemptions, deductions, and credits on that return. You can file a joint return even if one of you had no income or deductions.

If both you and your spouse have income, you should usually figure your tax on both a joint return and separate returns (using the filing status of married filing separately) to see which gives the two of you the lower combined tax.

Nonresident alien. To file a joint return, at least one of you must be a U.S. citizen or resident alien at the end of the tax year. If either of you was a nonresident alien at any time during the tax year, you can file a joint return only if you agree to treat the nonresident spouse as a resident of the United States. This means that your combined worldwide incomes are subject to U.S. income tax. These rules are explained in Publication 519, U.S. Tax Guide for Aliens.

Signing a joint return. Both you and your spouse generally must sign the return, or it will not be considered a joint return.

Joint and individual liability. Both you and your spouse may be held responsible, jointly and individually, for the tax and any interest or penalty due on your joint return. This means that one spouse may be held liable for all the tax due even if all the income was earned by the other spouse.

Divorced taxpayers. If you are divorced, you are jointly and individually responsible for any tax, interest, and penalties due on a joint return for a tax year ending before your divorce. This responsibility applies even if your divorce decree states that your former spouse will be responsible for any amounts due on previously filed joint returns.

Relief from joint liability. In some cases, a spouse may be relieved of the tax, interest, and penalties on a joint return. You can ask for relief no matter how small the liability.

There are three types of relief available.

- Innocent spouse relief.
- Separation of liability, which applies to joint filers who are divorced, widowed, legally separated, or who have not lived together for the 12 months ending on the date election of this relief is filed.
- Equitable relief.

Married persons who live in community property states, but who did not file joint returns, may also qualify for relief from liability arising from community property law or for equitable relief. See *Relief from liability arising from community property law*, later, under *Community Property*.

Each kind of relief has different requirements. You must file Form 8857 to request relief under any of these categories. Publication 971 explains these kinds of relief and who may qualify for them. You can also find information on our website at IRS.gov.

Tax refund applied to spouse's debts. The overpayment shown on your joint return may be used to pay the past-due amount of your spouse's debts. This includes your spouse's federal tax, state income tax, child or spousal support payments, or a federal nontax debt, such as a student loan. You can get a refund of your share of the overpayment if you qualify as an injured spouse.

Injured spouse. You are an injured spouse if you file a joint return and all or part of your share of the overpayment was, or is expected to be, applied against your spouse's past-due debts. An injured spouse can get a refund for his or her share of the overpayment that would otherwise be used to pay the past-due amount.

To be considered an injured spouse, you must:

1. Have made and reported tax payments (such as federal income tax withheld from wages or estimated tax payments), or claimed a refundable tax credit, such

as the earned income credit or additional child tax credit on the joint return, and

2. Not be legally obligated to pay the past-due amount.

Note. If the injured spouse's permanent home is in a community property state, then the injured spouse must only meet (2). For more information, see Publication 555.

Refunds that involve community property states must be divided according to local law. If you live in a community property state in which all community property is subject to the debts of either spouse, your entire refund is generally used to pay those debts.

If you are an injured spouse, you must file Form 8379 to have your portion of the overpayment refunded to you. Follow the instructions for the form.

If you have not filed your joint return and you know that your joint refund will be offset, file Form 8379 with your return. You should receive your refund within 14 weeks from the date the paper return is filed or within 11 weeks from the date the return is filed electronically.

If you filed your joint return and your joint refund was offset, file Form 8379 by itself. When filed after offset, it can take up to 8 weeks to receive your refund. Do not attach the previously filed tax return, but do include copies of all Forms W-2 and W-2G for both spouses and any Forms 1099 that show income tax withheld.

An injured spouse claim is different from an innocent spouse relief request. An injured spouse uses Form 8379 to request an allocation of the tax overpayment attributed to each spouse. An innocent spouse uses Form 8857 to request relief from joint liability for tax, interest, and penalties on a joint return for items of the other spouse (or former spouse) that were incorrectly reported on or omitted from the joint return. For information on innocent spouses, see Relief from joint liability, *earlier.*

Married Filing Separately

If you and your spouse file separate returns, you should each report only your own income, exemptions, deductions, and credits on your individual return. You can file a separate return even if only one of you had income. For information on exemptions you can claim on your separate return, see *Exemptions*, later.

Community or separate income. If you live in a community property state and file a separate return, your income may be separate income or community income for income tax purposes. For more information, see *Community Income* under *Community Property*, later.

Separate liability. If you and your spouse file separately, you each are responsible only for the tax due on your own return.

Itemized deductions. If you and your spouse file separate returns and one of you itemizes deductions, the other spouse cannot use the standard deduction and should also itemize deductions.

Dividing itemized deductions. You may be able to claim itemized deductions on a separate return for certain expenses that you paid separately or jointly with your spouse. See Table 1, later.

Separate returns may give you a higher tax. Some married couples file separate returns because each wants to be responsible only for his or her own tax. There is no joint liability. But in almost all instances, if you file separate returns, you will pay more combined federal tax than you would with a joint return. This is because the following special rules apply if you file a separate return.

1. Your tax rate generally will be higher than it would be on a joint return.
2. Your exemption amount for figuring the alternative minimum tax will be half of that allowed a joint return filer.
3. You cannot take the credit for child and dependent care expenses in most cases.
4. You cannot take the earned income credit.
5. You cannot take the exclusion or credit for adoption expenses in most instances.
6. You cannot take the credit for higher education expenses (American opportunity and lifetime learning credits), the deduction for student loan interest, or the tuition and fees deduction.
7. You cannot exclude the interest from qualified savings bonds that you used for higher education expenses.
8. If you lived with your spouse at any time during the tax year:
   a. You cannot claim the credit for the elderly or the disabled, and
   b. You will have to include in income more (up to 85%) of any social security or equivalent railroad retirement benefits you received.
9. Your income limits that reduce the child tax credit and the retirement savings contributions credit are half of the limits for a joint return filer.
10. Your capital loss deduction limit is $1,500 (instead of $3,000 on a joint return).
11. Your basic standard deduction, if allowable, is half of that allowed a joint return filer. See *Itemized deductions*, earlier.
12. Your first-time homebuyer credit is limited to $4,000 (instead of $8,000 if you filed a joint return). If the special rule for long-time residents of the same main home applies, the credit is limited to $3,250 (instead of $6,500 if you filed a joint return).

Joint return after separate returns. If either you or your spouse (or both of you) file a separate return, you generally can change to a joint return any time within 3 years from the due date (not including extensions) of the separate return or returns. This applies to a return either of you filed claiming married filing separately, single, or head of household filing status. Use Form 1040X to change your filing status.

Table 1. **Itemized Deductions on Separate Returns** *Keep for Your Records*

This table shows itemized deductions you can claim on your married filing separate return whether you paid the expenses separately with your own funds or jointly with your spouse. ***Caution:*** *If you live in a community property state, these rules do not apply. See* Community Property.

IF you paid ...	AND you ...	THEN you can deduct on your separate federal return...
medical expenses	paid with funds deposited in a joint checking account in which you and your spouse have an equal interest	half of the total medical expenses, subject to certain limits, unless you can show that you alone paid the expenses.
state income tax	file a separate state income tax return	the state income tax you alone paid during the year.
	file a joint state income tax return and you and your spouse are jointly and individually liable for the full amount of the state income tax	the state income tax you alone paid during the year.
	file a joint state income tax return and you are liable for only your own share of state income tax	the smaller of: • the state income tax you alone paid during the year, or • the total state income tax you and your spouse paid during the year multiplied by the following fraction. The numerator is your gross income and the denominator is your combined gross income.
property tax	paid the tax on property held as tenants by the entirety	the property tax you alone paid.
mortgage interest	paid the interest on a qualified home[1] held as tenants by the entirety	the mortgage interest you alone paid.
casualty loss	have a casualty loss on a home you own as tenants by the entirety	half of the loss, subject to the deduction limits. Neither spouse may report the total casualty loss.

[1] For more information on a qualified home and deductible mortgage interest, see Publication 936, Home Mortgage Interest Deduction.

Separate returns after joint return. After the due date of your return, you and your spouse cannot file separate returns if you previously filed a joint return.

Exception. A personal representative for a decedent can change from a joint return elected by the surviving spouse to a separate return for the decedent. The personal representative has 1 year from the due date (including extensions) of the joint return to make the change.

Head of Household

Filing as head of household has the following advantages.

- You can claim the standard deduction even if your spouse files a separate return and itemizes deductions.
- Your standard deduction is higher than is allowed if you claim a filing status of single or married filing separately.
- Your tax rate usually will be lower than it is if you claim a filing status of single or married filing separately.
- You may be able to claim certain credits (such as the dependent care credit and the earned income credit) you cannot claim if your filing status is married filing separately.
- Income limits that reduce your child tax credit and retirement savings contributions credit are higher than the income limits if you claim a filing status of married filing separately.

Requirements. You may be able to file as head of household if you meet all the following requirements.

- You are unmarried or "considered unmarried" on the last day of the year.
- You paid more than half the cost of keeping up a home for the year.

- A "qualifying person" lived with you in the home for more than half the year (except for temporary absences, such as school). However, if the "qualifying person" is your dependent parent, he or she does not have to live with you. See *Special rule for parent*, later, under *Qualifying person*.

Considered unmarried. You are considered unmarried on the last day of the tax year if you meet all the following tests.

- You file a separate return. A separate return includes a return claiming married filing separately, single, or head of household filing status.
- You paid more than half the cost of keeping up your home for the tax year.
- Your spouse did not live in your home during the last 6 months of the tax year. Your spouse is considered to live in your home even if he or she is temporarily absent due to special circumstances. See *Temporary absences*, later.
- Your home was the main home of your child, stepchild, or foster child for more than half the year. (See *Qualifying person*, below, for rules applying to a child's birth, death, or temporary absence during the year.)
- You must be able to claim an exemption for the child. However, you meet this test if you cannot claim the exemption only because the noncustodial parent can claim the child using the rule described later in *Special rule for divorced or separated parents (or parents who live apart)* under *Exemptions for Dependents*. The general rules for claiming an exemption for a dependent are shown later in Table 3.

If you were considered married for part of the year and lived in a community property state (one of the states listed later under Community Property), special rules may apply in determining your income and expenses. See Publication 555 for more information.

Nonresident alien spouse. If your spouse was a nonresident alien at any time during the tax year, and you have not chosen to treat your spouse as a resident alien, you are considered unmarried for head of household purposes. However, your spouse is not a qualifying person for head of household purposes. You must have another qualifying person and meet the other requirements to file as head of household.

Keeping up a home. You are keeping up a home only if you pay more than half the cost of its upkeep for the year. This includes rent, mortgage interest, real estate taxes, insurance on the home, repairs, utilities, and food eaten in the home. This does not include the cost of clothing, education, medical treatment, vacations, life insurance, or transportation for any member of the household.

Qualifying person. Table 2, later, shows who can be a qualifying person. Any person not described in Table 2 is not a qualifying person.

Generally, the qualifying person must live with you for more than half of the year.

Special rule for parent. If your qualifying person is your father or mother, you may be eligible to file as head of household even if your father or mother does not live with you. However, you must be able to claim an exemption for your father or mother. Also, you must pay more than half the cost of keeping up a home that was the main home for the entire year for your father or mother. You are keeping up a main home for your father or mother if you pay more than half the cost of keeping your parent in a rest home or home for the elderly.

Death or birth. You may be eligible to file as head of household if the individual who qualifies you for this filing status is born or dies during the year. You must have provided more than half of the cost of keeping up a home that was the individual's main home for more than half of the year, or, if less, the period during which the individual lived.

Example. You are unmarried. Your mother, for whom you can claim an exemption, lived in an apartment by herself. She died on September 2. The cost of the upkeep of her apartment for the year until her death was $6,000. You paid $4,000 and your brother paid $2,000. Your brother made no other payments towards your mother's support. Your mother had no income. Because you paid more than half of the cost of keeping up your mother's apartment from January 1 until her death, and you can claim an exemption for her, you can file as a head of household.

Temporary absences. You and your qualifying person are considered to live together even if one or both of you are temporarily absent from your home due to special circumstances such as illness, education, business, vacation, or military service. It must be reasonable to assume that the absent person will return to the home after the temporary absence. You must continue to keep up the home during the absence.

Kidnapped child. You may be eligible to file as head of household even if the child who is your qualifying person has been kidnapped. You can claim head of household filing status if all the following statements are true.

- The child must be presumed by law enforcement authorities to have been kidnapped by someone who is not a member of your family or the child's family.
- In the year of the kidnapping, the child lived with you for more than half the part of the year before the kidnapping.
- You would have qualified for head of household filing status if the child had not been kidnapped.

This treatment applies for all years until the child is returned. However, the last year this treatment can apply is the earlier of:

- The year there is a determination that the child is dead, or
- The year the child would have reached age 18.

Table 2. **Who Is a Qualifying Person Qualifying You To File as Head of Household?**[1]

Keep for Your Records

Caution. *See the text of this publication for the other requirements you must meet to claim head of household filing status.*

IF the person is your ...	AND ...	THEN that person is ...
qualifying child (such as a son, daughter, or grandchild who lived with you more than half the year and meets certain other tests)[2]	he or she is single	a qualifying person, whether or not you can claim an exemption for the person.
	he or she is married and you can claim an exemption for him or her	a qualifying person.
	he or she is married and you cannot claim an exemption for him or her	not a qualifying person.[3]
qualifying relative[4] who is your father or mother	you can claim an exemption for him or her[5]	a qualifying person.[6]
	you cannot claim an exemption for him or her	not a qualifying person.
qualifying relative[4] other than your father or mother (such as a grandparent, brother, or sister who meets certain tests)	he or she lived with you more than half the year, and he or she is related to you in one of the ways listed under *Relatives who do not have to live with you* in Publication 501 and you can claim an exemption for him or her[5]	a qualifying person.
	he or she did not live with you more than half the year	not a qualifying person.
	he or she is not related to you in one of the ways listed under *Relatives who do not have to live with you* in Publication 501 and is your qualifying relative only because he or she lived with you all year as a member of your household	not a qualifying person.
	you cannot claim an exemption for him or her	not a qualifying person.

[1] A person cannot qualify more than one taxpayer to use the head of household filing status for the year.

[2] See Table 3, later, for the tests that must be met to be a qualifying child. **Note.** If you are a noncustodial parent, the term "qualifying child" for head of household filing status does not include a child who is your qualifying child for exemption purposes only because of the rules described under *Children of Divorced or Separated Parents (or Parents Who Live Apart)* under *Exemptions for Dependents*, later. If you are the custodial parent and those rules apply, the child is generally your qualifying child for head of household filing status even though the child is not a qualifying child for whom you can claim an exemption.

