IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S REPLY BRIEF

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STATEMENT OF THE CASE

Appellant relies upon the Statement of the Case in her Opening Brief. It is submitted that the Statement of the Case proffered by Respondent is imprecise, incomplete, and inaccurate. Specifically, there are no references to the Record On Appeal at all, and matters referenced as "facts" were actually perceptions argued about at the hearings. Appellant requests that this Court refer to the Statement of the Case in her Opening Brief.

STATEMENT OF FACTS

Appellant relies upon the Statement of Facts in her Opening Brief. As with the Statement of the Case, the version proffered by Respondent (Bob) is not helpful to examination of the case for several reasons. Normally, such matters would be passed by, but this appeal is very fact-oriented, and any mischaracterizations as to the record have a heightened effect. Many of the record page references in the Answering Brief are inaccurate, and in several areas where the page references are accurate, the matter set forth simply is not present.

For example, in discussing the testimony of Dr. Croskey (the Highlands school principal), Bob would have Dr. Croskey as testifying that Susan knew that the school scheduled Mari's re-examination for January, 1993, when he actually said no such thing. See Respondent's Answering Brief (RAB) at 17. Bob quotes Dr. Croskey as saying that the child missed school "28 days out of 77," when Dr. Croskey actually confirmed that the two figures are added together to determine total school days. VIII ROA 1374; RAB at 17.

Further, the Answering Brief fails to identify those matters on which conflicting testimony was presented, instead offering one party's testimony as factual matter. For example, Bob states as fact that Susan's travel caused Mari to miss medical appointments, citing X ROA 1727, when that was only Bob's disputed opinion. RAB at 7. He cites X ROA 1759 for the statement that "Susan asked Bob to take Mari for four to six weeks." RAB at 12. Actually, that page of the record has Bob himself saying only "She said she wasn't sure how long it was going to be . . . ." The only person saying anything about four to six weeks on that page was Bob's counsel asking a question, which his own client denied. Bob's Statement does not mention the directly conflicting evidence presented by Susan and a third party that the requested time was one to two weeks. IX ROA 1511, 1513; X ROA 1635-37, 1667-68; Tape of September 7, 1993, at time index 19:28:48--19:32:25. Most of the "factual" statement proffered by Bob suffers from this fault.

Respondent's factual recitation is also largely composed of argument, and is liberally peppered with contentious terms that are not part of the record in alleged factual recitals such as "frustrating," "extract," "stole," "fled," "stealing," "forced to file," "unwarranted," "specious,"

"ignored," "continually," "inappropriate," "expressed his dismay," etc. RAB at 6, 7, 9, 10, 11, 12, 18. All of these sentences, while perhaps good trial argument, are not descriptive of the facts below, or even of the testimony, and are largely counsel's commentary on the evidence.

Accordingly, Appellant requests that this Court refer to the Statement of the Case in her Opening Brief in deciding this appeal.

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

A. The Family Court Violated the Murphy Standard

Bob incorrectly states that the standard of review in this case is that of "abuse of discretion," citing Gilbert v. Warren, 95 Nev. 296, 594 P.2d 696 (1979). RAB at 20. Gilbert was addressing the broad discretion enjoyed by divorce courts at trial in determining the custody of children. In this case, that discretion was exercised by Judge Mosley in confirming Susan's primary physical custody, and highly specifying Bob's visitation, in the Decree of Divorce filed March 2, 1992. VI ROA 942-958.

As noted in the Opening Brief, and as this Court has recently re-affirmed, a different standard applies once there has been a custodial determination; that is the reason for existence of the test set out by this Court in Murphy v. Murphy, 84 Nev. 710, 447 P.2d 664 (1968). See Truax v. Truax, 110 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 51, May 19, 1994). The creation of the Family Court in 1993 was not an invitation to relitigate the custodial determinations made by the existing bench.

Bob correctly states that this Court defers to the discretion of the lower courts once exercise of discretion is called for. RAB at 20. This Court does not, however, turn a blind eye to legal error by those courts in deciding whether they may exercise discretion. Bob's first argument is the circular assertion that the district court can bypass the Murphy test and determine the child's best interest if the court determines that child's best interest would be served.

In an attempt to support that reasoning, Bob complains that Murphy would prevent a district judge from modifying custody if both of its elements are not satisfied "to the exclusion of the best interests of the child." RAB at 21.

Satisfaction of both elements of the Murphy test has indeed been required by this Court in the lengthy string of post-Murphy cases. See, e.g., Moser v. Moser, 108 Nev. 572, 836 P.2d

63 (1992). Of course, satisfying both elements of the test does not stymie, but serves the best interest of children, by requiring that their custodial status is not left up to the caprice of successive decision-makers without adequate changed circumstances to warrant re-examination of their custodial status. A change of custody order made without a specific, supportable finding that both prongs of Murphy have been satisfied is an abuse of discretion. Id.

