IN THE SUPREME COURT OF THE STATE OF NEVADA

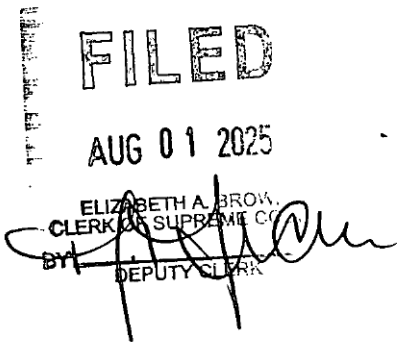
LUBA GONZALEZ N/K/A LUBA SNOW A/K/A LUBA DACE,

Appellant,

v.

ENRIQUE IVAN VELAZQUEZ-GONZALEZ,

Respondent.



Supreme Court No.: 90570
Related Appeal no. 84759

District Court No.: D-18-575860-D

APPEAL FROM FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDERS (POST-JUDGMENT) & ORDER DENYING MOTION FOR RECONSIDERATION

Eighth Judicial District Court of the State of Nevada
In and for the County of Clark
THE HONORABLE HEIDI ALMASE
DISTRICT COURT JUDGE

APPELLANT'S OPENING BRIEF

Emily McFarling, Esq.
Nevada Bar Number 8567
McFarling Cohen Fic & Squires
[redacted]

Attorney for Appellant, Luba Dace.

25-33810

I. NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

Emily McFarling, Esq. Nevada Bar # 8567 McFarling Cohen Fic & Squires [redacted]	Melvin R. Grimes, Esq. Nevada Bar # 12972 Roberts Stoffel Family Law Group
Attorney for Appellant, *Luba Dace*	*Attorney for Respondent,* *Enrique Ivan Velazquez-Gonzalez*

In the course of the proceedings in the district court, Appellant was also represented by Summer Squires, Esq., Nevada Bar # 7699, of McFarling Cohen Fic & Squires., Alex B. Ghibaudo, Esq., Nevada Bar#10592., Louis Schneider, Esq., Nevada Bar# 9683 of The Law Offices of Louis Schneider., John T. Kelleher, Esq., Nevada Bar# 6012 of Kelleher & Kelleher, LLC., Benjamin B. Childs, Esq., Nevada Bar# 3946 of The Law Offices of Benjamin B. Childs., Dawn Lozano, Esq., Nevada Bar# 3475 of Dawn M. Lozano, Ltd., and Respondent was also represented by Dawn Lozano, Esq., Nevada Bar# 3475 of Dawn M. Lozano, Ltd., John W. Muije, Esq., Nevada Bar#2419 of John W. Muije & Associates. These representations are made so that the judges of this court may evaluate possible disqualification or recusal.

DATED this 15th day of July, 2025.

MCFARLING COHEN FIC & SQUIRES

/s/ Emily McFarling, Esq.

Emily McFarling, Esq.
Nevada Bar Number 8567
[redacted]
Attorney for Appellant,
Luba Dace

II. TABLE OF CONTENTS

I. NRAP 26.1 DISCLOSURE i

II. TABLE OF CONTENTS iii

III. TABLE OF LEGAL AUTHORITIES vi

IV. JURISDICTIONAL STATEMENT 1

V. ROUTING STATEMENT 1

VI. STATEMENT OF THE ISSUES 1

VII. STATEMENT OF THE CASE 2

A. Initial Proceedings and the Stipulated Decree 2

B. Subsequent Filings 4

C. Enrique's Request for NRS 126C.0035(7) Finding 6

D. Orders to Show Cause 7

E. Luba's Motion for Reconsideration 8

VIII. STATEMENT OF THE FACTS 8

IX. SUMMARY OF ARGUMENT 25

X. ARGUMENT 27

A. STANDARD OF REVIEW 27

B. THE DISTRICT COURT ERRED WHEN IT FOUND THAT ONE WITHHOLDING CONSTITUTED ABDUCTION AS A MATTER OF LAW 28

1. WITHHOLDING AND ABDUCTION WERE CONFLATED IN THE PROCEEDINGS BELOW 30

2. LUBA DID NOT DETAIN OR CONCEAL THE CHILD. 31

3. LUBA DID NOT ACT "WILLFUL" IN WITHHOLDING THE CHILD. 32

C. THE DISTRICT COURT ERRED WHEN IT FOUND LUBA DID NOT REBUT ANY PRESUMPTION THAT SHE SHOULD NOT HAVE JOINT PHYSICAL CUSTODY. 38

D. THE DISTRICT COURT ERRED IN MODIFYING CUSTODY WHEN ENRIQUE DID NOT MEET THE STANDARD OF ESTABLISHING A SUBSTANTIAL CHANGE OF CIRCUMSTANCE AFFECTING THE WELFARE OF THE CHILD....40

E. THE DISTRICT COURT ERRED WHEN IT MODIFIED CUSTODY AFTER ENRIQUE DID NOT MEET THE STANDARD THAT MODIFICATION WAS IN THE MINOR CHILD'S BEST INTEREST....44

F. THE DISTRICT COURT'S ORDER MODIFYING CUSTODY VIOLATED LUBA'S CONSTITUTIONAL RIGHT TO PARENT AND TO DUE PROCESS. 58

G. THE DISTRICT COURT'S ORDER MODIFYING CUSTODY WAS THE RESULT OF THE BIAS THAT WAS FOUND AGAINST THE PRIOR JUDGE ASSIGNED TO THE CASE. 59

H. THE DISTRICT COURT ABUSED ITS DISCRETION IN HOLDING LUBA IN CONTEMPT AND THE RESULTING SANCTION....61

1. STANDARD OF REVIEW....61

2. THE CONTEMPT FINDING FOR WITHHOLDING THE CHILD 62

3. THE CONTEMPT FINDING FOR RESCHEDULING A DENTIST APPOINTMENT. 63

I. THE DISTRICT COURT ERRED IN ITS AWARD OF CHILD SUPPORT AND MINOR TAX CREDIT ORDER. 65

J. THE DISTRICT COURT ERRED IN AWARDING ATTORNEY'S FEES TO ENRIQUE AND DENYING FEES TO LUBA. 65

K. THE DISTRICT COURT HAS EXPRESSED BIAS. 67

XI. CONCLUSION 68

XII. CERTIFICATE OF COMPLIANCE 70

XIII. CERTIFICATE OF SERVICE 72

III. TABLE OF LEGAL AUTHORITIES

Case Law

Bloom v. Illinois, 391 U.S. 194 (1968).....58

Brunzell v. Golden Gate Nat'l Bank, 85 Nev. 345 (1969).....65

Castle v. Simmons, 120 Nev. 98, 86 P.3d 1042 (2004).....42

Culbertson v. Culbertson, 91 Nev. 230, 533 P.2d 768 (1975).....44

Cunningham v. District Court, 102 Nev. 551, 729 P.2d 1328 (1986).....61,62

Dagher v. Dagher, 103 Nev. 26, 731 P.2d 1329 (1987).....57

Davis v. Ewalefo, 131 Nev. 445, 352 P.3d 1139 (2015).....43

Div. of Child & Family Servs., v. Eighth Jud. Dist. Court, 120 Nev. 445 (2004)...61

Ellis v. Carucci, 161 P.3d 239, 123 Nev. 145 (2007).....40

Ex parte Milligan, 71 U.S. 2 (1866).....58

Fenkell v. Fenkell, 86 Nev. 397, 469 P.2d 701 (1970).....44

Hardy v. First Nat. Bank of Nev., 86 Nev. 921, 478 P.2d 581 (1970).....28

In re Water Rights of Humboldt River, 118 Nev. 901, 59 P.3d 1226 (2002).....62

Jensen v. Jenson, 104 Nev. 95, 753 P.2d 342 (1988).....27

Leavitt v. Siems, 130 Nev. 503, 330 P.3d 1 (2014).....56

Mack-Manley v. Manley, 122 Nev. 849, 138 P.3d 525 (2006).....65

Marbury v. Madison, 5 U.S. 137 (1803).....58

Martin v. Martin, 120 Nev. 342, 90 P.3d 981 (2004.....41

Miller v. Wilfong, 121 Nev. 619, 119 P.3d 727 (2005).....65

Mosley v. Figliuzzi, 113 Nev. 51, 930 P.2d 1110 (1997).....42

Nix v. Whiteside, 475 U.S. 157 (1986).....58

Pease v. Taylor, 86 Nev. 195, 467 P.2d 109 (1970).....28

Primm v. Lopes, 109 Nev. 502, 853 P.2d 103 (1993).....27

Real Estate Division v. Jones, 98 Nev. 260, 645 P.2d 1371 (1982).....28

Rico v. Rodriguez, 121 Nev. 695, 120 P.3d 812 (2005).....45

Rivero v. Rivero, 125 Nev. 210, 216 P.3d 214 (2009).....27

Roe v. Roe, 139 Nev. Adv. Op. 21 (2023).....59,60

Romano v. Romano, 138 Nev. Adv. Op. 1, 501 P.3d 980 (2022).....41

SIIS v. United Exposition Servs. Co., 109 Nev. 28, 846 P.2d 294 (1993).....28

Sims v. Sims, 109 Nev. 1146, 865 P.2d 328 (1993).....27

State Emp't Sec Dep't v. Hilton Hotels, 102 Nev. 606, 729 P.2d 497 (1986).....28

United States v. Gypsum Co., 333 U.S. 364, [redacted] 525 (1948).....57

Wallace v. Wallace, 112 Nev. 1015, 922 P.2d49 541 (1996).....27

Wright v. Osburn, 114 Nev. 1367 (1998).....65

Ybarra v. State, 127 Nev. 47, 247 P.3d 269 (2011).....59,67

Statutes

NRS 1.230.....59,67

NRS 18.010.....66

NRS 22.010.....61

NRS 125C.0035.....5,6,7,28,39,40,45,58,59

NRS 200.359.....6, 28, 29, 30, 31, 42

NRS 686B.1762.....32

Constitutional Amendments

U.S. Const. Amend. VI

U.S. Const. Amend XIV

Rules

NRAP 26.1(a).....i

NRAP the 3A(b)(1).....1

NRAP 17(b)(10).....1

NRAP 32(a)(4).....70

NRAP 32(a)(5).....70

NRAP 32(a)(6).....70

NRAP 32(a)(7).....70

NRAP 32(a)(7)(C).....70

NRAP 28(e)(1).....70

NCJC Rule 2.3.....59

NCJC Rule 2.11.....59

Other Authorities

Black's Law Dictionary (2nd Ed. 1910).....31

IV. JURISDICTIONAL STATEMENT

This court has jurisdiction pursuant to NRAP the 3A(b)(1), which permits a party to appeal from "[a] final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered." The final order appealed from is an Order entered on April 11, 2025. (AA04549). The notice of entry of order was filed on April 14, 2025. (AA04573). Appellant timely filed a notice of appeal on April 24, 2025. (AA04598).

V. ROUTING STATEMENT

This case should be assigned to the Court of Appeals as stated in NRAP 17(b)(10) because it involves a family law matter not involving termination of parental rights.

VI. STATEMENT OF THE ISSUES

1. Whether the District Court erred when it found that one withholding constituted abduction as a matter of law.
2. Whether the District Court erred when it found that Appellant did not rebut any presumption that she should not have joint physical custody.
3. Whether the District Court erred in modifying custody when Respondent did not meet the standard to show there was a substantial change of circumstance affecting the welfare of the child.

4. Whether the District Court erred in modifying custody when Respondent did not meet the standard that modification was in the minor child's best interests.
5. Whether the District Court's order modifying custody violated Appellant's right to due process.
6. Whether the District Court's order modifying custody was a result of the bias that was found against the prior judge assigned to the case.
7. Whether the District Court abused its discretion in holding Appellant in contempt for withholding the minor child and rescheduling a dentist appointment as well as the resulting sanctions.
8. Whether the District Court erred in its award of child support and minor tax credit order.
9. Whether the District Court erred in awarding attorney's fees to Respondent and denying fees to Appellant.
10. Whether the District Court was Biased against Appellant.

