CHILD CUSTODY MODIFICATION LAW: THE NEVER-ENDING BATTLE FOR PEACE OF MIND

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Introduction

Ellis v. Carucci¹ represents an evolution in Nevada's child custody laws that should continue.² Before Ellis, Nevada courts modified custody arrangements without explicitly considering the best interests of the child. Ellis cemented the legislative intent behind Nevada Revised Statute (NRS) § 125.480³ to make the child's best interest the focus of the judge's decision in custody cases.4

However, Ellis and NRS §125.480 are not enough to accomplish this overarching goal. The Nevada legislature should revise NRS § 125.480 so that the statute explicitly recognizes the instability and adjustments that children of divorce must endure. The statute should also be revised to identify factors that are not appropriate for consideration under the best interests standard and to provide for the possible use of a Court Appointed Special Advocate.⁵

Part I of this Note describes the historical development of Nevada's child custody laws, from the early law in child custody to the contemporary law and the Ellis decision. Part II explains the principal case, Ellis v. Carucci. Part III analyzes the Nevada Supreme Court's decision in Ellis v. Carucci. Part IV proposes a revision of NRS § 125.480. Part V analyzes the probable effects of the revisions suggested in Part IV. Finally, Part VI concludes the note suggesting that courts must analyze additional issues to properly focus on the child's best interest in a custody modification decision.

³ Nev. Rev. Stat. Ann. §125.480(1) (West 2008) (The statute states, in relevant part: "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.").

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¹ Ellis v. Carucci, 161 P.3d 239 (Nev. 2007).

² See id. at 243.

⁴ Ellis, 161 P.3d at 242.

⁵ A Court Appointed Special Advocate, or CASA, is a volunteer who represents the child's best interest. See infra notes 95, 134-42 and accompanying text.

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I. HISTORICAL DEVELOPMENT OF NEVADA'S CHILD CUSTODY LAWS

Recently, child custody law in Nevada has adjusted in an effort to provide more stability for families affected by divorce and custody battles. As a result, judges now consider various factors when a parent attempts to modify a custody arrangement in which the custodial parent has primary physical custody. These factors are the primary focus of this evolution in custody law.

The History of Child Custody Laws

In America's early days, the law regarded children as property of their fathers or assumed that there existed a master-servant relationship between children and fathers.⁶ Later, the "tender years" doctrine⁷ emerged, in which courts began to favor mothers over fathers when granting custody.⁸ Finally, the courts shifted their focus to the welfare of the child and the standard for custody decisions became the best interests of the child.⁹

1. The Paternal Rights Doctrine

At the beginning of America's history, children were regarded as vital to the colonial labor force and the agrarian culture, resulting in children being employed as if they were adults.¹⁰ The common law reflected the father's authority over the children; a father had the right to custody over his legitimate children, which encompassed a right to association with them and a right to their services. 11 These paternal rights were enforceable against all parties, even the children's mother.¹¹

2. The Shift to a Maternal Preference

After America developed its agrarian foundation, American society shifted its focus to the development of industry.¹³ Parents now had the opportunity to focus more attention on each child because they enjoyed more free time.¹⁴ Mothers became responsible for making sure that their children were not corrupted by the outside world and took a more prominent role in the lives of their children.15

⁶ See Mary Ann Mason, From Father's Property to Children's Rights: The His-TORY OF CHILD CUSTODY IN THE UNITED STATES 6 (1994).

⁷ The "tender years" doctrine was a preference for keeping young children with their mothers because the courts assumed that a mother could best give the needed love and affection to the young child. See infra notes 13-26 and accompanying text.

⁸ See Mason, supra note 6, at 63.

⁹ See infra notes 15-45 and accompanying text (explaining how custody law changed in Nevada to eventually become the best interests of the child standard).

¹⁰ Mason, supra note 6, at 2; Suzanne Ramos, The Complete Book of Child Custody 32 (1979).

¹¹ Mason, *supra* note 6, at 6.

¹² *Id*.

¹³ Ramos, supra note 10, at 33.

¹⁵ Mason, supra note 6, at 52.

