ATTORNEY INFORMATION

Attorneys for Plaintiff/Defendant

*In Conjunction with Legal Aid Center of Southern Nevada Pro Bono Project*

DISTRICT COURT

CLARK COUNTY, NEVADA

PLAINTIFF NAME )

)

Plaintiff, ) Case No.: CASE NO.

)

vs. ) Dept. No.: DEPT. NO.

)

DEFENDANT NAME, )

)

Defendant. )

)

**DEFENDANT’S OPPOSITION TO PLAINTIFF’S**

**MOTION FOR TEMPORARY ORDERS**

**and**

**COUNTERMOTION FOR TEMPORARY PHYSICAL**

**CUSTODY AND VISITATION, CHILD SUPPORT and**

**PERMISSION TO RELOCATE OUTSIDE OF THE STATE OF NEVADA**

Comes now, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, counsel for Defendant, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, and herein files this Opposition to Plaintiff’s Motion for Temporary Orders and Countermotion for Temporary Physical Custody, Visitation and Child Support and Permission to Relocate Outside of the State of Nevada with the Minor Children. This motion is made in good faith and is supported by law and fact and is brought before the Court based upon the pleadings on file herein, Points and Authorities and the Affidavit of \_\_\_\_\_\_\_\_\_\_\_\_\_, attached hereto and arguments as will be made by counsel at the duly noticed hearing.

WHEREFORE, Defendant, \_\_\_\_\_\_\_\_\_ moves this Court for the following:

1. An Order denying Plaintiff’s Motion for Temporary Orders in its entirety;

2. An Order granting Plaintiff and Defendant joint legal custody of the minor child;

3. An Order granting Defendant primary physical custody of the minor child;

4. An Order establishing Plainitff’s child support obligation; and

5. For such other and further relief as the Court may deem just and proper.

DATED this DATE day of MONTH, YEAR.

By \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I.**

**FACTS**

**Factual History**

**Procedural History**

**II.**

**LEGAL AUTHORITY AND ARGUMENT**

A. **Temporary Custody and Visitation. \_\_\_\_\_\_ is a fit and proper person to be awarded joint legal and primary physical custody of the minor children**.

Regarding the temporary custody of the parties’ minor children, NRS 125.480 provides in pertinent part:

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

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

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

(a) To both parents jointly pursuant to NRS 125.490 or to either parent. If the court does not enter an order awarding joint custody of a child after either parent has applied for joint custody, the court shall state in its decision the reason for its denial of the parent’s application. When awarding custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent.

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

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

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

4. In determining the best interest of the child, the court shall consider, among other things:

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

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

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

In addition, NRS 125.510, provides in pertinent part:

1. In determining the custody of a minor child in an action brought pursuant to this chapter, the court may, except as otherwise provided in this section and Chapter 130 of NRS:

(a) During the pendency of the action, at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such an order for the custody, care, education, maintenance and support of the minor children as appears in their best interest; and . . .

The party seeking such an order shall submit to the jurisdiction of the court for the purposes of this subsection. The court may make such an order upon the application of one of the parties or the legal guardian of the minor.

Currently the parties’ minor children \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ reside with the Defendant in the \_\_\_\_\_\_\_\_\_\_\_\_\_\_. They are healthy, happy \_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_ agrees that sharing joint legal custody is in the best interest of the minor children. With respect to physical custody, however, she contends that she should be awarded primary physical custody. She has been the primary caretaker for the children all of their lives. She is a loving and caring mother who provides for their needs. It is undisputed that she has always provided for the parties’ children with a healthy, stable and safe environment.

Nevada law is clear that anyone who has committed domestic violence against the other parent or the children should not be awarded either primary or joint physical custody of the minor children. \_\_\_\_ falls within this category and physical custody of the parties’ minor children should be awarded to \_\_\_\_.

In conclusion, it is not in the best interest of the children that \_\_\_\_ should have primary or joint physical custody of the parties’ minor children.