VII. STATEMENT OF THE CASE

A. Initial Proceedings and the Stipulated Decree

The Parties to this Appeal, Luba Snow ("Luba") and Enrique Ivan Velazquez-Gonzalez ("Enrique"), were granted a divorce on October 12, 2021. (AA00001-AA00032). The Stipulated Marital Settlement Agreement and Decree of Divorce and the Notice of Entry was effectuated December 10, 2021. (AA00001-AA00032).

Pursuant to the Stipulated Decree, the parties shared joint legal custody and joint physical custody of their minor child, on a week on/week off timeshare. (AA00014). The parties stipulated for each party to have up to seven days of specified vacation with the child per year with no less than thirty days advance written notice. (AA00017- AA00018). The parties stipulated the traveling parent would provide a written itinerary for travel with the child outside of Nevada no later than fourteen days prior to the trip. (AA00017- AA00018). The parties also stipulated the travel itinerary was to state all flights the child would take, the address where the child would stay each night of the trip, including hotel name if applicable, and emergency phone number for the child. (AA00017- AA00018). In the event border crossings (for travel between the United States and Mexico) would take place on foot, the parties stipulated the itinerary would include the dates of the border crossings. (AA00017- AA00018).

The parties further stipulated that, when travelling by air with the child, the parties would provide each other with "complete itineraries to include dates of travel, passengers on the reservation, and airline and flight details." (AA00111). The parties stipulated to provide the other parent with the address they would be staying as soon as it was known. (AA00111). Lastly, all communication between the parents was via the Talking Parents communication application absent an emergency. (AA00111).

B. Subsequent Filings

Luba filed a Motion to Clarify Orders and Make Additional Orders on March 13, 2023. (AA00033-AA00036). On March 15, 2023, District Court Judge Almase, Ben Childs (Luba's previous District Court attorney), and Melvin Grimes, Enrique's attorney, had an off the records telephone conference regarding Luba's Motion. After the telephone conference Childs and Grimes agreed via email that Enrique will provide CBX tickets and enable a video call feature in Talking Parents. (AA00183-AA00190). Luba was assured by Childs that the Judge clarified the order during the call and that CBX tickets were part of the itinerary required for the child to travel. (AA02852).

On March 20, 2023, Enrique filed an Emergency Motion for Return of the Child, for an Order to Show Cause and for a Referral to the District Attorney for Criminal Charges alleging Luba violated the Stipulated Decree by purportedly refusing to exchange the child on March 15, 2023 for his vacation to Mexico and changing a March 21, 2023 dental appointment without consulting him. (AA00154-AA00173). On March 30, 2023, Luba filed an Opposition and Countermotion. (AA00280-AA00296). On April 27, 2023, Luba filed a Motion for an Order to Show Cause. (AA00526-AA00541).

On May 5, 2023, Enrique filed an Opposition and Countermotion for Modification of Custody Awarding Defendant Primary Physical and Sole Legal

Custody, Sole Possession of the Child's Passport, et. al. (AA01051-AA01090). Within his Opposition and Countermotion, Enrique claimed Luba made medical appointments without his permission and wrongfully detained the child in violation of NRS 125C.0035(7) on March 15, 2023. (AA01051-AA01090).

On May 24, 2023, Enrique filed an Emergency Motion to Enforce seeking enforcement of his Father's Day, 2023 visitation. (AA01922-AA01932). On May 31, 2023, Luba filed an Opposition and Countermotion for an Order to Show Cause. (AA01955-AA01961). At the April 6, 2023 hearing on Enrique's March 20, 2023 Emergency Motion for Return of Child, et al., the District Court deferred the issue of custody modification and set an evidentiary hearing on the Order to Show Cause against Luba. (AA02027-AA02028). In the June 13, 2023 Order, the Court issued a written order related to all other pending matters. Specifically, the Court denied each of Luba's 110 requests for indirect contempt, denied Luba's requests for surname and school modification and for award for attorney fees. (AA02106-AA02129). The District Court found Enrique established a prima facie basis to modify child custody based in part, on Luba withholding the child for the March 15, 2023 vacation. ((AA02106-AA02129). On the contrast, the District Court finds no provision in the MSA related to what should occur when a party's requested vacation time occurs during another specific holiday, e.g. Father's Day. (AA02217-AA02218). The District Court also found that Luba provided documents that her vacation period was

duly noticed to Enrique on December 4, 2022, and that Enrique agreed to the vacation time. (AA02217-AA02218) The District Court DENIES Enrique's May 24 ,2023 motion mandating the child spend Father's Day 2023 with Enrique where the parties agreed on Luba's vacation time on or about December 4, 2022. (AA02217-AA02218)

On June 9, 2023, Luba filed an Emergency Motion for Reconsideration. (AA02037-AA02041). On July 21, 2023, Enrique filed an Opposition and Countermotion. (AA02237-AA02249). On September 11, 2023, the Court filed an Order denying Luba's July 5, 2023 motion and awarded Enrique attorney fees. (AA02352-AA02362).

C. Enrique's Request for NRS 126C.0035(7) Finding

After hearing evidence on March 19, 2024 and October 15, 2024, the District Court issued its Order on January 2, 2025. (AA04126-AA04175). The Notice of Entry of Order was filed January 7, 2025. (AA04176). The District Court made a preliminary finding that the NRS 125C.0035(7) rebuttable presumption was triggered. (AA02793-AA02800). The District Court found Enrique met the relevant factors in NRS 125C.0035(7) regarding an act of withholding or abduction in that Luba willfully detained the minor child on March 15, 2023. (AA02793-AA02800). The District Court utilized the definition of abduction pursuant to NRS 200.359(1). (AA02793-AA02800). The District Court then found Luba overcame the

presumption triggered by NRS 125C.0035(7) finding the single withholding not sufficient to show that Luba should not have sole or joint physical custody and supervised visitation only. (AA04155-AA04156). In making this finding, the District Court found Enrique established a substantial change of circumstances affecting the child's best interest. (AA04155). In considering the NRS 125C.0035(4) best interest factors, the District Court awarded Enrique primary physical custody, changing the prior week on/week off arrangement to Luba only having the minor child for three weekends per month. (AA04157).The District Court awarded Enrique the yearly child tax credit and denied his request for referral for prosecution for parental abduction. (AA04158). Lastly, the District Court denied Luba's request for attorney fees and preliminarily granted Enrique's request for fees. (AA04158).

D. Orders to Show Cause

The District Court found Luba in violation of the obligations set forth in the decree of divorce when she did not exchange the child on March 15, 2023 which interfered with Enrique's vacation. (AA04160). The District Court also found Luba in violation of the obligations set forth in the decree of divorce when she allegedly failed to consult with Enrique before changing the child's March 21, 2023 dental appointment to March 24, 2024. (AA04162). As a result, the District Court found Luba in contempt for each violation and ordered her to pay a sanction of $500.00 for each ($1,000 total). (AA04162).

E. Luba's Motion for Reconsideration

A Motion for Reconsideration was filed by Luba on January 21, 2025. (AA04310-AA04343). On January 30, 2025, Enrique filed his Opposition to the Motion to Reconsider and his Countermotion for an Award of Attorney's Fees. (AA04450-AA04479). On February 20, 2025, Luba filed a Reply to Enrique's Opposition to the Motion to Reconsider and an Opposition to his countermotion and request for attorney's fees. (AA04501-AA04533). On April 11, 2025, the district court entered an Order denying Luba's Motion for Reconsideration and an Order Granting Enrique's Countermotion. (AA04549-AA04572).

Luba filed a timely Notice of Appeal on April 24, 2025, challenging the district court's Orders. (AA04598-AA04600).

VIII. STATEMENT OF THE FACTS

Mr. Benjamin Childs, Luba's former District Court attorney, testified on her behalf. (AA02577). Mr. Childs recalled exchanging emails with opposing counsel on March 15, 2023, given Luba's concerns for the child's safety, as well as having a telephone conference with the District Court concerning the issues. (AA02579). Mr. Childs explained for security reasons, it is possible to travel from the American side of Tijuana, Mexico into the Tijuana airport via a tunnel with the purchase of "CBX" tickets. (AA02579). It was Enrique's travel across the border into Tijuana

with the minor child, as opposed to utilizing the CBX tunnel which connected directly into the airport, that Luba was concerned with. (AA02579).

After the conference call with the Court, Mr. Childs sent Enrique's counsel an email summarizing the Court's clarification of the Order: Enrique was to permit communication with the child during the vacation, CBX tickets were to be provided (both going and coming) as part of the travel itinerary and there was to be no travel outside of Nuevo Leon. (AA02581). Enrique's counsel indicated this was the agreement and counsel confirmed Enrique would purchase the CBX tickets and provide copies. (AA02583). To Mr. Childs' knowledge, Enrique never purchased the tickets. (AA02583). Mr. Childs' testified he advised Luba it was her choice whether or not to conduct the exchange because the Court clarified the Order and what needed to occur, but Enrique did not comply. (AA02583). Mr. Childs clarified the Court's ruling at the telephone conference were that the CBX tickets were part of the itinerary, and it was his opinion that if they were never provided it was the equivalent of Enrique failing to provide the itinerary prior to travel and thus, Luba was within her rights not to conduct the exchange. (AA02578). This was particularly true because during the March 15, 2023 telephone conference, the court clarified the CBX tickets were part of the itinerary. (AA02595). In essence, based upon Mr. Childs advice, it would have been reasonable for Luba to make the determination she did (not exchange the child) based upon what her counsel told her. Mr. Childs

testified he did not believe Luba was deliberately trying to undermine Enrique's custodial rights. (AA02590).

Emma Muth, the minor child's teacher, was called to testify by Enrique (AA02601). Ms. Muth regularly communicates with both parents. (AA02603). Ms. Muth testified she observed the child to have a good relationship with both parents and observed "good things from both parents." (AA02603). Ms. Muth testified the child is attached to her stepmother, Jennifer (Enrique's wife), who works at the school and is eager to interact with her throughout the school day. (AA02605-AA02606). Ms. Muth also testified on one or two occasions she thought the child appeared better groomed when she was with Enrique as opposed to Luba, indicating she once (on a singular incident) saw the child had dry skin and thought she was wearing a "Halloween" type Skelton shirt close to Valentines Day. (AA02608-AA02609, AA02616). Ms. Muth acknowledges she works with Enriques wife and the two have a workplace relationship. (AA02610). Ms. Muth also acknowledged she was aware it was not common for teachers to get involved in custody disputes between parents, but Jennifer (Enrique's wife) had asked her to testify for Enrique. (AA02610-AA02611).

Gina Thornton, a school counselor, testified she was present at a school Halloween parade in 2023 and walking in the parade with the child and Jennifer when joined in. (AA02630). Ms. Thorton testified Luba videoed the parade while

walking with her child, while the other parents videoed from the sidelines. (AA02630). Ms. Thorton did not know if other parents were walking with their children in the parade. (AA02630). Ms. Thorton testified she had a "feeling" the child was sad because she wanted to hang out in the parade with Jennifer and not her mother, Luba. (AA02633). Ms. Thorton had never made any other observations of the child or Luba that were concerning; she was a happy child. (AA02634).

Ms. Thorton acknowledged she had known Jennifer for approximately eight years and the two were friends. (AA02631). Jennifer asked Ms. Thorton to testify on her husband Enrique's behalf. (AA02642).