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Noticing this change, the courts began to shift toward using a maternal preference in custody decisions. In *Prather v. Prather*, ¹⁶ a South Carolina court granted custody of a five-year-old girl to the mother, defying the paternal rights doctrine for the first time.¹⁷

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Other courts followed the *Prather* court's lead and the "tender years" doctrine soon developed. During this time, the courts emphasized the importance of the child staying with his/her mother because the very young needed a mother's care. 18 The courts granted custody to the mother, unless there was evidence that she was unfit to care for her child.¹⁹

In Nevada, *Peavey v. Peavey*²⁰ authorized courts to use the "tender years" doctrine in custody cases.²¹ In *Peavey*, the Nevada Supreme Court stated that the child should be placed with the mother, absent a showing that she is unfit.²² The Court felt children should receive the benefit of a mother's attention, care, supervision, and advice and that there was no substitute for a mother's love and devotion.²³ The Court supported its decision by noting that the Nevada legislature implied the applicability of the "tender years" doctrine in its custody statute.²⁴

Five years later, the Nevada Supreme Court clarified the "tender years" doctrine in Smith v. Smith. 25 In Smith, the Nevada Supreme Court held that the trial court has the discretion to decide whether children fall within the category of tender years, which the court must decide on a case-by-case basis.²⁶

Finally, the Nevada Supreme Court expressly overruled *Peavey*'s "tender years" doctrine in Arnold v. Arnold²⁷ because the Court felt as though the doctrine was not up to the standards that the Court demanded.²⁸ To overrule Peavey, the Nevada Supreme Court relied on the Nevada legislature's expression of public policy²⁹ that courts should not consider the sex of a parent when determining custody.³⁰ The Court further noted that the "tender years" doctrine was "nothing more than an expression of a culturally enforced bias favoring rigidly and unrealistically defined societal sex roles."31

¹⁶ Prather v. Prather, 4 S.C. Eq. (4 Des. Eq.) 33 (1809).

¹⁷ Id. at 44, cited in Mason, supra note 6, at 60.

¹⁸ See Ramos, supra note 10, at 34.

¹⁹ Mason, supra note 6, at 63.

²⁰ Peavey v. Peavey, 460 P.2d 110 (Nev. 1969), overruled by Arnold v. Arnold, 604 P.2d 109 (Nev. 1979).

²¹ Peavey, 460 P.2d at 111.

²² *Id*.

²³ *Id*.

²⁵ Peavey, 529 P.2d 209, 210 (Nev. 1974).

²⁷ Peavey, 604 P.2d 109 (Nev. 1979).

²⁸ *Id.* at 110.

²⁹ Id.; "In determining custody of a minor child... the sole consideration of the court is the best interest of the child, and no preference may be given to either parent for the sole reason that the parent is the mother or father of the child." Act of May 3, 1979, ch. 269, sec. 2, § 1, 1979 Nev. Stat. 367, 368 (codified as amended at Nev. Rev. Stat. § 125.410) (current version at Nev. Rev. Stat. § 125.510).

³⁰ Arnold v. Arnold, 604 P.2d 109, 110 (Nev. 1979).

³¹ *Id*.

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Nevada's Murphy Test and Its Progeny

After the Nevada Supreme Court overruled the "tender years" doctrine, the next standard that was widely used to decide child custody modification issues in Nevada was the Murphy test.³² In Murphy v. Murphy,³³ the Court was asked to determine whether a positive change in a mother's mental health constituted an improvement in the children's welfare.³⁴ First, the Court awarded temporary physical custody to the mother and then reversed in favor of the father one year later.³⁵ Three years after that decision, the mother regained custody.³⁶ The father appealed the custody modification and the Court finally held that a positive change in the mother's health alone was not evidence that the children's welfare would be improved if the court modified custody in favor of the mother.³⁷

Murphy provided that a modification to the custody arrangement was only appropriate when two factors were satisfied³⁸: First, the circumstances of the parents must have been materially altered.³⁹ Second, the child's welfare must be substantially enhanced by the change in custody. 40 Ultimately, the Court found that the second prong was not satisfied in this case.⁴¹

After Murphy, the Nevada Supreme Court clarified the Murphy test in a line of cases. ⁴² In *Adams v. Adams*, ⁴³ the Nevada Supreme Court decided that a mother's improvement in mental health did not qualify as a change in circumstances under the first prong of the Murphy test. 44 Furthermore, the Court noted that it could not find that the child's welfare would be substantially enhanced by the change in custody.⁴⁵

The Introduction and Effect of NRS § 125.480

This line of child custody jurisprudence was interrupted after *Adams* when the Nevada legislature codified what the primary focus should be in custody cases: the best interest of the child.⁴⁶ After the legislature passed NRS § 125.480, the Nevada Supreme Court in Sims v. Sims⁴⁷ concluded that a court

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32 Adams v. Adams, 464 P.2d 458, 460 (Nev. 1970).
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³⁶ *Id*.

