IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

SUSAN L. MCMONIGLE,	)	
	)	
Appellant,	)	S.C. CASE 25296
	)	D.C. CASE D 124619
vs.	)	
	)	
ROBERT MITCHELL MCMONIGLE,	)	
	)	
Respondent.	)	

APPELLANT'S OPENING BRIEF

MARSHAL S. WILLICK, ESQ.
Attorney for Appellant
330 S. Third St., #960
Las Vegas, NV 89101
(702) 384-3440

JAMES W. ERBECK, ESQ.
Attorney for Respondent
620 Bank of America Plaza
Las Vegas, Nevada 89101
(702) 387-1000

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

ARGUMENT 31

I. **THE DISTRICT COURT ERRED IN CHANGING CUSTODY ABSENT ABUSE OR NEGLECT AND WITHOUT A FOUNDATION FOR FINDING EITHER THAT THE CIRCUMSTANCES OF THE PARENTS HAD BEEN MATERIALLY ALTERED OR THAT THE CHILD'S WELFARE WOULD BE SUBSTANTIALLY ENHANCED BY THE CHANGE** 31

A. **The Family Court Violated the** Murphy **Standard** 31

B. **The Family Court Judge Misapportioned the Burden of Proof** 34

C. **The Court's Findings Were Not Supported By the Evidence Presented** 35

II. **THE DISTRICT COURT ERRED IN FINDING A CHANGE IN CIRCUMSTANCE DEVELOPED DURING THE COURT-IMPOSED SIX-MONTH DELAY PRIOR TO THE CUSTODY HEARING** 40

III. **THE DISTRICT COURT'S WORDS AND ACTIONS DEMONSTRATED AN APPARENT BIAS** 43

A. **The Court Expressed a Bias Against Out of State Witnesses, Parties, Experts, and Schools** 47

IV. CONCLUSION 47

TABLE OF AUTHORITIES

Hildahl v. Hildahl, 95 Nev. 657, 601 P.2d 58 (1979) 31

Moser v. Moser, 108 Nev. 572, 836 P.2d 63 (1992) 32, 34, 41

Murphy v. Murphy, 84 Nev. 710, 447 P.2d 664 (1968) 31, 32, 34

Sims v. Sims, 109 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 170, Dec. 22, 1993) 42, 43

Stevens v. Stevens, 810 P.2d 1334 (Or. App. 1991) 31

Truax v. Truax, 110 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 51, May 19, 1994) 23

STATEMENT OF THE ISSUES

I. Whether the District Court erred in changing custody absent abuse or neglect and without a foundation for finding either that the circumstances of the parents had been materially altered or that the child's welfare would be substantially enhanced by the change.

   A. Whether the Family Court Violated the Murphy Standard

   B. Whether the Family Court Judge Misapportioned the Burden of Proof

   C. Whether the Court's Findings Were Supported By the Evidence Presented

II. Whether the District Court erred in finding a change in circumstance developed during the Court-imposed six-month delay prior to the custody hearing.

III. Whether the District Court's Words and Actions Demonstrated an Apparent Bias

STATEMENT OF THE CASE

Appeal from post-divorce order changing primary physical custody of a child entered December 2, 1993, Honorable Frances-Ann Fine, Eighth Judicial District Court, Clark County.

The Decree of Divorce awarded primary physical custody of the child at issue to Defendant Susan McMonigle (now Susan Grandgeorge), who had relocated out of state, and provided detailed visitation for Plaintiff Robert McMonigle (Bob). VI ROA 942-958.

On March 17, 1993, while the child was visiting with Bob in Las Vegas, Bob's counsel filed a motion to modify child custody on the basis of the child missing too much school, and simultaneously obtained and filed an ex parte "Restraining Order" preventing the child's departure from Las Vegas from a judge of the civil/criminal division (Judge Becker). VII ROA 1188-1198. On March 23, a judge of the family division (Judge Fine) sent the parties to Family Mediation and Assessment Center (FMAC), and then ordered the child to remain in Las Vegas and be assessed by a local therapist. XI ROA 2025; VII ROA 1216.

After an ex parte examination of the court-appointed psychologist on March 29, 1993, Judge Fine entered a Minute Order keeping the child in Las Vegas in Bob's custody. XI ROA 2026-28. After a further ex parte phone conference, this time with the therapist, the FMAC worker, and a local psychiatrist, the Court changed primary physical to Bob on June 8, 1993. XI ROA 2029; VII ROA 1257-58.

Eventually, evidentiary hearings were held in the months of September and October, at the conclusion of which the Court ratified its original order changing custody, based primarily upon the benefits the Court determined that the child was receiving in Las Vegas. XI ROA 1996-2004; 2034-2042. The written order was filed December 2, 1993, and served by mail on December 3, 1993. XI ROA 1994, 1996. Notice of appeal was filed January 2, 1994. XI ROA 2005.

STATEMENT OF FACTS

This case was previously before this Court on appeal from the Decree of Divorce in case number 23502. The legal issues are fairly straightforward, but the facts are complex.

This is an appeal from a post-divorce order changing custody from the mother to the father. In the interest of economy and efficiency, the briefs from the prior appeal are included for this Court's reference as Appendices 1, 2, and 3 to this Opening Brief, and this Statement of Facts will refer only to facts of particular relevance to the child custody aspects of the case.

Before meeting Bob, Susan's home town was Kansas City, Kansas. The parties met in 1982, began cohabiting in 1984, and were married on November 14, 1986. IX ROA 1421-26. Bob's Complaint for Divorce was filed January 30, 1990. I ROA 1. The parties have one child, Mari Grandgeorge McMonigle ("Mari"), born April 20, 1987, and now seven years old.

Susan left her home in Kansas to join Bob in California, where they bought a house and lived until June, 1986, when they moved to Reno so Bob could take a job offer from IGT. IX ROA 1422-25. Bob's job at IGT required his commuting to Las Vegas, first once or twice a week, and then three to four times per week. IX ROA 1433; XI ROA 1830. By 1988 he had an apartment, and then moved into a suite in Las Vegas. IX ROA 1433-34.

The parties differ as to the situation in 1987 through 1989, prior to their separation and divorce. Susan testified that Bob primarily lived in Las Vegas; Bob testified that he primarily lived in Reno, and was only in Las Vegas three days per week. IX ROA 1434-35; XI ROA 1830. The live-in house-sitter believed Bob was gone four to six nights per week. II ROA 244.

Mari was born April 20, 1987. IX ROA 1427. The parties agree that Mari had some significant medical difficulties from birth. She was born two months premature, by C-section, and was quite small (four pounds, ten ounces); both Susan and Mari almost died. IX ROA 1427; XI ROA 1841; VII ROA 1143. Susan was put on medication; Mari was diagnosed with Marcus-Gunn jaw-winking, had crossed eyes, and could not suck for feeding; she was later found to have a hole in her heart. IX ROA 1428-1430.

Susan testified that for about two years, Mari woke up four times per night for feeding, apparently due to her small size. IX ROA 1429. Bob remembered it differently, and testified that within six months, Mari slept normally through the night. XI ROA 1834. The child's other problems were discovered later, and are discussed below.

The parties agreed that Susan sought out and obtained various physicians for Mari, including two ophthalmologists (in Reno and Milwaukee), a heart specialist, a San Francisco specialist in Marcus-Gunn ptosis, and a medical team at UCLA. IX ROA 1435-36; XI ROA 1839-1841. Susan testified that she had virtually sole responsibility for obtaining medical care for Mari and following up with the child's medical treatments as needed; Bob believed that he was highly involved with all doctors and the child's medical care at home, but he could not recall the doctor's names and believed Mari's only problem was with her eyes. IX ROA 1436-39; XI ROA 1839-1842.

Mari had significant dental problems. Susan asserted that while Bob was watching the child, he fell asleep and the child fell off a stool onto a tile floor, pushing her emerging teeth back into the child's gums and causing them to later re-emerge black. IX ROA 1448. Still later, they either fell out or were knocked out, and a partial was built by a pediatric dentist named Dr. Lyman in Santa Barbara. IX ROA 1447-49, 1491-92. Bob confirmed that the child had an accident, but denied his supervision was negligent. XI ROA 1916.

Susan maintained that she always served as Mari's primary caretaker, from the child's birth through Bob's retention of the child and ex parte custody change in March, 1993. IX ROA 1432, 1581. Bob, however, professed that he "probably did more than Susan" during the marriage before separation, despite working full time and not being in town three to four days per week. XI ROA 1829-1831.

The parties agreed that there came a time that Bob was living primarily in Las Vegas, and that they put the Reno home up for sale in 1988. IX ROA 1440; X ROA 1690, 1700. The Reno house sold in late 1989, and Susan and Mari moved to Las Vegas for about five weeks. IX ROA 1441; X ROA 1690. Susan considered the temporary conditions unsafe and took Mari to live with Susan's parents in Florida until November, 1989. IX ROA 1441.

Susan and Mari returned to Las Vegas for the Thanksgiving and Christmas holidays, but the marriage broke down completely and Susan and Mari moved to California on January 4, 1990. IX ROA 1442-43. Bob had considered the marriage broken down for "at least a couple of years," but wanted to make sure Mari was old enough to know who he was before he asked for divorce because he knew Susan would move outside of Nevada with the child. X ROA 1700.

The parties were at considerable odds as to their respective actions in the time between their separation and divorce, with Susan asserting that Bob helped her pack and sent her off, and had no interest in the child, and Bob asserting that Susan was in hiding with the child for three months, from January through March, 1990. I ROA 162; IX ROA 1442-45; X ROA 1700-1716. At a later day of trial, he expanded the time he claimed she was missing to four months. IV ROA 630. By the time of the 1993 proceedings, Bob's claim was that Susan had been in hiding for four or five months. X ROA 1716, 1965.

While the parties greatly disagreed as to exactly why Susan and Mari were living in Santa Barbara, California, while Bob remained in Las Vegas, they agreed that during the two-year pendency of the divorce, mother and child remained in California, while father lived in Nevada. Both parties' pleadings recognized that Susan was and should remain the child's primary custodian. I ROA 1, 67-68.