Luba was called as a witness in Enrique's case. (AA02645). Luba indicated prior to the scheduled March 2023 exchange she had the flight information, the address and Enrique's cell phone number. (AA02647-AA02648). Luba explained the CBX route into Tijuana was much safer and she informed Enrique that if he provided the tickets as part of the itinerary, she would be on her way to the exchange. (AA02666). Luba explained her concerns as reiterated to Enrique:

> I don't have a problem you taking [the child] to Mexico if you want to fly out of United States. U.S. Department issued a warning about Mexico border crossing. It is dangerous and I'm not comfortable with our daughter crossing border wall. There is active gang shootings. Please provide full itinerary flying out of Las Vegas for your trip." And I sent him a link to the Mexico travel warning which he never opened.

(AA02667).

Luba reiterated she wanted the child to go on the trip with Enrique, but she was concerned with the recent violence and travel warnings for the border crossing (AA02669). Luba testified with reference to the March 15, 2023 exchange, she based her decision off "what was said in the conference" and mentioned in the confirming emails exchanged between her counsel and Enrique's counsel (AA02673, AA02675-AA02676). Luba admitted she did not exchange the child, but explained she did not believe she was in violation of the District Court order given the confirming email she received from her counsel as to what the agreement was in order for her to exchange the child. (AA02675). Luba explained she was told by her counsel (Mr. Childs) that there was an agreement and unless the agreed items were provided by Enrique, she was not required to exchange the child. (AA02678). As confirmed by Mr. Childs testimony *supra*, Luba testified based on his advice not exchanging the child was an option after Enrique failed to comply with the agreements that derived from the phone conference. (AA02677- AA02678).

Luba testified to her moving the child's dentist appointment from March 21, 2023 to March 24, 2023. (AA02694). Luba testified she put the new appointment date in the calendar, but Enrique did not respond. (AA02694). Instead of discussing the change with Luba, or indicating the new date would not work, Enrique filed a Motion to hold her in contempt. (AA02694). Luba was of the belief because he did not object, he was okay with the date. (AA02694). Luba did not think this was

unusual because she normally attended the medical appointments, they always occurred on her custodial time, and Enrique did not attend the appointments. (AA02696).

Enrique Valasquez-Gonzalez testified on his own behalf. (AA02701). Enrique testified he had a trip planned for October 15, 2023 to Monterrey, Nuevo Leon, Mexico which did not go as planned because Luba did not exchange the child. (AA02702). Enrique testified he provided the airline flight number and location for the trip. (AA02702). Enrique indicated he did not purchase the CBX tickets because he did not want to spend more money. (AA02704). Enrique admitted his lawyer and Luba's lawyer agreed that he would purchase the CBX passes prior to travel and let him know that he needed to do that, but he refused. (AA02749- AA02750).

Concerning the March 21, 2023 dentist appointment, Enrique acknowledged he did not object to the date. (AA02704 AA02705). Enrique testified he would have "tried" to be back in time for the date for which it was originally scheduled prior to Luba moving the appointment. (AA02705). Enrique testified he was not normally involved in making the appointments for their child, indicating Luba normally makes the appointments. (AA02705).

Enrique testified he sought a modification of custody because Luba interferes with his vacations. (AA02706- AA02707). Enrique also indicated that he believed

he could take better care of their child if provided more time with her specifically in regard to her skin and allergies. (AA02707).

Enrique testified to his belief that Luba abuses and neglects the child because she "returned my kid before with a third degree burn." (AA02714-AA02715). Enrique reported this to CPS and acknowledged that CPS found it was not a burn. (AA02715). However, Enrique did not care what CPS found, but maintained his belief it was a burn, testifying he disagreed with CPS. (AA02715- AA02716). Enrique agreed that CPS found he was making up allegations against Luba, but again testified he disagreed with CPS. (AA02715- AA02716). Enrique had called CPS twice alleging abuse against the child. (AA02715-AA027). However, CPS found nothing to be substantiated and in fact, found he was making up the allegations. (AA02719).

As an additional reason for seeking a change in custody, Enrique claimed the child had allergies and Luba would not take her to see an allergist. (AA02723-AA02724). When questioned as to why Enrique did not take her to see an allergist, he testified he could not make the appointment without the required social security information. (AA02725). Even after he received the information, months went by without him scheduling the appointment for the allergies he believed Luba left untreated. (AA02726-AA02728). When questioned why he failed to make the appointment, Enrique testified he gave Luba the option to take her. (AA02726-

AA02728). In sum, Luba's failure to take their child to an allergist was purportedly so serious he sought a change in custody, but when he had the opportunity to take her for months, he failed to do so.

Enrique testified a change in custody, with him having three weeks and Luba having one week was necessary for her to have constant parenting, grooming, lotion, and taken to an allergist. (AA02729-AA02730). Enrique testified the extra week would allow him to take the child to an allergist (AA02730). When questioned by the District Court as to why he failed to take the child to the allergist despite having the needed information for months, Enrique testified he had not even tried to make the appointment because he was waiting until the court proceedings were over. (AA02730). When questioned by the District Court as to why he would wait until court was over, he testified, "I don't have an answer for that" indicating he had not even looked for an allergist yet. (AA02730). Enrique later elaborated that he had not made the appointment with the allergist in the preceding months since obtaining the information because he did not have time. (AA02731).

Enrique testified to his understanding that at the time of his testimony, Luba was to have possession of the child's passport, but he did not want to give it to her, and he was following the advice of his counsel who told him he did not have to deliver the passport. (AA02732-AA02733). Enrique admitted he was currently withholding the passport from Luba. (AA02735).

Enrique continued his testimony pertaining to why a custody modification was warranted, citing "grooming, lotion, allergies, and sleeping." (AA02735). Enrique testified his wife told him that she had seen her daughter at school with messy hair and clothing that appeared to not fit well. (AA02739). Enrique admitted the alleged grooming had not caused the child any harm. (AA02741). Concerning the child's sleeping, Enrique testified he did not know what she had at Luba's home, but that he would provide a bigger bedroom for her than what Luba had which would in his opinion, provide her a better life. (AA02742- AA02743).

At the conclusion of the hearing, the District Court found the rebuttable presumption concerning abduction against Luba triggered citing clear and convincing evidence of a single act of unlawful detaining occurring March 15, 2023. (AA02779-AA02780).

Luba testified on her own behalf. (AA02896). Luba testified to her remorse for the mistake in withholding the child during Enrique's custodial time, indicating she only did so given the advice of her prior counsel and explained she would not follow similar advice in the future, assuring to abide by the court's orders. (AA02896). Luba explained what began her fears in March of 2023 concerning Enrique's travel to Mexico was all the shootings occurring at the Tijuana border. (AA02896). Luba testified her and her former attorney did some research concerning the violence at the border and it was very concerning. (AA02897).

Luba had concern with their child visiting Monterey, Mexico because Enrique had been the victim of an attempted kidnapping in 2015 and in 2016 his uncle was kidnapped and killed. (AA02906). This information was corroborated by Enrique who previously admitted to a psychologist that he had anxiety surrounding an experience where he was almost kidnapped in Mexico by individuals with ties to the cartel. (AA01854). Enrique and Luba were once driving together in Mexico when they were robbed by police in 2015 and it was an extremely frightening experience. (AA02906, AA03024). Given the prior history, once Luba heard of the violence at the border where Enrique wanted to cross, she was increasingly scared. (AA02906). Given the safety issues and violence, Luba wanted to ensure Enrique used the CBX tunnel to get to the airport to avoid the border violence. (AA02907).

To alleviate the concern, Luba asked Enrique if he would provide the CBX tickets as part of the itinerary. (AA02907). To settle the issue, Luba believed her former attorney filed a motion which resulted in a conference call. (AA02907). Luba traveled to her former District Court attorneys' office the day of the call (March 15, 2023) and her former attorney advised the conference call was only with the attorneys and had her step out of the room. (AA02908). Luba's former District Court attorney copied her on emails sent between the parties so she could see what the new agreement was as a result of the conference call. (AA02908). Luba testified to what

she believed was the result of the conference call between the court and the attorneys:

> My understanding was that in order for me to do the exchange, our court order was modified for – by this meeting that the attorneys had with the judge and the requirements were that Enrique would provide CBX tickets because that was part of the itinerary and he was also going to enable TalkingParents video calls, so I could call [the minor child] while she's gone. (AA02908).

Luba believed this was the agreement not only because of the confirming emails she received afterwards, but based on her conversation with her former District Court counsel. (AA02908). As far as Luba understood, there was no compliance with the agreement because she was sitting at her former District Court counsel's office awaiting the tickets to be provided. (AA02908). While in her District Court attorney's office, Luba testified she sent Enrique a message via Talking Parents indicating once he purchased the tickets and enabled the video calling, she would be on her way to the meeting spot. (AA02908). When Enrique never purchased the tickets as the drop off time approached, Luba discussed the situation with her then District Court counsel (Childs) who told her she should not drop off the child based upon what was agreed to via the conference call between the two attorneys. (AA02909- AA02910). It was based upon this understanding that Luba withheld the child from Enrique. (AA02910). At all times that she withheld, Enrique was aware where she was. (AA02910).

Luba testified if confronted with the same situation again, she would not withhold the child, even if it meant ignoring the advice from her attorney. (AA02910). Between the March 2023 withholding and the October 15, 2024 hearing, Luba abided by the District Court order concerning exchanges and there were no other major incidents with pickups or exchanges. (AA0291-AA02911).

Luba testified that communication with Enrique can be difficult because he regularly insults her even when she asks the most basic questions and is always bringing up things from the past. (AA02912).

Luba testified to how the parties facilitate communication with the child. For instance, Enrique had to be ordered to initiate communication on Mondays and Fridays at 7:15 via a Zoom link or otherwise, there would be no communication (AA02911-AA02912). Whereas Luba regularly contacts Enrique with the minor child so they can communicate and offered to get her a cell phone so she could freely text and speak with her father, but Enrique denied the offer. (AA02912). Luba has expressed to Enrique numerous times on Talking Parents that the child was provided a cell phone and he should feel free to call and text her any time he wants. Luba wants her daughter and Enrique to have unlimited communication when she is at her home. (AA02913). Luba recalled their child would use the phone to text her father, but he would never write back. (AA02937). Despite Luba offering for him to speak to her at his leisure, he has never called her. (AA02937- AA02938).

Luba's stepdaughter (her husband Phil's daughter) is the same age as their child and the two are very close; they do not know what life is like without each other. (AA02913-AA021914). Phil's timeshare with his daughter was the same as Luba and Enrique's arrangement (one week on, one week off); that way the two were together at home. (AA021914). With the schedule as it was before altered by the Court, the two children took Jujitsu together, attended birthday parties together, shared a room and were otherwise inseparable. (AA02914- AA02915).

Throughout Luba's testimony it was apparent she wanted the best for the minor child, for the family to work together as a whole. Luba desired for everyone to get along and stop fighting; her goal was for everyone to be okay with each other given her and Enrique's blended families with their new spouses. (AA02914-AA02915). Luba acknowledged she is not perfect, she makes mistakes, but she is willing to put everything aside for the best of the children in the family. (AA02916). As an example, Luba's present husband's ex-wife Robin had filed CPS complaints against her and Phil during their divorce proceedings – although CPS ruled in her favor, Luba has put that aside and now has a great relationship with Robin and they are a family who works together to coparent Phil's child. (AA02916-AA02917). Luba testified the relationship between the blended families is so great, they can vacation together. (AA02916-AA01917). Luba desires the same relationship with Enrique, his wife, and their child. (AA02917).

Luba desires to be involved in school events and for her family to be permitted to see the child at school events. For instance, Luba learned of a school Halloween event and reached out to Enrique to see if she, her Mom and Phil's daughter could attend and he simply replied, "No. Thank you." (AA02918- AA02919). Luba decided to not force the issue or attend because she did not want to cause problems. (AA02919).