Next, Bob alludes that Murphy is antiquated, predates the current custody statutes, and may be disregarded. RAB at 21-23. Bob does not demonstrate how the wording changes in the recodified statute altered its meaning in any way, and no change is apparent on the face of the statute; rather, it looks as if the "meat" of the text is identical, with only some of the "fat" removed. It is respectfully submitted that this Court's multiple reiterations of Murphy's viability within the past three years have not been blind applications of stare decisis, but reasoned applications of the settled standard under the current law.

Bob essentially concedes that the circumstances of Bob and Susan were unchanged during the year from the divorce until Bob filed his ex parte motion, so he decries the Murphy standard as a mere "talisman" that can be disregarded. RAB at 20-21.

In a tortured rendering of the language, Bob asserts that the first prong of the Murphy test, that "the circumstances of the parents have been materially altered," should include any changes to the child's circumstances, and is satisfied by the child's natural maturation. RAB at 23. By this reasoning, of course, the first prong may as well not exist, since all children get older. Essentially, his argument is for annual re-examination of a child's "best interests" without any change in circumstances, if a lower court judge elects to do so.

In this case, the span from the Decree of Divorce to Bob's change-of-custody motion was almost exactly one year, during which the situations of both Susan and Bob status were entirely unchanged. Obviously, Mari grew a year older during that time; she became more mature, finished some medical procedures, etc.; these are not changes in even the child's "circumstances" within the meaning of Murphy. Bob's argument is little more than a variant of the "destroy the village to save it" line -- to satisfy the test of changed circumstances in this case, he would have this Court disregard that test.

It is worth noting that the one case Bob leans heavily upon, Elmer v. Elmer, 776 P.2d 599 (Utah 1989) was concerned only with non-litigated custody cases. As set out in the Opening Brief at length, Bob sought and received an ex parte custody order at the start of the divorce litigation in 1990. I ROA 63-64. After negotiation, the parties signed a stipulation and order establishing Susan's primary physical custody. I ROA 89-90; XI ROA 2011. The proper placement of Mari, as to physical location in California and then Kansas, and the nature, extent, and duration of the child's visitation with Bob was the subject of at least eleven separate motions set out in the Record On Appeal, and gave rise to a series of examinations, hearings, re-hearings, modifications and decisions by the divorce court judge and at least one Referee. XI ROA 2011-2025. Custody and visitation were hardly "non-litigated"; the Utah case on which Bob relies is largely irrelevant.

Actually, the one relevant part of the Elmer case is its notation that the policy of preventing repetitive motions relating to custody and visitation is intended "to prevent the burdening of the courts and the harassing of parties by repetitive actions." Id., 776 P.2d at 602. Here, however, Bob has essentially unlimited funds, and he has liberally applied those funds in constant motion practice over a three-year period, using directly contradictory arguments from one year to the next, until he got what he wanted. See time-line set out in Opening Brief at 6-14, 46.

Bob correctly notes that a parent's inability to care for a child, or that the child had become "maladjusted," is evidence of changing circumstances. Susan has no problem with the general proposition, but the record in this case does not show even Bob's experts stating that Susan was abusive, neglectful, and the lower court specifically found that Susan did everything made known to her as proper in caring for Mari. XI ROA 1889. No evidence was presented that Susan would have been unable or unwilling to adopt any of the recommendations made by any of the diagnosticians, doctors, or therapists that have recently examined the child.

It is worth noting, however, that those experts themselves disagree significantly as to the child's diagnosis, prognosis, abilities, and progress. See AOB at 36 & n.8. Given that fact, it is difficult to see how Susan's beliefs in agreement or disagreement with any one of their

viewpoints, prior to the child's examination and testing, could in any way be treated as blameworthy.

Susan cannot let Bob's groundless assertion that Mari "developed learning disabilities" while in her care go unchallenged. RAB at 25. The record clearly shows that it was Susan, and only Susan, who for the three years prior to this motion did anything to attempt to deal with the child's perceived difficulties by involving the California and Kansas school authorities, etc. The expert diagnostician concluded that Mari has neurological problems, and that none of the actions complained of by Bob could be the proximate cause of any of the child's difficulties. AOB at 27-28. None of the experts called by Bob stated that Susan caused any problem that the child has had, or does have, or will have in the future.

Bob does not even attempt to identify for this Court what the un-named "changes taken together" could have been that were "of such a magnitude to establish the requisite change of circumstances." XI ROA 1998; see AOB at 31. He cannot, because there were none. Bob does not challenge this Court's holding in Moser (that the court below may not simply recite that there has been a change of circumstances without a finding of what the change was). Bob simply ignores the case and its holding entirely, refusing to acknowledge that it exists at all. This Court should note that its year-old holding remains valid, and condemns precisely what was done in this case.