[3] This person is a qualifying person if the only reason you cannot claim the exemption is that you can be claimed as a dependent on someone else's return.

[4] See Table 3, later, for the tests that must be met to be a qualifying relative.

[5] If you can claim an exemption for a person only because of a multiple support agreement, that person is not a qualifying person. See *Multiple Support Agreement* in Publication 501.

[6] See *Special rule for parent* for an additional requirement.

More information. For more information on filing as head of household, see Publication 501.

Exemptions

You can deduct $3,700 for each exemption you claim in 2011.

There are two types of exemptions: personal exemptions and exemptions for dependents. If you are entitled to claim an exemption for a dependent (such as your child), that dependent cannot claim his or her personal exemption on his or her own tax return.

Personal Exemptions

You can claim your own exemption unless someone else can claim it. If you are married, you may be able to take an exemption for your spouse. These are called personal exemptions.

Exemption for Your Spouse

Your spouse is never considered your dependent.

Joint return. On a joint return, you can claim one exemption for yourself and one for your spouse.

If your spouse had any gross income, you can claim his or her exemption only if you file a joint return.

Separate return. If you file a separate return, you can take an exemption for your spouse only if your spouse had no gross income, is not filing a return, and was not the dependent of another taxpayer. If your spouse is the dependent of another taxpayer, you cannot claim an exemption for your spouse even if the other taxpayer does not actually claim your spouse's exemption.

Alimony paid. If you paid alimony to your spouse, you cannot take an exemption for your spouse. This is because alimony is gross income to the spouse who received it.

Divorced or separated spouse. If you obtained a final decree of divorce or separate maintenance during the year, you cannot take your former spouse's exemption. This rule applies even if you provided all of your former spouse's support.

Exemptions for Dependents

You are allowed one exemption for each person you can claim as a dependent. You can claim an exemption for a dependent even if your dependent files a return.

The term "dependent" means:

- A qualifying child, or
- A qualifying relative.

Table 3 shows the tests that must be met to be either a qualifying child or qualifying relative, plus the additional requirements for claiming an exemption for a dependent. For detailed information, see Publication 501.

Dependent not allowed a personal exemption. *If you can claim an exemption for your dependent, the dependent cannot claim his or her own exemption on his or her own tax return. This is true even if you do not claim the dependent's exemption on your return.*

Table 3. Overview of the Rules for Claiming an Exemption for a Dependent

Caution. *This table is only an overview of the rules. For details, see Publication 501.*

- You cannot claim any dependents if you, or your spouse if filing jointly, could be claimed as a dependent by another taxpayer.
- You cannot claim a married person who files a joint return as a dependent unless that joint return is only a claim for refund and there would be no tax liability for either spouse on separate returns.
- You cannot claim a person as a dependent unless that person is a U.S. citizen, U.S. resident alien, U.S. national, or a resident of Canada or Mexico, for some part of the year.[1]
- You cannot claim a person as a dependent unless that person is your **qualifying child** or **qualifying relative.**

Tests To Be a Qualifying Child	Tests To Be a Qualifying Relative
1. The child must be your son, daughter, stepchild, foster child, brother, sister, half brother, half sister, stepbrother, stepsister, or a descendant of any of them. 2. The child must be (a) under age 19 at the end of the year and younger than you (or your spouse, if filing jointly), (b) under age 24 at the end of the year, a full-time student, and younger than you (or your spouse, if filing jointly), or (c) any age if permanently and totally disabled. 3. The child must have lived with you for more than half of the year.[2] 4. The child must not have provided more than half of his or her own support for the year. 5. The child is not filing a joint return for the year (unless that joint return is filed only as a claim for refund). If the child meets the rules to be a qualifying child of more than one person, only one person can actually treat the child as a qualifying child. See *Special Rule for Qualifying Child of More Than One Person*, later, to find out which person is the person entitled to claim the child as a qualifying child.	1. The person cannot be your qualifying child or the qualifying child of anyone else. 2. The person either (a) must be related to you in one of the ways listed under *Relatives who do not have to live with you* in Publication 501 or (b) must live with you all year as a member of your household [2] (and your relationship must not violate local law). 3. The person's gross income for the year must be less than $3,700.[3] 4. You must provide more than half of the person's total support for the year.[4]

[1] Exception exists for certain adopted children.
[2] Exceptions exist for temporary absences, children who were born or died during the year, children of divorced or separated parents (or parents who live apart), and kidnapped children.
[3] Exception exists for persons who are disabled and have income from a sheltered workshop.
[4] Exceptions exist for multiple support agreements, children of divorced or separated parents (or parents who live apart), and kidnapped children. See Publication 501.

You may be entitled to a child tax credit for each qualifying child who was under age 17 at the end of the year if you claimed an exemption for that child. For more information, see the instructions for the tax form you file (Form 1040, 1040A, or 1040EZ).

Children of Divorced or Separated Parents (or Parents Who Live Apart)

In most cases, because of the residency test (see item 3 under *Tests To Be a Qualifying Child* in Table 3), a child of divorced or separated parents is the qualifying child of the custodial parent. However, the child will be treated as the qualifying child of the noncustodial parent if the special rule (discussed next) applies.

Special rule for divorced or separated parents (or parents who live apart). A child will be treated as the qualifying child of his or her noncustodial parent if all four of the following statements are true.

1. The parents:
   a. Are divorced or legally separated under a decree of divorce or separate maintenance,
   b. Are separated under a written separation agreement, or
   c. Lived apart at all times during the last 6 months of the year, whether or not they are or were married.
2. The child received over half of his or her support for the year from the parents.
3. The child is in the custody of one or both parents for more than half of the year.
4. Either of the following applies.
   a. The custodial parent signs a written declaration, discussed later, that he or she will not claim the child as a dependent for the year, and the noncustodial parent attaches this written declaration to his or her return. (If the decree or agreement went into effect after 1984, see *Divorce decree or separation agreement that went into effect after 1984 and before 2009*, later.
   b. A pre-1985 decree of divorce or separate maintenance or written separation agreement that applies to 2011 states that the noncustodial parent can claim the child as a dependent, the decree or agreement was not changed after 1984 to say the noncustodial parent cannot claim the child as a dependent, and the noncustodial parent provides at least $600 for the child's support during 2011. See *Child support under pre-1985 agreement*, later.

Custodial parent and noncustodial parent. The custodial parent is the parent with whom the child lived for the greater number of nights during the year. The other parent is the noncustodial parent.

If the parents divorced or separated during the year and the child lived with both parents before the separation, the custodial parent is the one with whom the child lived for the greater number of nights during the rest of the year.

A child is treated as living with a parent for a night if the child sleeps:

- At that parent's home, whether or not the parent is present, or
- In the company of the parent, when the child does not sleep at a parent's home (for example, the parent and child are on vacation together).

Equal number of nights. If the child lived with each parent for an equal number of nights during the year, the custodial parent is the parent with the higher adjusted gross income.

December 31. The night of December 31 is treated as part of the year in which it begins. For example, December 31, 2011, is treated as part of 2011.

Emancipated child. If a child is emancipated under state law, the child is treated as not living with either parent. See *Examples 5 and 6.*

Absences. If a child was not with either parent on a particular night (because, for example, the child was staying at a friend's house), the child is treated as living with the parent with whom the child normally would have lived for that night, except for the absence. But if it cannot be determined with which parent the child normally would have lived or if the child would not have lived with either parent that night, the child is treated as not living with either parent that night.

Parent works at night. If, due to a parent's nighttime work schedule, a child lives for a greater number of days but not nights with the parent who works at night, that parent is treated as the custodial parent. On a school day, the child is treated as living at the primary residence registered with the school.

Example 1 – child lived with one parent greater number of nights. You and your child's other parent are divorced. In 2011, your child lived with you 210 nights and with the other parent 155 nights. You are the custodial parent.

Example 2 – child is away at camp. In 2011, your daughter lives with each parent for alternate weeks. In the summer, she spends 6 weeks at summer camp. During the time she is at camp, she is treated as living with you for 3 weeks and with her other parent, your ex-spouse, for 3 weeks because this is how long she would have lived with each parent if she had not attended summer camp.

Example 3 – child lived same number of days with each parent. Your son lived with you 180 nights during the year and lived the same number of nights with his other parent, your ex-spouse. Your adjusted gross income is $40,000. Your ex-spouse's adjusted gross income is $25,000. You are treated as your son's custodial parent because you have the higher adjusted gross income.

Example 4 – child is at parent's home but with other parent. Your son normally lives with you during the week and with his other parent, your ex-spouse, every other weekend. You become ill and are hospitalized. The other parent lives in your home with your son for 10 consecutive days while you are in the hospital. Your son is treated as living with you during this 10-day period because he was living in your home.

Example 5 – child emancipated in May. When your son turned age 18 in May 2011, he became emancipated under the law of the state where he lives. As a result, he is not considered in the custody of his parents for more than half of the year. The special rule for children of divorced or separated parents (or parents who live apart) does not apply.

Example 6 – child emancipated in August. Your daughter lives with you from January 1, 2011, until May 31, 2011, and lives with her other parent, your ex-spouse, from June 1, 2011, through the end of the year. She turns 18 and is emancipated under state law on August 1, 2011. Because she is treated as not living with either parent beginning on August 1, she is treated as living with you the greater number of nights in 2011. You are the custodial parent.

Written declaration. The custodial parent must use either Form 8332 or a similar statement (containing the same information required by the form) to make the written declaration to release the exemption to the noncustodial parent. The noncustodial parent must attach a copy of the form or statement to his or her tax return.

The exemption can be released for 1 year, for a number of specified years (for example, alternate years), or for all future years, as specified in the declaration.

Divorce decree or separation agreement that went into effect after 1984 and before 2009. If the divorce decree or separation agreement went into effect after 1984 and before 2009, the noncustodial parent may be able to attach certain pages from the decree or agreement instead of Form 8332. To be able to do this, the decree or agreement must state all three of the following.

1. The noncustodial parent can claim the child as a dependent without regard to any condition, such as payment of support.
2. The custodial parent will not claim the child as a dependent for the year.
3. The years for which the noncustodial parent, rather than the custodial parent, can claim the child as a dependent.

The noncustodial parent must attach all of the following pages of the decree or agreement to his or her return.

- The cover page (write the other parent's social security number on this page).
- The pages that include all of the information identified in items (1) through (3) above.
- The signature page with the other parent's signature and the date of the agreement.

The noncustodial parent must attach the required information even if it was filed with a return in an earlier year.

Post-2008 divorce decree or separation agreement. If the decree or agreement went into effect after 2008, a noncustodial parent claiming an exemption for a child cannot attach pages from a divorce decree or separation agreement instead of Form 8332. The custodial parent must sign either a Form 8332 or a similar statement. The only purpose of this statement must be to release the custodial parent's claim to the child's exemption. The noncustodial parent must attach a copy to his or her return. The form or statement must release the custodial parent's claim to the child without any conditions. For example, the release must not depend on the noncustodial parent paying support.

The noncustodial parent must attach the required information even if it was filed with a return in an earlier year.

Revocation of release of claim to an exemption. The custodial parent can revoke a release of claim to exemption that he or she previously released to the noncustodial parent on Form 8332 or a similar statement. In order for the revocation to be effective for 2011, the custodial parent must have given (or made reasonable efforts to give) written notice of the revocation to the noncustodial parent in 2010 or earlier. The custodial parent can use Part III of Form 8332 for this purpose and must attach a copy of the revocation to his or her return for each tax year he or she claims the child as a dependent as a result of the revocation.

Remarried parent. If you remarry, the support provided by your new spouse is treated as provided by you.

Child support under pre-1985 agreement. All child support payments actually received from the noncustodial parent under a pre-1985 agreement are considered used for the support of the child, even if such amounts are not actually spent for child support.

Example. Under a pre-1985 agreement, the noncustodial parent provides $1,200 for the child's support. This amount is considered support provided by the noncustodial parent even if the $1,200 was actually spent on things other than support.

Parents who never married. The special rule for divorced or separated parents also applies to parents who never married and lived apart at all times during the last 6 months of the year.

Alimony. Payments to your spouse that are includible in his or her gross income as either alimony, separate maintenance payments, or similar payments from an estate or trust, are not treated as a payment for the support of a dependent.

Special Rule for Qualifying Child of More Than One Person

If your qualifying child is not a qualifying child of anyone else, this special rule does not apply to you and you do not need to read about it. This is also true if your qualifying child is not a qualifying child of anyone else except your spouse with whom you file a joint return.

If a child is treated as the qualifying child of the noncustodial parent under the Special rule for divorced or separated parents (or parents who live apart), *earlier, see* Applying this special rule to divorced or separated parents (or parents who live apart), *later.*

Sometimes, a child meets the relationship, age, residency, support, and joint return tests to be a qualifying child of more than one person. (For a description of these tests, see list items 1 through 5 under *Tests To Be a Qualifying Child* in *Table 3*). Although the child meets the conditions to be a qualifying child of each of these persons, only one person can actually use the child as a qualifying child to take all of the following tax benefits (provided the person is eligible for each benefit).

1. The exemption for the child.
2. The child tax credit.
3. Head of household filing status.
4. The credit for child and dependent care expenses.
5. The exclusion from income for dependent care benefits.
6. The earned income credit.

The other person cannot take any of these benefits based on this qualifying child. In other words, you and the other person cannot agree to divide these tax benefits between you. The other person cannot take any of these tax benefits unless he or she has a different qualifying child.

Tiebreaker rules. To determine which person can treat the child as a qualifying child to claim these six tax benefits, the following tiebreaker rules apply.

- If only one of the persons is the child's parent, the child is treated as the qualifying child of the parent.
- If the parents do not file a joint return together but both parents claim the child as a qualifying child, the IRS will treat the child as the qualifying child of the parent with whom the child lived for the longer period of time during the year. If the child lived with each parent for the same amount of time, the IRS will treat the child as the qualifying child of the parent who had the higher adjusted gross income (AGI) for the year.
- If no parent can claim the child as a qualifying child, the child is treated as the qualifying child of the person who had the highest AGI for the year.
- If a parent can claim the child as a qualifying child but no parent does so claim the child, the child is treated as the qualifying child of the person who had the highest AGI for the year, but only if that person's AGI is higher than the highest AGI of any of the child's parents who can claim the child. If the child's parents file a joint return with each other, this rule can be applied by dividing the parents' total AGI evenly between them; see Pub. 501 for details.

Subject to these tiebreaker rules, you and the other person may be able to choose which of you claims the child as a qualifying child.

Example 1—separated parents. You, your husband, and your 10-year-old son lived together until August 1, 2011, when your husband moved out of the household. In August and September, your son lived with you. For the rest of the year, your son lived with your husband, the boy's father. Your son is a qualifying child of both you and your husband because your son lived with each of you for more than half the year and because he met the relationship, age, support, and joint return tests for both of you. At the end of the year, you and your husband still were not divorced, legally separated, or separated under a written separation agreement, so the special rule for divorced or separated parents (or parents who live apart) does not apply.