Luba recalled Enrique's testimony during the March 2024 evidentiary hearing date wherein he claimed he could not take the child to the allergist because he purportedly did not have the information. (AA02921- AA02921). As admitted to by Enrique at the hearing, Luba had provided him all information necessary for him to make the appointment, yet he failed to do so. (AA02922). In the time since Enrique's testimony in March of 2024 and Luba's testimony in October of 2024, Enrique still did not take the child to the allergist; Luba made the appointment and took her. (AA02923-AA02924). Luba advised Enrique of the date and time of the appointment via the Talking Parents App, but he did not attend the appointment. (AA02924). This is not uncommon for Enrique; Luba makes all of the child's medical appointment, notifies him via Talking Parents and attends them on her own. (AA02952). Enrique never attends the appointments. (AA02952).

The child was found by the allergist to have seasonal allergies to grass and an allergy to cats. (AA02924). Enrique had three cats at one point, but Luba believed

at the time of her testimony he only had one cat and four dogs. (AA02924). Luba informed Enrique of the diagnosis from the allergist and provided the paperwork, but he called her a liar. (AA02924). Luba also made a patient portal for the minor child and provided the information to Enrique for him to see the diagnosis and associated information. (AA02925). Because the child was prescribed a nose spray for allergy flareups, she obtained one for her home and one for Enrique. (AA02925). Luba believed the cat allergy affected the child because she would return from her time with Enrique itchy, with bad allergies, and he would send an allergy cream with her. (AA02942).

When Luba attempts to communicate with Enrique concerning school items, she is often met with hostility and called a liar. For instance, the child came home from school one day and told her she attended an afterschool program (Tech Brainiacs) and she liked it. (AA02928- AA02929). Because of this, Luba wanted to enroll her and pay for the program so she could attend on her time. (AA02928-AA02929). When she messaged Enrique via Talking Parents about enrolling in the program, she was told Jennifer (his wife) runs the program and to stop causing drama. (AA02929). When Luba asked Enrique if Jennifer, as head of the afterschool program could assist in enrolling their child during her custody time, Enrique called her a liar, and she was never assisted. (AA02929- AA02930). Luba had to go around Jennifer to someone else to enroll and pay for the child to attend the program.

(AA02929- AA02930). Luba testified she feels as if she can never win, even when she tries to work with Enrique to send their child to a program run by his wife, she is met with hostility. (AA02929- AA02930). Had Luba not asked Enrique about the after school program and went through the school to enroll her on her time, Enrique never would have told her of the program, despite it being in their child's best interests. (AA02930- AA02931).

Luba recalled around Mother's Day at school the child took part in a project that she made, but Jennifer took it with her. (AA02942). When Luba asked Enrique about the project, he told her the project was done on his time. (AA02942). Luba decided to let it go because she did not want to cause problems. (AA02942).

Enrique had never paid any of his portion of the insurance premiums for the child, despite Luba sending the information in Talking Parents. (AA02932-AA02933). It is not uncommon that Enrique does not even acknowledge the information sent. (AA02932-AA02933, AA02942-AA02943). When Enrique does respond to a message it is generally with hostility and name calling. (AA02943-AA02944). As an example, when Luba went to pick the child up from school one day, she learned she did not go to school that day because Jennifer pulled her out for take your child to work day, an entire school day. (AA02943- AA02944, AA02955). When Luba asked Enrique to inform her about these things, he responded that the child told her in advance and that she was calling their child a liar. (AA02943-

AA02944). Enrique also called Luba a liar. (AA02943- AA02944). In reality, it is not the child's job to convey the information (nor did she) and Luba simply desired to be aware when Jennifer was pulling her out of school. (AA02943- AA02944). Enrique similarly does not communicate school information with Luba, she must obtain it directly from the school. (AA02963).

Luba had traveled to Mexico with the child and other family members, staying in the resort area of Cancun. (AA03025). Luba confirmed she never desired to prohibit Enrique from traveling with their child, she was fearful from prior experiences in Mexico and just wanted all necessary information in the event something happened. AA03025). After the withholding, Luba contacted Enrique and apologized that the child missed the trip and offered him make up days. (AA03026).

Luba testified to her willingness to take parenting and/or coparenting classes to assist her in being a better coparent. (AA03031). Luba indicated she would do anything necessary to keep the status quo of her custodial share with their child. (AA03031).

Enrique testified in rebuttal. (AA03037). Enrique denied ever being involved in any violence in Mexico or being robbed. (AA03038- AA03039). Enrique claimed he did not want to be around Luba because she brings him to court and makes false allegations about his wife, Jennifer. (AA03038- AA03039). When questioned what false allegations were made, he could not recall specifically. (AA03039). Enrique

confirmed his request to the District Court, that a change of custody be ordered where the child would have her hair done, good vitamins, and clothes that fit. (AA03039). Enrique believed there was nothing else he could do to be a better co-parent, claiming he follows all orders and has no issues. (AA03043). It was Enrique's position that a change of custody is appropriate to ensure the child had more stability. (AA03051). When questioned as to what was unstable about Luba's household, Enrique testified her hair does not get brushed enough and she had made a doctor's appointment during school time. (AA03050-AA03051). Enrique could provide no answer when posed with the inquiry as to how striping Luba of three weeks a month with their daughter was more stable or in her best interests. (AA03052).

IX. SUMMARY OF ARGUMENT

In this case, the District Court abused its discretion when it modified the child custody arrangement from joint to primary custody in Enrique's favor. This modification was not in the best interests of the child. The District Court's finding is particularly in error in this regard because it found Luba committed abduction as a matter of law – a fact not supported by a plain reading of the statute or evidence. This finding is furthered because Luba relied – to her extreme detriment resulting in the loss of joint custody of her only child – on the faulty advice of her counsel. Given this, the District Court further erred when it found Luba did not rebut the

presumption that she should not have joint physical custody. The Orders of the District Court disrupted the stability and consistently of the previous joint physical custody arrangement and there was no indication that modification provided any benefit to the minor child.

The District Court further erred when it modified custody because Enrique could not meet either prong necessary for modification and it was his burden to bear. First, the District Court erred when it found a substantial change in circumstances because no substantial change affecting the welfare of the child was established. Second, even if for the sake of argument there was a substantial change in circumstances, Enrique did not meet the standard that modification was in the child's best interests. In modifying custody in this manner, the District Court violated not only Luba's constitutional right to parent but also violated her right to due process. In considering the District Court's errors, it is worthy to note that the modification appears to be the result of bias against Luba by the prior judge assigned to the case.

Furthermore, the District Court committed error when it found Luba in contempt of court (on two occasions) for withholding the child for safety reasons and under reasonable circumstances given her reliance upon District Court counsel's advice and for rescheduling a single dentist appointment. Moreover, because the District Court's decision modifying custody is in error, the award of child support and minor tax credit order is also in error. Lastly, the District Court erred in holding

Luba in contempt and awarding attorney's fees to Enrique while denying fees to Luba.

The numerous errors detailed herein warrant reversal and remand from this Court with instructions to reinstate joint physical custody with a week on/week off visitation; finding Luba did not commit abduction as a matter of law, Enrique did not meet the standard to show modification was in the child's best interest nor did he establish a substantial charge in circumstance affecting the welfare of the child.

X. ARGUMENT

A. STANDARD OF REVIEW

The appellate court may reverse the trial court's determination of child custody issues when there is a clear abuse of discretion in light of the best interest of the child. *Sims v. Sims*, 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993). Trial courts have discretionary powers in determining child custody, which will not be disturbed absent an abuse of discretion. *Primm v. Lopes*, 109 Nev. 502, 504, 853 P.2d 103, 104 (1993). A district court's factual determinations may be reversed when unsupported by substantial evidence. *Jensen v. Jenson*, 104 Nev. 95, 99-100, 753 P.2d 342, 345 (1988). This Court reviews a district court's decisions regarding custody, including visitation schedules, for an abuse of discretion. *Rivero v. Rivero*, 125 Nev. 210, 428, 216 P.3d 214, 226 (2009); *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d49 541, 543 (1996).

Generally, a court abuses its discretion when it makes a factual finding which is not supported by substantial evidence and is "clearly erroneous." *Real Estate Division v. Jones*, 98 Nev. 260, 645 P.2d 1371 (1982). Substantial evidence is evidence that "a reasonable mind might accept as adequate to support a conclusion." *State Emp't Sec Dep't v. Hilton Hotels*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986). A decision that is not supported by substantial evidence is arbitrary and capricious. *See id.*

The appellate courts review questions of law under a de novo standard. *SIIS v. United Exposition Servs. Co.*, 109 Nev. 28, 30, 846 P.2d 294, 295 (1993). In the absence of express findings, findings may be implied if the record is clear and will support the judgment. *Pease v. Taylor*, 86 Nev. 195, 197, 467 P.2d 109, 100 (1970). In the absence of a clear record to imply findings, reversible error exists, and reversal is proper. *Hardy v. First Nat. Bank of Nev.*, 86 Nev. 921, 923, 478 P.2d 581, 582-83 (1970), citing *Pease*, 86 Nev. at 195, 467 P.2d at 109.

B. THE DISTRICT COURT ERRED WHEN IT FOUND THAT ONE WITHHOLDING CONSTITUTED ABDUCTION AS A MATTER OF LAW.

On March 19, 2024, the District Court held Enrique established by clear and convincing evidence that Luba committed an act of abduction in accordance with NRS 200.359(1) for withholding the child on March 15, 2023 and invoked the presumption against her under NRS 125C.0035(7). (AA04130-AA04131). In

making this finding, the District Court explained the divorce decree identified the vacation timeshare and Luba conceded in her testimony that she did not turn the child over to Enrique on that day. (AA04131). Given this, the District Court found Luba violated NRS 200.359(1)[1], the criminal statute for abduction. The District Court found that referral for criminal charges for child abduction against Luba was not warranted. (AA04157).

The District Court, in finding Luba committed an act of child abduction, simplified the matter far more than designed by Nevada law. A consideration of Nevada law indicates for criminal abduction to occur, the conduct must be "willful" and she must act with specific intent. In this case, Luba's withholding was based upon the faulty advice of counsel and the fact that Enrique failed to comply with the stipulations reached by counsel. Based upon this information, it was reasonable for Luba to not only withhold the child, but it demonstrates she did not willfully commit child abduction in the sense of the criminal statutes.

The District Court also made findings that Enrique credibly established a need to hold Luba in contempt through his testimony Luba interfered with his scheduled

[1] NRS 200.359(1)(a) states in pertinent part: "A person having a limited right of custody to a child by operation of law or pursuant to an order, judgment or decree of any court, including a judgment or decree which grants another person rights to custody or visitation of the child, or any parent having no right of custody to the child, who: (a) In violation of an order, judgment or decree of any court willfully detains, conceals or removes the child from a parent, guardian or other person having lawful custody or a right of visitation of the child...is guilty of a category D felony."

vacations to Mexico in 2021 and 2022 by either refusing to produce the child or by demanding to have information Enrique could not reasonably provide. (AA04159). However, this finding was not supported by evidence. On the contrary, Enquire requested trips to Mexico in 2021 that predated the Stipulated Decree of Divorce dated on December 8, 2021. Nevertheless, on July 16, 2021, Enquire and the minor child were on vacation in Mexico. (AA01308). Moreover, on June 19, 2022, Luba provided the child and her passport to Enrique, so he and their child made the trip despite missing information from Enrique to Luba. (AA01155). Again, on July 28, 2022, Luba provided the child and her passport to Enrique despite missing information from Enrique to Luba, but Enrique missed his flight. (AA01164).

As a result, the District Court's findings are clearly erroneous.