⁴⁶ Nev. Rev. Stat. Ann. § 125.480(1) (West 2008).

³³ Murphy v. Murphy, 447 P.2d 664 (Nev. 1968).

³⁴ *Id.* at 665.

³⁵ *Id*.

³⁷ *Id*.

³⁸ *Id*.

³⁹ *Id*.

⁴⁰ Id.; see also Ellis v. Carucci, 161 P.3d 239, 240 (Nev. 2007).

⁴¹ Murphy, 447 P.2d. at 665.

⁴² Adams v. Adams, 464 P.2d 458, 459 (Nev. 1970); Sims v. Sims, 865 P.2d 328, 330 (Nev. 1993); Gepford v. Gepford, 13 P.3d 47, 49-50 (Nev. 2000); Martin v. Martin, 90 P.3d 981, 983 (Nev. 2004).

⁴³ Adams, 464 P.2d 458.

⁴⁴ *Id.* at 459.

⁴⁵ *Id*.

⁴⁷ Sims v. Sims, 865 P.2d 328 (Nev. 1993).

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should not punish a parent for ignoring a questionable⁴⁸ court order by awarding primary physical custody to the other parent under the guise that it would be in the best interest of the child.⁴⁹

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Following Sims, the Nevada Supreme Court clarified the second prong of the Murphy test in Gepford v. Gepford⁵⁰: the child's welfare must be substantially enhanced by modifying custody in favor of the non-custodial parent.⁵¹ The Court held that the non-custodial parent would need to show that the change in custody would enhance the child's welfare.⁵² Under the facts of Gepford, the non-custodial parent did not accomplish this by citing that one child was unharmed when left unattended when sick while the custodial parent was at work.⁵³ The Court decided that more than this isolated incident was needed to show that the children's welfare would be substantially enhanced by a change in custody.⁵⁴

After Gepford, the Nevada Supreme Court decided, in Martin v. Martin, 55 that when a custodial parent sought to prevent contact between the child and the non-custodial parent, a change in circumstances existed only if the prevention was "substantial or pervasive." The Court further noted that granting a change in custody solely on the basis of one parent's remarriage would upset the goal of providing a stable environment for the children.⁵⁷

Seven years after Gepford, the Nevada Supreme Court modified the Murphy test in Ellis v. Carucci in an attempt to make the focus of child custody modification cases the best interest of the child.⁵⁸

⁴⁸ The Court noted that an order requiring a ten-year-old child to "be 'within vision range of the responsible adult at all times' and 'not to be left alone for even 5 [sic] minutes' seems an absurd order." Id. at 330.

It may not be ideal to leave a ten-year-old child with the flu at home alone for a few hours (albeit with telephone access) but it hardly smacks of a reason to lose custody. While we assume that the referee, in making that order, wanted to impress upon the mother the need for proper supervision, the court should not translate impractical parental advice into impractical court orders.

Id.

⁴⁹ *Id*.

⁵⁰ Gepford v. Gepford, 13 P.3d 47 (Nev. 2000).

⁵¹ *Id.* at 49.

⁵² *Id*.

⁵³ *Id.* at 48-49.

⁵⁴ *Id.* at 49.

⁵⁵ Martin v. Martin, 90 P.3d 981 (Nev. 2004).

⁵⁶ *Id.* at 983.

⁵⁷ Id. at 983-84 (The Court held that "if remarriage alone could signify a change in circumstances, then children's home environments could be destabilized solely on that basis. Stability is one of the primary objectives behind the changed circumstances requirement, and children's stability should not be disturbed simply because the noncustodial parent has been

⁵⁸ Ellis v. Carucci, 161 P.3d 239, 243 (Nev. 2007).