The divorce was a hostile, lengthy affair with multiple hearings over a period of months focusing primarily on economic issues; Bob's Complaint was filed in January, 1990, and the final order was not entered until March, 1992. I ROA 1; II ROA 942.

Two weeks before Susan's appearance in the Nevada litigation in March, 1990, Bob obtained an ex parte custody order. I ROA 63-64. That order was apparently never pursued thereafter. On April 12, 1990, Bob filed a motion for "custody and visitation of minor child" alleging interference with visitation. Five days later, however, the parties signed and filed a stipulation and order establishing Susan's primary physical custody of Mari, subject to Bob's visitation. I ROA 89-90; XI ROA 2011.

On March 19, 1990, Susan arranged an evaluation of Mari by Carmen Pelland, an "Infant Specialist" with the Santa Barbara County Infant Program, to see what treatment was necessary for her visual problems. IX ROA 1452; Trial Exhibit F.[1] Susan sought assistance with what she thought was an optical problem, and sought an evaluation of Mari's "overall developmental performances." Id. The evaluation showed Mari to be verbally precocious with excellent communication skills, but presenting some "mild developmental delays" which made her eligible for Special Education service programs. Id.

The evaluation led to an Individual Education Plan (IEP) meeting, at which time Mari's problems were seen as being visual in origin; the team recommended visual handicap services one or two times per week for 30-60 minutes, and preschool specialist two to four times per month, 20-30 minutes. Trial Exhibit N at page 5. Susan started Mari on those programs, by having the specialists come to her home, and followed their recommendation to place the child in a preschool for two half days per week. IX ROA 1458, 1468; Tape of September 24, 1993, time index 11:51:00; Tape of September 29, 1993, at time index 15:02.[2]

In 1993, Bob testified that he never saw any of the reports from the California specialists. X ROA 1741. He admitted that on at least one occasion, he spoke to one of the specialists, and questioned Susan about it. X ROA 1741-42. Susan testified that she told Bob

---

[1] While working on this brief, counsel was unable to find the trial exhibits in the Record On Appeal, despite having designated the entire record, including all transcripts of all 1993 hearings. XI ROA 2007. Upon inquiry, counsel was informed by the Clark County District Court Clerk's Office that they consider themselves to be operating under an unwritten order from this Court not to send the trial exhibits as part of the record, even if designated, unless appellate counsel separately contacts them and specifically instructs them to do so. No such policy was known to counsel, or is believed known to the Bar generally. Here, the exhibits are quite important, as all of the psychological evaluations done by Dr. Etcoff, as well as other records, are solely in those exhibits. Counsel is informed that the original trial exhibits are being filed with this Court, but in the interim there is no ROA cite by which they can be referenced.

[2] As set forth more fully in the motion to be filed along with this brief, it was discovered during the drafting of this brief that the Clark County Clerk's Office did not follow the instructions given in the Designation of Record on Appeal and afterward, to produce transcripts of all "the hearings and proceedings occurring in 1993." Since this Court has indicated that this brief should not be delayed, reference can only be made to the video tape (the official record in Family Court), although the Clerk's Office has been asked to finally produce the transcripts requested last January.

all about the specialists' ongoing work with Mari, but that he never expressed any interest in it or asked for any reports. IX ROA 1468-1470; X ROA 1644-47.

Susan had Mari in two different preschools in California; she withdrew her from the first one when she did not do well that environment. X ROA 1647-1650. The California specialist who worked with Mari thought that withdrawal from the nursery school was appropriate because Mari was young, small, and did not do well there. Tape of September 29, 1993, at time index 15:11.

Bob filed a further motion for visitation in June, 1990, alleging that it was too expensive and inconvenient to visit the child in California. I ROA 93-97. As part of his moving papers, Bob complained that: "Apparently there exists a fear in [Susan's] mind that [Bob] will refuse to return the child to California. This fear is wholly misplaced." I ROA 95.

Upon negotiations, the parties reached a stipulation on July 19, 1990, in which Susan "shall be and remain the primary custodian of the minor child of the parties, MARI, in the State of California where she presently resides," and setting out fairly detailed visitation terms for Bob. I ROA 104-108. The stipulation and order were set up "to avoid further Court intervention" and to be permanent unless changed by court order upon a showing of changed circumstances. I ROA 107-108.

For most of the next year, the situation was fairly stable, and the ongoing litigation was focused on financial issues. Mari appears in the parties' submissions tangentially; in late 1990, while arguing about suit money and allowances pending trial, Susan complained that Bob was dumping the child with third party child care facilities, failing to take care of her medical and dental needs, and failed to notify Susan of an accident and injury Mari had suffered. I ROA 172.

In those proceedings, Susan also complained that Bob failed to take any interest in the number of visual care and "special programs" in which Susan had enrolled Mari to deal with her developmental difficulties. I ROA 173; IX ROA 1468. Bob claimed that Mari only suffered from "wandering eye," denied that the child had any significant problems, and claimed that

Susan's claims that the child had special needs were just a ploy to wring more money from Bob. I ROA 162-64.

In March, 1991, Bob again asked for a modification of custody. II ROA 222. For the first time, he argued that Susan was "unwilling and unable to care for the child in a manner consistent with the best interests of the child" because Susan placed the child in preschool too much of the time. II ROA 224. This motion, referred to Domestic Relations Referee Sanchez, complained that Susan "while not working, puts the child in day care for at least half the week. She does not spend the time available to an unemployed mother to care for her child." II ROA 225. Bob's affidavit complained that Susan travelled and did not spend enough time with Mari. II ROA 230. The motion alleged that placing the child in day care was inappropriate and not in the child's best interest. It also complained about Mari's potty training and the child's bed.

In support of his motion, Bob attached a letter from an ophthalmologist who stated that Mari's vision problems were minor, and that: "Regarding the central issue of Mari's day care situation, I see no reason here that she functions at any different level than any . . . other three and a half year old child." II ROA 233. The letter went on to criticize Susan for obtaining "specialized intervention for learning disabilities" for Mari because in his opinion, such special programs were not warranted. II ROA 233.

Susan's response, filed March 13, 1991, contested Bob's assertions relating to potty training and the child's bed. II ROA 240. Susan opposition specifically asserted that Susan "does not put Mari in daycare for half of the week. When [Susan] travels to see friends or relatives, Mari spends the total time with [Susan]." II ROA 241. Susan refuted Bob's accusation of over-reliance on day care, and defended seeking special assistance for Mari, stating:

> [Mari] is enrolled in several programs for her better development and as her mother, [Susan] attends these same programs. She is never put a daycare more than two half days out of seven, and never during any travelling. [Bob] has no knowledge of Mari's care while she is with [Susan], nor does he ever ask.

II ROA 241 [emphasis in original]. Susan also complained of Bob's uninvolvement with Mari's medical treatments, and asserted that Mari would not be starting school "for at least two more

years." II ROA 242. She enclosed a supporting affidavit from Dr. Pamela Thiene, a California ophthalmologist, that refuted Dr. Fant's statements as to the severity of Mari's conditions, calling it a "rare and complex eye problem which will require close follow up by a general ophthalmologist and surgical treatment . . . ." II ROA 247.

In April, 1991, the parties filed a stipulation stating that "the parties hereto shall maintain the visitation and custody rights as set forth previously by Stipulation herein." II ROA 259. Two weeks later, a Referee's Report and Order was filed "denying any change in the current stipulated Custody Order entered on the 19th day of July, 1990." II ROA 263.

The divorce trial began May 17, 1991, and was focused on money matters. VII ROA 1122. On May 23, 1991, the divorce trial continued. III ROA 274. Again, proceedings were almost entirely on financial matters relating to stock options, with only a few minutes taken for matters relating to the child. While apportioning responsibility for visitation costs, the trial court noted that it was Susan's choice to move out of the jurisdiction, but that Las Vegas was not really Susan's home. V ROA 849-850. The only questions Bob pursued relating to the child were the extent of Bob's visitation, and who should pay for the cost of transportation; all matters of custody remained settled by stipulation. III ROA 437-39.

Susan had continued with recommended therapy with the child in California. Rennett Pasanella, a Preschool Specialist with the Santa Barbara County Education Office, prepared an annual review of Mari's services on May 28, 1991. Trial Exhibit H. The report summary found that her language and pre-academic activities were age appropriate or above, and that:

> Mari's primary area of need is in her visual-motor abilities. Here she demonstrates considerable delays that affect her pre-writing skills and coordination for ball skills and balance activities.

Exhibit H at 5. The report noted that Mari was eligible to continue receiving services due to her significant delays in fine and gross motor skills.

The 1990-91 annual review by Gretchen Folks, the teacher of the visually impaired who was working with Mari, noted ways in which Mari's vision problems impacted on her development. Trial Exhibit G. She recommended that in the following school year, it was expected that visually impaired services would continue, and that "it is hoped" that such services

"can be provided in a school environment where Mari will have a great variety of play equipment, ground levels, and throw toys to help her increase her visual efficiency." Trial Exhibit G.

Susan followed the recommendations of the specialists in having Mari in the Goleta nursery school, removing her from that school when she appeared too immature to benefit, and placing her in a second preschool a year later to try again. X ROA 1657-1660. Tape of September 29, 1993, at time index 15:51:30. Susan claimed that she kept Bob fully apprised, but he had no opinion on enrollment or withdrawal from preschool. X ROA 1660. Bob claimed that he knew only of the Goleta preschool. XI ROA 1850.

Also in June, 1991, the anniversary review of Mari was conducted by the California specialists. Trial Exhibit F; Tape of September 29, 1993, at time index 14:54. The IEP team met and produced an annual review. Trial Exhibit M. Susan enthusiastically complied with every suggestion made by any of the specialists as to services to provide to Mari. Tape of September 29, 1993, at time index 15:04:50. To the view of the specialists, for the year that Mari was out of preschool at their recommendation, Mari was not in need of any specialized services outside the home. Tape of September 29, 1993, at time index 15:07:10.

Bob expressed unhappiness with what he alleged was Susan's failure to comply with the visitation terms to which the parties had stipulated, and filed yet another visitation motion in June, 1991. IV ROA 442. Susan countered that Bob had failed to comply with the notice provisions he had specified, and that in any event he was not even in town during visitation, but left the child with third parties while he travelled. IV ROA 448-454. After further, lengthy filings by both parties, the trial court entered a specific order for certain days on which Bob would have Mari for 10 days, and set the matter over for later hearing to avoid similar problems in the future. IV ROA 474-76.