1. WITHHOLDING AND ABDUCTION WERE CONFLATED IN THE PROCEEDINGS BELOW.

The distinction between "withholding" and "abducting" has significant legal implications, yet in this case, these terms have been conflated. *See e.g.* (AA04130 and AA04154). "Withholding" is a civil term often used in custody disputes, while "abducting" is a criminal act under NRS 200.359, requiring proof of specific intent to deprive the other parent of custodial rights. Criminal findings demand strict procedural safeguards, including the presumption of innocence, proof beyond a reasonable doubt, and the right to a jury trial. Despite these requirements, the District

Court improperly treated a civil custody dispute as a criminal proceeding, imposing criminal-like consequences on Luba.

Misapplying the kidnapping statute in this case distorts its purpose, turning it into a punitive measure rather than addressing serious crimes. The statute is not designed for minor custody violations such as what happened in this case. The principle *ratio legis est anima legis* (the reason of the law is the soul of the law) requires statutes to align with their purpose—here, protecting children from serious harm, not resolving technical custody disputes. Black's Law Dictionary (2nd Ed. 1910). Here, the absence of supervised visitation or referral for criminal charges shows the Court did not view Luba's actions as an abduction or safety risk.

2. LUBA DID NOT DETAIN OR CONCEAL THE CHILD.

The District Court's order found that Luba concealed and detained the child in violation of NRS 200.359(2). (AA04154). The natural meaning of concealment is to hide. Something is only hidden from someone if they seek to find the thing and are prevented from doing so. In the context of this case, concealment requires intent to hide and prevent access, yet Luba maintained constant communication with Enrique, facilitating exchanges and make-up time, as evidenced by the Talking Parents messages. (AA04365-AA04370). Enrique presented no evidence of seeking to find from Luba where the child was during the time he claims the child was

concealed from him. In fact, Enrique was aware at all times where the child was. (AA02910).

Under these circumstances, the lower court could not logically find by clear and convincing evidence that Luba detained or concealed the child in the context of the criminal abduction statute.

3. LUBA DID NOT ACT "WILLFUL" IN WITHHOLDING THE CHILD.

Although "willful" is not defined within the child custody statutes, it is defined elsewhere by the Nevada Legislature. "Willful" means with actual knowledge or belief that the act or omission constitutes a violation and with specific intent to commit the violation. *See* NRS 686B.1762. Contrary to the lower court's finding that Luba's admission that she withheld the child on the day in question in violation of a set vacation schedule amounts to criminal abduction – the matter is not that simple. The withholding by Luba on that day was not willful and Luba acted in the best interests of her child given safety concerns and based upon the advice of her counsel given stipulations between the parties which occurred during an unrecorded telephone conference.

a. Security Concerns with the child's travel to the Tijuana, Mexico border.

Enrique sought to travel across the Mexican border, via the Tijuana crossing, with the minor child to each the Tijuana airport. Luba testified her and her former counsel (Mr. Childs) did some research concerning the violence at the border and it

was very concerning. (AA02897). Luba had concern with their child visiting Monterey, Mexico because Enrique had been the victim of an attempted kidnapping in 2015 and in 2016 his uncle was kidnapped and killed. (AA02906). Enrique and Luba were once driving together in Mexico when they were robbed by police in 2015 and it was an extremely frightening experience. (AA02909 and AA03024). Given the prior history, once Luba heard of the violence at the border where Enrique wanted to cross, she was increasingly scared. (AA02909). Given the safety issues and potential for violence, Luba wanted to ensure Enrique used the CBX tunnel to get to the airport to avoid the border violence. (AA02910).

Mr. Childs testified for security reasons, it is possible to travel from the American side of Tijuana, Mexico into the Tijuana airport via a tunnel with the purchase of "CBX" tickets. (AA02923). It was Enrique's travel across the border into Tijuana with the minor child, as opposed to utilizing the CBX tunnel which connected directly into the airport, that Luba was concerned with. (AA02923).

b. Counsel's agreement/stipulation

When the parties could not reach an agreement as to whether the CBX tickets needed to be obtained by Enrique in advance of his travel with the child, the parties

scheduled a telephone conference with the lower court. The conference was held the morning of the exchange (March 15, 2023) and was unrecorded[2].

After the conference call with the Court, Mr. Childs sent Enrique's counsel an email summarizing the Court's clarification of the Order and/or the stipulation of the parties: Enrique was to permit communication with the child during the vacation, CBX tickets were to be provided (both going and coming) as part of the travel itinerary and there was to be no travel outside of Nuevo Leon. (AA02581). This email was forwarded to Luba. (AA02908). Enrique's counsel confirmed this was the agreement and that Enrique would purchase the CBX tickets and provide copies. (AA02582). To Mr. Childs' knowledge, Enrique never purchased the tickets. (AA02583).

c. The flawed advice of counsel influenced Luba's withholding of the child.

Mr. Childs' testified he advised Luba it was her choice whether to conduct the exchange because the Court clarified the Order and what needed to occur, but Enrique did not comply. (AA02583). Mr. Childs clarified the District Court's ruling

[2] With regard to the unrecorded telephone conference, the lower court explained "nothing good came of it" indicating it was a lesson learned for the court because one of the attorneys made "absolute misrepresentations" about what occurred during the conference. (AA02778). In indicating Mr. Grimes was not the party who did so, and not wanting "to throw anybody under the bus" by stating the name of the person on the record, it is worth nothing Luba's former counsel was the only other party on the call. (AA02778).

at the telephone conference was that the CBX tickets were part of the itinerary, and it was his opinion that if they were never provided it was the equivalent of Enrique failing to provide the itinerary prior to travel and thus, Luba was within her rights not to conduct the exchange. (AA02578). It was Mr. Child's opinion that this was true because during the March 15, 2023 telephone conference, the District Court clarified the CBX tickets were part of the itinerary. (AA02595). In his professional opinion, it was reasonable for Luba to make the determination she did (to not exchange the child) based upon what he told her. Given this, Mr. Childs did not believe Luba was deliberately trying to undermine Enrique's custodial rights. (AA02590).

d. Luba's good faith belief given the stipulation of the attorneys and her counsel's advice demonstrate she did not willfully commit abduction.

Luba testified the CBX route into Tijuana, Mexico was much safer, and she informed Enrique that if he provided the tickets as part of the itinerary (as agreed to by his counsel), she would be on her way to the exchange. (AA0310). Luba testified with reference to the March 15, 2023 exchange, she based her decision to withhold based on "what was said in the conference" and mentioned in the confirming emails exchanged between her counsel and Enrique's counsel. (AA0319-AA0320). Luba admitted she did not exchange the child, but explained she did not believe she was in violation of the court order given the confirming email she received from her counsel as to what the agreement was in order for her to exchange the child.

(AA0319-AA0320). Luba further explained she was told by her District Court counsel (Mr. Childs) that there was an agreement and unless the agreed items were provided by Enrique, she was not required to exchange the child. (AA0322). As confirmed by Mr. Childs testimony *supra,* Luba testified based on his advice, not exchanging the child was an option after Enrique failed to comply with the agreements/stipulations that derived from the phone conference. (AA0321-AA0322).

The very fact that Enrique admitted the lawyers agreed that he would purchase the CBX passes prior to travel or the exchange occurring corroborates Luba's understanding of what occurred during the conference call:

> My understanding was that in order for me to do the exchange, our court order was modified for – by this meeting that the attorneys had with the judge and the requirements were that Enrique would provide CBX tickets because that was part of the itinerary and he was also going to enable TalkingParents video calls, so I could call [the minor child] while she's gone.

(AA02908).

Luba believed this was the agreement not only because of the confirming emails she received after the conference but based on her conversation with her former counsel[3]. (AA02908). When Enrique never purchased the tickets as the drop

[3] The District Court found Luba's former counsel made "absolute misrepresentations" about what occurred on the unrecorded telephone conference. (AA02778). There is no reason to believe he did not make these same misrepresentations to Luba and she relied upon them to her detriment in her decision

off time approached, Luba discussed the situation with her then District Court counsel (Mr. Childs) who told her she did not need to drop off the child based upon what was agreed to via the conference call between the two attorneys. (AA02909-AA02910). It was based upon this understanding that Luba withheld the child from Enrique. (AA02910).

After the withholding, Luba contacted Enrique and apologized that the child missed the trip and offered him make up days. (AA03026). Luba testified if confronted with the same situation again, she would not withhold the child, even if it meant ignoring the advice from her attorney[4]. (AA02910). Between the March 15, 2023 withholding and the January 2, 2025 Order (an intervening 21 months), Luba abided by all court orders concerning exchanges and there were no other major incidents with pickups or exchanges. (AA02910- AA02911).

Considering the totality of the circumstances, the District Court's finding that Luba intentionally and willfully abducted the child is clearly erroneous because it is not supported by substantial evidence. *See Jones*, 98 Nev. at 260. This finding was utilized throughout the proceeding to her detriment – as not only a purported substantial change in circumstances but the only real claim that joint physical

---

to withhold the child on the day in question. This demonstrates a lack of specific intent to commit abduction, and a lack of willfulness in withholding the child on the day in question.

[4] Notably, even Enrique's counsel admitted Luba may have received poor advice from her former counsel. (AA03071).

custody was not in the child's best interests. Due in large part to this incorrect finding, Luba was stripped of the joint physical custody she previously shared of her only child. Thus, the district court's failure to properly apply the abduction presumption is reversible error as it affected Luba's substantial rights regarding her parenting time. *See Khoury v. Seastrand,* 132 Nev. 520, 539, 377 P.3d 81, 94 (2016) (concluding that an error is prejudicial, and thus reversible, when it affects the party's substantial rights)."

As a result, Luba respectfully requests this Court find there was not clear and convincing evidence of willful abduction of the child under the circumstances and reverse the lower court's finding accordingly. For these same reasons, Luba also requests this Court find the lower court's utilization of this improper abduction finding as establishing a substantial change in circumstances as argued *infra* at Argument III also in error and reverse accordingly as affecting her substantial rights.

C. THE DISTRICT COURT ERRED WHEN IT FOUND LUBA DID NOT REBUT ANY PRESUMPTION THAT SHE SHOULD NOT HAVE JOINT PHYSICAL CUSTODY.

In this case, the District Court's findings are in contradiction to each other. Having found that Luba could rebut the presumption that she should not have joint physical custody because she could provide appropriate care to the child, the District Court used that same presumption to bar her from enjoying joint physical custody.

NRS 125C.0035(7), the statute referencing the presumption concerning custody when the court determines that a parent committed an act of abduction against the child states in pertinent part:

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

See NRS 125C.0035(7) (emphasis added).

On March 19, 2025, after a hearing on the matter, the District Court found Enrique established by clear or convincing evidence that Luba committed an act of abduction, thereby invoking the presumption against sole or joint physical custody against her. (AA04154). The District Court then found that Luba demonstrated her ability to provide daily care for the child, provide for the child's physical and emotional needs, and provide the child with a safe home overcomes the presumption set forth in NRS 125C.0035(7). (AA04154-AA04155).

In this case, even if the withholding could be considered an abduction, Luba rebutted any presumption that she should not have joint physical custody. In fact, the District Court found that Luba rebutted the presumption yet, inexplicably

awarded primary custody to Enrique, contradicting its own conclusions. (AA04154-AA04155).

NRS 125C.0035 mandates custody orders to be based on credible evidence and the child's best interests. The District Court found that Luba rebutted the presumption of unfitness under NRS 125C.0035(7) but continued to treat her as though she were unfit. Despite finding Luba rebutted the presumption, the lower court applied it to punish her for a single, non-criminal act, ignoring the statutory presumption favoring joint custody absent evidence of unfitness. *See generally* NRS 125C.0035(3)(a). The lower court did so in a context which was devoid of necessary evidentiary safeguards to determine *mens rea*, and thereby punished Luba based upon that isolated act. Given the lack of adequate cause, this Court should reverse, finding joint custody must be reinstated to uphold Nevada's policy of prioritizing stability and the child's best interests.