**B.** \_\_\_\_**seeks child support pursuant to NRS 125B.030 and NRS 125B.070**.

NRS 125.040 allows a party to bring this motion for temporary child support to be paid by the opposing party. NRS 125.040 provides in pertinent part:

1. In any suit for divorce the court may, in its discretion, upon application by either party and notice to the other party, require either party to pay moneys necessary to assist the other party in accomplishing one or more of the following:

(a) To provide temporary maintenance for the other party;

(b) To provide temporary support for the children of the parties; or

(c) To enable the other party to carry on or defend such suit.

2. The court may make any order affecting property of the parties, or either of them, which it may deem necessary or desirable to accomplish the purposes of this action. Such orders shall be made by the court only after taking into consideration the financial situation of each of the parties.

The statutory guidelines for child support are set forth in NRS 125B.070 and 125B.080, and provides as a child support guideline of 25% of the non-custodial parent’s gross income when he is the parent of two (2) children. The non-custodial parent is obligated to pay a minimum of $100.00 per month per child and a maximum amount of up to \_\_\_\_\_\_ per month per child depending on the non-custodial parent’s income range. However, the court can deviate from these sums based upon the factors listed in 125B.080.

\_\_\_\_ is presently unemployed and living in \_\_\_\_.

\_\_\_\_ is presently employed and on active military duty. He is earning $\_\_\_\_ per month and only contributes $\_\_\_\_ per month for the parties’ minor children.

\_\_\_\_ asks that this Court award her child support in the amount of $\_\_\_\_ per month. This amount is in compliance with NRS 125B.070 and is based on \_\_\_\_’s stated gross monthly income of $\_\_\_\_ per month.

**C.** \_\_\_\_ **should be allowed to relocate to** \_\_\_\_ **with the parties’ minor children.**

NRS 125C.200 provides as follows:

**Consent required from noncustodial parent to remove child from state; permission from court; change of custody**. If custody has been established and the custodial parent intends to move his residence to a place outside of this state and to take the child with him, he must, as soon as possible and before the planned move, attempt to obtain the written consent of the noncustodial parent to move the child from this state. If the noncustodial parent refuses to give that consent, the custodial parent shall, before he leaves this state with the child, petition the court for permission to move the child. The failure of a parent to comply with the provisions of this section may be considered as a facto if a change of custody is requested by the noncustodial parent.

This “move” statute has received a good deal of attention from the Nevada Supreme Court in its former version, codified at NRS 125A.350.

In the determination of custody matters, the best interest of the child is the primary guiding factor. Even though relocation from Nevada is a different issue from custody, both issues rest on some of the same fundamental factual and policy considerations. The Supreme Court of Nevada determined that the best interest of the child should be the principle factor in a relocation determination. Schwartz v. Schwartz, 107 Nev. 378, 812 P.2d 1268, 1271 (1991).

When one parent is the primary physical custodian, the parent seeking to relocate may do so either with the written consent of the non-custodial parent, or absent consent, with the permission from Court, NRS 125C.200. When the Court considers a request, it must first determine whether the parent demonstrates a “sensible, good-faith reason for the move” so as to protect the relationship between the non-custodial parent and the children. Following Schwartz, the Nevada Supreme Court has also reaffirmed this standard in Jones v. Jones, 110 Nev. 1253, 885 P.2d 563, (1994); Trent v. Trent, 111 Nev. 309, 890 P.2d 1309 (1995); Davis v. Davis, 114 Nev. 1461, 970 P.2d 1084 (1998) and Reel v. Harrison, 118 Nev. 881, 60 P.3d 480 (2002).

In Jones v. Jones, 110 Nev. 1253, 885 P.2d 563 (1994), the Court held that a custodial parent seeking permission for removal of the child under NRS 125A.350 does not even need to show a significant economic or other tangible benefit to meet the threshold showing of “actual advantage” to the child and the parent. If a custodial parent shows a sensible, good faith reason for the move, the District Court should evaluate other facts enumerated in the balancing test, focusing on the possibility of reasonable alternative visitation and if the reasonable alternative visitation is possible, the burden shifts to the non-custodial parent to show concrete, material reasons why the move is inimical to that child’s best interest. Jones at 1256.