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II. THE PRINCIPAL CASE: ELLIS V. CARUCCI

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A. The Conflict

When Melinda Ellis and Roderic Carucci divorced in December 2000, a paternity and custody agreement was part of the divorce decree. The agreement provided for joint legal custody of the couple's daughter, Geena, with Ellis having primary physical custody, and Carucci having liberal visitation. However, by March 2004, Carucci felt that there had been a change in circumstances because Geena's performance in school was declining and he sought to modify the custody arrangement.

B. Procedural History

As a result of Geena's declining school performance, Carucci filed a motion to modify primary physical custody. The district court scheduled a hearing after Carucci filed his second emergency motion to modify custody. At the hearing, Geena's elementary school teacher, Bridgett Banta, testified that Geena was "an exceptionally bright student" who had performed well in her first two quarters but struggled through her last two quarters. According to Banta, Geena failed to turn in homework assignments, talked in class, refused to revise her work, and was not applying herself. Banta testified that Carucci "regularly inquired about" Geena's progress but "Banta had very little contact with Ellis."

The district court denied Carucci's emergency motion to modify custody. For Instead, the court scheduled an evidentiary hearing three months later in July 2004 and the parties stipulated that a Dr. Joann Lippert would conduct a family evaluation and submit a report to the court. Dr. Lippert testified that Geena was attached to both parents and recommended that the parties share physical custody because this arrangement would serve Geena's best interests. Dr. Carucci argued that the Court should grant him primary physical custody because he and his new wife emphasized education and he had shown an interest in Geena's education by staying in contact with her teacher. Ellis testified that she and her new husband also helped Geena with her homework and that she believed Geena was simply having trouble adjusting to the divorce of her parents. Ellis also testified that Geena's decline in performance was a result of the stress associated with her parents' ongoing custody dispute.

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⁵⁹ *Id.* at 240.

⁶⁰ *Id*.

⁶¹ *Id*.

⁶² *Id*.

⁶³ *Id*.

⁶⁴ *Id*.

⁶⁵ *Id*.

⁶⁶ *Id.* at 241.

⁶⁷ *Id*.

⁶⁸ *Id*.

⁶⁹ *Id*.

⁷⁰ *Id*.

⁷¹ *Id.* ⁷² *Id.*

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district court ruled that a modification from primary physical custody to joint physical custody was in Geena's best interest because Geena's declining performance constituted a change of circumstances to warrant modification.⁷³ Therefore, the court modified the custody arrangement so that each parent would have Geena for a week at a time.⁷⁴ The district court felt constrained by the Murphy test and ruled that, in this case, the child's best interest was paramount.75

Ellis appealed the order on the grounds that the court abused its discretion by granting Carucci's motion to modify primary physical custody because the evidence did not demonstrate either a change in circumstances or that the modification would be in Geena's best interest.⁷⁶

The Nevada Supreme Court's Ruling

In reviewing the district court's decision, the Nevada Supreme Court held that the trial court did not abuse its discretion for two reasons: (1) a four-month slide in performance constituted a substantial change in circumstances affecting Geena's welfare, and (2) parental involvement in a child's education is certainly in the child's best interest.⁷⁷ The Court found that these two factors warranted a modification in the custody arrangement.⁷⁸ The Court also modified the Murphy test to comport with the language of NRS § 125.480, such that the focus of the modification decision is on the best interests of the child.⁷⁹ The court believed the Murphy test improperly placed too much emphasis on the parents and not the children.⁸⁰ Now, when Nevada courts attempt to determine whether primary physical custody arrangements should be modified, two factors must be satisfied for modification to be warranted: "(1) there must have been a substantial change in circumstances affecting the welfare of the child and (2) the child's best interest is best served by the modification."81

Under *Ellis*, modification of child custody may serve a child's best interest even if the modification does not substantially enhance the child's welfare.⁸² The Ellis decision also recognized that when determining whether the modification would serve the best interests of the child, courts should use the factors enumerated in NRS § 125.480(4) along with "any other relevant considerations."83 However, in *Ellis*, the court performed an explicit analysis according to the factors that the legislature provided in NRS § 125.480. The Court recognized that other jurisdictions modify custody while keeping the stability of the child's environment in mind, and the Nevada Supreme Court acknowledged

⁷⁴ *Id*.