D. THE DISTRICT COURT ERRED IN MODIFYING CUSTODY WHEN ENRIQUE DID NOT MEET THE STANDARD OF ESTABLISHING A SUBSTANTIAL CHANGE OF CIRCUMSTANCE AFFECTING THE WELFARE OF THE CHILD.

The District Court erred in finding a substantial change in circumstances affecting the welfare of the minor child. This is because the evidence in this case demonstrates there was no substantial change in circumstances affecting the welfare of the child. Under *Ellis v. Carucci*, 161 P.3d 239, 123 Nev. 145 (2007), a

modification of primary physical custody is only warranted 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. *See also Romano v. Romano*, 138 Nev. Adv. Op. 1, 501 P.3d 980 (2022). The party seeking a modification of custody bears the burden of satisfying both prongs. *Ellis*, 123 Nev. at 151, 161 P.3d at 242-43. Enrique did not establish the first factor and thus, the district court abused its discretion when it awarded Enrique primary physical custody of the child.

The District Court found Enrique "established a substantial change of circumstances affecting the child's welfare and in the child's best interests." (AA04155). The District Court then went on to consider the best interests factors but provided no other analysis as to why this finding was made. (AA04155- AA04156).

Notably, this Court has found a "custodial parent's ***substantial and pervasive interference*** with a noncustodial parent's visitation could give rise to changed circumstances warranting a change in custody." *Martin v. Martin*, 120 Nev. 342, 343, 90 P.3d 981, 981-82 (2004) (emphasis added) *abrogated on other grounds by Elis*, 123 Nev. 145, 161 P.3d 239. 8 AA 1882. Although the District Court failed to recite any analysis for its finding as detailed *infra*, it is assumed the finding was based upon the alleged abduction. The fact of the matter is a single act of civil withholding – grounded in Luba's valid concerns for the child's safety and at the advice of her counsel given Enrique's failure to comply with a stipulation– was misrepresented as

criminal abduction under NRS 200.359[5]. Thus, even if the finding of abduction was the substantial change in circumstance used by the lower court, a ***single isolated incident*** by its very nature is not ***pervasive*** and therefore does not give rise to a substantial change in circumstances warranting a change in custody.

Furthermore, Enrique presented no evidence of any other alleged change in circumstances for the District Court (or this Court) to consider. To be relevant to a substantial change in circumstances determination, "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 same facts.' *Carucci*, 123 Nev. at 150-151 (*citing 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)). Custody should not be modified if the circumstances that existed at the time of the last custody order are the same. Because the single, isolated incident cited by Enrique is insufficient to amount to a substantial change in circumstances, because abduction did not occur as a matter of law, there was no avenue to modify custody.

[5] Luba submits given that there was not even a recommendation for criminal prosecution, meaning none of the relevant factors necessary to establish the statutory presumption were ever met, there can be no substantial change in circumstances.

Requiring a substantial change in circumstances serves "the important purpose of guaranteeing stability unless circumstances have changed to such an extent that a modification is appropriate. *Id.* In purportedly addressing this required analysis, the district court failed to provide clear reasoning for its ruling. In fact, the lack of analysis or written findings on this issue was brought to the District Court's attention via the Motion for Reconsideration filed by Luba. (AA04330). In response, the lower court in its Order of April 11, 2025, refused to provide any further clarification, referencing only its summary conclusion as indicated above. (AA04558).

In determining whether to modify child custody, District Courts must make specific findings and provide adequate explanation for their custody determinations. See *Davis v. Ewalefo*, 131 Nev. 445, 452, 352 P.3d 1139, 1143 (2015). A plain review of the lower court's order and the order concerning Luba's Motion for Reconsideration provides no explicit reasoning for finding that Enrique established a substantial change in circumstances. The very fact that the District Court's order is void of factual analysis in this important consideration of modification of custody, necessitates reversal because as demonstrated above, there was no valid avenue to begin modification analysis. This is especially true because in the absence of a clear record to imply findings, reversible error exhibits, and reversal is proper. *See Hardy,* 86 Nev. at 923, citing *Pease,* 86 Nev. at. 197.

Based upon the evidence, the District Court's finding of a substantial change in circumstances was erroneous and necessitates reversal. The District Court abused its discretion when it awarded Enrique primary physical custody of the child without providing clear findings for the record. For this reason, Luba requests this Court reverse, finding there was no substantial change in circumstances sufficient to warrant the modification and award her joint physical custody of her child, just as the parties shared in the years prior.

E. THE DISTRICT COURT ERRED WHEN IT MODIFIED CUSTODY AFTER ENRIQUE DID NOT MEET THE STANDARD THAT MODIFICATION WAS IN THE MINOR CHILD'S BEST INTEREST.

In this case, it was not in the child's best interest for Enrique to be awarded primary physical custody. The District Court's findings are an abuse of discretion because Enrique did not establish the child spending only one week per month with her mother was in the best interests of the child.

In entering orders regarding child custody, the court's paramount consideration under Nevada law is the welfare of the children. *Culbertson v. Culbertson*, 91 Nev. 230, 533 P.2d 768 (1975). The guiding principle in the court's exercise of its discretion in cases affecting the rights and welfare of the children, are the best interests and the welfare of the children whose rights are involved. *Fenkell v. Fenkell*, 86 Nev. 397, 469 P.2d 701 (1970).

In making its custody determination and assessing the best interests of the child the court shall consider and set forth its specific findings concerning, among other things, numerous factors. *See* NRS 125C.0035(4). The consideration of these matters is a "balancing test" wherein the court "weighs each factor that may affect" the child. *See Rico v. Rodriguez*, 121 Nev. 695, 701, 120 P.3d 812, 816 (2005). In accordance with NRS 125C.0035(4), Luba submits the below factors weighed heavily in favor of denying Enrique's request for primary physical custody and the district court's finding to the contrary, *see* AA04126-AA04167, was an abuse of discretion.

1. The wishes of the child

This factor is not appliable.

2. The nomination of a guardian

This factor is not applicable.

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

The District Court found this factor to favor Enrique citing Luba's interference with his vacation time and/or the withholding in March of 2023. (AA04149). The District Court also found Luba's safety concerns not credible because she later traveled with the child to a different part of Mexico. (AA04149). The District Court then found Luba interfered with Enrique's Father's Day visitation

because it conflicted with her scheduled vacation. (AA04149), which contradicts the findings in 2023: the District Court finds no provision in the MSA related to what should occur when a party's requested vacation time occurs during another specific holiday, e.g. Father's Day. (AA02217-AA02218). The District Court also found that Luba provided documents that her vacation period was duly noticed to Enrique on December 4, 2022, and that Enrique agreed to the vacation time. (AA02217-AA02218) The District Court DENIES Enrique's May 24 ,2023 motion mandating the child spend Father's Day 2023 with Enrique where the parties agreed on Luba's vacation time on or about December 4, 2022. (AA02217-AA02218)

Although noting that Enrique withheld the child from her in 2021 after filing an emergency motion alleging abuse and neglect, the district court found Luba did not establish any other incidents of withholding on Enrique's part. (AA04149).

The District Court's factual findings are clearly erroneous. Luba is the parent most likely to permit the child to have frequent associations with the noncustodial parent. Luba only withheld the child on a single occasion given the poor advice from her counsel concerning Enrique's failure to comply with a stipulation and given fear for her child. The erroneous nature of the district court's findings is illustrated by the fact that Enrique withheld the child from Luba after he filed false allegations of child abuse with CPS against Luba *on more than one occasion.* Enrique admitted CPS found he was making up false allegations against Luba. (AA02715-AA02716,

and AA02719). Additionally, Enrique only returned the child after Luba was forced to obtain an Order for Return from Judge Moss. (AA02898-AA02899). Yet, the District Court failed to consider Enrique's false allegations of abuse and his withholdings so significant, Luba was required to obtain an Order for Return from the court. As a result, the District Court's finding was in error as this factor favors Luba.

4. The level of conflict between the parties

The District Court found the level of conflict in the case high based upon Luba's litigation of this case, finding the Motions she has filed in the preceding six years excessive. (AA04150). The District Court found Luba contacts Enrique outside of the Talking Parents app, demonstrating her unwillingness to abide by Court Orders. (AA04150). The District Court also noted Enrique refers to Luba as a liar and refuses to go to medical appointments for the child with her. (AA04149). Based on these findings, the district court found the level of conflict very high and that the factor favored Enrique. (AA04150).

Luba submits the evidence in this case is diametrically opposed to the District Court's findings. The level of conflict between the parties is historically high because of Enrique. Luba contacts Enrique outside the Talking Parents App because he does not respond. (*See e.g.,* 3/19/24, p. 147). It is not uncommon that Enrique does not even acknowledge the information sent. (AA02932-AA02933, AA02942-

AA02943). When Enrique does respond to a message, it is generally with hostility and name calling. (AA02943-AA02944). The level of conflict is high because Enrique is consistently calling Luba a liar without adequate basis. (*See e.g.,* AA02924, AA02929- AA02930, AA02943-AA02944). Given this it is difficult to reconcile the District Court's findings as this factor favors Luba.

5. The ability of the parents to cooperate to meet the needs of the child

The District Court found it was undisputed that Luba is the one who schedules all of the child's medical and dental appointments and Enrique does not attend. (AA04150). The District Court found Enrique does not come to the appointments because Luba creates conflict. (AA04150). The District Court found Enrique does not assist in scheduling or attending medical or dental appointments for the child simply to avoid conflict from Luba. (AA04150).

The District Court found that Enrique had all information necessary to schedule appointments as of December 30, 2023 and could have scheduled the child an appointment with an allergist. (AA04151). The District Court admitted Enrique's putting off the appointment until litigation was over improperly prioritized conflict over the child, but excused this behavior, citing that Luba changed a dentist appointment. (AA04151). The District Court did not find Luba's testimony credible that she changed the appointment to her time to take the child because Enrique would

not. (AA04151). In fact, the District Court then faulted Luba for failing to make the allergist appointment, citing this as her emphasis on conflict. (AA04151).

The District Court's finding as to this factor are contradictory. On the one hand the District Court did not find Luba credible that she changed the appointment because she always maintained the responsibility for them and planned on taking the child to the appointment. Yet on the other hand, the District Court found Enrique ceded responsibility for scheduling the child's medical and dental appointments to Luba based upon his historical behavior. (AA04152). Furthermore, despite the District Court's finding that Enrique fails to follow through with his joint legal custody rights, abdicating them to Luba or abandoning an issue, then complaining he does not like What Luba does, the District Court finds this factor to favor Enrique. (AA04151).

The District Court's finding that Enrique fails to follow through and abdicates or abandons an issue supports Luba's testimony that she only changed the dental appointment to be on her time so that she could take the child; otherwise, the child would not be taken to the appointment. This is especially true as the District Court also found it undisputed that Luba is the one who schedules all of the child's medical and dental appointments and Enrique does not attend. (AA04150).

When Luba rescheduled the dentist appointment, she notified Enrique by placing the date in the calendar on the Talking parents app. (AA03038). Luba was

of the belief because Enrique did not object, he was okay with the new date. (AA03038). Enrique did not deny he viewed the appointment and did not object. (AA03048-AA03049). Luba did not think this was unusual because she normally attended the medical appointments, they always occurred on her custodial time, and Enrique never attended the appointments. (AA03040).

Throughout Luba's testimony it was apparent she wanted the best for the minor child, for the family to work together as a whole. Luba desired for everyone to get along and stop fighting; her goal was for everyone to be okay with each other given her and Enrique's blended families with their new spouses. (AA02915-AA02916). Luba acknowledged she is not perfect, she makes mistakes, but she is willing to put everything aside for the best of the children in the family. (AA02916). Luba testified to her willingness to take parenting and/or coparenting classes to assist her in being a better coparent. (AA03031). Luba indicated she would do anything necessary to keep the status quo of her custodial share with their child. (AA03031). Whereas, Enrique believed there was nothing else he could do to be a better co-parent, claiming he follows all orders[6] and has no issues. (AA03043). This factor overwhelmingly favored Luba and the District Court's finding to the contrary was in error.