You and your husband will file separate returns. Your husband agrees to let you treat your son as a qualifying child. This means, if your husband does not claim your son as a qualifying child, you can claim your son as a dependent and treat him as a qualifying child for the child tax credit and exclusion for dependent care benefits, if you qualify for each of those tax benefits. However, you cannot claim head of household filing status because you and your husband did not live apart the last 6 months of the year. As a result, your filing status is married filing separately, so you cannot claim the earned income credit or the credit for child and dependent care expenses.

Example 2—separated parents claim same child. The facts are the same as in *Example 1* except that you and your husband both claim your son as a qualifying child. In this case, only your husband will be allowed to treat your son as a qualifying child. This is because, during 2011, the boy lived with him longer than with you. If you claimed an exemption, the child tax credit, or the exclusion for dependent care benefits for your son, the IRS will disallow your claim to all these tax benefits, unless you have another qualifying child. In addition, because you and your husband did not live apart the last 6 months of the year, your husband cannot claim head of household filing status. As a result, his filing status is married filing separately, so he cannot claim the earned income credit or the credit for child and dependent care expenses.

Applying this special rule to divorced or separated parents (or parents who live apart). If a child is treated as the qualifying child of the noncustodial parent under the special rule for divorced or separated parents (or parents who live apart) described earlier, only the noncustodial parent can claim an exemption and the child tax credit for the child. However, the noncustodial parent cannot claim the child as a qualifying child for head of household filing status, the credit for child and dependent care expenses,

the exclusion for dependent care benefits, and the earned income credit. Only the custodial parent, if eligible, or another eligible taxpayer can claim the child as a qualifying child for those four tax benefits. If the child is the qualifying child of more than one person for those tax benefits, the tiebreaker rules determine which person can treat the child as a qualifying child.

Example 1. You and your 5-year-old son lived all year with your mother, who paid the entire cost of keeping up the home. Your AGI is $10,000. Your mother's AGI is $25,000. Your son's father does not live with you or your son. Under the rules for children of divorced or separated parents (or parents who live apart), your son is treated as the qualifying child of his father, who can claim an exemption and the child tax credit for the child if he meets all the requirements to do so. Because of this, you cannot claim an exemption or the child tax credit for your son. However, your son's father cannot claim your son as a qualifying child for head of household filing status, the credit for child and dependent care expenses, the exclusion for dependent care benefits, or the earned income credit. You and your mother did not have any child care expenses or dependent care benefits, but the boy is a qualifying child of both you and your mother for head of household filing status and the earned income credit because he meets the relationship, age, residency, support, and joint return tests for both you and your mother. (Note: The support test does not apply for the earned income credit.) However, you agree to let your mother claim your son. This means she can claim him for head of household filing status and the earned income credit if she qualifies for each and if you do not claim him as a qualifying child for the earned income credit. (You cannot claim head of household filing status because your mother paid the entire cost of keeping up the home.)

Example 2. The facts are the same as in *Example 1* except that your AGI is $25,000 and your mother's AGI is $21,000. Your mother cannot claim your son as a qualifying child for any purpose because her AGI is not higher than yours.

Example 3. The facts are the same as in *Example 1* except that you and your mother both claim your son as a qualifying child for the earned income credit. Your mother also claims him as a qualifying child for head of household filing status. You as the child's parent will be the only one allowed to claim your son as a qualifying child for the earned income credit. The IRS will disallow your mother's claim to the earned income credit and head of household filing status unless she has another qualifying child.

Alimony

Alimony is a payment to or for a spouse or former spouse under a divorce or separation instrument. It does not include voluntary payments that are not made under a divorce or separation instrument.

Alimony is deductible by the payer and must be included in the spouse's or former spouse's income. Although this discussion is generally written for the payer of the alimony, the recipient can use the information to determine whether an amount received is alimony.

To be alimony, a payment must meet certain requirements. Different requirements generally apply to payments under instruments executed after 1984 and to payments under instruments executed before 1985. The requirements that apply to payments under post-1984 instruments are discussed later.

Spouse or former spouse. Unless otherwise stated, the term "spouse" includes former spouse.

Divorce or separation instrument. The term "divorce or separation instrument" means:

- A decree of divorce or separate maintenance or a written instrument incident to that decree,
- A written separation agreement, or
- A decree or any type of court order requiring a spouse to make payments for the support or maintenance of the other spouse. This includes a temporary decree, an interlocutory (not final) decree, and a decree of alimony *pendente lite* (while awaiting action on the final decree or agreement).

Invalid decree. Payments under a divorce decree can be alimony even if the decree's validity is in question. A divorce decree is valid for tax purposes until a court having proper jurisdiction holds it invalid.

Amended instrument. An amendment to a divorce decree may change the nature of your payments. Amendments are not ordinarily retroactive for federal tax purposes. However, a retroactive amendment to a divorce decree correcting a clerical error to reflect the original intent of the court will generally be effective retroactively for federal tax purposes.

Example 1. A court order retroactively corrected a mathematical error under your divorce decree to express the original intent to spread the payments over more than 10 years. This change also is effective retroactively for federal tax purposes.

Example 2. Your original divorce decree did not fix any part of the payment as child support. To reflect the true intention of the court, a court order retroactively corrected the error by designating a part of the payment as child support. The amended order is effective retroactively for federal tax purposes.

Deducting alimony paid. You can deduct alimony you paid, whether or not you itemize deductions on your return. You must file Form 1040. You cannot use Form 1040A, 1040EZ, or 1040NR.

Enter the amount of alimony you paid on Form 1040, line 31a. In the space provided on line 31b, enter your spouse's social security number.

If you paid alimony to more than one person, enter the social security number of one of the recipients. Show the social security number and amount paid to each other recipient on an attached statement. Enter your total payments on line 31a.

If you do not provide your spouse's social security number, you may have to pay a $50 penalty and your deduction may be disallowed.

Reporting alimony received. Report alimony as income you received on Form 1040, line 11, or on Schedule NEC (Form 1040NR), line 12. You cannot use Form 1040A, 1040EZ, or 1040NR-EZ.

You must give the person who paid the alimony your social security number. If you do not, you may have to pay a $50 penalty.

Withholding on nonresident aliens. If you are a U.S. citizen or resident alien and you pay alimony to a nonresident alien spouse, you may have to withhold income tax at a rate of 30% on each payment. However, many tax treaties provide for an exemption from withholding for alimony payments. For more information, see Publication 515, Withholding of Tax on Nonresident Aliens and Foreign Entities.

General Rules

The following rules apply to alimony regardless of when the divorce or separation instrument was executed.

Payments not alimony. Not all payments under a divorce or separation instrument are alimony. Alimony does not include:

- Child support,
- Noncash property settlements,
- Payments that are your spouse's part of community income, as explained later under *Community Property*,
- Payments to keep up the payer's property, or
- Use of the payer's property.

Example. Under your written separation agreement, your spouse lives rent-free in a home you own and you must pay the mortgage, real estate taxes, insurance, repairs, and utilities for the home. Because you own the home and the debts are yours, your payments for the mortgage, real estate taxes, insurance, and repairs are not alimony. Neither is the value of your spouse's use of the home.

If they otherwise qualify, you can deduct the payments for utilities as alimony. Your spouse must report them as income. If you itemize deductions, you can deduct the real estate taxes and, if the home is a qualified home, you can also include the interest on the mortgage in figuring your deductible interest. However, if your spouse owned the home, see *Example 2* under *Payments to a third party*, later. If you owned the home jointly with your spouse, see Table 4. For more information on a qualified home and deductible mortgage interest, see Publication 936, Home Mortgage Interest Deduction.

Child support. To determine whether a payment is child support, see the discussion under *Instruments Executed After 1984*, later. If your divorce or separation agreement was executed before 1985, see the 2004 revision of Publication 504 on IRS.gov.

Underpayment. If both alimony and child support payments are called for by your divorce or separation instrument, and you pay less than the total required, the payments apply first to child support and then to alimony.

Example. Your divorce decree calls for you to pay your former spouse $200 a month ($2,400 ($200 x 12) a year)

Table 4. Expenses for a Jointly-Owned Home

Keep for Your Records

Use the table below to find how much of your payment is alimony and how much you can claim as an itemized deduction.

IF you must pay all of the ...	AND your home is ...	THEN you can deduct and your spouse (or former spouse) must include as alimony ...	AND you can claim as an itemized deduction ...
mortgage payments (principal and interest)	jointly owned	half of the total payments	half of the interest as interest expense (if the home is a qualified home).[1]
real estate taxes and home insurance	held as tenants in common	half of the total payments	half of the real estate taxes[2] and none of the home insurance.
	held as tenants by the entirety or in joint tenancy	none of the payments	all of the real estate taxes and none of the home insurance.

[1] Your spouse (or former spouse) can deduct the other half of the interest if the home is a qualified home.
[2] Your spouse (or former spouse) can deduct the other half of the real estate taxes.

RELOCATIONS AND SEGUE TO MHP ROLE

I. The law of relocations, and the place of psychological evidence to it

A. NRS 125.200

B. Cases under it

1. Primary custody

a. Measurements of Custodial Time (from *Rivero* exhibits)

2. Joint custody

3. No custody?

C. The "Relocation Risk Assessment" and its misuse

1. February, 2009, "Guidelines for Child Custody Evaluations in Family Law Proceedings" approved by the American Psychological Association ("APA"): "Psychologists render a valuable service when they provide competent and impartial opinions with direct relevance to the 'psychological best interests' of the child."

a. Derivation, per APA, from "sound psychological data" and not "personal biases or unsupported beliefs."

b. "Psychologists are encouraged to monitor their own values, perceptions, and reactions actively, and to seek peer consultation in the face of a potential loss of impartiality." vs. "I don't believe in relocations," "I disagree with current relocation law," and "a high standard should be established for [relocation] in custody dispute situations."

2. Role of DV: Legal factor favoring relocation (*Hayes v. Gallacher*) vs. "DV is a risk factor [militating against] relocation."

3. Tiny sample size; unreliable for any purpose.

D. Current State of the Art of Social Science Research in Relocation Cases (as reported by Deborah A. Day, Psy.D. & Arnold Shienvold, Ph.D., as of 9/19/2012:

1. Data extremely limited.

2. Some generalizations relating to multiple moves.

3. Otherwise, data "Does not create favor for or against relocation."

4. [See slides from CLE]

E. "Psychological best interest" is ***NOT*** legal "best interest" (see NRS 125.480)

1. Psychological concerns and recommendations are just one piece of legal determinations

F. Insertion of personal opinion into reports & other violations of APA Guidelines is unethical; basis for ethics complaint to licensing boards.

1. *Grossman v. PA State Board of Psychology* (2003); penalties for APA violations

List of Exhibits:

1. NRS 125C.200
2. Measurements of Custodial Time
3. *Schwartz* Factors Worksheet
4. *Hayes v. Gallacher*, 115 Nev. 1, 972 P.2d 1138 (1999)
5. "Shrinks Gone Wild" (legal note no. 34)
6. Slide selection from "Speculation or Science – Psychological Research Used in Custody Cases" (9/19/12)
7. *Grossman* opinion

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

(Added to NRS by 1987, 1444; A 1999, 737)—(Substituted in revision for NRS 125A.350)

Ex. 1

MEASUREMENTS OF CUSTODIAL TIME

As detailed in the *Rivero Amicus Brief*, no single measurement of "time" is probably adequate for all cases, because the purpose of the measurement is to approximate direct expenditures made on a child, and a great number of possible facts can disconnect time-share from actual expenditures relating to a child.

The reader is cautioned that the approximations can be altered to some degree by such random events of which parent has the starting week, or whether the schedule starts on January 1 or somewhere in the middle of a year. Even a leap year can alter the math.

Nevertheless, for many cases, a short-hand "translation" of various custodial schedules to percentage of time share might be useful, and the following approximations are provided for that purpose.

STANDARD SCHEDULES[1]

Every other weekend: 14%.

First, third and alternate fifth weekends: 14%.

Second, fourth and alternate fifth weekends: 14%.

First, third and fifth weekends: 15%.

Second, fourth and fifth weekends: 15%.

Every other weekend, plus one evening per week: 16%.

Every other weekend (52 days), plus two weeks in summer (14 days), plus Mother's Day or Father's Day (1 day), plus Thanksgiving or Christmas (2 days), plus birthdays (2 days), plus a miscellaneous day (1 day): 20% (73 days) overnights.[2]

Alternating extended weekends: 21%.

Alternating extended weekends plus one evening per week: 23%.

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[1] Presumes 6:00 p.m. exchanges.

[2] See Karen Czapanskiy, "Child Support, Visitation, Shared Custody and Split Custody," in Child Support Guidelines: The Next Generation 43, 44 (U.S. Dep't Health & Human Services, Office of Child Support Enforcement, 1994); Karen Czapanskiy, Child Support and Visitation: Rethinking the Connection, 20 Rut.-Cam. L.J. 619 (1989).

EXHIBIT 5

Every other weekend, plus one overnight per week: 29%.

Every weekend: 29%.

Alternating extended weekends plus one overnight per week: 36%.

4/3 custody split: 43%.

Alternating weeks: 50%.

OVERNIGHTS[3]

10% = 37.

15% = 55.

20% = 73.

25% = 91.

30% = 110.

35% = 128.

40% = 146.

45% = 164.

50% = 183.

[3] Requires rounding. Any percentages .5 or above, rounded up.

Schwartz Factors Worksheet:

This Worksheet allows you to insert the relevant data in the format the Court indicated was most relevant, so that it can be gone over with counsel in assessing the strength of any relocation proposal.

The legal test is whether the custodial parent has demonstrated that an actual advantage will be realized by both the children and the custodial parent in moving to a location so far removed from the current residence that weekly visitation by the noncustodial parent is virtually precluded.

If the custodial parent satisfies the threshold requirement set forth above, then the court must weigh the following additional factors and their impact on all members of the family, including the extent to which the compelling interests of each member of the family are accommodated: (1) the extent to which the move is likely to improve the quality of life for both the children and the custodial parent; (2) whether the custodial parent's motives are honorable, and not designed to frustrate or defeat visitation rights accorded to the noncustodial parent; (3) whether, if permission to remove is granted, the custodial parent will comply with any substitute visitation orders issued by the court; (4) whether the noncustodian's motives are honorable in resisting the motion for permission to remove, or to what extent, if any, the opposition is intended to secure a financial advantage in the form of ongoing support obligations or otherwise; (5) whether, if removal is allowed, there will be a realistic opportunity for the noncustodial parent to maintain a visitation schedule that will adequately foster and preserve the parental relationship with the noncustodial parent.