In Davis v. Davis, 114 Nev. 1461, 970 P.2d 1081 (1998), the Nevada Supreme Court recited written authority in this area, starting with Schwartz v. Schwartz, 107 Nev. 378, 812 P.2d 1268 (1991) and set forth that the proper calculus involve a balancing between the custodial parent’s interest and freedom of movement as qualified by his or her custodial obligation, the State’s interest in protecting the best interest of the child and the competing interest of the non-custodial parent.

Once the moving parent satisfies the threshold of good faith, the Court must then consider the following factors set forth in Schwartz; (1) the extent to which the move is likely to improve the quality of life of the children and custodial parent; (2) whether the custodial parent’s motives are honorable and not designed to frustrate or defeat the non-custodial parent’s visitation rights; (3) whether the custodial parent will comply with visitation if permission to relocate is granted; (4) whether the non-custodial parent’s motives are honorable, and to the extent any opposition is intended to secure a financial advantage in the form of continuing support obligations, etc.; and (5) whether the non-custodial parent will be afforded a reasonable opportunity to exercise a visitation schedule that adequately preserves and encourages a health parent-child relationship, if permission to relocate is granted. See Schwartz as 383.

It is appropriate for the Court to consider other facts in weighing and balancing the primary factors above. Such secondary factors to be considered include, but are not limited to, (1) the enhancement of positive family care and support; (2) improved housing and environmental conditions; (3) education advantages for children; (4) better employment and financial health for the custodial parent; (5) better resources for the care of the child’s special needs, medical or otherwise; and (6) whether the child opines that circumstances and relationships will improve. Schwartz at 378.

The Court must also consider the needs of the custodial parent, as the well-being and circumstances of the parent and children are “inextricably intertwined.” McGuinness v. McGuinness, 114 Nev. 1431, 1433, 970 P.2d 1074 (1998). Therefore, the justification provided by and freedom of movement of the custodial parent, must be weighed and balanced with the best interest of the children and non-custodial parent’s competing interests. Reel v. Harrison, 118 Nev. 881, 60 P.3d 480 (2002).

In Gandee v. Gandee, 111 Nev. 754, 895 P.2d 1285 (1995), the Nevada Supreme Court indicated that they construed NRS 125A.350 to mean the following: “Once the custodial parent has made a threshold showing of a good faith reason for the move, i.e., a reason that is not designed to frustrate visitation of the non-custodial parent, then the courts must consider the Schwartz factors. Recognizing that the visitation the non-custodial parent has been enjoying will necessarily be disrupted as a result of the custodial parent’s intended move, the courts must focus particularly on the possibility of alternative and reasonable visitation schedules. Id. At 763.

In Hayes v. Gallacher, 115 Nev. Adv. Op. No. 1, 972 P.2d 1138 (1999), the Nevada Supreme Court noted that the first requirement was to ask whether the parent seeking the move had made the threshold showing of sensible, good faith reasons for the move. If so, the lower court should go through the Schwartz factors, focusing on the availability of adequate, alternative visiting. The Court noted the impossibility of not causing at least one parent to be negatively impacted in any move case. The Court then announced a new rule to apply, “where relocation of the primary custodial will substantially obliterate the possibility of a traditional alternative visitation” which essentially states that if the move makes it impractical to maintain the same proportion of residential responsibilities, the move should be granted anyway if it is made because of one of a number of reasons (including to be with a new spouse) and there is no reasonable closer alternative.

\_\_\_\_ believes that in light of the law and all of the cases on this area, that she should be granted leave to relocate.

***Must show the following:***

***I have primary physical custody of*** \_\_\_\_

***I have requested permission to relocate and the permission was denied by the children’s other parent.***

***My proposed move is motivated in good faith in that I have a good reason for the move and the move is not motivated to frustrate the other parent’s contact with the children.***

***The proposed move is likely to improve the quality of life for my children and myself.***

***If the proposed move is allowed, I will comply with all proposed substitute visitation orders.***

***The motives of the non-custodial parent.***

***If the move is permitted, there is a realistic opportunity for visitation schedule between the child and the parent not moving.***

\_\_\_\_ has family and family support in \_\_\_\_. Her relocation would not prejudice \_\_\_\_.