[6] Notably, nowhere in the District Court's findings does the court even recall that Enrique admitted he had been, and was currently withholding the child's passport from Luba in violation of the court's orders. (AA02733).

6. The mental and physical health of the parties

The District Court found this factor to favor Enrique because Luba testified she was diagnosed with anxiety for which she participated in therapy for two years and learned tools to assist her in the future. (AA04150). Given the conflict between the parties, the District Court found Luba fails to use the tools she learned in therapy because she withheld the child on March 15, 2023 and changed a single dentist appointment. (AA04152). At the same time, the District Court found Luba had not violated any court orders since March 21, 2023 and demonstrates she uses her therapeutic skill set. (AA04152).

Because the District Court admitted Luba learned tools to assist with her anxiety she should not be faulted for seeking help. Nor should Luba be penalized for dealing with stress resulting from Enrique seeking to strip her of physical custody of her only daughter. The District Court should have found this factor neutral.

7. The physical, developmental, and emotional needs of the child.

The District Court found this factor to nominally favor Enrique. (AA04152). This is despite finding it was undisputed that Luba is the one who attends all of the child's medical and dental appointments. (AA04152). Given this, the court found Enrique ceded responsibility for scheduling the child's medical and dental appointments to Luba. (AA04152). The District Court found that when Enrique made an appointment, Luba rescheduled it to her custodial time. (AA04152). The

District Court found Luba unilaterally enrolled the child in counseling over Enrique's objection. (AA04152). Because the counseling Luba utilized was online, the District Court found Luba's statement that counseling was in the child's best interest unpersuasive because it fails to consider the child's online privacy. (AA04152).

The District Court's findings in support of this factor favoring Enrique are incorrect for several reasons. First, the District Court erred in faulting Luba for unilaterally enrolling the child in counseling because the court previously admitted Luba had the authority to do so based upon the parties' marital settlement agreement. (AA04139). Second, the District Court's finding that Luba failed to consider the child's online privacy when enrolling her in therapy is belied by common sense. Common sense dictates that many individuals utilize online therapy services and such services are often covered by insurance. The District Court's faulting Luba for doing exactly as the settlement agreement provided, she could do was error.

Next, the District Court's findings fail to consider that Enrique makes decisions which negatively affect the child, including his refusal to attend doctor's appointments. In fact, Enrique refused to make the doctor's appointments, even admitting he failed to do so ***months*** after being provided with the information. Enrique also commits acts which negatively affect the child's medical welfare, to include failing to remove cats from the home despite receiving medical

documentation that the child is severely allergic, a fact the court does not attribute sufficient weight to, especially considering the child's consistent allergy symptoms while in Enrique's care. (AA02924 and AA02942).

The evidence in this case indicated Luba made the child's medical appointments and advised Enrique when they were. (AA02924 and AA02952). Luba attended all appointments and when Enrique failed to show, she provided the documentation for the appointments. (AA02924 and AA02952). Luba went so far as to create portals for the medical offices and provide the login information to Enrique so he would view the medical information. (AA02924). Luba is the parent who is willing and able to ensure the child continues to receive the appropriate care.

Lastly, the District Court's order notably omits any mention of the minor child's allergies, a key issue raised by Enrique throughout his case. As an example, when questioned as to why he believed he could take better care of the child, and why he should receive primary physical custody, Enrique indicated if provided more time, he would take care of her allergies. (AA02707). When questioned why he sought a change in custody, Enrique claimed Luba failed to take the child to an allergist. (AA02723-AA02724). In sum, Luba's failure to take their child to an allergist was purportedly so serious, Enrique sought a change in custody. But when he had the opportunity to take her for months, he failed to do so.

Enrique's actions reflect a pattern of neglect and manipulation, prioritizing legal maneuvers and personal vendettas over the child's health and well-being. This behavior is confirmed by the very fact that Enrique had the information to make an allergist appointment for the child but failed to do so, citing he did not have time. (AA02726-AA02728, AA02731). It is not until Luba made the appointment that the child's allergies were treated.

Evidence revealed that the minor child has seasonal allergies to grass and is allergic to cats. (AA02924). Luba did not have any cats in her home while Enrique had three. (AA02924). Despite recognizing the child's symptoms, Enrique left her in an allergenic environment for years, neglecting her needs while using her discomfort to target Luba. This troubling behavior on Enrique's behalf underscores the District Court's findings. Custody decisions must prioritize the child's stability and needs.

This factor overwhelmingly favored Luba and the District Court's decision to the contrary was not supported by substantial evidence and thus, clearly erroneous.

8. The nature of the relationship of the child with each parent.

The District Court concluded this factor was neutral. (AA04153).

9. The ability of the child to maintain a relationship with any siblings.

The District Court found the child has a four-year-old half-sister with Enrique and an eight-year-old stepsister with Luba. (AA04153). The District Court also

found the stepsister with Luba is the same age as the minor child, the two are in the same grade, attend extracurricular activities together, and shared the same weekly timeshare at Luba's home. (AA04153). The District Court found this factor neutral. (AA04153).

Notably, the court's finding this factor neutral contradicts the court's later finding that it placed "value on the child's undisputed close bond with her sister…in Luba's home." (AA04156). It also ignores Luba's testimony that the parties' child and the step-sister who reside in her home are extremely close, "inseparable" and they do not know what life is like without each other. (AA02913-AA02914).

10. Any history of parental abuse or neglect of the child or a sibling of the child.

The District Court, finding no evidence was presented demonstrating either party engaged in abuse or neglect despite Enrique's allegations to the contrary, found this factor neutral. (AA04153).

Notably, the district court never faults Enrique for making repeated false allegations to CPS in an attempt to gain a custodial advantage. Enrique acknowledged that CPS found his allegations were false and did not deny that CPS found he was making up allegations against Luba. (AA02715-AA02716, AA02719).

11. Whether either parent or any other person seeking physical 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.

This factor is not applicable. (AA04153).

12. Whether the parent or any person seeking physical custody has committed any act of abduction against the child or any other child.

The district court found this factor favored Enrique given its finding that Luba committed an act of abduction. (AA04153- AA04154). As detailed at length *supra* (Argument I), the district court's finding that Luba committed a criminal act of abduction as defined by – was in error.

Unbelievably, the District Court did not find a single factor to favor Luba. A review of the evidence in this case without a doubt established the best interest of the child was served by the child remaining in a joint physical custody situation just as she had the preceding years. Joint custody remains the only arrangement that aligns with the child's best interest. No reasonable jurist would accept otherwise. *See Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014) (noting a court abuses its discretion if "no reasonable judge could reach a similar conclusion under the same circumstances.").

Furthermore, to ensure fairness, adherence to statutory requirements, and the preservation of judicial integrity, the District Court's order should be vacated because it is not based upon the child's best interest, but as punishment against Luba[7]. This Court has explained:

---

[7] Interestingly, even the district court in its Order denying reconsideration characterized Enrique's position during the reconsideration proceedings that its Order punishes Luba for failing to obey court orders. (AA04554).

> Based on the record before us, it appears that the determination that the custody should be changed was made, ***not because it was in the best interests of the child, but because the mother admittedly did not obey a questionable, if not absurd, court order. This court has made it clear that a court may not use changes of custody as a sword to punish parental misconduct; disobedience of court orders is punishable in other ways.*** *Dagher v. Dagher*, 103 Nev. 26, 28 n. 3, 731 P.2d 1329, 1330 n. 3 (1987).

Sims, 109 Nev. at 1148-49 (emphasis added).

This Court emphasized that custody modifications must prioritize the child's best interests and rely on substantial evidence, not punitive measures. Luba's isolated action caused no harm, showed no pattern of unfitness, and the child thrived under the current arrangement. Under *Sims*, conduct that does not materially harm the child or affect their best interests cannot justify a custody change.

This Court should reverse the District Court's findings because the decision finding in favor of Enrique was clearly erroneous. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Gypsum Co.*, [redacted] 525, 542 (1948). The record as a whole reveals a mistake has been committed; one this Court should reverse to rectify, confirming Enrique and Luba should share joint physical custody of their minor child.

F. THE DISTRICT COURT'S ORDER MODIFYING CUSTODY VIOLATED LUBA'S CONSTITUTIONAL RIGHT TO PARENT AND TO DUE PROCESS.

The District Court's Order modifying custody violated Luba's constitutional right to due process.

NRS 125C.0035(7) creates a presumption against a parent's fitness for custody if they are found, by clear and convincing evidence, to have committed abduction. However, such findings must occur in a criminal court adhering to constitutional safeguards, including due process and the right to a jury trial. *See Marbury v. Madison*, 5 U.S. 137 (1803); *Bloom v. Illinois*, 391 U.S. 194 (1968). Family courts lack jurisdiction to make criminal determinations and cannot impose such findings without violating constitutional protections under the Sixth and Fourteenth Amendments.

Exploiting ambiguities in statutes like NRS 125C.0035(7) to bypass these safeguards undermines fairness and public confidence, creating "kangaroo courts" that distort statutory intent. Attorneys have an ethical duty to uphold constitutional rights (*Nix v. Whiteside*, 475 U.S. 157 (1986)), and manipulating legal processes to infringe on these rights breaches that obligation. Statutes and rulings must align with the Constitution as the supreme law of the land (*U.S. Const. art. VI, cl. 2; Ex parte Milligan*, 71 U.S. 2 (1866)), ensuring that rights are protected under all circumstances.

The District Court's finding that Luba committed an act of abduction, without any of the categories set forth in NRS 125C.0035(8) (the criminal acts which constitute abduction) based upon a single act of withholding for safety concerns violated her constitutional right to parent and denied her due process. Luba therefore requests reversal because the lower court imposed its findings in violation of her constitutional protections under the Sixth and Fourteenth Amendments.

G. THE DISTRICT COURT'S ORDER MODIFYING CUSTODY WAS THE RESULT OF THE BIAS THAT WAS FOUND AGAINST THE PRIOR JUDGE ASSIGNED TO THE CASE.

Luba was entitled to consideration of the merits of her arguments presented to the lower court without the hinderance of bias. As *Roe v. Roe*, 139 Nev. Adv. Op. 21 (2023), establishes, a judge must be disqualified if their impartiality might reasonably be questioned. The judge's failure to ensure impartiality violated NCJC Rules 2.3(A)-(C), 2.11(A), and NRS 1.230(1), eroding trust in the proceedings and underscoring the need for fairness to protect the child's best interests. If a "judge's impartiality might reasonably be questioned," then that judge should be disqualified. NCJC Rule 2.11(A). The test for judicial bias is a question of law, and the burden is on the party asserting bias to establish the factual basis. *Ybarra v. State*, 127 Nev. 47, 51, 247 P.3d 269, 272 (2011).

Ultimately, a judge should be disqualified if "a reasonable person, knowing all the facts, would harbor reasonable doubts about the [judge's] impartiality." *Id.*

(alteration in original) (internal quotation marks omitted). When evaluating if a case should be reassigned on remand, we consider the following factors: (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, *Roe v. Roe*, 139 Nev. Adv. Op. 21 (2023).

Although the prior judge (Judge Perry) was disqualified due to her bias against Luba on May 29, 2022, the ruling made by the subsequent Judge was obviously tainted by the prior bias and perpetuated throughout the entire proceeding. For instance, the District Court concluded the high conflict was caused by Luba, attributing the conflict to her efforts to defend her custodial rights and challenge bias – all while disregarding the insulting, threatening, and often misleading nature of Enrique's pleadings, including false allegations of abuse. (AA04136-AA04138). The bias is further readily apparent from the lower court's finding that Luba's pursuit of a fair outcome via her Motion for Reconsideration was filed without just cause. (AA04568).