MOVE CASES AFTER *SCHWARTZ*

The Legal Standard

The first "major" relocation case of the modern era in Nevada was *Schwartz v. Schwartz*, 107 Nev. 378, 812 P.2d 1268 (1991), in which a father's request to move to Pennsylvania with kids was allowed. In *Schwartz*, the father was the primary physical custodian. An extended family was present in Pennsylvania to assist with custody and child-rearing. The court held that the purpose of NRS 125A.350 was to preserve rights and familial relationship of the noncustodial parent, and that it was in the best interest of the child to have a healthy and close relationship with both parents, as well as other family members.

The court found that the court needs to balance the "custodial parent's interest in freedom of movement as qualified by his or her custodial obligation, the State's interest in protecting the best

EX.3

interest of the child, and the competing interests of the noncustodial parent." The court noted that removal is "separate and distinct" from custody, but that the facts and policies of the two analyses overlap – in both, the best interest of the child is paramount.

In setting out guidelines, the court held that these cases are necessarily fact-specific, with no bright-line determinations possible, but the court generally found the *D'Onofrio*[1] criteria sound. Under that standard, the court must first find whether custodial parent has demonstrated an actual advantage for both the child and parent in moving. If there is such an advantage, then the court must weigh: (1) the extent to which move likely to improve quality of life for the child and parent; (2) whether the motive for the move is "honorable" and not designed to frustrate or defeat visitation rights to the non-custodian; (3) whether, if the move is allowed, the parent will comply with substitute visitation orders; (4) whether non-custodian's motives are honorable in resisting motion to move, or if it is simply intended to secure a financial advantage as to support or otherwise; (5) whether, if the move is allowed, there is realistic opportunity for a visitation schedule that will adequately foster and preserve the relation with the non-custodian.

The court went further and set out sub-factors for determining quality of life improvement; in *Schwartz*, the court found a financial advantage to the move (lower costs), and concluded that a reduction in visitation was "not necessarily determinative" and could be offset by expanded summer visits. The court found the fact that the parent had no job waiting not critical.

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[1] *D'Onofrio v. D'Onofrio*, 144 N.J.Super. 200, 365 A.2d 27, 29 (Ch.Div.1976)

Application to the Facts of A Particular Case

Some background facts are helpful in this analysis. The parties are from _____. Their extended family and close friends primarily live in _____. Almost all members of _____ family also live in _____.

The parties met and were married in _____, and are present in Nevada because of _____. Had Party 1 had ever before left _____? Had the parties intended to return there as soon as they could?

Can the threshold question, whether the custodial parent has demonstrated an actual advantage for both the child and parent in moving, be clearly answered yes on economic, familial, and other bases?

1. **The extent to which move likely to improve quality of life for the child and parent.**

Comparison with existing situation here. Currently, Party 1 is working as a _____, and must work _____ (schedule). Impact on time primary custodian can spend with the children.

Whether Party 1 is able to attend weekend school functions, and whether work schedule interferes with holidays as a family unit. Whether a large portion of Party 1's wages are consumed by baby sitters and day-care centers. Same questions for Party 2.

Whether the move will lead to a different work schedule in a different city. Whether extended families (Party 1's, Party 2's, or other relevant persons) would give the children an opportunity for extended family interaction of which they have been deprived during their stay in Las Vegas.

2. **Whether the motive for the move is "honorable" and not designed to frustrate or defeat visitation rights to the non-custodian.**

Is there a clear answer to this question, in light of the information above and below? Whether relocation or return to _____ has previously been intended by the parties; what changed, and for whom?

3. **Whether, if the move is allowed, the parent will comply with substitute visitation orders.**

Does the history of visitation lend any substantial question to an expectation of facilitating contact with the non-custodian?

4. **Whether non-custodian's motives are honorable in resisting motion to move, or if it is simply intended to secure a financial advantage as to support or otherwise.**

Are the opposing party's motives clear. Whether previous consent to the move has been given. Financial impact on Party 2 of the move going forward or not? Whether Party 2 has expressly demanded lower child support or other concessions in exchange for written consent to the move.

5. **Whether, if the move is allowed, there is realistic opportunity for a visitation schedule that will adequately foster and preserve the relation with the non-custodian.**

What steps Party 1 will take to maintain a strong relationship between child and Party 2.

6. **The court's sub-factors.**

Whether the sub-factors set out by the court militate toward permitting the move in question.

Whether positive family care and support, including that of the extended family, would be enhanced. How? What commitments made?

Whether housing and environmental living conditions will be improved. Comparison with current conditions. Long-range plans for these factors.

Whether there are educational advantages for the children likely to result from the move (Party 1's greater availability to assist them, other direct or indirect factors, such as cultural events and programs in the proposed relocation area).

Whether gains would likely occur for Party 1's long-term employment and income. How? Free rent? Support of family?

The court's last specified sub-factor, whether the children believe that their circumstances and relationships will be improved, must be approached child-by-child, depending on ages and ability to state reasoned opinions.

Bottom line is whether the Party 1 should be allowed to relocate from the State of Nevada and whether written consent should be included in the Decree (divorce cases; or Order, if post-divorce). Whether the actual best interests of the children, as well as Party 1, outweigh any inconvenience that might accrue to Party 2's visitation with them.

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"Where Relocation of Primary Custodian Would Substantially Obliterate the Possibility of Traditional Alternative Visitation, Move Should Normally be Granted Anyway, but Justifies Reexamination of Custody."
Hayes v. Gallacher, 115 Nev. 1, 972 P.2d 1138 (1999). Parties were married in 1987, and had three children. Father filed for divorce in 1995, and four months later the parties were divorced, with joint legal custody and primary physical custody to Mother. In 1997, Mother remarried, to USAF officer. The Air Force sought to transfer him to Japan, Mother petitioned court for permission, and Father counter-moved for change of custody in the event she did move.

The district court (Redmon), without an evidentiary hearing, denied Mother's motion and granted Father's motion to change custody if Mother moved. The court made written findings that both parties' motives were honorable, but it was in the children's best interest to remain in Las Vegas, Mother had not "justified" the move under the standard of *Schwartz v. Schwartz*, 107 Nev. 378, 812 P.2d 1268 (1992), there were "concerns" about Japan, where the kids would not speak the local language, contact with extended family would be lost, the medical facilities were not believed adequate, housing and environmental conditions were "unknown," and Mother's overall financial condition would be reduced. The court also found that round trip travel for the kids would cost $6,000, and such a move would by itself meet the test set out in *Murphy v. Murphy*, 84 Nev. 710, 447 P.2d 608 (1974) as a "change of circumstances."

The Supreme Court repeated its usual standard, noting the "broad discretionary power" regarding custody, citing *Primm v. Lopes*, 109 Nev. 502, 853 P.2d 103 (1993), as well as its holding that the appellate court "must be satisfied that the court's determination was made for appropriate reasons." *Sims v. Sims*, 109 Nev. 1146, 865 P.2d 328 (1993).

Here, the Court noted the *Schwartz* line of authorities interpreting NRS 125A.350, noting the requirement of first asking whether the parent seeking to move had made the threshold showing of a sensible, good faith reason for the move. If so, then the lower court should go through the *Schwartz* factors, focusing on the availability of adequate, alternative visitation.

The Court termed this case "difficult" because the distance would not allow any "adequate alternative visitation." The Court found to be in conflict the following "important interests and policies": the right of the children to have frequent associations and a continuing relationship with both parents after a divorce, citing NRS 125.460(1); the right of a parent to change his or her residence; and the right of a parent to have access to his or her children. The Court noted the impossibility of not causing at least one parent to be negatively impacted.

The Court therefore announced a new rule to apply "where relocation of the primary custodian would substantially obliterate the possibility of a traditional alternative visitation," adopting Section 2.20 of the American Law Institute's Principles of the Law of Family Dissolution (Tentative Draft No. 3, Mar. 20, 1998), which essentially states that if a move makes it "impractical to maintain the same proportion of residential responsibilities," the move should be granted anyway if it is made because of one of a number of listed reasons (including to be with a new spouse), and there is no reasonable closer alternative. Since the move here "significantly impairs" the Father's abilities to exercise the responsibilities set out in the prior plan, it "justif[ies] a reexamination of custody based on the best interest of the children, taking into account all relevant factors, including the effects of the relocation."

Noting the absence of an evidentiary hearing before the ruling, and that the lower court's findings were "contrary to the unrefuted evidence in the record regarding the quality of life at a military base in Japan," the Court further criticized the district court's failure to address NRS 125.480(4), which requires consideration of domestic violence, given the Mother's obtaining of a Temporary Protective Order against the Father. The Court therefore reversed and remanded for "consideration of the relevant evidence."

Cleaning up, the Court criticized the order below (that would grant a change of custody upon relocation) as "designed to punish the primary custodian for relocating, which is prohibited by *Sims*. The Court held it "particularly unacceptable" to force the Mother to choose between her husband and her children, and stated that such conditional orders should only be made when the best interest of the child are served by such a change, taking into consideration all factors, not just the move. Even if a move is for "an illegitimate reason" or to "an unreasonable location," the move with the child should be allowed if that parent can show that the relocation would be better for the child than a change of custody would be.

Ex. 4

A legal note from Marshal Willick about ensuring that the input of psychologists is restricted to a correct – and quite limited – place in making child custody and relocation decisions.

A recent case has re-emphasized the vigilance necessary by lawyers – and especially judges – to ensuring that the legal process is not distorted by, or surrendered to, mental health professionals who are not qualified to make legal determinations relating to child custody.

I. THE LEGAL BACKGROUND

A. CUSTODY GENERALLY

For many decades, Nevada has proclaimed by statute and case law that a child's best interests are paramount when considering issues of custody and visitation. NRS 125.480(1); *Culbertson v. Culbertson*, 91 Nev. 230, 233, 533 P.2d 768 (1975). As stated by the Nevada Supreme Court, "[i]n custody matters, the polestar for judicial decision is the best interest of the child." *Schwartz v. Schwartz*, 107 Nev. 378, 382, 812 P.2d 1268, 1270-71 (1991).

The Nevada Legislature has set out a specific list of factors in NRS 125.480(4) that a trial court ***must*** consider in any case involving determination of the best interest of a child:

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

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

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

(d) The level of conflict between the parents.

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

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

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

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

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

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

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

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

Ex. 5

In any given case, factors can militate in different directions. It is the task of the trial court to properly weigh all of them – and any other relevant information presented in the case – in order to fulfill the mandate of issuing an order intended to serve the best interest of the child.

B. RELOCATIONS

The Nevada Supreme Court has long recognized the multi-faceted balancing of rights and responsibilities in play in every case where a parent seeks to relocate with a child to another jurisdiction:

> The proper calculus involves a balancing between "the custodial parent's interest in freedom of movement as qualified by his or her custodial obligation, the State's interest in protecting the best interests of the child, and the competing interests of the noncustodial parent."

Davis v. Davis, 114 Nev. 1461, 1465, 970 P.2d 1084, 1087 (1998) (quoting from *Schwartz v. Schwartz*, 107 Nev. 378, 812 P.2d 1268 (1991)).

Such cases are not a simple pick between parents' conflicting desires, but require a much more subtle balancing of multiple viewpoints and interests, some of which are of Constitutional dimension (*e.g.*, freedom of movement and right to parent).

II. THE PROPER ROLE OF PSYCHOLOGISTS AND RELATED PROFESSIONALS

In the polarized and contentious world of custody and relocation cases, judges are often faced with allegations of lousy parental behavior and its impact on children. Judges are quite appropriately reluctant to put children on the stand or otherwise involve them in the legal proceedings any more than necessary.

This often leads to utilizing mental health professionals in an array of possible tasks, from child interviews on contested questions of fact, to full-blown custody evaluations involving subjective observation and objective testing of some or all of those involved in a case. This input can enter the litigation in a variety of ways, from a background report to testimony at an evidentiary hearing.

The February, 2009, "Guidelines for Child Custody Evaluations in Family Law Proceedings" approved by the American Psychological Association ("APA") Council of Representatives correctly notes that "Psychologists render a valuable service when they provide competent and impartial opinions with direct relevance to the 'psychological best interests' of the child." *See* 65 American Psychologist No. 9 at 863-67 (Dec. 2010).

An informed opinion as to such "psychological best interest," accompanied by any objective data uncovered by a mental health professional as to the ability of the parents to function as care-givers, provides a trial court with ***one*** piece of the information the court must weigh in making either a custodial or relocation decision, along with others.

Or, as the APA Guidelines put it:

> The extensive clinical training of psychologists equips them to investigate a substantial array of conditions, statuses, and capacities. When conducting child custody evaluations, psychologists are expected to focus on factors that pertain specifically to the psychological best interests of the child, because the court will draw upon these considerations in order to reach its own conclusions and render a decision.

Given the emotional intensity of the proceedings and the importance one or both sides tend to put on outsourced evaluations, etc., it is no great wonder that some mental health professionals get a little carried away with their importance in family law matters. Shrinks are hardly immune from human nature, and the impact of fearful, anxious people putting great stock in one's opinions cannot help but have an influence on those whose opinions are solicited.

Unfortunately, it has led some mental health practitioners to misconstrue their role in legal proceedings, ceasing to see themselves as contributing a piece to a puzzle, and instead seeing themselves in the role of decision-makers.

III. AN ARROGANT ASSERTION OF SELF-IMPORTANCE, AND (PARTIAL) RETREAT

A. NATIONALLY

A couple of years ago, the APA issued proposed new guidelines, quietly dropping the word "psychological" from their task in evaluating families – from "best psychological interest" to "best interest."

Changing a single word can mean a great deal, and the use of the identical term to what courts try to determine was not accidental. The purpose was to put psychologists in the role of directly informing courts what to do, altering and elevating their position from that of "expert" to that of "arbiter."

Some of those interested in the field – both psychologists and legal scholars – noticed, and complained. Among attorneys, Lynne Z. Gold-Bikin of Pennsylvania was among the most vocal in opposition to the proposed change. She spoke eloquently about the foolhardiness of having mental health professionals address a legal standard. Many mental health professionals – among them the well-respected Jonathan W. Gould, David Martindale, and Jay Flens – also provided feedback to the committee drafting the guidelines, either formally or informally.

The APA committee changed course. The ultimate 2009 Guidelines acknowledge that a psychological recommendation is not appropriate at all in some cases, and:

> If a recommendation is provided, the court will expect it to be supportable on the basis of the evaluations conducted. . . . If psychologists choose to make child custody recommendations, these are derived from sound psychological data and address the psychological best interests of the child. When making recommendations, psychologists

seek to avoid relying upon personal biases or unsupported beliefs.

Emphasizing the direction for psychologists to do such work with a humble concept of place rather than an arrogant presumption of knowledge they in fact lack, the Guidelines also add the sage advice that "Psychologists are encouraged to monitor their own values, perceptions, and reactions actively, and to seek peer consultation in the face of a potential loss of impartiality."