The divorce trial continued on July 31, 1991. IV ROA 482. Again, the primary focus was financial. Susan's counsel noted that the parties had stipulated to custody and visitation, and had discussed some possible changes to the visitation terms, but Susan felt Bob had not proven flexible in the year and a half that the child had been visiting with Bob. IV ROA 548-

50. She complained that the child was going back and forth too often, and asked that Bob's time with the child be lengthened but made less frequent, to reduce the child's travel. IV ROA 550-554. Bob countered that he travelled extensively, and wanted to retain the arrangement at ten days per month so he could try to arrange his travel schedule around seeing Mari when possible. IV ROA 628.

An "Interlocutory Decree of Divorce" was entered on September 5, 1991. V ROA 661. That decree expressly granted Susan primary physical custody of Mari outside of the State of Nevada, subject to Bob's visitation. V ROA 662. The parties filed post-trial briefs by court direction. Bob's request was that he receive 10 days visitation per month until Mari attended school, at which time he desired two weekends per month and one and a half months in the summer. V ROA 720-21.

On October 30, 1991, the Court heard closing argument of the divorce trial. V ROA 765. Bob's complained that Susan should have a job because she put Mari into day care "all the time" or "most of the time" but should not do so. V ROA 777; 797. Bob's attorney argued that whether Susan stayed in California, or moved back to Kansas City, Susan should have to pay half the visitation costs. V ROA 799.

The trial court granted Bob's requests, and set visitation at ten days per month unless the parties otherwise agreed, with the parties to split the expenses of visitation between Las Vegas and wherever the parties might live. V ROA 849-850.

Susan moved back to her home in Kansas upon completion of the divorce litigation. IX ROA 1474. Less than two months later, in December, 1991, Bob again filed a motion relating to visitation. V ROA 861. The motion complained, among other things, of Susan's move to Kansas City, which "will make it even more difficult to obtain visitation." V ROA 863. Again, Susan opposed Bob's motion, claiming that the relocation had been anticipated, and that Bob was simply not satisfied with the accommodations that had been made to his schedule. VI ROA 870-887.

A hearing was held December 16, 1991, before Judge Mosley. VI ROA 891. There was argument as to who should be allowed to provide transportation in lieu of Bob. He argued

that Joanie, his then-girlfriend, was close to the child, and was the person who took the child to school and dance class. VI ROA 906-907. The Judge tightened up the notice requirements to change scheduled days of visitation in an effort to avoid future conflict. VI ROA 919-926.

Upon arrival in Kansas in November, 1991, Susan consulted with friends who were experienced in special education, and obtained recommendations for educational programs in the Kansas City area. X ROA 1611-12. Susan enrolled Mari in a preschool after the Christmas break, following up on the recommendations given to her by the California specialists that it would be good for the child to be in such a program once or twice per week. IX ROA 1531-33; X ROA 1613.

In January, 1992, there were further proceedings before Judge Mosley on visitation problems. Bob complained that Susan had not yet managed to get the rental tenant out of Susan's house in Kansas, and asked to keep Mari until Susan regained possession of the house. The court saw no problem with Mari travelling to stay with her parents in Florida until the child was "of school age," saying "this Court does not think there is any detriment here" to Susan's travel with the child. XI ROA 2023.

The final decree was entered March 2, 1992. It also recognized Susan's custody of Mari, that Susan and Mari lived in Kansas, and specified Bob's visitation in great detail. VI ROA 942, 950-52, 954-58. The order contemplated that once Mari was "enrolled on a full time basis in school," Bob's visitation would change to two weekends per month. VI ROA 952.

It was anticipated that Susan would be travelling to various locations with the child. The order contemplated that if Susan had a pre-paid travel commitment predating any notice of change of schedule that Bob might send, Susan's schedule would take priority. VI ROA 955. The March 2, 1992, order was the last custody order prior to the motion that led to this appeal.

Problems continued. Bob filed a motion seeking visitation for Easter. VI ROA 1015. On April 8, 1992, the court entered an order denying Bob's motion. VI ROA 1023-24. The parties engaged in substantial further litigation relating to monetary issues. Mari went in for her first eye surgery in March or May, 1992. X ROA 1598, 1721.

After Mari's return from extended summer visitation with Bob in 1992, Susan enrolled Mari in the Westwood View kindergarten after carefully comparing the relative merits of available schools and spending several days observing them. IX ROA 1533-35, 1538; X ROA 1650-53. Mari was five, and not yet "of school age," and no attendance was required. IX ROA 1535-36. Susan was attempting on her own initiative to give Mari the best educational base she could. IX ROA 1538. There was no custody litigation pending when Susan made all of these schooling arrangements for Mari.

Bob gave no suggestions to and made no requests of Susan as to placing Mari in school. IX ROA 1534-35. He claimed, however, that he was "always" concerned that Mari did not have enough schooling, and that was wy he left the child in a day care center all day during his visitation. XI ROA 1834-36. Bob denied that he left the child at day care all day because he and his wife worked full time, stating that he could have had his wife quit her job. XI ROA 1836. He claimed to have told Susan of his concerns, but could not recall anything to substantiate such notice. XI ROA 1836-39.

Susan's trial court motions on financial matters were denied on June 11, 1992. VII ROA 1094-1095. Susan's counsel filed a notice of appeal on July 2, 1992, based on the March 2, 1992 Judgment. VII ROA 1102-1104.

Susan put Mari into kindergarten, and in a supplemental afternoon program. XI ROA 1868. Bob claimed that he only knew of the afternoon program when he started writing checks to cover its cost in October, 1992. XI ROA 1862. The kindergarten teacher reported that Mari was having trouble staying on task and lining up with the other children. IX ROA 1536-37; X ROA 1654. The school personnel recommended an evaluation, which Susan approved. IX ROA 1537; 1621-22. The team recommended Mari be placed in a pre-kindergarten program. Susan approved. Trial Exhibit 10, at 3.

Susan kept Bob informed of the child's educational placements, but expressed no opinion until the team recommended placing Mari in pre-kindergarten; he flew to Kansas and met with the school personnel directly. XI ROA 1866. He later testified that he found the

program unsatisfactory because it was only for about three hours per day, which is why he asked for a supplemental afternoon program as of October, 1992. XI ROA 1866.

Internally, at least, the school system scheduled a re-evaluation of Mari for mid-January. Trial Exhibit 10, at 3. Susan and Bob both testified that they did not receive any notice of such a scheduled re-examination, and were told only that it would be held before the end of the year; Susan took this to mean the 1993 school year; Bob claimed that he thought in would be by the end of the calendar year, December, 1992. IX ROA 1540; X ROA 1622-23; XI ROA 1942.

In the meantime, litigation of the prior appeal in this case (No. 23502) had begun. Appellant's Opening Brief was filed in late October, 1992. In that brief, Susan argued that the visitation schedule was excessive and disruptive to the child's schedule, since it required flying back to Las Vegas every other weekend. See Appendix 1 at 10-11; Appendix 3 at 4-5. Bob argued that the visitation terms were fair and adequate. See Appendix 2 at 15.

The child entered the pre-kindergarten class in the sixth week of the first quarter. VII ROA 1232. Mari missed five days of pre-kindergarten in October, 1992, when Susan took Mari to Seattle. IX ROA 1541; VII ROA 1232. Susan discussed the absence with Mari's teacher in advance, and obtained the school materials with which the child could do, while away, what the pre-kindergarten class was doing. IX ROA 1541-42. Mari also visited a library and another child's school while in Seattle. IX ROA 1541.

Mari missed a day on October 24, 1992, when she was sick and was taken to a doctor, and was out for two more sick days in January, 1993, and two more sick days in February, 1993. IX ROA 1523-24, VII ROA 1232.

On January 17, 1993, Susan accidentally cut her hand with a knife; the doctor who lived down the street drove Susan to his office and stitched it up. IX ROA 1544-45. The injury was painful, and Susan found it difficult to bathe and otherwise care for Mari with one hand. IX ROA 1545-46. Two days later, Susan called Bob and told him about the incident and her difficulties, and that she was considering going to Florida for some help from her parents while she healed. IX ROA 1546. Bob did not object to removing the child from school, or to the trip to Florida, or volunteer to assist in taking care of Mari or otherwise help. IX ROA 1547.

Susan therefore went to Florida to stay with her parents for two weeks in January, 1993; Mari missed ten days of pre-kindergarten. IX ROA 1547-48; VII ROA 1232. Again, Susan met with Mari's teacher and obtained such "schoolwork" materials as there were for Mari's pre-kindergarten class. IX ROA 1549. While in Florida, Mari spent much time with Susan's mother, who is a former teacher and went over the pre-kindergarten materials with the child. IX ROA 1549-1550. Since the absence was arranged and the schoolwork was done, the school administrators did not see "the cause for the greatest of alarm." VIII ROA 1376.

On February 19, 1993, at Bob's request, Susan kept Mari home from school so Bob could pick her up and visit with his family members in the area. IX ROA 1525; VII ROA 1232. He did not express any concern about the child missing school that day. IX ROA 1525. Susan's policy was to always grant Bob's requests for additional visitation, but at least one other time during the semester, Susan convinced Bob to wait until Mari was out of school before exercising that additional visitation. IX ROA 1517-18. Bob filed his Answering Brief in the earlier appeal at about the same time.

Susan was very involved with Mari's daily care and schooling. She dropped the child off and picked her up every day, and Mari was never tardy. Susan spoke with the principal several times, met with Mari's teachers, and went to all parent conferences. She even went to Mari's school every day to eat lunch with her, took her to the library, and met her on the playground. She checked in with Mari's teacher every day. IX ROA 1551-52. During Fall, 1992, Susan told the teacher that she would like to be even more involved, but she was quite occupied working on her earlier appeal in this Court. IX ROA 1552-55; X ROA 1626-1630. Susan never left Mari with an overnight babysitter. IX ROA 1582.