The continued bias is readily ascertained in this case because Enrique came nowhere close to meeting the burden necessary to modify from joint physical custody to primary. Yet, that is precisely what happened. Under the circumstances,

Luba is entitled to reversal for consideration of the best interests of the child without the shadow of bias against her.

H. THE DISTRICT COURT ABUSED ITS DISCRETION IN HOLDING LUBA IN CONTEMPT AND THE RESULTING SANCTION.

The District Court found Luba in violation of the obligations set forth in the decree of divorce when she did not exchange the child on March 15, 2023 which interfered with Enrique's vacation. (AA04159). The District Court also found Luba in violation of the obligations set forth in the decree of divorce when she allegedly failed to consult with Enrique before changing the child's March 21, 2023 dental appointment to March 24, 2024. (AA04161). As a result, the District Court found Luba in contempt for each violation and ordered her to pay a sanction of $500.00 for each ($1,000 total). (AA04161).

1. STANDARD OF REVIEW

The District Court maintains contempt power to address "[d]isobedience or resistance to any lawful writ, order, rule or process issued by the court or judge at chambers." NRS 22.010(3). "An order on which a judgment of contempt is based must be clear and unambiguous, and must spell out the details of the compliance in clear, specific, and unambiguous terms so that the person will readily know exactly what duties or obligations are imposed on him. *Div. of Child & Family Servs., v. Eighth Judicial Dist. Court*, 120 Nev. 445, 454-55 (2004) *citing Cunningham v.*

District Court, 102 Nev. 551, 559-60, 729 P.2d 1328, 1333-34 (1986). In considering a District Court's decision in a contempt order, this Court reviews for an abuse of discretion. *See In re Water Rights of Humboldt River*, 118 Nev. 901, 907, 59 P.3d 1226, 1230 (2002).

2. THE CONTEMPT FINDING FOR WITHHOLDING THE CHILD

The District Court abused in discretion in finding Luba committed contempt given the extenuating circumstances at issue in this case. The evidence presented to the lower court and the reasoning provided establish Luba's state of mind at the time, including why the exchange did not occur on March 15, 2023, was to protect the child's safety and because Luba had a reasonable belief that she was not required to exchange the child on that day because Enrique did not satisfy the requirements agreed to prior to the exchange occurring (purchasing of a CBX ticket to help ensure safety and downloading the video app) (AA04349, and AA04372-AA04373). By not exchanging the child on March 15, 2023, Luba was shielding the child from a legitimate safety concern and protecting the child from an undeniable threat to the child's safety and best interest which is of "paramount" importance. *See Carucci,* 123 Nev. at 149.

Following her attorney's advice, Luba withheld travel to a region under a United States Department advisory citing serious risks, including killings and kidnappings. (AA04372-AA04373). Despite these valid concerns, the lower court

unjustly penalized her. Luba did not prevent Enrique from visiting Mexico but instead urged him to use the safer CBX route instead of the Tijuana border crossing. While Enrique initially agreed through his attorney, he later admitted in his deposition that he never intended to comply. (AA04349- AA04350). Enrique also testified he did not end up taking CBX crossing during his trip (AA02749-AA02751). In doing so, Enrique obstinately refused to secure the safest transportation option even while a serious travel advisory was in effect. This demonstrates his reckless prioritization of his own convenience over the minor child's safety.

In light of this information, it was an abuse of discretion for the District Court to disregard the travel advisory and Luba's valid concerns, prioritizing punishment over the minor child's wellbeing. Considering the totality of the circumstances, including the travel advisories for the specific region Enrique desired to travel to and Luba's reasonable belief she did not have to exchange the child that day, the district court abused its discretion in holding her in contempt. As a result, Luba respectfully requests this Court reverse the contempt finding.

3. THE CONTEMPT FINDING FOR RESCHEDULING A DENTIST APPOINTMENT.

The District Court found Luba in contempt for rescheduling a single dentist appointment. (AA04161). This holding was an abuse of discretion because it directly contradicts a previous order filed June 13, 2023. (AA02111-AA02116). Within the June 13, 2023 Order, the District Court found, "the Talking Parent communications

indicate only that Luba made the appointments and do not indicate Enrique objected to the appointments in the same communications." (AA02111-AA02116). Enrique's allegations about the dentist appointment were thus previously resolved in a prior order, where the District Court found Luba acted appropriately under the parallel parenting plan by notifying Enrique and denying his request to modify custody. (AA02111-AA02116). Despite this, the final order held Luba in contempt for the very same incident, violating the legal doctrine of *res judicata*.

The District Court's finding of contempt in this instance as an abuse of discretion is furthered by the fact that Luba was held in contempt for something Enrique does with impunity. Luba scheduled a dentist appointment and informed Enrique via TalkingParents, but he did not respond or object to the appointment. (AA04364). Luba then rescheduled the appointment and once again informed Enrique via TalkingParents. Although Enrique viewed the calendar event, he still did not respond or object but instead filed a motion for contempt regarding this situation. (AA04370). It was not until after Enrique filed his motion that he objected via TalkingParents. Luba was subsequently held in contempt and Enrique faced no consequence. It is absurd to hold Luba in contempt for something that Enrique does with impunity.

Considering the above, Luba respectfully requests this Court reverse the contempt finding as the Order was a clear abuse of discretion.

I. THE DISTRICT COURT ERRED IN ITS AWARD OF CHILD SUPPORT AND MINOR TAX CREDIT ORDER.

As demonstrated *supra,* the District Court's decision modifying custody was in error. As a result, this Court should reverse the lower court's award of child support and minor tax credit to Enrique based upon this error.

J. THE DISTRICT COURT ERRED IN AWARDING ATTORNEY'S FEES TO ENRIQUE AND DENYING FEES TO LUBA.

Both parties to the case requested an award of attorney's fees. The District Court denied Luba's request for attorney's fees finding she had not submitted an updated FDF and found for Enrique, awarding him attorney's fees and costs, claiming Luba's Motion for Reconsideration multiplied the costs of litigation without just cause. (AA04568 and AA04157).

Generally, this Court reviews an award or denial of attorney's fees for an abuse of discretion. *Mack-Manley v. Manley*, 122 Nev. 849, 860, 138 P.3d 525, 532-33 (2006). When deciding attorney's fees awards in family law matters, four requirements were set forth in *Miller v. Wilfong*, 121 Nev. 619, 119 P.3d 727 (2005: (1) counsel must cite a legal basis for attorney's fees; 2) the District Court must evaluate the *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345 (1969) factors; 3) the Court must consider any disparity in income of the parties under *Wright v. Osburn*, 114 Nev. 1367, 1370 (1998); and 4) the request must be supported by affidavit or other evidence.

In this case, Luba was required to file her Motion for Reconsideration due to the findings and orders made by the District Court in its Findings of Fact, Conclusions of Law and Order. (*See generally* AA0430-AA04343). Luba's filings were based on sound legal authority, on a reasonable basis, and not to harass Enrique.

NRS 18.010 states in pertinent part that an award of attorney's fees may be made to a prevailing party "...when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party." There is nothing in the record to suggest Luba's Motion for Reconsideration was made with no reasonable grounds or to harass the prevailing party.

Despite Enrique's claim that the Motion for Reconsideration was "without merit" and "frivolous" that is simply not the case. (AA04457 and AA04474). The Motion challenged the District Court's ruling that led to Enrique being awarded primary physical custody of the parties' daughter when the parties shared joint physical custody her entire life. Luba's position was (and is) that the decision to modify custody was erroneous and not supported by the facts. As a result, Luba's Motion was not vexatious nor wasteful as Enrique claimed. (AA04474). Luba should not be required to quietly acquiesce to her custodial timeshare being reduced to three weekends a month when she previously enjoyed joint physical custody of her daughter her entire life. Under these circumstances, the District Court's finding that

Luba's Motion for Reconsideration multiplied the costs of litigation without just cause is clearly erroneous. (AA04568).

As a result, Luba respectfully requests this Court reverse the District Court's finding of Attorney fees to Enrique, finding the award was an abuse of discretion.

K. THE DISTRICT COURT HAS EXPRESSED BIAS.

It has been established that the standard of review for judicial misconduct is de novo. *Lioce v. Cohen*, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008). Under NRS 1.230 (1), a judge shall not act as such in an action or proceeding when the judge entertains actual bias or prejudice for or against one of the parties to the action.

A judge shall disqualify herself in any proceeding in which the judge's impartiality might be reasonably questioned. *Ybarra v. State,* 127 Nev. 47, 51, 247 P.3d 269, 271 (2011). The test for whether a judge's impartiality might be reasonably questioned is objective and courts must decide whether a reasonable person, knowing all the facts, would harbor reasonable doubts about a judge's impartiality. *Id.* at 51.

A judge has a duty to preside with the conclusion of all proceedings, in the absence of some statute, rule of court, ethical standard, or compelling reason to the contrary. *Las Vegas Downtown Redevelopment v. District Court*, 116 Nev. 640, 643, 5 P.3d 1059, 10612000). A judge is presumed to be impartial, and the burden is on

the party asserting the challenge to establish sufficient factual grounds warranting disqualification. *Ybarra*, 127 Nev. at 51.

Here, Luba has met her burden to show bias from the District Court Judge as the Child Protective Services investigation result impartially showed that Enrique and his wife repeatedly call Child Protective Services on Luba, while Luba was never substantiated by CPS. (AA04395; AA003113). Enrique was only able to attempt to explain one of his calls to Child Protective Services as his belief the minor child had a third-degree burn. (AA04395). However, he was unable to give another example for the additional calls; in fact, he probably called Child Protective Services because "he does not feel Luba treats him like an equal parent." (AA04395). Nevertheless, instead of believing a neutral government agency like Child Protective Services, the District Court found "Enrique's testimony generally credible" and further blamed the parties' high conflict to Luba instead of Enrique's unfounded calls to CPS. (AA04396)

Therefore, to ensure impartiality and eliminate the threat of bias by Judge Almase in further proceedings, this Court should remand and reassign the case to a different District Court Judge.

XI. CONCLUSION

For these reasons, the District Court committed multiple errors when it modified custody in Enrique's favor, none of which served the child's best interests.

The court's finding of abduction was unsupported by law or evidence, and Luba was prejudiced by reliance on faulty legal advice. Enrique failed to meet his burden to show a substantial change in circumstances or that modification benefited the child. The contempt findings and related awards were similarly flawed. Reversal and remand are warranted with instructions to reinstate joint physical custody, reject the abduction finding, and correct the legal and procedural errors outlined above.

Last, to ensure impartiality and eliminate the threat of bias by Judge Almase in further proceedings, this Court should remand and reassign the case to a different District Court Judge.

DATED this 15th of July, 2025.

MCFARLING COHEN FIC & SQUIRES

/s/ Emily McFarling

Emily McFarling, Esq.
Nevada Bar Number 8567
[redacted]
Attorney for Appellant,
Luba Dace

XII. CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word–Office 365 Business in font type Times New Roman size 14.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ Proportionately spaced, has a typeface of 14 points or more and contains 17,882 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 15th of July, 2025.

MCFARLING COHEN FIC & SQUIRES

/s/ Emily McFarling, Esq.

Emily McFarling, Esq.
Nevada Bar Number 8567
[redacted]
Attorney for Appellant,
Luba Dace

XIII. CERTIFICATE OF SERVICE

I, an employee of McFarling Cohen Fic & Squires, hereby certify that on the ___ of July, 2025, I served a true and correct copy of this Appellant's Opening Brief as follows:

☒ via the Supreme Court's electronic filing and service system (eFlex):

MELVIN R. GRIMES, ESQ.
Attorney for Respondent

/s/ Rebeca Renderos
Rebeca Renderos