The Guidelines reflect on their face the back-and-forth debate recounted above, citing commentary critical of the proposed arrogation of directly commenting on legal standards, and noting that:

> The specific nature of psychologists' involvement and the potential for misuse of their influence has been the subject of ongoing debate (Grisso, 1990, 2005; Krauss & Sales, 1999, 2000; Melton, Petrila, Poythress, & Slobogin, 2007).

See Tippins, T.M., & Wittman, J.P. *Empirical and ethical problems with custody recommendations: A call for clinical humility and judicial vigilance* (Family Court Review, 43, 193-222, 2005).

But the 2009 Guidelines were a committee project, and those striving to elevate the position of psychologists in evaluations peppered the final work product with some foretastes that they might try again:

> Although the profession has not reached consensus about whether psychologists should make recommendations to the court about the final child custody determination (i.e., "ultimate opinion" testimony), psychologists seek to remain aware of the arguments on both sides of this issue (Bala, 2006; Erard, 2006; Grisso, 2003; Heilbrun, 2001; Tippins and Wittman, 2006) and are able to articulate the logic of their positions on this issue.

B. LOCALLY

The fallout from this conceptual struggle is definitely being seen in Nevada family courts. It is not universal, of course – several local psychologists display a keen grasp of the legal process and their appropriate place in it. However, I have cross-examined a number of psychologists hired by counsel – or appointed by the court – to perform custody evaluations in this State whose testimony indicates that some of them don't get it.

In my experience, most psychologists (with some notable exceptions) have no clue what the legal factors for a "best interest" custody determination might be – and they don't care. The problematic ones perceive no conflict between that ignorance and making a best interest custody recommendation anyway, based entirely on their ***own*** standards and factors, and generally not even acknowledging the difference between "psychological best interest" and ***legal*** "best interest" determinations.

Similarly, psychologists have readily admitted on cross-examination that they have no idea what the legal standards for granting or disallowing relocation requests might be – and again, they don't care. A recent case of mine involved an outsourced evaluation that attempted to arrogate judicial responsibilities at least three separate ways.

First, the psychologist proposed an entirely new and original test for when a relocation is "appropriate" – which was primarily notable for having nothing to do with the Nevada Supreme Court's holdings on that subject.

While it is an aside, the danger of a psychologist purporting to apply a legal test was immediately apparent from the report having screwed up its own analysis: after confirming a history of domestic violence, the report concluded that the history was a "risk factor [militating against] relocation." The Nevada Legislature, of course, has found as a matter of public policy that a history of domestic violence should disqualify a parent as a primary or joint custodian, and the Nevada Supreme Court has opined that domestic violence by the left-behind parent is a factor ***favoring*** a relocation request. NRS 125.480; *Hayes v. Gallacher*, 115 Nev. 1, 972 P.2d 1138 (1999).

The psychologist went even further, however, explaining in some detail "disagreeing with" current relocation law, and stating that in the psychologist's opinion, "a high standard should be established for [relocation] in custody dispute situations."

So instead of the balancing test set out by the Nevada Supreme Court (see above), the psychologist apparently sought to directly tell the judge what to order based on a variation of the "Relocation Risk Assessment" ("RRA"), allegedly used by some in the psychological community for determining "long term behavioral outcomes of a child" after relocations, but which grew out of a limited sample group that should not be relied upon for much. The conclusion of such an analysis uses the same ***language*** as the legal determination ("relocation should be . . .") but has essentially nothing to do with the factors in the legal analysis.

If anything, the RRA analysis could be ***part*** of the process of crystal-balling the "long term psychological best interest of the child" – providing ***one*** component of the legal analysis. In the real world, however, application of the factors to the facts tends to be distorted and biased (as here), and because its results are phrased the same way as the legal determination, it is more likely that the inclusion of an RRA analysis in a report could cause a judge to improperly confuse it with the final determination the court is supposed to make in making the ultimate (and mandatory) ***legal*** best interest and interest-balancing relocation decisions.

The facts made it clear that the mother had always been the children's primary caretaker, so it was not terribly surprising that the psychologist suggested that a schedule leaving the children with the mother most of the time was appropriate, "given her bonds with the children and her historic primary caretaker role." What ***was*** surprising – in fact, astonishing – was the statement in the report that the court should only do what was best for the children "if it does not present an advantage to [the mother] in seeking relocation."

Virtually every aspect of the parts of the report recounted above was improper, bordering on the edge of unethical. First, the psychologist's personal "feelings" about Nevada law – like that of any ***other*** unqualified layman – had no place in any document placed before the court. If anything, the psychologist, under the APA guidelines, should have self-reported the existence of a personal bias on that issue, and said nothing further about it, or self-disqualified from involvement entirely.

Second, that the psychologist did not confine remarks to "psychological best interest," but purported to instruct the court as to the ultimate issue of best interest, was an unwarranted and remarkably arrogant attempted usurpation of the core judicial function.

Finally, the offhand urging of the court to ***subordinate*** the best interest of the child to indulge the psychologist's disfavor of relocations was absolutely breathtaking in its wrong-headedness, from any conceivable legal perception.

The report in this case was not a fluke, and not an exception. Several psychologists issuing child custody evaluations in Nevada's family courts seem to have no proper conception of the limitations of their role, and the acceptable bounds of their reports. But I have yet to see a Nevada judge act on – or even ***note*** – this pervasively corrosive influence on the integrity of child custody and relocation proceedings, and on the legitimacy of the resulting orders. It is past time for that to change.

C. QUALIFICATIONS AND THE ABUSE OF PSYCHOBABBLE

Misuse of psychological tools and terms is not limited to psychologists.

There is a tendency in family court to use Marriage and Family Therapists ("MFTs") or other counselors wherever possible, instead of psychologists, because they are cheaper. That, in and of itself, is okay, but such practitioners cannot properly administer objective test instruments or make diagnoses, and they should ***not*** be asked (or permitted) to perform tasks outside their professional training and expertise.

Some such practitioners, however, cannot seem to resist the urge to do so anyway – and their attempts endanger the legitimacy of every legal determination based on their reports. "Half-priced shrinks" can no more be expected to perform all the tasks required for full outsourced custody evaluations than "half-priced lawyers" could be expected to have the experience and skill of certified specialists. One may, or may not, get what is paid for, but certainly no more, and it does a disservice to everyone involved to pretend otherwise.

One jurist, possessing a bare minimum of training in psychologically-related matters, has purported – both on and off the record – to make unsubstantiated and uninformed snap "diagnoses" of "personality disorders" on the part of litigants, and even of various members of the Bar.

Such cloaking of subjective bias, prejudice, and personal opinion under a veneer of psychological labeling fools no one, but it is problematic when indulged in by a person in a position of authority, since such pronouncements, no matter how outrageous, are unlikely to be contradicted by those dependent on pending rulings. There is the real risk that such a person can come to believe their own propaganda, and cease doing the actual work of judging in favor of the arrogant – if not irrational – belief in some inherent personal ability to perceive "the truth." This defect will lead, sooner or later, to disaster of smaller or larger proportion.

The point here, however, is the rampant misuse of "psychological" labels and conclusions in our

family courts to disguise mere personal bias. Trial courts of this State are bound to apply statutes, case law, and the rules of evidence to reach ***legal*** conclusions in the cases brought before them. The irresponsible – and lazy – substitution of psychologists' personal opinions and arm-chair diagnoses by the unqualified, in place of solid legal reasoning and results, reveals poor performance by lawyers, and especially judges, who should be far more jealously safeguarding the legitimacy of the processes by which legal decisions are reached.

IV. RECOMMENDATIONS

Shakespeare wrote that "All the world's a stage / And all the men and women merely players." If so, in the adversary system, we all have our parts to play. Mental health professionals, brought in to objectively evaluate psychological dysfunction in individuals by use of instruments they are qualified to apply, and divine the psychological best interest of children, should do so – and keep their remaining opinions to themselves.

The gross and pervasive failure of various mental health professionals to perceive and fill their proper place in the legal process is lamentable, but understandable. The true fault lies with lawyers too lazy to learn the relevant guidelines and standards, and insist that they be adhered to – and with judges, who have ceded their authority on ultimate issues to laymen with no legal expertise, and thus endangered the legitimacy of every custody and relocation decision unduly influenced by such reports.

Lawyers should be much more willing to object and move to strike "expert" reports going beyond the legitimate role and knowledge of the experts submitting them. And judges should sustain those objections and ***grant*** those requests to strike.

Much can be smoothed at the outset by judges more properly giving direction to mental health professionals when evaluations are commissioned – expressly confining them to appropriate tasks, and reports. And the reports should be strictly required, as the APA itself dictates, to contain conclusions firmly supported by the facts, as opposed to being vehicles for expression of what mental health professionals "feel" is true, or best.

Judges should require these things as if the legitimacy of their rulings is at stake. It is.

V. QUOTES OF THE ISSUE

"The difference between the right word and the almost right word is the difference between lightning and a lightning bug."
– Mark Twain.

"No psychologist should pretend to understand what he does not understand.... Only fools and charlatans know everything and understand nothing."
– Anton Chekhov (1860-1904).

"You're readin' my mind you won't look in my eyes
You say I do things that I don't realize
But I don't care it's all psychobabble rap to me."
– Alan Parsons Project, *Psychobabble* (EYE IN THE SKY, Arista Records 1982).

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Ex. 6

Relocation: What Does Social Science Tell Us

General Issues

- Relocation is an extraordinarily complex issue
- Child development, social policy and scientific research are all considered
- No Bright line for families
- Psychologist's role in relocation cases is to:
  - Maintain a balanced approach
  - Individualized assessment
  - Careful investigation of the facts
  - Identify variables, assess risk, and make clear the limitations of the predictions

What does the research tell us generally?

- Relocation represents general change and loss and change within family relationships
- Peer group issue, especially for teens
- Academic impact for teens
- 3 or more move doubles the likelihood of academic/behavioral issues in children.
- Braver, et.al, rendered a number of conclusions from their 2003 article. Some reasons for relocation are more compelling than other reasons.

Limitations to the research

- Most of the data is gathered from surveys as is the Braver, et.al study
- Does not create favor for or against relocation
- Risk Predictive Model utilized is predictive in nature (Austin, Stahl, Kelly)
- Literature provides little direction for families that have a successful equal timesharing schedule.
- What about parents who move without their children?

Pros for relocation

- Mobile society: changes happen with families such as remarriage and employment opportunities
- Economic improvement
- Extended family closer for support
- Stability results from the support system
- Relocation literature and attachment theory have not concluded relocation creates harm to children.
- Relocation can be beneficial to children.

Cons of relocation

- Frequent moves associated with adjustment problems for children: different impact based on age of the child
- Causes disruption to familiar routines, requires school changes, loss of peer relationships
- Loss of regular contact with parent
- Strain of frequent travel
- Some people have ulterior motives that are not evident
- 3 or more relocations associated with increased risk for behavioral and emotional problems in children

Risk Assessment Model
William Austin, Ph.D.

- Age of the Child
- Geographic Distance and Travel Time.
- Psychological stability of the relocating parent and the parenting effectiveness of both parents
- Individual resources / differences in the child's temperament / special needs

- History of parental conflict or domestic violence and continued….
- Interpersonal conflict and Domestic Violence
- Recentness of the Marital Separation
- Gate keeping behavior
- Involvement of the non-relocating parent

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jan C. Grossman, Petitioner	:	
v.	:	
State Board of Psychology, Respondent	:	No. 3023 C.D. 2001
	:	Submitted: January 17, 2003

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION BY JUDGE McGINLEY FILED: June 2, 2003

Jan C. Grossman, Ph.D. (Dr. Grossman) petitions for review of the order of the State Board of Psychology (Board) that reprimanded Dr. Grossman and assessed a $1,000.00 civil penalty.

The "M" family is composed of B.P., mother, D.M., father, and L.M., a daughter. B.P. and D.M. separated and ultimately divorced in 1994. At the time of the separation, B.P. and D.M. shared legal custody of L.M. who was approximately four years old. The Court of Common Pleas of Montgomery County (common pleas court) appointed Margaret Cook, Ph.D. (Dr. Cook), to perform a custody evaluation of the M family and to make a recommendation with respect to L.M.'s custody. Dr. Cook recommended that joint legal custody continue.

B.P's attorney, Lori Shemtob (Attorney Shemtob), hired Dr. Grossman to review Dr. Cook's report. Dr. Grossman asked Attorney Shemtob to obtain D.M.'s consent before Dr. Grossman evaluated L.M. in July 1996. Attorney

Ex. 7

Shemtob attempted to obtain D.M.'s consent through correspondence with his attorney. Because D.M.'s attorney was in the process of ending their attorney-client relationship, D.M. did not receive the letters for some time.

During the first week of July, Dr. Grossman met with B.P. and her then husband, Michael (M.P.), for approximately one hour. On July 9, 1996, Dr. Grossman met with L.M., B.P. and M.P. After a brief introduction, Dr. Grossman met with L.M. alone for approximately one hour. Dr. Grossman's initial meeting with L.M. was to determine whether L.M. could verbally assess her needs, communicate realistically, describe her two home environments and to ultimately evaluate Dr. Cook's determination that L.M. was not a reliable witness. B.P. expressed her concern to Dr. Grossman that D.M. was not bathing L.M. when she stayed with him. B.P. arranged with Dr. Grossman to meet in a restaurant after B.P. picked up L.M. on July 14, 1996.

Though Dr. Grossman had requested Attorney Shemtob to obtain D.M.'s consent before he met with L.M., he did not confirm with Attorney Shemtob whether D.M. consented. He also did not contact D.M. prior to the July 9, 1996, meeting. On July 10, 1996, D.M. learned from his daughter of her meeting with Dr. Grossman the previous day. On July 12, 1996, D.M. telephoned Dr. Grossman and told him not to meet with L.M. again. D.M. sent a letter by fax and by certified mail to Dr. Grossman and reiterated his objection to Dr. Grossman. During the telephone conversation, Dr. Grossman failed to inform D.M. that he was scheduled to meet with L.M. on July 14, 1996. Dr. Grossman did not receive the fax until Monday, July 15, 1996, when he returned to his office.

On July 14, 1996, Dr. Grossman met L.M., B.P., and M.P. at a restaurant. After first meeting together, B.P. and M.P. moved to another table as far away from Dr. Grossman and L.M. as possible. To determine whether D.M. had cared for L.M. properly, Dr. Grossman picked up some of L.M.'s hair and also lifted her arms to smell L.M.'s hair and armpits.

After the common pleas court became aware that Dr. Grossman met with L.M. without D.M.'s consent, the common pleas court ordered that neither parent could take L.M. to another professional unless the other parent consented. Dr. Grossman did not prepare a formal report but provided "feedback" to Attorney Shemtob.