Mari complained of dental pain in the week of February 25, 1993. IX ROA 1491. Mari had an extensive history of dental problems, and to Susan's observation, the child's partial was not fitting correctly. IX ROA 1491. The partial had been made by a pediatric dentist named Lyman in Santa Barbara. IX ROA 1492. Susan had taken Mari to see Dr. Feldhouse, a pediatric dentist in Kansas City, since moving there, but he was on vacation and Susan was not able to get in to see him. IX ROA 1487-1496; X ROA 1630-34. As a precaution, Susan

made a back-up appointment with the Kansas City dentist for after he would return, and contacted Dr. Lyman in Santa Barbara. IX ROA 1492; X ROA 1631.

Dr. Lyman made himself available in the next few following days to look at the partials. IX ROA 1497. Susan knew that the dental work might involve putting Mari under general anaesthetic, and that within the next year she would be required to have Mari put under for the next scheduled eye surgery, so she called the UCLA optical team and ensured that they would be willing to coordinate their work with the dentist's so that if Mari had to be put under anaesthetic, she would only have to do so once for both procedures. IX ROA 1495-1501. When everyone agreed to coordinate their schedules, Susan made appointments to take Mari to San Diego on Saturday, February 27, and return on March 7. IX ROA 1500-1502; X ROA 1665-1666; Trial Exhibit U; Tape of September 24, 1993, starting at time index 8:46:00, 8:51:31.

Susan spoke with Bob before leaving Kansas City, and told him of the problem and her plan to correct it through the California dentist; he voiced no objections, as to taking Mari out of school or for any other reason. IX ROA 1506-1507.

During the course of the litigation, accusations were levelled at Susan that the trip to California was a "vacation" or intended for the purpose of seeing a "boyfriend." Ultimately, the family court judge took "judicial notice" that the purpose of Susan's trip to Santa Barbara was for the purpose of attending to Mari's dental problems. IX ROA 1487.

On Monday, Mari was examined by Dr. Lyman and was scheduled for treatment the following day. Fortunately, general anaesthetic was not necessary, so Susan discontinued efforts to have the eye surgery completed at the same time. IX ROA 1502-1504. Between Mari's appointments, Susan saw her own dentist in Santa Barbara, who found significant problems and recommended an immediate root canal and other work. IX ROA 1504-1505.

Bob was vacationing, but called Susan in California to check on Mari on March 4, by which time the child's treatments were finished. IX ROA 1507-1509. Again, Bob voiced no objection to Mari's absence from school, or otherwise. IX ROA 1509-1510. The parties agree that Susan knew she needed further work done on her own teeth, and knew Mari was on

school break anyway, so she offered to let Bob keep Mari for some period of time. There was conflicting testimony as to the exact course of the conversation.

Susan and her witnesses asserted that the intended time with Bob was one to two weeks (the expected time to complete Susan's dental work, and before the end of the child's school break). IX ROA 1511, 1513; X ROA 1635-37, 1667-68; Tape of September 7, 1993, at time index 19:28:48--19:32:25. Bob testified that Susan asked him to watch Mari for four to six weeks, which Susan denied. XI ROA 1944; IX ROA 1512.

The parties agree that Bob flew in to Santa Barbara on March 9 and picked up Mari from Susan with Susan's consent. X ROA 1673; XI ROA 1805. The following day, Bob telephoned Mari's school in Kansas City, and withdrew Mari. IX ROA 1526; XI ROA 1805-1806. Bob's attorney suggested that the withdrawal was pursuant to the ex parte court order obtained a week later, but Bob explained that he was just trying to do what he thought was right for Mari, and intended to enroll her into a different school in Las Vegas. Tape of September 24, 1993, at time index 17:20:01; XI ROA 1933. Bob testified that it never occurred to him to try to make arrangements for Mari's care in Kansas City so she could return to her home and school while Susan completed oral surgery. XI ROA 1947.

On March 11, the day after withdrawing Mari from her Kansas City school, Bob called Stephanie Crowley and tried to get Mari in for an evaluation. XI ROA 1806. On March 12, Bob had his attorney send a letter to Susan's attorney stating that Mari would be staying in Las Vegas for the next school year. XI ROA 1806-1808; VII ROA 1209. Susan's counsel immediately responded, noting that the child was in pre-kindergarten, and refuting Bob's other assertions. XI ROA 1809-1811; VII ROA 1211.

On March 15, 1993, Susan's reply brief was filed in the earlier appeal. See Appendix 3. Two days later, Bob filed the motion to modify custody that led to this appeal. VII ROA 1188. The motion was not accompanied by Bob's affidavit, but did have an affidavit from Bob's attorney, stating that "after the child arrived in Las Vegas, it became clear that the child's development has been slowed due to repeated absences from school as a result of the mother's vacations." VII ROA 1193.

Bob's motion alleged that the child should be in kindergarten and her development was suffering "educationally and socially" due to time missed from school at the hands of Susan. VII ROA 1188-1196. The same day, Judge Nancy Becker, without testimony of expert witnesses, argument of counsel, or even an Affidavit by Bob, signed a Restraining Order effectively transferring primary physical custody to Bob until the hearing scheduled for March 23, 1993. VII ROA 1197-1198.

Susan swiftly responded via Opposition to Bob's Motion to Modify on March 19, 1993. VII ROA 1201-1215. She requested a continuance of the March 23, 1993, hearing in order to gather evidence, records, and witnesses to show that a change in custody was not warranted.

A brief hearing was held on March 23. The family court judge noted that the entire file was before this Court on the earlier appeal, and mistakenly believed that the move to Kansas might be before her. Tape of March 23, 1993, at time index 11:41:47. She was incorrectly informed that the child had missed "28 out of 77" days of school, and stated that she did not care whether the school was required or voluntary in determining whether the child's absence was wrongful. Id. at 11:40:40. The court thought that the five-day impact of the restraining order was simply "erring on the side of caution" to see whether there was an emergency. Id. at 11:45:16. The court made an immediate emergency referral to the court's Family Mediation and Assessment Center (FMAC). VII ROA 1216.

That afternoon, Mr. Sheldon from FMAC stated that he could not get hold of the Kansas school officials to sort out allegations, that his review of the school records showed that it was possible that "28 out of a possible 43" days of school had been missed, and that it was possible the child's dental health was being ignored by the mother. Id. at time index 15:30:22. He further stated that there was "certainly no indication of any significant change of circumstances, which should indicate a necessity for a change of primary custody." Id. at time index 15:43:77.

The judge asked whether: "You don't see missing 28 days of school as a significant change of circumstances?" at which time Mr. Sheldon responded that under the circumstances, he saw a "cumulative effect as far as the dental, the school, I see a significant change, and I think the best interest of the child would be served, at least on an interim basis, to continue with

the Presbyterian preschool and complete the assessment with Stephanie Crowley [a local therapist]." Id. at time index 15:43:42.

Mr. Taylor, for Susan, protested that maintaining the child here would be a temporary change of custody, without an evidentiary hearing, that would work against his client as time passed. Id. at time index 15:45:27. The judge asserted that she was not changing custody, which remained primary in Susan, but that as long as the child was here, the assessment should be done by local workers that the court trusted. Id. at time index 16:00:30, 15:52:12.

The judge further criticized the custody and relocation decisions of Judge Mosley, and asked: "Wouldn't it be great if you lived here? . . . Maybe the best thing would be if you all lived in the same town. Wouldn't you hate me if I did that? I have no right to do that . . . ." Id. at time index 16:02:41. The judge attempted to set up a conference call with both counsel and Ms. Crowley. XI ROA 2025.

Instead, however, the family court judge initiated an ex parte conversation with Ms. Crowley on March 28, 1993, and noted that conversation in a minute entry dated March 29, which she then related to both counsel. XI ROA 2026. Ms. Crowley apparently reported to the judge that the child was tiny, appeared to suffer from Attention Deficit Hyperactivity Disorder, and had a short attention span. XI ROA 2026. Ms. Crowley, who had met both parents by that date, described Susan as "evidencing symptoms of emotional problems or being under the influence of a drug, perhaps . . . as a result of her recent oral surgery" and "clean but unkempt." Ms. Crowley thought that the child had been removed from school, by Susan "for more than 28 days out of 77" and therefore had questionable judgment. XI ROA 2026. Ms. Crowley recommended that "at least for the present" Mari should be in a specialized setting. She concluded that Mari's observed developmental problems "perhaps is a result of [Susan's] evidenced inconsistencies and poor choices" and voiced unspecified "valid concerns about [Susan's] ability to appropriately parent." XI ROA 2027.

The March 29 minute entry inexplicably references a further ex parte conversation on March 30 between the judge's law clerk and the therapist, Ms. Crowley, during which Ms. Crowley reported on conversations had with school officials in Kansas. XI ROA 2027. It was

here that Ms. Crowley reported receiving information indicating that Susan was lying to the Kansas school about working, and indicating that Kansas does not have the programs mandated by federal law for special education students. XI ROA 2027-28. The court recommended that Mari should remain in Las Vegas and participate in the Child Find program. XI ROA 2028.

Reno counsel for Susan sent letters to Ms. Crowley pointing out various factual errors in her information, and requesting a corrected report to the court. Tape of September 8, 1993, at time index 16:43. Those mistakes included that the child had been in Kansas not for nine months, but since 1991, that the child's birth was not normal, but premature and by caesarian section, and that in other ways "the initial report by mother may have been misinterpreted by this therapist." Ms. Crowley did not send the corrections to the court until August, because she did not feel it was her responsibility to do so; she saw her role as "an advocate and support for the child." Id. at time index 16:46:01. In the September hearings, the family court judge said that the errors "don't make any difference in how I feel or what I'm thinking." Id. at time index 16:45:25. Ms. Crowley, however, when testifying in September, reported that the child's time in the Kansas City home, and whether Susan had lied to the child's teacher about working, would have been "significant differences" in her evaluation. Id. at time index 17:06:33, 17:17:18.