⁷³ *Id*.

⁷⁵ *Id*.

⁷⁶ *Id*.

⁷⁷ *Id.* at 244.

⁷⁸ *Id*.

⁷⁹ *Id.* at 243.

⁸⁰ *Id*.

⁸¹ Id. at 242.

⁸² Id. at 243; see also McMillen v. McMillen, 602 A.2d 845, 847 (Pa. 1992) (custody orders can be modified without proof of a substantial change in circumstances as long as the modification is in the best interests of the child).

⁸³ Ellis, 161 P.3d at 243.

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that this is the correct course to follow.⁸⁴ The Court, however, never stated how it used NRS § 125.480 in its analysis in Ellis, other than noting that the statute provides an overarching principal to follow: the best interests of the child standard. The lack of inclusion of NRS § 125.480 is likely because the statute does not guide the courts effectively; the statute simply states a standard to be imposed in custody modification proceedings and lists a few factors to follow, but overall the statute is vague and allows the courts to utilize their discretion. This lack of guidance is not in the best interest of the children of Nevada, and will create an inconsistency in decisions when courts are permitted to substitute personal biases for what is in the best interests of the child.

III. Analysis of Ellis v. Carucci

Even though Ellis v. Carucci followed NRS § 125.480 by applying the best interest of the child standard, there is still much progress to make to ensure that decisions are made that are truly in the best interests of the child. The Nevada Supreme Court was successful in prioritizing the best interest of the child in *Ellis*. By changing the language of the *Murphy* test to reflect that the change in circumstances had to affect the child in some substantial way, the Court reminded the lower courts of the legislature's intent to keep custodial modifications centered on the best interest of the child.⁸⁵

Nonetheless, Ellis did not solve all of the problems associated with custody modification. Issues like adjustment, instability, and the concept of divorce as a process are nowhere addressed in NRS § 125.480.86 Furthermore, factors that judges should not consider as part of the best interests analysis are also not delineated in NRS § 125.480.87 This aperture in the statute renders the statute somewhat vague and opens the door for abuse of discretion, as has happened in other jurisdictions.⁸⁸ Therefore, the legislature should intervene via statutory amendment once again and clarify certain aspects of custody law that are still uncertain to achieve greater consistency in court decisions.

Before Ellis, courts had the discretion to modify custody arrangements when the parents incurred a substantial change of circumstances, without any requirement that the change actually affect the child. This created the opportunity for an abuse of discretion: judges were modifying custody in situations in which the changes in circumstances were not affecting the children.⁸⁹ For example, in Sims, the trial court modified the custody arrangement as a way to punish the mother for disobeying an order that was questionable in the first place: a ten-year-old child was not supposed to be left unsupervised for even five minutes and was to be within vision range of the supervising adult at all times. 90 The Nevada Supreme Court reversed the modification because pun-

87 Id.

⁸⁴ Id. at 242-43 & n.14 (noting that "custodial stability is still of significant concern when considering a child's best interest").

⁸⁵ Nev. Rev. Stat. § 125.480 (2007).

⁸⁶ *Id*.

⁸⁸ See supra notes 77-83.

⁸⁹ See C. Gail Vasterling, Child Custody Modification Under the Uniform Marriage and Divorce Act: A Statute to End the Tug-of-War?, 67 WASH. U. L.Q. 923, 928 (1989). 90 Sims v. Sims, 865 P.2d 328, 330 (Nev. 1993).

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ishing the mother was the primary basis for the modification and because the modification was not in the child's best interest. 91 Although the Nevada Supreme Court recognizes that the legislature intended to focus on the best interests of the child, the opportunity for lower courts to abuse their discretion would force the Nevada Supreme Court to continuously review the lower courts' rulings in this area.⁹² Thus, the statute should be clarified so that the lower court judges have explicit guidelines to determine custody modification.