Dr. Grossman testified at the custody trial. Dr. Grossman testified that he asked Attorney Shemtob to obtain the cooperation of all parties. Notes of Testimony, January 28, 1997, (N.T. 1/28/97) at 451[1]. Dr. Grossman also testified that in his telephone conversation with D.M., D.M. "did not forbid or, in any way, stop me from seeing his daughter." N.T. 1/28/97 at 468-469. Dr. Grossman described L.M.'s condition when he met her at the restaurant as having matted hair with a slight smell about her. N.T. 1/28/97 at 470. Dr. Grossman criticized Dr. Cooke's evaluation because there was no meeting with the parents together and no interview of L.M. N.T. 1/28/97 at 478-481. Dr. Grossman stated that the fact that D.M. sold insurance could present a child care problem because he might have to contact customers at night. N.T. 1/29/97 at 505-506; Reproduced Record (R.R.) at 372a-373a. Dr. Grossman concluded that Dr. Cook did not collect sufficient data

[1] The Reproduced Record does not contain the complete notes of testimony.

to draw the conclusions in her report. N.T. 1/29/97 at 515. On cross-examination, Dr. Grossman admitted that while meeting with B.P. and M.P., he made a note that D.M. consumed 750 milligrams per day of caffeine. N.T. 1/29/97 at 550; R.R. at 386a.

On or about February 14, 2000, the Commonwealth of Pennsylvania Bureau of Professional and Occupational Affairs (Commonwealth) filed a Notice and Order to Show Cause why the State Board of Psychology (Board) should not suspend, revoke or otherwise restrict Dr. Grossman's license, certificate, registration or permit, or impose a civil penalty. Count One of the Order to Show Cause alleged:

> 9. On or about July 9, 1996, Respondent [Dr. Grossman] met with L.M., then approximately 5½ years old, for approximately one hour in his office at the request of L.M.'s mother, B.P. and without the knowledge or consent of D.M.
>
> 10. By letter dated July 12, 1996, D.M. demanded that Respondent [Dr. Grossman] discontinue any meetings or evaluations with his daughter without his consent and advised Respondent [Dr. Grossman] that he did not have consent to evaluate his daughter, L.M.
>
> 11. On or about July 14, 1996, which was a Sunday evening, Respondent [Dr. Grossman] again met with L.M. in a Chinese restaurant at the request of B.P. without the knowledge or consent of D.M.
>
> 12. At the time B.P. requested that Respondent [Dr. Grossman] see her daughter, she was in the midst of a custody battle with L.M.'s father, D.M.
>
> 13. During the course of the meetings on July 9 and 14, 1996, Respondent [Dr. Grossman] not only spoke to

L.M. but also viewed her physical appearance by holding her hands and smelling her because B.P. had alleged that D.M. failed to bathe L.M. and/or engage in appropriate hygiene care with respect to L.M.

14. On July 16, 1996 in the Court of Common Pleas of Montgomery County, Respondent [Dr. Grossman] provided expert testimony on behalf of B.P. in the custody matter of L.M.

15. Respondent [Dr. Grossman], who is also a licensed practicing attorney, never consulted with D.M. or his attorney with respect to consent to meet with, treat and/or evaluate L.M.

16. Based upon the foregoing Factual Allegations, the Board is authorized to suspend or revoke, or otherwise restrict Respondent's [Dr. Grossman] license, or impose a civil penalty under 63 P.S. §1208(a)(9)[2] as well as the Board's Regulations at 49 Pa.Code §41.61, Ethical Principle 3(e)[3], because Respondent [Dr. Grossman] has

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[2] Section 8(a)(9) of the Professional Psychologists Practice Act (Act), Act of March 23, 1972, P.L. 136, *as amended*, 63 P.S. §1208(a)(9), provides:

> (a) The board may refuse to issue a license or may suspend, revoke, limit or restrict a licensee or reprimand a licensee for any of the following reasons:
>
> . . . .
>
> (9) Violating a lawful regulation promulgated by the board, including, but not limited to, ethical regulations, or violating a lawful order of the board previously entered in a disciplinary proceeding.

[3] Principle 3(e) of the Board's Code of Ethics (Principle 3(e)), 49 Pa.Code §41.61(3)(e), provides:

> As practitioners and researchers, psychologists act in accord with American Psychological Association standards and guidelines related to practice and to the conduct of research with human beings and animals. In the ordinary course of events, psychologists adhere to relevant governmental laws and institutional regulations. Whenever the laws, regulations or standards are in conflict, psychologists make known their

(Footnote continued on next page...)

> deviated from the American Psychological Association standards and guidelines when he conducted a psychological evaluation and/or met with L.M. without the knowledge or consent of her father, D.M.

Notice and Order to Show Cause, February 14, 2000, Paragraphs 9-16 at 2-3; R.R. at 3a-4a. In Count II, the Commonwealth alleged that Dr. Grossman violated Section 8(a)(11) of the Act, 63 P.S. §1208(a)(11)[4], because his psychological evaluation and/or meeting with L.M. with respect to a custody proceeding without the knowledge or consent of D.M., constituted unprofessional conduct.

On March 17, 2000, Dr. Grossman moved to dismiss the order to show cause because the order failed to set forth the material facts and/or statute upon which the cause of action was based, failed to set forth with specificity the grounds on which it is alleged that Dr. Grossman violated the Act and Principle 3(e). The Pennsylvania Psychological Association (PPA) filed a brief for amicus curiae in support of Dr. Grossman's motion to dismiss. On July 25, 2000, the Board denied the motion to dismiss.

(continued...)

> commitment to a resolution of the conflict. Both practitioners and researchers are concerned with the development of laws and regulations which best serve the public interest.

[4] Section 8(a)(11) of the Act, 63 P.S. §1208(a)(11), provides:

> (a) The board may refuse to issue a license or may suspend, revoke, limit or restrict a licensee or reprimand a licensee for any of the following reasons:
>
> . . . .
>
> (11) Committing immoral or unprofessional conduct. Unprofessional conduct shall include any departure from, or failure to conform to, the standards of acceptable and prevailing psychological practice. Actual injury to a client need not be established.

On October 6, 2000, the Commonwealth presented a motion in limine in the nature of a motion to limit expert testimony because Dr. Grossman indicated in his prehearing statement that he planned to call three expert witnesses: Alvin I. Gerstein, Ph.D. (Dr. Gerstein), Sam Knapp, Ed.D. (Dr. Knapp), and Barry Bricklin, Ph.D. (Dr. Bricklin) and that the experts were scheduled to testify with respect to the same issues. The Commonwealth requested that the Board prohibit Dr. Grossman from calling all three expert witnesses. On October 19, 2000, the Board granted the motion in part and excluded the testimony of Dr. Gerstein.

On October 23, 2000, the Board conducted a formal hearing. D.M. testified that he spoke to Dr. Grossman on July 12, 1996, after Dr. Grossman met with L.M. on July 9, 1996. D.M. testified that he read a letter to Dr. Grossman over the telephone that advised him not to see L.M. again. Notes of Testimony, October 23, 2000, (N.T. 10/23/00) at 28, 34-35; R.R. at 75a. D.M. further testified that he was never asked to participate in a custody evaluation of L.M. with Dr. Grossman. N.T. 10/23/00 at 36; R.R. at 76a.

The Commonwealth called Dr. Grossman as a witness. Dr. Grossman admitted that he never obtained the written or verbal consent of D.M. to become involved in the custody case. N.T. 10/23/00 at 116; R.R. at 79a. Dr. Grossman testified that he never accused D.M. of having a caffeine addiction but that Dr. Cook had an obligation to investigate this issue because B.P. raised it and it was not included in Dr. Cook's report. N.T. 10/23/00 at 139; R.R. at 101a. Dr. Grossman explained that he did not perform a comprehensive custody evaluation of L.M. but instead performed a limited review of Dr. Cook's procedures. N.T.

10/23/00 at 147; R.R. at 109a. Dr. Grossman explained that he informed Attorney Shemtob "the only way I'll undertake this case is if you tell the other side what I'm doing and she agreed to do it. As it turns out from later correspondence, it turns out she didn't." N.T. 10/23/00 at 151; R.R. at 112a. On cross-examination, Dr. Grossman denied that D.M. read anything to him over the telephone or that he was told not to see L.M. N.T. 10/23/00 at 164; R.R. at 115a.

Kirk Heilbrun, Ph.D. (Dr. Heilbrun), a professor of psychology and chair of the Department of Clinical and Health Psychology at MCP Hahnemann University, testified as the Commonwealth's expert. Dr. Heilbrun reviewed the records and documents in the case. Dr. Heilbrun testified that Dr. Grossman played the role of evaluator in that he did more than just critique Dr. Cook's evaluations. Dr. Heilbrun reported:

> When he moved to evaluating LM, meeting with LM herself, then he moved from evaluating existing data to creating to his own data. And in my mind, that was what made the difference between his critiquing the evaluation of another mental health professional, and performing a version of his own evaluation.

N.T. 10/23/00 at 220; R.R. at 141a. Dr. Heilbrun determined that Dr. Grossman functioned as an evaluator because he saw L.M. twice and developed some of his own data and because he testified about custodial aspects of the father-child relationship. N.T. 10/23/00 at 231. Dr. Heilbrun testified that the standard of conduct in July 1996 and January 1997 for a custody evaluator required the permission and consent of both parents. N.T. 10/23/00 at 238; R.R. at 148a. Dr. Heilbrun also testified that it is not appropriate for a psychologist to delegate the responsibility of obtaining consent to attorneys. N.T. 10/23/00 at 241.

After the Commonwealth rested, Dr. Grossman's attorney moved to dismiss as the Commonwealth admitted that the Board had no written policy regarding consent in a custody evaluation. The Board denied the motion. Dr. Bricklin, a clinical psychologist and a professor at the Institute for Graduate Clinical Psychology at Widener University and an expert in custody, testified that there is no standard with respect to obtaining consent from both parents where there is shared legal custody. N.T. 10/23/00 at 365; R.R. at 180a. Dr. Bricklin testified that there was nothing in the Guidelines for Child Custody Evaluations in Divorce Proceedings (Guidelines) that would prevent a psychologist from critiquing the assessment methodology of someone else or conducting a limited evaluation of a child alone. N.T. 10/23/00 at 374; R.R. at 189a.

Dr. Grossman explained his conduct with respect to L.M.:

> And I thought, up until I got my Prosecution letter, that as a psychologist based on the guidelines and the APA ethical principles, I had discretion. The discretion I used in this case was I felt it was very important, given what I had read in Dr. Cooke's report, for the Court to be informed that this child either did or did not have the ability to contribute to her own evaluation and express her own needs. And because I felt that it was important, because I made that clinical decision, I went forward notifying the father in the way that I felt was the best and most efficient way.

Notes of Testimony, October 24, 2000, (N.T. 10/24/00) at 424; R.R. at 217a.

Dr. Knapp, deputy executive officer and director of professional affairs with the PPA, testified that in 1996, there was no requirement that Dr. Grossman obtain D.M.'s consent for the review of Dr. Cook's report and there was

no requirement that he notify or obtain consent from D.M. prior to meeting with L.M. N.T. 10/24/00 at 537; R.R. at 246a.

On December 3, 2001, the Board determined that Dr. Grossman violated Principle 3(e) and Section 8(a)(9) of the Act and issued a reprimand. The Board also determined that Dr. Grossman violated Section 8(a)(11) of the Act and assessed a $1,000 civil penalty. The Board sustained both Count 1 and Count 2 in the Order to Show Cause. The Board made the following relevant findings of fact:

> 17. The father called Respondent [Dr. Grossman] in the afternoon of July 12, 1996, instructed him not to meet with his daughter again and informed him that he would be sending the Respondent a fax following the conversation.
>
> 18. Respondent [Dr. Grossman] learned for the first time that the father did not give his consent to Respondent's evaluation of L.M.
>
> 19. Respondent [Dr. Grossman] did not advise the father at any time during that conversation that he was scheduled to meet with L.M. again two days later.
>
> 20. During the conversation, Respondent [Dr. Grossman] did not attempt to obtain the father's consent to meet with L.M. on July 14, 1996.
>
> 21. The father followed up his telephone call by sending the Respondent a letter by fax and certified mail reiterating his prohibition against the Respondent seeing L.M. again.
>
> 22. Respondent did not receive the fax until July 15, 1996. (NT 165, 480)
>
> 23. As was previously arranged, Respondent met L.M. at a Chinese restaurant on July 14, 1996, to see if the

> mother's claim that L.M. returned from visits with her [sic] the father in a 'dirty and slovenly condition' were accurate.
>
> . . . .
>
> 28. Respondent testified at the custody proceeding the father had a caffeine addiction and as an insurance salesman would be required to work at night, both of which would affect his ability to care for L.M.
>
> . . . .
>
> 31. Respondent conducted a custody evaluation.

State Board of Psychology, Adjudication and Order, December 3, 2001, (Adjudication) Findings of Fact Nos. 17-23, 28, 31 at 6-8; R.R. at 346a-348a.

The Board concluded that Dr. Grossman conducted a psychological evaluation of, and met with, L.M. without the knowledge or consent of D.M., in violation of Sections 8(a)(9) of the Act and Principle 3(e) and raised questions about D.M.'s parenting ability without having talked to D.M. in violation of Section 8(a)(11) of the Act. The Board also determined that Dr. Grossman had sufficient notice that he was required to obtain consent because the Board amended its Code of Ethics on June 17, 1989. Included in the amendment was Principle 3(e) which required adherence to the standards and guidelines of the American Psychological Association [APA] related to practice. In July 1994, the APA published Guideline #9 of the Guidelines which provided:

> The psychologist obtains informed consent from all adult participants and, as appropriate, informs child participants. In undertaking child custody evaluations, the psychologist ensures that each adult participant is aware of (a) the purpose, nature, and method of the evaluation; (b) who has requested the psychologist's services; and (c) who will be paying the fees. The psychologist informs adult participants about the nature of the assessment instruments and techniques and informs those participants about the possible disposition

> of data collected. The psychologist provides this information, as appropriate to children, to the extent that they are able to understand.

Guidelines for Child Custody Evaluations in Divorce Proceedings, American Psychologist, July 1994, at 679; R.R. at 413a.