At some point, the judge asked Dr. Lewis Etcoff to evaluate Bob, Susan and Mari.[3] On June 8, 1993, the judge held an ex parte phone conference with Mr. Sheldon, Dr. Etcoff, and Ms. Crowley without participation of either party or counsel for either party. XI ROA 2029. After this unreported, ex parte conversation, the court entered a further minute entry:

> COURT FINDS, the Defendant has been a good mother, however, sometimes being so close to a situation one does not see certain things so obvious to one less familiar and perhaps that is the reason why the child's symptoms went undetected. Whatever the reason, the child is currently receiving appropriate attention and needs to stay in the constructive program she is currently involved in. COURT ORDERED, child to remain the Clark County and in the program she is currently involved in. Parties to have joint legal custody with primary to

[3] This Court has previously noted that the services of Dr. Etcoff are used in obtaining expert testimony in Clark County in custody disputes. Truax v. Truax, 110 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 51, May 19, 1994) (Murphy standard applies when there has been determination of primary custody).

> the Plaintiff. If Defendant moves to Las Vegas, there should be shared primary. If Defendant cannot move here, it is requested that the child support continue for the next few months so Defendant can travel to Las Vegas for visitations. The child must not feel she has been intentionally separated from her mother. There is to be a joint effort to have the child develop to her full potential and the cooperation of both parties is required. Court's Order is temporary pending completion of tests and Evidentiary Hearing.

XI ROA 2029.

Susan's Reno counsel filed a "petition to vacate order and to reset hearing," but did not include the notice of motion necessary in Clark County to have a motion set for hearing. VII ROA 1218-1237. The petition pointed out various inaccuracies and false conclusions drawn during the ex parte communications, and protested that the court was not permitted to make a custody change without a hearing, or finding a material change in circumstances, or that the child's welfare would be materially enhanced, as it had done. VII ROA 1221-23. It also attempted to correct various of the factual errors made by Ms. Crowley. VII ROA 1223-25.

The family court judge, sua sponte, changed the pending hearing on the motion to modify custody from July 1, 1993, to August 11, 1993. VII ROA 1220. Susan associated the undersigned counsel, who appeared on August 11 and was informed that the court reset that date as well to an evidentiary hearing date in September. XI ROA 2030; Tape of August 11, 1993. On the same date, the court sua sponte issued a further order for FMAC services, requiring consolidation of the reports of Dr. Etcoff and Ms. Crowley, and a written recommendation to the court with copies to counsel. VII ROA 1217. This was apparently never done. VIII ROA 1279.

Six months after the filing of the Restraining Order that effectively changed primary physical custody of the child, the court commenced the first of an extended course of Evidentiary Hearing dates. Evidentiary hearings commenced September 7, 1993, continued on September 8, 23, 24, and 29, October 5, and the final hearing concluded on October 6, 1993. VIII ROA 1264-1399, IX ROA 1400-1590, X ROA 1591-1800, XI ROA 1801-1974.

Acknowledging that the court had already effected a change of custody, the court stated that the burden of proof was on Susan, and had her counsel go first. VIII ROA 1267; XI ROA

1953. On September 7, 1993, Susan called as witnesses Mr. Sheldon, Dr. William Bainbridge and Frank Croskey.

Dr. Bainbridge is the principal of a School Match, a national business that evaluates schools and school districts with one another. VIII ROA 1281. He was admitted as an expert in the evaluation of choice of schools for elementary and secondary education. VIII ROA 1288-89. Dr. Bainbridge had reviewed Mari's school records and submitted a report, going to regular and special education, public and private, in both Kansas City and Las Vegas. Trial Exhibit C. He reiterated on the stand that information on Clark County is difficult to come by, but that Shawnee Mission, Kansas, was outstanding, and that based on his review of the information relating to Mari, and investigation and comparison of the two school systems:

> It is my opinion that an examination of Mari's school records together with data on the public and private elementary and secondary schools in the Las Vegas(NV) and Shawnee Mission (KS) areas presents a clear picture. It is my recommendation that based upon the special attention and small class sizes available, likelihood of academic success and effective parent-school system communications, Mari be permitted to receive her education in one of the nation's finest school systems -- Shawnee Mission, Kansas.

VIII ROA 1317-18; Trial Exhibit C. He further indicated that the original placement Bob made at First Presbyterian daycare was absolutely inappropriate. VIII ROA 1298-99.

Dr. Frank Croskey is principal of Highland Elementary School in Kansas and has a Ph.D. in special education. VIII ROA 1354-56. He concurred with Dr. Bainbridge's evaluation of the Shawnee Mission school system, which he described as "leading edge," and verified that the pre-kindergarten program is strictly voluntary on the part of parents that want to enroll their children. VIII ROA 1357, 1360-61. He also testified that Susan had already initiated the evaluation process, and that if Bob had not withdrawn Mari from the school, she would have had a full evaluation and assessment for educational placement. VIII ROA 1367-1372. He confirmed that Susan was a highly concerned and involved parent, and that if a high absence rate had continued for any length of time, it would have resulted in contact by the school to see what problems existed. VIII ROA 1372-77. He further verified that his school had special emphasis on its special education program and was particularly well-equipped to properly handle children such as Mari. VIII ROA 1390-92.

Stephanie Crowley, testifying for Bob, did not do an evaluation of the two parties and the child, but from her work with the child thought custody should be changed to Bob because she thought the child was "making progress" in Las Vegas and was in an educational program that met her needs. Tape of September 8, 1993, at time index 16:08:47. Although she conceded the possibility of identification with and bias toward Bob, who paid her and with whom she has had primary contact, she believed that she was able to keep her focus on the best interest of the child. Id. at time index 18:43:59.

While Ms. Crowley had no information relating to the Shawnee Mission schools, she disagreed with the Bainbridge comparison report because she had dealt with parents who reported positive as well as negative things about the Clark County schools. Id. at time index 19:00:21. She expressed that the home environment was more important than the school environment. Id. at time index 18:18:04. She did not specify what Mari could get in Bob's home that she could not get in Susan's home. Ms. Crowley reported seeing progress in Mari and predicted that the child would be fully mainstreamed within a year. Id. at time index 19:03:01.

Dr. Lewis Etcoff was the only person to perform psychological testing, objective personality tests, and substantial interviews leading to an evaluation of Susan, Bob, and Mari; he is an evaluative psychologist. Tape of September 24, 1993, at time index 14:00. He submitted complete psychological reports for each. Trial Exhibits A-13, A-14, Court Exhibit 4. He found substantial neuro-developmental deficits in Mari, biological in origin, and diagnosed Attention Deficit Hyperactivity Disorder, serious information-processing difficulties, motor coordination delays, and possible language disturbances. Id. at time index 14:07:05.

Dr. Etcoff testified that any "improvements" observed by Ms. Crowley were not borne out by his testing at the beginning and end of her therapy with the child, and that there were no gains other than natural maturation and the child's increased comfort with her over time. Id. at time index 14:14:41. He testified that the possibility was "next to none" that Ms. Crowley's prediction that Mari would be mainstreamed in a year could be correct. Id. at time index 14:14:06, 16:00:50.

Dr. Etcoff had no answer to the question of who would be the better parent, and felt that the parties were both good parents who wanted the best for their child. Id. at time index 15:05:51. His reports noted inappropriate decisions by each of them. He considered Susan's rationales for travel with the child during any school time to be weak, and that Bob had exercised poor judgment in taking Mari out of school in Kansas City in order to gain some control in custody litigation.[4] Dr. Etcoff was certain that in any event, the school absences made no difference to Mari's condition, and that if the child had been in school "seven days a week" she would be no different today; any inappropriate decisions about travel made by Susan were in no way the proximate cause of Mari's difficulties. Id. at time index 15:16:07.

Stepping through each of the allegations made in Bob's original motion, Dr. Etcoff stated that all allegations relating to causes of Mari's condition were false, and Bob was simply incorrect as to his allegations relating to Mari's "socialization." Id. at time index 14:03:08, 16:54:20. He summarized:

> If you go back to how this occurred -- while I understand that Mr. McMonigle did what he did [unilaterally remove the child from school in Kansas and retain her in Las Vegas] in the belief that his daughter's difficulties occurred because he felt that his ex-wife was not providing his daughter with the necessary services and environment for her to blossom, I think, in knowing what I now know about Mari, most of his assumptions concerning his [ex-]wife about being less capable or neglectful of her can't be borne out in the facts I have gone through. I think that essentially the child is the way she is, because of her developmental difficulties and not because [Susan] has been a negligent parent.

Id. at time index 16:08:34.

Dr. Etcoff testified that it would be more detrimental for Mari to go 24 days without contact with a natural parent than to miss 25 half-days of pre-kindergarten. Id. at time index 17:09:40. He would expect that her third and final eye surgery (completed during the six months the child was in Las Vegas) would result in a behavioral improvement. Id. at time index 17:10:50. Further, if the facts were that the days missed because of Susan's travels were 15

---

[4] Bob's attorney kept insisting (while creating "hypotheticals" for the expert witnesses) during argument that Bob's unilateral termination of Mari's enrollment in the Kansas City school on March 10 was somehow pursuant to Judge Becker's ex parte order, which was not issued until a week later. VII ROA 1197; Tape of September 24, 1993, at time index 17:20:01.

rather than 25, her "lapse of judgment" would not be as serious as indicated in his report. Id. at time index 16:58:07.

Dr. Etcoff testified that he did not believe, from his examination of the child, and his examination of both parties, that the child's welfare would be substantially enhanced by a transfer of primary physical custody from the mother to the father. Id. at time index 17:14:00.

Dr. Pierce, an academic from UNLV, testified at length. XI ROA 2032. According to Dr. Pierce, it was "impossible" that the specialist intervention obtained in California was what was recommended by the California specialists, and it was "impossible" and he did not believe that there were no "Child Find" reports, even though the specialist who drafted or was otherwise involved with the documents that were produced in court was reached by conference call and so testified. Trial Exhibit F, G, & H; Tape of September 29, 1993, at time index 14:14:32, 17:15:16, 17:15:59. While he testified originally that a parent should do what the reporting specialists indicate should be done, once he found out that the visual-motor therapy was what the California specialists had said should be done, he asserted that a "good parent fights for the child" and must "follow that instinct" to demand more services than are provided. Id. at time index 17:17:06.