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

Bob does not dispute that under this Court's oft-repeated standards, the burden of proof is on the party who seeks to alter the last prior custodial order. Nor does he deny that Mari's primary custodian has always been Susan. See, e.g., I ROA 89-90; XI ROA 2011; II ROA 259; III ROA 437-39; VI ROA 942.

Instead, Bob asserts that the lower court did not do what it said that it was doing, and that Susan waived the error in any event. RAB at 225-27. He is wrong on both counts.

Bob argues that the lower court was merely changing the "burden of production," and not that of proof, and that such is "clear" from some unspecified language in the decision below.

The lower court's decision starts, not with a recognition that Bob has a burden to overcome, but with a statement that if the parties both lived in Las Vegas, the court would have changed the custody order to make it joint legal and physical. XI ROA 1997. At the end of evidence, the lower court reiterated that she had made a pre-hearing determination to change custody, to which Susan "objected," and that "in essence" the burden of proof was on her to talk the lower court into changing its mind. XI ROA 1953.

It appears that the lower court judge missed the point entirely. There is certainly no indication in this record that the lower court judge was consciously attempting to apportion merely the "burden of production," and Bob has not shown how that (even if true) would be any less of a legal error that the lower court's erroneous misplacement of the burden of proof.

It is submitted that Bob's unsupported argument in apology for the lower court's error is sophistry without substance. The very language he quotes makes it clear that the lower court was making a subjective "best interest" analysis from the beginning, and rationalized her placement by labelling it the placement that would "most expediently facilitate her social and mental development," etc., in the lower court judge's personal opinion. XI ROA 1998-99.

Bob's second point (that Susan waived any objection to reversal of the burden of proof) is likewise wrong. Susan's counsel attempted to be polite in cautioning the lower court that it was unfairly reversing the burden of proof and that the court's pre-hearing change of custody absent any emergency, neglect, or abuse was unconstitutional. VIII ROA 1271-74. The effort was repeatedly made to bring the lower court back to the Murphy standard in determining that Susan was the primary custodian, and that the burden of proving a material change in circumstances and a substantial enhancement to the child was on Bob. XI ROA 1957, 1963-64.

There was no formal rendering of a decision on the question of burden of proof, and therefore no particular time to "object," but the record clearly shows both the lower court's misplacing of the burden of proof, and Susan's arguments that such was improper. Susan should not have been required to "prove" that there was a lack of parental concern and guidance in Bob's home in order to change the situation that the court created by changing custody.

This, however, is the position in which she was placed when the lower court changed primary physical custody for over six months before examining the child's status. There was no meaningful evidence of any lack of "proper parental concern and guidance" by Susan.

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

Oddly, Bob appears to admit that his original accusations were never found to be true or accurate. RAB at 27. Rather than rely on those accusations, he reiterates the language used by the court in expressing the judge's opinion that Bob could provide "most expediently" for Mari -- i.e., the judge's best interest balancing. He then implies some findings of fact, and presumes from the face of the judge's decision that there was sufficient evidence to support the express and his implied findings. RAB at 28.

Nothing in this section of Bob's brief even pretends to show any evidence in the record to support the judge's findings. Bob does not address in any way the evidence recited in detail in the Opening Brief's Statement of Facts, or the items summarized at pages 35-40. Those sections showed exhaustively that Susan was neither negligent nor abusive in any way, that she had done all within her power for the child, and that the court's findings even as to the parties' intentions at various times simply were not supported by the record.

Apparently, Bob concedes that the evidence only supports Susan's version of her intent in going to California, that Bob's own actions were primarily responsible for any delay in re-testing Mari, that Bob knew the child was in regular and supplemental programs where she was being "socialized with other children" for five full months before he filed a motion claiming otherwise, and that the case boils down to the child's absence from 15 half-days of entirely voluntary pre-kindergarten as the sole actual action by Susan that is attacked as a basis for changing primary physical custody. AOB at 37-39.

Bob does not attempt to show any basis for the lower court's sua sponte conclusions that Mari had been somehow "stifled" in her mother's care, or that attending school as planned in Kansas City could injure Mari's "self-esteem and socialization." AOB at 40. He provides no citations to the record to support any of the findings made by the lower court.

Where, as here, a party fails to meaningfully address a point of error, it can and should be treated as a confession of error. State, Emp. Sec. Dep't v. Weber, 100 Nev. 121, 123-24, 676 P.2d 1318 (1984); Orme v. District Court, 105 Nev. 712, 782 P.2d 1325 (1989). Here, none of the specific instances in which the record fails to support the lower court's findings are even addressed by Respondent, who should be deemed to have confessed error.