Dr. Grossman contends that the Board failed to give proper notice to him of its use, enforcement and interpretation of the Guidelines and its standards for notice and consent in child custody situations, that the Board committed errors of law, that the Board committed a gross abuse of discretion when it did not allow him to present a witness, and that the Board's finding that the Commonwealth had met its burden of proof was a gross abuse of discretion and against the weight of the evidence presented. Dr. Grossman also contends that he did not violate Section 8(a)(9) of the Act because the Commonwealth did not meet its burden of proof, or because Principle 3(e) is defective, and/or because the Board misapplied one of its own cases. Dr. Grossman also contends that Section 8(a)(11) of the Act is unconstitutionally vague and/or the application of the section constitutes a result so excessively punitive so as to constitute a gross abuse of discretion on the part of the Board.[5]

Dr. Grossman asserts that he did not need to obtain D.M.'s consent before either of his meetings with L.M. He also asserts that even if the Board

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[5] An adjudication made by the Board must be affirmed on appeal unless constitutional rights have been violated, an error of law has been made, rules of administrative procedure have been violated or a finding of fact necessary to support the adjudication is not supported by substantial evidence. Batoff v. State Board of Psychology, 561 Pa. 419, 750 A.2d 835 (2000).

required him to obtain consent, the Board failed to provide him with adequate notice of the requirement. Dr. Grossman also argues that the Board failed to inform him in the Notice and Order to Show Cause that he could be cited for immoral and unprofessional conduct under Section 8(a)(11) of the Act for his testimony at the custody trial rather than for his evaluation of L.M. without D.M.'s consent. As a consequence, Dr. Grossman could not adequately prepare a defense because he did not know that his testimony at the custody trial was at issue.

I. COUNT I.

A. Notice.

Dr. Grossman contends that the Board failed to provide proper notice of its use, enforcement, and interpretation of the Guidelines and its standards for notice and consent in child custody situations. Dr. Grossman notes that he was found guilty of violating Principle 3(e) because he did not follow Guideline #9 which was published in 1994.

First, Dr. Grossman asserts that Principle 3(e) fails to delineate what a "standard or guideline" is. However, Guideline #9 is clearly identified as a "guideline" of the APA. On this basis, this Court does not believe that Dr. Grossman could not ascertain that Guideline #9 was a "guideline".

Second, Dr. Grossman asserts that Principle 3(e) did not provide any notice or clarification as to what would happen if an APA guideline or standard was updated, such that the Board did not inform Dr. Grossman or other psychologists between July 1994, when the APA published the Guidelines that

they applied to Principle 3(e). This Court does not accept Dr. Grossman's argument. If the Board's principle states that it will adhere to the Standards and Guidelines of the APA and the APA issues a new set of guidelines, it stands to reason that the new guidelines apply to psychologists licensed in the Commonwealth of Pennsylvania. Although Dr. Grossman argues that Principle 3(e) is unconstitutionally vague and fails to contain reasonable standards to guide conduct to satisfy the requirements of due process, See Watkins v. State Board of Dentistry, 740 A.2d 760 (Pa. Cmwlth. 1999), this Court does not agree. Principle 3(e) requires adherence to the standards and guidelines of the APA. Guideline #9 of the Guidelines is a guideline of the APA. The principle is clear.

Next, Dr. Grossman asserts that the Board improperly delegated its rulemaking authority to the APA. Section 3.2(2) of the Act, 63 P.S. §1203.2(2), requires the Board to establish standards of practice and a code of ethics. The Board complied with the General Assembly's statutory directive.

Dr. Grossman also asserts that a reliance on APA standards and guidelines could result in some guidelines or standards that are in conflict with Pennsylvania law. However, he does not indicate that was the case here.

Dr. Grossman next asserts that even if he concedes that the Board legally incorporated the Guidelines into Principle 3(e) that the Guidelines are inapplicable because they are merely aspirational. The introduction to the Guidelines provides:

> These Guidelines build upon the American Psychological Association's Ethical Principles of Psychologists and

> Code of Conduct (APA, 1992) and are aspirational in intent. As guidelines, they are not intended to be either mandatory or exhaustive. The goal of the guidelines is to promote proficiency in using psychological expertise in conducting child custody evaluations.

Guidelines at 677; R.R. at 411a. Dr. Grossman argues that because the Guidelines are aspirational and not mandatory, they cannot be applied to regulate conduct of psychologists in Pennsylvania. While Dr. Grossman is correct that the APA describes the Guidelines as aspirational and not mandatory, the Board made the Guidelines mandatory when it required compliance with the standards and guidelines of the APA.

As part of this same argument, Dr. Grossman asserts that the Board applied an unconstitutionally vague term, "higher standard", in reaching its decision. The Board stated:

> Regardless of whether the APA intended their Guidelines to be aspirational for association members, the inclusion of APA standards and guidelines in Principle 3(e) of the Board's Code of Ethics, 49 Pa. Code §41.61, Principle 3(e), established a mandatory requirement for licensees in this Commonwealth. As the Board explained in its Preamble to the amended regulations, '[t]he primary objective of this amendment is to hold licensed psychologists to a higher standard of ethical practice . . . in their relationships with their clients, their colleagues, their research subjects and the general public.' 19 Pa. B. 2555 (Emphasis in original).

Adjudication at 15; R.R. at 355a.

Dr. Grossman asserts that the term "higher standard" is unconstitutionally vague because it is unclear as to what or whom the standard is higher. Dr. Grossman believes that it is unclear whether the standard is higher than

that for licensed physicians, chiropractors, podiatrists, cosmetologists or whether the standard is higher than the APA's standard or the standard of psychology boards in other states. However, Dr. Grossman answered his own question in his brief when he acknowledged that the preamble to the proposed 1989 Ethical Code explained that the new Code had a higher standard than the previous Code.[6]

Dr. Grossman next argues that convicting him of "immoral and unprofessional" conduct was a gross abuse of discretion because Principle 3(e) must be strictly construed and any ambiguities resolved in his favor. See Commonwealth v. Lassiter, 554 Pa. 586, 722 A.2d 657 (1998). This argument, however, goes to the underlying merits of Dr. Grossman's case and not to the issue of whether he received notice. Arguments raised in the argument section of a brief but not in the Statement of Questions Involved are waived. See Pa.R.A.P. 2116(a).[7]

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[6] With respect to this same issue, Dr. Grossman argues that it was improper for the Board to cite him for "immoral and unprofessional" conduct because he was compelled to adhere to a higher standard, the aspirational APA Guideline. Dr. Grossman was cited for "immoral and unprofessional" conduct in Count II which will be discussed below.

[7] Dr. Grossman further argues that a brief summary of one of the Board's decisions in the State Board of Psychology Spring 1993 Newsletter was insufficient to apprise him of the necessity to obtain the consent of both parents before a custody evaluation. The summary of Commonwealth of Pennsylvania, Bureau of Professional and Occupational Affairs v. Rosenblum, Docket No. 436-MISC-91, File No. 86-63-01749, in the State Board of Psychology Spring 1993 Newsletter stated: "The Board's action against Rosenblum was based upon his admission to having failed to value objectivity, engaged in a dual relationship, and committed unprofessional conduct in five child-custody cases." State Board of Psychology Newsletter, Spring 1993, at 8; R.R. at 580a.

The Board referred to Rosenblum in Footnote #17 of the Adjudication at the conclusion of its discussion of Hill and Wesley and its determination that in light of Guideline #9, dual consent of both parents must be provided:

(Footnote continued on next page...)

B. Errors of Law.

Dr. Grossman contends that the Board committed errors of law. First, Dr. Grossman contends that the Board erred when it referred to two cases, In re: Wesley J.K., 445 A.2d 1243 (Pa. Super. 1982)[8] and Hill v. Hill, 619 A.2d 1086 (Pa. Super. 1993)[9]. The Board stated:

(continued...)

> Applying these principles regarding dual consent, as early as 1991, the Board reprimanded and assessed a civil penalty against a psychologist for, amongst other violations, violating Principle 3 for failing to obtain the consent of both parents who had shared legal custody. Commonwealth of Pennsylvania, Bureau of Professional and Occupational Affairs v. Rosenbloom [sic], Docket No. 436-MISC-91, File No. 86-63-01749, p.6. Notice of the Rosenbloom [sic] Consent Agreement was published in the Board's Spring 1993 newsletter which was mailed to all licensees.

Adjudication, n.17 at 16-17; R.R. at 357a-358a.

This Court agrees with Dr. Grossman that this squib in a newsletter did not constitute sufficient notice to Dr. Grossman. Further, neither the Board in its opinion nor the Commonwealth in its brief to this Court cites any case law, rule, or regulation that a brief summary constitutes notice. Even though the Board's reliance on the mention of this case in the newsletter is misplaced, this Court agrees with the Board that Principle 3(e) and the Guidelines constituted sufficient notice.

[8] In Wesley, our Pennsylvania Superior Court set forth the basis under which parents may be awarded shared custody of a child. The Superior Court referred to Section 3 of the Custody and Grandparents Visitation Act, Act of November 5, 1981, P.L. 115, 23 P.S. §1003, which defined Legal Custody as the "legal right to make major decisions affecting the best interests of a minor child, including but not limited to, medical, religious and educational decisions." Under a shared custody arrangement, legal and/or physical custody of a child is shared.

[9] In Hill, our Pennsylvania Superior Court reversed the order of the Court of Common Pleas of Philadelphia County that awarded parents shared legal custody but allowed the mother to make the decision if a conflict arose. The Superior Court determined that the trial court's order effectively granted the mother sole legal custody and reasoned, "[i]t is abundantly clear . . . that the concept of shared legal custody does not contain the principle of giving one parent final authority in the case of a dispute." Hill, 619 A.2d at 1089.

> Respondent's [Dr. Grossman] actions should also have been guided by the decisions of the Superior Court in Hill and Wesley involving shared or joint custody. 'Legal custody' is defined by statute as the legal right to make decisions affecting the best interest of a minor child, including, but not limited to, medical, religious and educational decisions.' 23 Pa.C.S.A. §5302. In the Board's opinion, decisions involving psychological evaluations are encompassed within this definition. . . . Unlike sole custody, in shared or joint custody, legal custody is shared while physical custody is alternated by the agreement of the parties. Wesley, 445 A.2d at 1247. 'The philosophic premise of shared custody is the awarding to both parents of *responsibility* for decisions and care of the child . . . . Shared custody allows both parents input into major decisions in the child's life.' Hill, 619 A.2d at 1088 (emphasis added [by the Board] and Wesley, 445 A.2d at 1247). Given that both parents' input is required, and in light of Guideline #9, dual consent of both parents must be provided. (Footnote omitted).

Adjudication at 16; R.R. at 356a.

Dr. Grossman attacks the Board's reliance on Hill and Wesley from different angles. First, he asserts that the Board did not find his intervention or evaluation of L.M. to be a major decision[10] therefore dual consent was not required. Second, he asserts that because neither Hill nor Wesley mentions health professionals of any sort there is no affirmative duty for a psychologist to legally interpret a joint custody order and abide by the order by withholding professional service absent joint consent.

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[10] Section 5302 of the Domestic Relations Code, 23 Pa.C.S. §5302, gave legal custodians the legal right to make major decisions affecting the best interest of a minor child, including, but not limited to, medical, religious and educational decisions. This section was the same as the section cited in Wesley. Since Wesley, the domestic relations statutes have been consolidated.

Although the Board did not explicitly make a finding that the decision to pursue a second evaluation of L.M. was "major", this Court infers that the Board in the promulgation of its regulations and Code of Ethics regarded a custody evaluation to be a major decision, and, second, while Hill and Wesley do not mention health care professionals or psychologists, that was not the thrust of the opinions. Hill and Wesley addressed the concept of shared legal custody in Pennsylvania. The result is that when both parents share legal custody of a child, then the consent of both parents is needed with respect to major decisions.

Dr. Grossman also alleges that he met with L.M. a second time to investigate B.P.'s allegation that D.M. did not properly care for L.M. because she returned to B.P. in a "slovenly and unkempt" condition. Dr. Grossman argues that he was investigating possible child abuse and, consequently, did not have to obtain the consent of D.M. before he met with L.M. on July 14, 1996. The Board noted that where there is a "bona fide emergency" a psychologist need not obtain the consent of both parents in the performance of a custody evaluation. The Board cited allegations of sexual abuse or a child's threat of suicide as examples. Adjudication at 13, n.11; R.R. at 353a. This Court agrees with the Board that Dr. Grossman was not excused from obtaining D.M.'s consent because L.M. was returned to B.P. not freshly bathed and coiffured.

C. Refusal to Allow Dr. Gerstein to Testify.

Dr. Grossman next contends that the Board committed an abuse of discretion when it did not permit the testimony of Dr. Gerstein. Dr. Grossman asserts that Dr. Gerstein, a member of the Board from 1992-1997 when Dr.

Grossman's alleged offenses occurred, would in his testimony address whether Dr. Grossman's conduct was in any way forbidden by a Board policy, rule, and/or adjudication. Prior to the commencement of the hearing, the Board granted the Commonwealth's motion in limine to exclude Dr. Gerstein's testimony. The Board determined that Dr. Gerstein was not permitted to testify because Dr. Grossman informed the Board that Dr. Gerstein would have testified that while he was a member of the Board Dr. Grossman's actions in conducting a custody evaluation would not have been a violation of the Act or the regulations. The Board determined that Dr. Gerstein's view of how the Board would have interpreted the Act or the regulations were not relevant or probative. Dr. Grossman argues that the Board committed an abuse of discretion because Dr. Gerstein would not have testified with respect to his interpretation of the Guidelines but would have discussed whether the Guidelines served as rules for the Board in 1996.

In Allegheny County Institution District v. Department of Public Welfare, 668 A.2d 252 (Pa. Cmwlth. 1995), *petition for allowance of appeal denied*, 547 Pa. 757, 692 A.2d 567 (1997), this Court affirmed a decision of a hearing examiner of the Department of Public Welfare that refused permission to allow Allegheny County Institution District to introduce the testimony of Speaker of the Pennsylvania House of Representatives, K. Leroy Irvis, with respect to the General Assembly's intent when it passed a certain act. This Court stated that it "is not bound by the arguments of a single legislator made on the floor in debate of the issue, much less the post-Act expression of opinion by a single legislator made on the floor in debate of the issue, much less the post-Act expression of opinion by a single legislator." Allegheny County Institution District, 668 A.2d at 257 n.13.

Similarly, the Board would not be bound by the opinion of a single Board member of the Board's intentions regarding the Board's rules and policies in 1996. The rules and policies speak for themselves and the underlying intent was subject to administrative review by the Board. This Court agrees with the Board that Dr. Gerstein's opinion as a former Board member was not relevant or probative, and the Board did not abuse its discretion when it chose not to permit the testimony of Dr. Gerstein.

D. Burden of Proof.

Dr. Grossman next contends that the Board's finding that the Commonwealth met its burden of proof was a gross abuse of discretion and was against the weight of the evidence. Dr. Grossman asserts that he along with Dr. Knapp, Dr. Bricklin, and the PPA, believed that dual parental consent was unnecessary. Further, Dr. Grossman asserts that he did not perform a custody evaluation but that upon the request of B.P. he evaluated L.M. and critiqued the assumptions and methodology of Dr. Cooke's assessment.