The California specialist, Gretchen Folks, testified about Susan's involvement with the Santa Barbara special education services in 1990-1991. Tape of September 29, 1993, at time index 14:50. She testified that Susan did everything the California specialists suggested be done for Mari, reiterated that the view of the California specialists was that Mari was not in need of any specialized services outside the home, and noted that there was no Child Find report because services for Mari had been obtained in the first instance by Susan's direct request for services to the school district. Id. at time index 15:04:50, 15:07:10, 15:41:40. She stated that Susan put Mari in preschool, and then withdrew her, and then tried again, in conformity with the specialists' recommendations. Id. at time index 15:46:00.

After the testimony of Pierce and Folks, the family court judge reiterated her earlier sentiments: "The only problem we have is that geographically you don't agree. Other than that,

everything's fine. And if you both lived in the same city, and you both lived here, we wouldn't have a problem." Id. at time index 17:32:20.

Joanie McMonigle, Bob's current wife, testified that after conferring with Bob, she quit her job so she could stay home and care for Mari. IX ROA 1414. She agreed that she was Mari's primary caretaker, but added that "when Bob's there, we pretty much share the duties." IX ROA 1405. Specifically, she conceded that she had responsibility for Mari's morning routine, that she and Bob split Mari's evening care when he is in town, and that she "sometimes" spanks the child. IX ROA 1417-18. She identified ten states and two other countries that she knew Bob had been to during the pendency of the hearings. IX ROA 1411-12. She also conceded that: "We probably eat at the club two or three nights a week, which I would like to -- I'm really not a cook, so we go out a lot." IX ROA 1416.

One of Joanie's friends, Deborah Hawkins, testified that Joanie was the primary caretaker of Mari, and had to get up early to take care of the child. Tape of September 24, 1993, at time index 10:04, 10:32:40, 10:37:20.

The bulk of testimony came from the parties. After the parties had testified, the family court judge took the matter under submission and issued a decision by minute order on October 21, 1993, changing primary physical custody to Bob. XI ROA 2034. The decision was rendered as a formal order by Bob's counsel and was filed December 2, 1993. XI ROA 1996. From the filing of Bob's motion, the litigation took almost nine months. This appeal followed.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CHANGING CUSTODY ABSENT ABUSE OR NEGLECT AND WITHOUT A FOUNDATION FOR FINDING EITHER THAT THE CIRCUMSTANCES OF THE PARENTS HAD BEEN MATERIALLY ALTERED OR THAT THE CHILD'S WELFARE WOULD BE SUBSTANTIALLY ENHANCED BY THE CHANGE

The family court's order was inconsistent, and appeared to contradict the court's own rulings during the pendency of the case. To the degree that it did not do so, it was not supported by the evidence presented.

A. **The Family Court Violated the** Murphy **Standard**

The order recites the standard of Murphy v. Murphy, 84 Nev. 710, 447 P.2d 664 (1968), that a change of primary physical custody is warranted only when the circumstances of the parents have been materially altered and the child's welfare would be substantially enhanced by the change. XI ROA 1998. The order then recites that the court looks "not only" to that standard, but to other case law. Specifically, the court found persuasive Stevens v. Stevens, 810 P.2d 1334 (Or. App. 1991), for the principle that "though no single factor may constitute a substantial change of circumstances, changes taken together may be of such a magnitude to establish the requisite change of circumstances." XI ROA 1998. The court below also cited Hildahl v. Hildahl, 95 Nev. 657, 601 P.2d 58 (1979), for the proposition that "the sole consideration of the court should be the welfare of the child."

It should be noted that the court's order is inaccurate, since it used Susan's move to Kansas City as the cut off for when the court would begin to review the parties' actions. XI ROA 1998. The last prior custody order in this case was Judge Mosley's order of March 2, 1992, which was entered about four months later than Susan's move to Kansas City. VI ROA 942. As discussed below, this error did not matter much, since the court was not engaged in finding changed circumstances, but in re-weighing the relative merits of the parties to determine the child's "best interest."

As implied in Murphy, and explicitly recited in the Stevens case relied upon by the court below, the court should not have even reached a "best interest" weighing before finding specific changed circumstances. See 810 P.2d 1336, n.2. This Court has repeatedly reaffirmed that Murphy remains the law of this state. See, e.g., Truax v. Truax, 110 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 51, May 19, 1994) (Murphy standard applies when there has been determination of primary custody); Moser v. Moser, 108 Nev. 572, 836 P.2d 63 (1992) (decision reversed where court below found a "drastic" (but unspecified) change in circumstances since divorce, and ordered change in custody to father, with mother's visitations to be in Nevada only).

The opinion displayed a substantial confusion by the family court judge of the legal tests of "changed circumstances" and "best interest of the child." Several times during the trial, and despite paying lip service to Murphy, the judge reiterated her opinion that she had no duties to either party, and no role except to determine the child's best interest. See, e.g., IX ROA 1456[5]; Tape of September 8, 1993, at time index 17:56:55; Tape of March 23, 1993, at time index 11:42:46. The contention was raised in the court below that application of Murphy, and not a simple "best interest" balancing, was required by the court. XI ROA 1964.

In this case, as in Moser, the court below never specified exactly what change in circumstances occurred between March 2, 1992, and March 17, 1993 -- the dates of the prior custody order and the motion for modification. Moser holds that the court below may not simply recite that there has been a change of circumstances without a finding of what the change was.

The only "circumstances" even addressed by the court below were three trips made by Susan that Bob argued caused Mari to be "undersocialized and that the court deemed "self-serving for [Susan's] own needs and desires." XI ROA 1999-2000.

Despite Bob's obfuscations, it was eventually established at the hearings, and the family court acknowledged, that other than sick days and when Bob took the child out of school for visitation, the entire amount of voluntary pre-kindergarten time that Susan caused Mari to miss was 15 half-days, or some 45 hours. IX ROA 1551; VII ROA 1232; XI ROA 1816. That was the only circumstance underlying Bob's custody motion that had any resemblance to truth.

The family court should not be permitted to hold against a parent less than perfect execution of an entirely voluntary act; there is no precedent for such in our law, and it would be a poor policy to establish now. Mari was not required to be in any school of any kind, and was only in pre-kindergarten in the first place because Susan was trying to follow up on the

---

[5] Specifically, the judge remarked: "Change of circumstance could have something to do with all of that and nothing to do with any of that. If I find there to be a change of circumstance, there will be a change in custody. If I find there not to be a change in circumstance or I find it not to be in the best interest of Mari, then I, whatever I find to be in the best interest of Mari is what will be done."IX ROA 1456.

recommendations of the California specialists and provide the best foundation she could for the child. VIII ROA 1360-61; IX ROA 1538. Susan's taking Mari out of that voluntary program for 15 days, even if for "selfish" reasons, cannot be a "changed circumstance" underlying a change of primary physical custody.

The court notes that Bob's original motion claimed that Mari has "not received the care and attention required for the child to properly develop socially and educationally." XI ROA 1998. Without addressing whether that charge was true or false, the court stated that it would "place Mari in the atmosphere and home that will most expediently facilitate her social and mental development," and added that "This child has incredible potential if given the necessary attention and reinforcement. This is the sole focus of the Court's findings and decision." XI ROA 1998-99.

The reasoning used in the order is not a Murphy determination. At best, it is a "best interests" balancing judgment, which might have been appropriate at the time of divorce, but which constitutes only second-guessing of the divorce court's judgment at this time.

B. **The Family Court Judge Misapportioned the Burden of Proof**

Murphy, supra, and *Moser*, supra, make it clear that the burden of proof is on the party who seeks to alter the last prior custodial order. In this case, by a lengthy series of stipulations and rulings from 1990 to 1992, it had been established that Susan was Mari's primary physical custodian. See, e.g., I ROA 89-90; XI ROA 2011; II ROA 259; III ROA 437-39; VI ROA 942.

Without apparently realizing what it had done, the family court reversed the burden of proof; having started with an ex parte, five-day emergency restraining order until a hearing could be held, the court below became so accustomed to the change it had effected during the many months of delayed hearings that the court took the changed custody as the starting point for any other orders to be entered. VIII ROA 1267; XI ROA 1953.

By reversing the burden of proof, the court below reversed the presumptions that are supposed to apply, and undermined the rulings of the earlier court. In this instance, the family

court judge expressed some disdain for the expertise of her predecessor, but this was no reason not to give Judge Mosley's express, one-year-old ruling the deference that it should have been accorded. See Tape of March 23, 1993, at time index 11:41:47.

Turning to education, the court's decision dismissed Dr. Bainbridge's testimony as "unpersuasive and incomplete" because he had "no information" on the Clark County school system and was too fond of that of Shawnee Mission, Kansas. The court further found that while schools and their excellence "must be taken into consideration," they were not "proper vehicles to care and support children in every aspect of their development." Rather, child development "involves positive parent encouragement and often means that a parent's personal desires must be held in abeyance for the benefit of the child." XI ROA 2001. The court found that on the basis of other testimony, the Clark County schools are "adequately addressing Mari's needs," and that "more importantly proper parental concern and guidance is taking place."

It is the last statement that requires scrutiny, since except for Bob (who found nothing worthwhile in anything that Susan did for the child) there is no evidence that there had ever been any lack of parental concern and guidance. Again, the burden was reversed; Susan should not have been required to prove a lack of such concern and guidance in Bob's home, and the record does not establish that it was lacking from Susan.

C. **The Court's Findings Were Not Supported By the Evidence Presented**

In reaching its conclusion, the court below found that Mari's teachers reported that the child was not staying on task, and that more tests of her abilities were needed to determine why. The court found that the "central underlying reason for the lack of timely testing" was Susan's conduct. XI ROA 1999. Specifically, the court found that Susan took "several vacations" all of which occurred immediately after Mari commenced her "regular schooling." XI ROA 1999. The findings are insupportable in several ways.

The court's findings imply that either Susan knew about the testing, and consciously chose to forego it, or that she was negligent in failing to find out about them. The only evidence

below, however, was that Susan and Bob had both spoken with the teachers and administrators in Kansas, and neither had been told of the dates that Mari might be tested. Susan and Bob both testified that they did not receive any notice of such a scheduled re-examination, and were told only that it would be held before the end of "the year."[6] IX ROA 1540; X ROA 1622-23; XI ROA 1942. So Susan did not know about the tests.