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Now that Ellis has established somewhat more concrete guidelines for deciding a modification of custody case, it is likely that custody decisions will be more consistent than they have been in the past. Judges now know that they must scrutinize the evidence to make certain that the child actually will be affected by a change in circumstances. By adding the word "substantially" to the first prong of the test, Ellis ensured that modification that served the child's best interest but did not substantially enhance the child's welfare could not be made.93

However, there are other issues that must be considered before Nevada's custody modification proceedings will truly reflect the best interests of the child. Issues like adjustment, stability, and the fact that divorce is a process are factors that should be included in NRS § 125.480.94 There should also be a list of factors that courts should not include in their analysis of what is in the best interests of the child, such as religion, lifestyle, parents' sexual orientation, parents' gender, parents' financial situation, and the child's preference. 95 Lastly, the possibility of expanding Court Appointed Special Advocates (CASAs) into child custody modification proceedings should be included in NRS § 125.480.96

⁹¹ *Id.* at 330-31.

⁹² Nevada does not have an intermediate appellate court. Therefore, every decision that is appealed goes to the Nevada Supreme Court and creates a huge burden.

⁹³ Ellis v. Carucci, 161 P.3d 239, 243 (Nev. 2007).

⁹⁴ The Nevada Legislature has not considered including these factors in NRS § 125.480 in the past, as evidenced by the lack of discussion of these factors in the legislative history for § NRS 125.480. See generally Assemb. 51, S. Comm. on the Judiciary, 73rd Sess. (May 9 & 17, 2005); Assemb. 51, Assemb. Comm. on the Judiciary, 73rd Sess. (Feb. 10, 22 & 28, Mar. 4 & 15, 2005); Assemb. 51, Assemb. Comm. on Ways & Means, 73rd Sess. (2005); Assemb. 395, S. Comm. on the Judiciary, 68th Sess. (1995); Assemb. 395, Assemb. Comm. on the Judiciary, 68th Sess. (1995); S. 609, S. Comm. on the Judiciary, 66th Sess. (1991); S. 609, Assemb. Comm. on the Judiciary, 66th Sess. (1991); S. 188, S. Comm. on the Judiciary, 61st Sess. (1981); S. 188, Assemb. Comm. on the Judiciary, 61st Sess. (1981).

⁹⁵ The Nevada Legislature has never considered the idea of explicitly instructing courts not to include these factors in their decisions, as evidenced by the lack of discussion of these factors in the legislative history for NRS § 125.480. See generally Assemb. 51, S. Comm. on the Judiciary, 73rd Sess. (May 9 & 17, 2005); Assemb. 51, Assemb. Comm. on the Judiciary, 73rd Sess. (Feb. 10, 22 & 28, Mar. 4 & 15, 2005); Assemb. 51, Assemb. Comm. on Ways & Means, 73rd Sess. (2005); Assemb. 395, S. Comm. on the Judiciary, 68th Sess. (1995); Assemb. 395, Assemb. Comm. on the Judiciary, 68th Sess. (1995); S. 609, S. Comm. on the Judiciary, 66th Sess. (1991); S. 609, Assemb. Comm. on the Judiciary, 66th Sess. (1991); S. 188, S. Comm. on the Judiciary, 61st Sess. (1981); S. 188, Assemb. Comm. on the Judiciary, 61st Sess. (1981).

⁹⁶ The Nevada Legislature has not considered CASAs in the past, as evidenced by the lack of discussion of this topic in the legislative history for NRS § 125.480. See generally Assemb. 51, S. Comm. on the Judiciary, 73rd Sess. (May 9 & 17, 2005); Assemb. 51,

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A. Factors That Should Be Added Under the Best Interests Standard in NRS § 125.480

There a number of factors that should be included in NRS § 125.480 to fully encompass the best interests of the child standard. Such factors are the issue of adjustment, the issue of stability, and that fact that divorce is a process.

1. The Issue of Adjustment

The higher "substantially" standard in *Ellis* is a safeguard to serve the best interests of the child. However, this safeguard is not sufficient protection from arbitrary decision-making. Before *Ellis*, commentators raised issues regarding custody that are not addressed by *Ellis*. One such issue is that children in divorced families often experience an adjustment period.⁹⁷ This period of time can vary from case to case, but during this time the child is learning to cope with the divorce and its effects.⁹⁸ During this transitional period, a child may act out in various ways.⁹⁹ Therefore, a child may be acting out because she is having trouble adjusting and not as a result of changed circumstances. This is what Ellis was referring to when she testified that Geena was having trouble dealing with the stress of her parents' divorce and that was the reason she was performing poorly in school.¹⁰⁰ The one thing that all of these custody modification cases have in common is that the parents are divorced. Because this fact is constant in every case, the adjustment issue should be more of a factor in deciding custody modification.