Her desire to move is not motivated by a desire to frustrate the other parent’s contact with the children. Rather, \_\_\_\_ believes that this move will improve the quality of life for her and the children. In \_\_\_\_, she has family and the support both financially and emotionally that she would need when re-establishing herself in a new community.

D. \_\_\_\_ should be allowed exclusive possession of the marital residence.

\_\_\_\_ and the parties’ two small children have been ordered to return to Nevada. They have left their apartment in Missouri, their family support and \_\_\_\_ has taken a leave of absence from her schooling. In Nevada, \_\_\_\_ has been denied access to the parties’ marital residence by \_\_\_\_. He has refused to allow her into the home to even retrieve her personal belongings in violation of the Court’s previous order.

As a result, \_\_\_\_ and the parties’ two small children are residing in \_\_\_\_. They have no income and no resources and the $\_\_\_\_per month that \_\_\_\_ periodically gives them is not sufficient to allow them to live anywhere else. As a part owner of the martial residence, \_\_\_\_ and the children should be allowed to reside in their own home and enjoy exclusive possession of that home during the pendency of this action or until such time as \_\_\_\_ is allowed to leave Nevada. She has no money and no resources here. \_\_\_\_, on the other hand, is employed with \_\_\_\_. He has resources and could find himself suitable housing during the pendency of this action.

D. **\_\_\_\_ seeks Court ordered mediation.**

EDCR 5.70 (a) states in part, “All parties filing an answer for domestic contested child custody, access or visitation disputes must attend mediation prior to the hearing or trial of their matter.” \_\_\_\_ would like to attempt to resolve custody and visitation issues regarding the minor child by mediation.

**III.**

**CONCLUSION**

\_\_\_\_ has set forth herein valid reasons as to why she should be awarded primary physical custody of the parties’ minor children. She is reasonably seeking child support and an Order from the Court allowing her to relocate to \_\_\_\_. In addition, she has proposed a visitation schedule in her Counterclaim that is reasonable. For the foregoing reasons, \_\_\_\_ respectfully asks that this Court grant to her the relief that she has requested.

WHEREFORE, the Defendant \_\_\_\_, respectfully requests that this Court issue an Order as follows:

1. That \_\_\_\_ be awarded joint legal and primary physical custody of the minor children subject to \_\_\_\_’s visitation rights as stated;

2. That \_\_\_\_ be awarded child support for the minor children, retroactive to the date of \_\_\_\_, the date the parties’ separated;

3. That \_\_\_\_ be allowed to relocate to \_\_\_\_;

4. For such other and further relief as this Court deems just and equitable.

DATED this DATE day of MONTH, YEAR.

**LEGAL AID CENTER OF SOUTHERN NEVADA, INC.**

By \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

ATTORNEY INFORMATION

Attorneys for Plaintiff/Defendant

*In Conjunction with Legal Aid Center of Southern Nevada Pro Bono Project* ///

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**AFFIDAVIT OF \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

STATE OF NEVADA )

ss:

COUNTY OF CLARK )

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_,** being first duly sworn, upon oath, deposes and says:

I am the Defendant-Mother in the subject case and I am familiar with the facts. I have read the foregoing ***Opposition to Plaintiff’s Motion for Child Support, Visitation and Custody and Countermotion for Custody, Visitation Child Support and Consolidation with Case \_\_\_\_\_\_\_*** and the factual averments contained therein are true and correct to the best of my knowledge, except as to those matters based on information and belief, and as to those matters, I believe them to be true. Those factual averments contained in the preceding are incorporated herein as if set forth in full.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

PLAINTIFF/DEFENDANT NAME

**SUBSCRIBED** and **SWORN** to before me

this DATE day of MONTH, YEAR,

by NOTARY NAME.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

NOTARY PUBLIC

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