During the course of trial, Susan testified that she was never notified that Mari had ADHD, or that were any procedures or activities that she should be following, other than the ones she was following.[7] IX ROA 1457, 1466, 1481-82; X ROA 1657-1660. The court found repeatedly that Susan was not negligent, and had complied with every directive given her by school officials as to what she should do for Mari. See, e.g., IX ROA 1460. For the time period of 1992-1993, the court specifically stated: "We understand or at least this Court understands that . . . Ms. Grandgeorge was doing according to Mr. McMonigle and according to this Court everything she thought necessary to care properly for the child."[8] XI ROA 1889.

The only other possibility is that she did not know the testing was scheduled and was not acting unreasonably in not knowing that fact. In which case Susan's travels with Mari, as a "central underlying reason" for testing to have not occurred, is blameless. Further, the record is clear that if not for Bob's unilateral termination of Mari's enrollment at her school in Kansas City, comprehensive testing of the child would have proceeded sooner than it did. VIII ROA 1367-1372; IX ROA 1540.

---

[6] Bob's understanding that the school officials meant "calendar year" instead of "school year" could not have been correct, since it is now known that the first such attempt was internally scheduled by school authorities for the next year -- January, 1993. Trial Exhibit 10, at 3. Ms. Crowley labelled Susan's removing Mari from school when testing would have been done to be an error in judgment, without realizing that neither party knew when the school was going to do that testing. Id. at time index 18:02:05.

[7] Susan has a B.S. in psychology, but has not had training or experience in identifying and diagnosing learning disabilities. IX ROA 1421.

[8] It is worth noting that at this juncture Mari's diagnosis and prognosis is still uncertain. The Highlands school measured her I.Q. at 105. Trial Exhibit 10 at 3. Dr. Etcoff came up with a cumulative I.Q. of about 70. Trial Exhibit A-13; Tape of September 24, 1993, at time index 15:11:29. Dr. Etcoff believes that Mari can never be mainstreamed, but Ms. Crowley believes she will be mainstreamed in a year. Tape of September 24, 1993, at time index 16:00:50.

The only evidence presented as to Susan's intentions when she took Mari to Santa Barbara to see Dr. Lyman (other than Bob's unsupported speculation), was that Susan hoped to have Mari's eye surgeries completed at the same time, and had arranged a return flight for a week later, before the end of Mari's school vacation. X ROA 1665-67.

The court found that as to the trip to Santa Barbara, "the medical necessity could have been addressed in Kansas City as well, if not better than in Santa Barbara, and it was not necessary for the child to miss more school." XI ROA 1999-2000. The court's finding does not make sense. Mari would have been out of school for the few days that it took to complete the work on her mouth even if Susan had sought out a third dentist in Kansas City, and Mari would then still have been on school vacation. If general anaesthetic had been required, then the third eye surgery would have been completed by the UCLA doctors at the same time, and the child would have been spared another general anaesthetic, and possibly some lost school time. See Testimony of Susan Kerpan, Tape of September 24, 1993, at time index 8:54:22; X ROA 1660-65; Trial Exhibit T.

The court below found that the Santa Barbara trip was more for Susan's need for dental work than for Mari's. XI ROA 1999-2000. There is absolutely no evidence in the record to support that finding. Other than Bob's ruminations of Susan's probable wrongful intent, the only evidence as to Susan's dental appointments was her testimony and the supporting documentation that she first consulted her dentist in Santa Barbara between Mari's appointments, and that it was only then discovered that she needed any dental work at all. IX ROA 1504-1505; VII ROA 1213-14.

Further, the order contradicts the court's finding during the hearings. Counsel for Susan was attempting to show that Susan went to Santa Barbara to have Mari's dental work done, and not for a vacation, and was attempting to introduce an affidavit to so establish. The judge interrupted to take "judicial notice" that the trip was for Mari's dental work, at which time counsel discontinued questions seeking to prove the point.[9] IX ROA 1487.

---

[9] Unfortunately, on the face of the transcript, the court's meaning is not clear, since it states "the Court is taking judicial notice that she went to Santa Barbara because she needed dental

The court below never addressed the obvious prevarication in Bob's testimony, as to the basis of his motion. He repeatedly asserted that his "main concern" was that "it was obvious" that Mari "hadn't been around other kids" and was therefore undersocialized. See, e.g., X ROA 1744. Bob admitted, however, that he not only knew about, but was paying for, a supplemental program in Kansas City in addition to Mari's regular school, that put Mari in a program with other children in the afternoon, at least five months before he filed his motion. XI ROA 1862, 1864, 1866.

When Bob obtained the attendance records, he must have been able to pick out the days he took Mari out of school, and should have known about Mari's days out sick, since Susan testified (without contradiction) that she always informed him of any illnesses. XI ROA 1910. He therefore should have been able to figure out that Mari had missed only 15 half-days of pre-kindergarten, and presumably would have figured out that such an insignificant time period could not cause his daughter to be "undersocialized."

It is worth noting that Bob nowhere refuted Susan's position that he failed to object to taking the child out of school at any of the times she was taken out of school. See, e.g., IX ROA 1509. It is respectfully submitted that as a matter of public policy, a noncustodial parent who silently acquiesces to the acts of the primary custodian should not be able to lie in wait and use his complaints for the purpose of a change of custody motion without at least asking the primary custodian to engage in whatever behavior is desired.

Finally, there is the question of whether Mari had "commenced her regular schooling." The court below found Susan's behavior wrongful because the child was "in school." As Dr. Croskey noted, there is some considerable distinction between pre-kindergarten and the sixth grade. VIII ROA 1375. Susan has been on record since 1991 as being of the belief that Mari was not beginning real "school" until at least March, 1993. II ROA 242.

---

work," but in context it was clear that the first "she" was Susan while the second "she" was Mari. That is why counsel for Susan responded "Very good, Your Honor . . ." and why the court's next comment was "I don't know for how long she, but I knew she went." Also see IX ROA 1495-97.

This case boils down to 15 half days of missed pre-kindergarten. In this case, Susan thought Mari benefitted from the trips she took and the people she saw. See, e.g., VII ROA 1234-35. It is respectfully submitted that such should not be considered grounds for change of primary physical custody, irrespective of the motives of the custodial parent.

The court acknowledged that it had entertained testimony as to Mari "from the time of her birth, through the divorce proceeding and continuing to the present," but the court claimed to "not address any issue prior to the last Custody Order at the time of the Divorce," and that it was therefore disregarding any activities which occurred prior to Susan's move to Kansas City. XI ROA 1998. According to Bob and his attorney, these hearings put at issue all of Susan's parenting of Mari from the child's birth through the hearing dates. VIII ROA 1276-77; XI ROA 1869; Tape of September 8, 1993, at 17:55:33.

Apparently by mistake, then, the court below then referenced Susan's "failure" to copy Bob with "certain reports," from which the court concluded that it was "clear that he did not have any information for him to think she was not doing everything possible for their child." Susan, however, testified that she told him all about the reports, and Bob admitted speaking to one of the specialists. In any event, the reports, and any matters relating thereto, were from California in 1990-1991, which time period the court stated that it was not considering in reaching a decision. XI ROA 1998.

Worse, this conclusion appears to contradict the court's declaration during the hearings that Susan was in fact doing everything she knew was possible for their child. XI ROA 1889.

The court's decision contains a finding that in Bob's household, the child was receiving the same love and attention received from her mother, but "has been permitted to grow and achieve and develop, something this Court believes had been stifled in her Mother's custody." XI ROA 2001. Despite a complete psychological evaluation by the court's diagnostic psychologist, and extensive intervention by a therapist for the child, no such testimony from any credible source was ever presented to the court. The finding is without foundation, and its presence in the court's opinion raises only a question of bias (discussed below).

Noting the testimony of Dr. Croskey, the court noted his concern for excessive absences, but found it "interesting" that Mari would be placed in kindergarten in Kansas "without considering the damage this action might cause to Mari's self-esteem and socialization progress." XI ROA 2001-2002. It is not believed that there is any evidence in the record that any such damage is even possible in this case.

II. THE DISTRICT COURT ERRED IN FINDING A CHANGE IN CIRCUMSTANCE DEVELOPED DURING THE COURT-IMPOSED SIX-MONTH DELAY PRIOR TO THE CUSTODY HEARING

In reaching its decision, the court examined the time since Bob refused to return the child, and concluded that "it is clear that more has been accomplished in the first few months -- more intense therapy and attention to education -- than has taken place in the past. XI ROA 2001. The family court judge reasoned that the hearings conducted in September and October, 1993, were sufficient to comply with the court's due process responsibilities to the parties. VIII ROA 1273.

The other aspect of Moser v. Moser, supra, that should therefore be addressed is its reaffirmation that litigants in a custody battle have a right to a full and fair hearing concerning disposition of a child, and that, at minimum, the law requires that before a parent loses custody, elements that support change of custody must be supported by factual evidence. In Moser the Court specified that the party threatened with loss of child must be given the opportunity to disprove the evidence presented, before that action occurs.

This case presents a case of extreme bootstrapping. As observed by Mr. Taylor at the March 23 and September 8 hearings, every time the court below delayed the hearing of the merits of Bob's complaint during its "emergency" or "protective" time, it effectively granted the relief Bob requested, and made it more difficult to refuse to leave that change in place. Sure enough, by the time Stephanie Crowley testified, her position was couched in how "disruptive" it could be to "disturb" the "routine" that had been established. Tape of September 8, 1993, at 16:09:30.

Ms. Crowley's position was a product of the family court's retention of the child in Las Vegas during the pendency of the case. She testified that Mari "appears to be thriving" and that, to her, Las Vegas was a known set of conditions, and it was possible that if the current circumstances were changed by returning Mari to Kansas, "she possibly could not do as well as she's doing." Tape of September 8, 1993, at 16:16:10. The court below echoed this reasoning by expressing the "hope" that there would be no future modification that could "damage the stability that has been brought to this child."[10] XI ROA 2002.

It is respectfully submitted that the court below cannot be permitted to impose a change in circumstances upon the primary custodian, let six to nine months elapse, and then use the child's adaptation to the situation created by the court as the grounds for finding "changed circumstances" to support a change of custody.