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

Again without any citation to the record whatsoever, Bob denies the claim of error by admitting but rationalizing it. Here, Bob rhetorically asks "what better evidence" there could be to support a change of custody than to change primary custody and watch to see if the child happens to do well. RAB at 29.

The cute metaphor to flowers aside, Bob provides no basis in law for using events after a change of custody for rationalizing the earlier change. Again, he refuses to even acknowledge the cases set out at pages 40-43, or any of the evidence of the record discussed in that section. Apparently, Bob concedes that the requirements set out by this Court in Moser have been violated, and that the lower court judge bootstrapped her way to justify the decision she had made over six months earlier without evidence, testimony, or a basis in fact or law. AOB at 40-41. He does not refute the testimony of his own witnesses showing that the child would be delivered to the primary care of third parties by a change of custody. AOB 43. As with the above section, Bob's non-response should be treated as a confession of error.

Susan repeats her request that this Court reaffirm its recent statement in Sims v. Sims, 109 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 170, Dec. 22, 1993), and formally hold that the lower courts are not permitted to impose a change in circumstances upon a child and a child's primary custodian, let a tenth of the child's life pass, 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 delay prior to the opportunity to present evidence was unconsciona-

bly prejudicial to Susan's ability to defend against the false accusations Bob brought in March, 1993.

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

Yet again with no citations to either law or the record, Bob attacks Susan's argument as "specious," "meanspirited," and "baseless," but nowhere says how or why. RAB at 29-31. Bob protests being called a hypocrite, but does not even try to explain why his actions, but not Susan's could have delayed the child's re-testing but not be wrongful. He offers nothing to show how his providing third party stand-ins while he attends to business demonstrates that "a parent's personal desires must be held in abeyance for the benefit of the child," while Susan's taking the child with her to be with friends and family did not. See XI ROA 2001.

Bob does not even try to defend the lower court's apparent belief that he could do less each day in the child's school than Susan did, but claim to be "actively involved" while criticizing her for not doing more. Bob offers not even a rationalization for how making the child's diet primarily fast food while out at the country club is superior to careful home-cooked meals. He offers no defense for the court's conclusion that switching the child to an "adequate" school is somehow better than leaving her in an outstanding one. AOB at 43-46. There is no defense for the conclusion that Susan "should have known" about all the child's neurological problems from her twenty days per month with Mari, while Bob "did not have any information" from which he should have seen the child's needs from his ten days per month with the child. XI ROA 2000.

The examples go on and on. If the bare allegation had been made that Bob's position was hypocritical, and that the lower court had adopted that hypocritical double-standard in rendering a decision, perhaps the matter could be dropped. On this record, however, hypocritical sexism is so overt that it would do a dis-service to both the client and justice to not bring them to this Court's attention.

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

Typically, and still without citation to fact or law, Bob dismisses the evidence of the court's apparent bias. RAB at 31. Bob apparently concedes that he wished (and the judge permitted him) to re-litigate the validity of Susan's move to Kansas permitted by Judge Mosley three years ago. Id.

Calling the judge's admittedly impermissible relocation demand a "casual observation," despite the court's word-for-word admission of intent to do just that, and that any such order would be improper, simply belies the record. See quotations set out at AOB 22, 47. Castigating Susan for revealing it on appeal by terming the argument "outlandish . . . tortured . . . defective logic" is improper and amounts to little more than petulance.

The fact remains that the lower court changed primary physical custody of a little girl from her long-standing physical custodian on virtually no evidence, and kept her here for six months because the lower court judge could only "trust" the evaluative psychologists in Las Vegas to give an honest report. Tape of March 23, 1993, at time index 16:00:30, 15:52:12. When the only wrongful act that could be dredged up in six months to rationalize that decision was taking the child out of voluntary pre-kindergarten for 15 half-days, the court then justified her decision by how well "settled" and "stable" the child was in Las Vegas. All of this behavior was judicially improper, and it smacks of personal, and locational, bias.

IV. CONCLUSION

Bob has presented nothing that adequately defends the lower court's improper ex parte communications, the pre-hearing change of custody, the legally defective decision-making process, or the lack of evidence for the decision ultimately reached.

The lower court disregarded the holdings of this court to be followed in custodial matters, and simply chose to superimpose her own views of propriety and comparative worth over that of the trial judge who had rendered a decision a year earlier. 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, choosing instead to focus on facts developing during the six-month delay during which the court's orders left the child in a de facto change of custody. Bias, personally and by location, was apparent.

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 forthwith.

Respectfully submitted,
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