With respect to this issue, the Board determined:

> Lastly, Respondent [Dr. Grossman] asserted that he was not required to obtain the father's consent because he did not perform a custody evaluation. Respondent [Dr. Grossman] maintained that he was simply providing a custody related evaluation, which does not require the consent of both parents. . . . He insists that within the gamut of this review he was permitted to review Dr. Cook's report and also conduct a brief assessment of the child. . . . Conversely, the Commonwealth insisted that Respondent served as a custody evaluator, thereby requiring dual consent.

> Drs. Bricklin, Knapp and Heilbrun all testified that a 'records review' is limited to a review of the documents of record including the custody report, raw testing data, and background information. It does not involve any personal contact with the parties. . . . Dr. Knapp further testified that *any* direct evaluation of the child or the parent may be construed as a custody evaluation. . . . Again, all three experts agreed that in this type of evaluation dual consent is required. . . .
>
> Specifically, in this case, Dr. Heilbrun opined that the Respondent [Dr. Grossman] exceeded the scope of a records review and acted more like a custody evaluator because he met with L.M. on two occasions. The Board agrees. (Citations and footnote omitted).

Adjudication at 17-18; R.R. at 357a-358a. This Court finds that the Board had the authority to make such findings of fact and conclusions of law.

Dr. Grossman also asserts that he did not violate Guideline #9 because he was not required to obtain consent from D.M. because D.M. was a litigant. Dr. Grossman argues that D.M. was not a participant because he was not going to be examined.

The Board disagreed with Dr. Grossman:

> Respondent [Dr. Grossman] argues that even if Guideline #9 is mandatory it did not require him to obtain the father's consent because it uses the language 'adult participants' rather than 'litigants.'. . . In Respondent's [Dr. Grossman] opinion, the father was a 'litigant' and therefore, was not required to provide consent. . . . Reading the Guideline as a whole, the Board simply cannot interpret it as requiring anything less than the consent of both the mother and the father. The Guideline requires that 'each' participant understand who has requested the services and who is paying the fee. Given this specific language, it would be illogical to suggest

> that the adult participants are limited to the parties hiring the psychologist since they are well aware of the scope of the engagement and the fee. (Footnote and citations omitted).

Adjudication at 15-16; R.R. at 356a-357a. Again, this Court must conclude that the Board had the authority to make these findings and conclusions and committed no error.

Essentially, Dr. Grossman next asks this Court to reweigh the testimony of his witnesses, Dr. Bricklin and Dr. Knapp, that Dr. Grossman did not have a duty to obtain D.M.'s consent. Dr. Grossman also asserts that the Commonwealth's expert, Dr. Heilbrun, came to the same conclusion. A review of Dr. Heilbrun's testimony does not support Dr. Grossman's assertion. Dr. Heilbrun testified that, in his opinion, Dr. Grossman conducted a custody evaluation which required the consent of both parents. The Board accepted Dr. Heilbrun's testimony over the testimony of Dr. Knapp and Dr. Bricklin. It is not this Court's function to judge the weight and credibility of evidence before an administrative agency. Makris v. State Bureau of Professional and Occupational Affairs, State Board of Psychology, 599 A.2d 279 (Pa. Cmwlth. 1991). Dr. Grossman's argument must fail.[11]

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[11] Dr. Grossman next contends that the Commonwealth did not meet its burden of proof and/or Principle 3(e) was defective and/or the Board misapplied Rosenblum and he was not in violation of Section 8(a)(9) of the Act. This Court has already determined that the Commonwealth met its burden of proof with respect to Principle 3(e) and that Principle 3(e) was not defective. With respect to Rosenblum, Dr. Grossman argues that he did not violate Rosenblum. Dr. Grossman mischaracterizes the Board's discussion. The Board did not refer to Rosenblum to indicate that it served as a basis upon which to cite Dr. Grossman. Rather, the Board cited its decision to show that it required dual parental consent in certain cases since 1991 well before the conduct at issue here. This Court reiterates that the Board did not err when it determined that Dr. Grossman violated Section 8(a)(9) of the Act.

II. COUNT II – SECTION 8(a)(11) OF THE ACT.

Finally, Dr. Grossman contends that Section 8(a)(11) of the Act is unconstitutionally vague and/or the application of this statute constituted a result so excessively punitive as to constitute a gross abuse of discretion by the Board. Dr. Grossman believes that the Order to Show Cause was so vague that he was prevented from ascertaining that he was accused of a violation of Section 1208(a)(11) based on his testimony in the child custody hearing.

With respect to a violation as a result of Dr. Grossman's testimony, the Order to Show Cause provided:

> **COUNT TWO**
>
> 17. Paragraphs 1 through 15 are incorporated by reference.
>
> 18. Based upon the foregoing Factual Allegations, the Board is authorized to suspend or revoke, or otherwise restrict Respondent's [Dr. Grossman] license, or impose a civil penalty under 63 P.S. §1208(a)(11) because Respondent's [Dr. Grossman] conduct of conducting a psychological evaluation and/or meeting with L.M. with respect to a custody proceeding without the knowledge or consent of her father, D.M., constituted unprofessional conduct in the practice of psychology.

Order to Show Cause, February 14, 2000, Paragraphs 17-18 at 3; R.R. at 4a.

In the "Violations and Sanctions" section of the Adjudication, the Board stated:

> The Respondent [Dr. Grossman] also engaged in unprofessional or immoral conduct, under Section 8(a)(11) of the Act, 63 P.S. §1208. Even though

> Respondent [Dr. Grossman] did not meet with the father, the Respondent [Dr. Grossman] cast aspersions about the father's ability to parent L.M. Specifically, Respondent [Dr. Grossman] suggested that the father may have a caffeine addiction. (NT 139-142, 144, 272) While Respondent [Dr. Grossman] suggested that the mother also drinks coffee, Respondent [Dr. Grossman] only offered specific calculations about the father's consumption. Respondent [Dr. Grossman] also raised the issue of whether the father was able to care for L.M. because insurance salesmen often have to work at night. (N.T. 139-142, 144, 272) Both statements were specifically intended to call the father's fitness to parent into question. In that Respondent [Dr. Grossman] did not speak with the father about these issues, his speculation constitutes unprofessional conduct. The Board believes that a $1,000 civil penalty is appropriate for this violation.

Adjudication at 20; R.R. at 360a.

In an administrative proceeding, the essential elements of due process are notice and an opportunity to be heard. Wills v. State Board of Vehicle Manufacturers, Dealers and Salespersons, 588 A.2d 572 (Pa. Cmwlth. 1991). "Notice, the most basic requirement of due process, must 'be reasonably calculated to inform interested parties of the pending action, and the information necessary to provide an opportunity to present objections. . . .'" Noetzel v. Glasgow, Inc., 487 A.2d 1372, 1377 (Pa. Super. 1985) *cert. denied*, 475 U.S. 1109 (1986), quoting Pennsylvania Coal Mining Association v. Insurance Department, 471 Pa. 437, 452-453, 370 A.2d 685, 692-693 (1977).

Here, Count II of the Notice and Order to Show Cause incorporated all of the previous paragraphs. Count II stated that Dr. Grossman violated Section 8(a)(11) of the Act because he conducted a custody evaluation and/or met with

L.M. without D.M.'s consent. The Notice and Order to Show Cause did not mention Dr. Grossman's testimony at the custody trial. This Court agrees with Dr. Grossman that the Notice and Order to Show Cause failed to afford Dr. Grossman adequate notice and the opportunity to sufficiently prepare a defense to the challenge to his testimony at the custody trial. Although the Board's conclusions of law referenced Dr. Grossman's failure to obtain consent from D.M. before the custody evaluation with respect to Count II, it is apparent from the Violations and Sanctions section of the Adjudication that the Board found that Dr. Grossman *violated Count II as a result of his testimony at the custody trial, not just the custody evaluation itself.* This Court concludes Dr. Grossman did not receive adequate notice of this specific charge against him. As a result, this Court sustains Dr. Grossman's appeal as to Count II.

Accordingly, this Court affirms in part and reverses in part. This Court affirms the Board as to the reprimand for Count I. This Court reverses the Board as to the $1,000 fine for Count II.

BERNARD L. McGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jan C. Grossman, Petitioner	:	
v.	:	
State Board of Psychology, Respondent	:	No. 3023 C.D. 2001

ORDER

AND NOW, this 2nd day of June, 2003, the order of the State Board of Psychology in the above-captioned matter is affirmed in part and reversed in part. This Court affirms the State Board of Psychology's reprimand for Count I. This Court reverses the State Board of Psychology as to the $1,000 fine for Count II.

BERNARD L. McGINLEY, Judge

LAW RELATING TO MHPs

I. Law Relating to MHPs, and Interactions with the Court system

A. ***Purpose*** of appointment

1. The "encouragement" of dispute resolution through nonadversarial means (NRS 3.225).

B. "Special Masters"

a. NRS 3.405 (paternity and child support)

b. EDCR 1.40 (child support masters); EDCR 1.42 (UPA masters); EDCR 144 (civil commitments); EDCR 1.46 (Juvenile masters)

c. NRCP 53 – pretty much everyone else

(1) Quasi-judicial immunity

(a) *Duff v. Lewis*, 114 Nev. 564, 958 P.2d 82 (1998): psychologist was "entitled to absolute quasi-judicial immunity from Duff's suit because `(1) at least to some extent, his evaluations and recommendations aided the trial court in determining child custody, and (2) his services were performed pursuant to a court order.'"

(2) Quasi-judicial responsibility; "order of reference"

(3) Grounds for objection

(4) Powers; witnesses by party subpoena; other

(5) Reports

(a) Can't withhold for non-payment

(b) Findings of fact vs. other conclusions

(c) Must be served on all parties unless otherwise specified in order of reference

d. Proposed Forms

(1) Stipulation and Order

(2) PC Report, Recommendations and Order

C. Absolute requirement of adherence to court orders; enforcement vs. second-guessing; subordination of authority to judge; the ability to ***recommend*** is ***not*** the authority to require.

D. Limits of delegation per federal and State law; *Van Schaik* illustration

E. Priority of safety overrides; see *Mack-Manley* ("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").

F. Masters, Parenting Coordinators, and Related MHPs Limits

1. EDCR 5.12 – no examination of child for purposes of report absent stipulation or order

2. EDCR 5.13 – Child interview/outsourced evaluation reports

a. Who can read them

b. Who can keep them

c. Who can copy them

d. File them?

e. Exhibits to reports

3. Limits on role – APA, ABA, AAML, and other guidelines

a. Advising

b. Providing therapy

c. Exceeding scope of appointment (financial and other issues)

d. Potential liability; limits of quasi-judicial immunity

e. Mandatory reporting and its limits

(1) NRS 432B.220 (amended 1/1/12)

4. Details of form appointment order; alternatives

a. Prior model order

b. Problems identified with prior model

c. Revised proposed model

5. Potential personal financial responsibility for failure to warn of/prevent danger to vulnerable persons

G. Outsourced evaluators

1. Incompatibility of evaluative and therapeutic functions

2. Recommendations – Yes? No? Maybe?

3. Documentation and maintenance of notes, source documents, etc.

4. Admissibility and use of evaluation and reports

a. Nationally: FRE 702; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) & *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).

(1) 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 has applied the principles and methods reliably to the facts of the case.

(2) *Daubert* is even more restrictive: minimum standards for scientific legitimacy of a practice or procedure: (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.

b. Nevada: NRS 50.275, *Hallmark v. Eldridge*, 124 Nev. 492, ___, 189 P.3d 646 (2008) & *Higgs v. State*, 126 Nev. ___, 222 P.3d 648 (Nev. Adv. Opn. No. 1, Jan. 14, 2010) (adopting *Frye*, and referencing *Daubert*)

(1) NRS 50.275: 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.

(2) *Hallmark*: 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.

(3) *Higgs*: "to the extent that *Daubert* espouses a flexible approach to the admissibility of expert witness testimony, this court has held it is persuasive. . . . But, to the extent that courts have construed *Daubert* as a standard that requires mechanical 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.

(4) three overarching requirements for admissibility of expert witness testimony pursuant to NRS 50.275: (1) qualification, (2) assistance, and (3) limited scope requirements.

c. Lots of attention, CLEs, articles, and suggestions for rigorous cross-examination of any expert purporting to make a custodial evaluation without solid foundation in established scientific methods.

H. Miscellaneous Issues relating to MHP interactions with the Court system

1. Process and procedure of recommendations

2. Objections; how, how long, and possible outcomes

I. Communications

1. With the Court

a. Meaning of *ex parte* communications

b. From *In re Fine*, 116 Nev. 1001, 13 P.3d 400 (Nev. 2000):

(1) Canon 3B(7) expressly provides that "[a] judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding."

(2) Any ex parte communications with court-appointed experts should be limited to procedural or administrative matters. Matters involving the merits or substance of a case must not be discussed outside the presence of the parties. Moreover, the content of procedural or administrative communications should be promptly documented and forwarded to the parties so as to afford them an opportunity to respond to the court's actions.

(3) The fact that an actor may have acted with the best of intentions does not relieve the actor of liability.

2. With represented parties

3. With unrepresented parties

4. With counsel

5. With third parties

J. Testimony and formal reports

K. Is "reunification therapy" or other such tasks *Daubert*-allowed (reliability/validity/peer consensus)?

1. Qualifications/certification?

2. Availability of materials for counsel vetting and approval.

L. ***All*** base documentation, work product, work notes, etc., to be preserved for discovery

and cross-examination; the concept of spoliation.

List of Exhibits:

1. NRS 3.225
2. NRS 3.405
3. NRCP 53
4. Stipulation and Order
5. PC Report, Recommendations and Order
6. Brett Turner: Referring Disputed Custody Issues to Guardians or other third parties
7. *Mack-Manley*
8. EDCR 5.12
9. EDCR 5.13
10. Prior model order
11. Problems identified with prior model
12. Revised proposed model
13. "Shrinks Gone Wild II" (legal note No. 51)
14. *Higgs*
15. Titles and contents of CLEs on MPH custody evaluator cross-examination
16. NRS 432B.220

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: _____

_____
Plaintiff

Dated: _____

_____
Defendant

Dated: _____

_____
Attorney for Plaintiff

Dated: _____

_____
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

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_____

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.

...

...

...

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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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

,	Case No.:
	Dept. No.:
Plaintiff,	
vs.	
,	Hearing Date:
	Hearing Time:
Defendant.	

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.

...

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...

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\00005095.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

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 Oriegel-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, case-law 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.

LEONARD FOWLER

Saitta

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

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35TH ANNUAL MARRIAGE DISSOLUTION INSTITUTE
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August 5-8, 2002
Dallas, Texas
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CHAPTER 5

Daubert/Lanigan Issues

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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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