The family court judge appeared unable to see the impact of the delay she allowed in the proceedings. During the six month pendency of the evidentiary hearings, Mari passed one-tenth of her life, had her final corrective eye surgery completed, and was finally diagnosed with not just visual, but cognitive developmental delays, for which therapy was started. It is no wonder that under these circumstances, witnesses reported that the child was "improving" and "flourishing" as noted by the judge. Tape of September 8, 1993, at 19:44:46, 19:47:32. The child's maturation was even noted by Susan. IX ROA 1571-72.

There is no "control set" in a child custody case; not one of the experts was willing to say that Mari would have done any less well in the intervening six months if she had stayed in her mother's primary physical custody. The only indication is that comprehensive testing would

---

[10] Counsel for Susan indicated at trial that the court's invitation to later proceedings if Bob's testimony proved to be false created an impossible burden, since it was easy for Bob to prevaricate. XI ROA 1829. For an example, it is only necessary to look at the testimony concerning Mari's first day of school in Las Vegas. Susan's counsel, informed that a housekeeper took the child to school on that first day, separately challenged both Bob and Joanie on the point. Bob, claiming to understand the psychological importance of the day to a child, claimed that he took Mari to school. X ROA 1698. Joanie claimed that Bob was in Alaska, so she took Mari. IX ROA 1406. Of course, it is impossible for Susan to be reasonably certain which, if either of them is telling the truth, and is unlikely to be able to prove such matters in the future.

have been performed earlier if Bob had not unilaterally removed Mari from the school district where she was scheduled to be re-evaluated. VIII ROA 1367-1372; IX ROA 1540.

This case presents precisely the sort of delay that this Court condemned in Sims v. Sims, 109 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 170, Dec. 22, 1993). In Sims, this Court acknowledged that trial courts enjoy broad discretionary powers in determining questions of child custody, but reiterated that "this Court must be satisfied that the court's determination was made for the appropriate reasons." In that case, the Court noted the "inadequate attention to the real impact that these decisions, and particularly the delay in these decisions, have on children's lives. . . . Time is more of the essence in these cases involving children than in any other cases and decisions should be made promptly after the close of evidence. Otherwise irreparable harm can be caused to the entire family, and especially the children."

It is respectfully submitted that delay is even more harmful when the delay is prior to the opportunity to present evidence. By the time of the hearings in this case, the original allegations in Bob's motion were all but forgotten. The testifying experts spent their time on future "disruptions" to the "stability" that had been established by the six month delay in the proceedings. This not only left the parties in limbo, and greatly magnified costs, but again made Bob's unilateral seizure of the child a fait accompli by mere passage of time.

Sims bears closer scrutiny for other reasons. This Court noted that a change of custody seemed especially arbitrary where it resulted in a child being transferred into the actual primary custody of a third party (there, the child's grandmother). Here the facts are similar, since Joanie has testified that Bob had her quit her job so she could attend to Mari's needs on his behalf, and she does the bulk of care for the child. IX ROA 1405, 1414, 1417-18; Tape of September 24, 1993, at time index 10:04, 10:32:40, 10:37:20.

III. THE DISTRICT COURT'S WORDS AND ACTIONS DEMONSTRATED AN APPARENT BIAS

On June 17, 1993, Reno counsel file a motion for recusal of the family court judge on the basis of the court's ex parte communications and termination of primary custody. VII ROA 1238. The proceedings throughout have demonstrated a certain measure of hypocritical double standard when comparing what is expected of Bob and Susan, both past and present.

Ms. Crowley's testimony, obviously relied upon heavily by the family court, bears closer scrutiny. She thought it very important that Susan could have chosen to be more involved on a daily basis in Mari's schooling than she was, but was completely unconcerned that Bob does less each day than Susan did. Tape of September 8, 1993, at 17:17:23; cf. IX ROA 1551-52.

It should be noted that the underlying motion was brought on the basis of Mari's missing 15 half-days of pre-kindergarten, but after testimony was developed that the available schooling in Kansas City is superior, Ms. Crowley testified for Bob that the home environment is more important than the school environment. Tape of September 8, 1993, at 17:18:04. By itself that is fine, but no one has ever provided any evidence that there is anything wrong with Susan's home environment.

The court's decision focuses on the one allegedly wrongful act that evaluative testing was missed. XI ROA 1999. The court perceived delaying testing of the child as being of central importance, but ignored the unrefuted testimony that Bob's action in removing Mari from school delayed testing that otherwise would have taken place. VIII ROA 1367-1372; IX ROA 1540.

It is undisputed that Susan did not work, so she could devote the maximum time and attention to Mari. Yet Ms. Crowley had no stated opinion on Joanie McMonigle's testimony that Joanie, a step-parent, was and would be providing primary care for the child in the home, with replacement of a natural parent with a step-parent for primary care, and eating out several times per week rather than being fed family meals at home by a natural parent. Id. at time index 18:04. Only Susan appeared concerned as to the child's diet and meal-time routine. IX ROA 1581.

That Bob would be substantially involved in Mari's upbringing at all required some degree of faith. At the time of the hearings in this case, Bob admitted to having been travelling for at least 39 out of the 175 days since the child had been placed in his custody, during which time he had to either arrange to put the child in Susan's care or leave the child with third parties. X ROA 1788.

Bob admitted to Dr. Etcoff that if Mari lived primarily with him, his current wife would be Mari's primary caretaker. Court Exhibit 4 at 4-5. Bob was of the opinion that Joanie would "be a better primary caretaker than [Mari's] own mother." Id. When Bob was on the stand, he denied such an intent, and claimed that child-rearing responsibilities in his household in Las Vegas would be "evenly divided," but he also stated Joanie "is a better mother figure than Susan ever has been." The family court judge threw Bob a softball question: "I will ask you a question 'cause I want to and I hope I don't -- and I'm just going to preface it. Is it your intent to supplant Joanie for Susan?" XI ROA 1826. Despite Bob's other testimony, the court received the predictable "Absolutely not, Your Honor" in response.

There does not seem to be any legitimate reason why the father, but not the mother, of this child, can be seen as providing a "superior" environment by substituting a third party as the child's primary caregiver. Bob's own expert, Dr. Pierce, thought a parent would always be a superior choice. Tape of September 8, 1993, at time index 16:51:33. With the exception of the one question reprinted above, the court apparently disregarded Dr. Etcoff's caution about such a substitution.

On the court's own questioning, Bob admitted that he sought to impose blame on Susan for visiting with relatives during school when he did the very same thing. XI ROA 1896. The court apparently did not give this significance.

Bob's hypocrisy was evident throughout the record. He thought Susan was negligent for not discovering neurological deficits the child might have during the twenty days per month she had the child, but saw no reason why he should have noticed those deficits during the ten days per month that he had the child. XI ROA 1879-1881. He thought Susan's occasional trips with the child to her parents' home, or to visit friends, were disruptive to the child's

schooling and damaging to her "socialization," but saw nothing wrong to his own travels with the child during his ten days per month. XI ROA 1825. He saw no reason to inquire about following up with any work Mari might be doing in pre-school, and believed it was not his responsibility. XI ROA 1860-1882.

At some point the apparent role of money must be mentioned. It is clear from the record that Bob is many times wealthier than Susan. IX ROA 1474; X ROA 1785-86. If a poor person went to court complaining that his ex-wife had kept their child out of fifteen days of voluntary pre-kindergarten, it is doubtful the "controversy" would have lasted beyond an original appearance on a law and motion calendar.

Bob McMonigle, however, has virtually unlimited resources, and that has allowed him to continue filing motions, even with contradictory themes, until he found a judge that would bite. Hence this Court's review of a record that includes Bob's allegations, two years apart, that Susan put Mari in preschool too much of the time, II ROA 224-26, and did not have her in school enough of the time, VII ROA 1188, while the parental conduct attacked remained fairly consistent. The economic impact on Susan has been devastating. XI ROA 1970.

A. The Court Expressed a Bias Against Out of State Witnesses, Parties, Experts, and Schools

The court's decision states that if the parties should "find themselves to be residing in the same jurisdiction," they should submit to mediation on custody and visitation. XI ROA 2004. There is no precedent for a judge ordering an out-of-state party to move to Nevada in order to facilitate the judge's view of how child sharing should occur. It is hard to look at this record, however, without concluding that precisely such coercion was part of the judge's agenda.

At the very first hearing on March 23, 1993, the judge stated her personal preference that "the best thing would be if you all lived in the same town." While acknowledging the court's lack of power to compel such a move the judge overtly contemplated it. Tape of March 23, 1993, at time index 16:02:41. The court below also wanted the child in Las Vegas during

any evaluation process since the court had experts it could "trust." Tape of March 23, 1993, at time index 15:52:12.

The court's final opinion returned to the original theme, stating that if both parents resided in Clark County, the decision "would be an easy one" and the court would have awarded joint legal and physical custody "to insure the needs of this magical child are met." XI ROA 1997. Seven pages later, Susan is invited to engage in mediation if she should "find" herself living in Las Vegas. In effect, she was commanded to choose between her home and her child, after receiving judicial permission to relocate there with the child in 1991.

IV. CONCLUSION

The family court judge found no abuse, or neglect, and was incorrect in re-weighing the parties' relative equities where there had been no material change in the parties' circumstances since the last prior custody order. The court also erred in finding no specific way in which the child's welfare would be substantially enhanced by the change of primary custody from mother to father. The court improperly reversed the presumptions and burdens set out by this Court in Murphy, failed to find a material change before proceeding to examine and weigh "best interest," and made findings unsupported by substantial evidence.

The family court erred by creating a six-month delay, and then finding that changes in circumstances developed during that delay justified the court's original, temporary decision. The court's disparate treatment of the parties during the litigation give rise to an appearance of bias.

This Court should find that on the basis of the record, there was insufficient grounds for finding that the parties' circumstances had been materially altered, and should reverse the order changing primary physical custody, and order Mari returned to Susan's primary physical care and custody.

Respectfully submitted,
MARSHAL S. WILLICK, ESQ.

By:_____

Marshal S. Willick, Esq.
Attorney for Appellant