2. The Issue of Stability

This leads to the second issue: kids need stability.¹⁰¹ If the adjustment period is plagued with instability, the child may take longer to adjust to the divorce, or may never adjust.¹⁰² Frequent changes in custody are not in the child's best interest because they impede the child's progress in learning how to cope with the divorce.

The Nevada Supreme Court recognized this issue of instability in *Ellis*. ¹⁰³ Custodial stability is important in promoting the emotional and developmental needs of children and, therefore, judges presiding over custodial modifications should thoroughly review the child's needs so as not to disturb the adjustment process. ¹⁰⁴

Assemb. Comm. on the Judiciary, 73rd Sess. (Feb. 10, 22 & 28, Mar. 4 & 15, 2005); Assemb. 51, Assem. Comm. on Ways & Means, 73rd Sess. (2005); Assemb. 395, S. Comm. on the Judiciary, 68th Sess. (1995); S. 609, S. Comm. on the Judiciary, 66th Sess. (1991); S. 609, Assemb. Comm. on the Judiciary, 66th Sess. (1991); S. 609, Assemb. Comm. on the Judiciary, 66th Sess. (1991); S. 188, S. Comm. on the Judiciary, 61st Sess. (1981); S. 188, Assemb. Comm. on the Judiciary, 61st Sess. (1981).

⁹⁷ See generally Joan G. Wexler, Rethinking the Modification of Child Custody Decrees, 94 YALE L.J. 757, 785-89 (1985).

⁹⁸ See generally id.

⁹⁹ *Id.* at 791.

¹⁰⁰ Ellis v. Carucci, 161 P.3d 239, 241 (Nev. 2007).

¹⁰¹ See Wexler, supra note 97, at 789-97.

¹⁰² See id.

¹⁰³ Ellis, 161 P.3d at 242.

¹⁰⁴ See id. at 243.

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Because the state continuously acts as parens patriae concerning the child's welfare, decisions that the courts make cannot be said to ever really be final. 105 Therefore, more safeguards are needed to ensure that decisions that courts make are sound and necessary. Judges should be guided by concrete principles when deciding whether to modify a custody arrangement. If the courts haphazardly modify custody arrangements, the children involved will only suffer. Surely, this result is not in the best interests of the child. The issues discussed above outweigh the possibility of modification only when there is no real showing that there was a substantial change in circumstances affecting the welfare of the child and the child's best interest is best served by the modification. For example, if there is domestic violence present or basic needs such as food, shelter, and clothing are not being met, there is a basis for modification that will outweigh the risks of adjustment and instability because these things have the potential to harm the child more than a disruption in stability or adjustment.

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The Issue of Divorce as a Process

Finally, adjustment and stability help to identify the final issue: divorce is better understood as an ongoing process, not just a single event. 106 If the court keeps modifying the custody arrangement, this has the propensity to impede the child's progress; the child is repeatedly being asked to adjust and endure an unstable environment, instead of just making the transition once. Every time there is a change in custody, the child must reevaluate and adapt to the current situation without knowing that the situation will be the same in a month. This lack of stability eradicates much of the incentive for the child to adjust in the first place. The result is a frustrated child who acts out because of all the changes that are affecting her when these changes were made in order to counteract the behavior of the child in the first place.¹⁰⁷ It is a never-ending battle because the cause of the child's behavioral problems is never truly identified.

Geena's struggle to adjust to her parents' divorce may have been one of the factors that affected Geena's performance in school, as Ellis alluded to when she testified in court. 108 By granting joint physical custody, the Court gave Geena a better chance to adjust to the divorce because she was still able to spend a significant amount of time with both of her parents; she was not being forced to just adjust to a new life with one parent being in her life the majority of the time. The Court may have taken this point into consideration when it

¹⁰⁵ 4 Child Custody and Visitation Law and Practice Ch. 25 § 25.01[2][a] (Matthew Bender, Rev. Ed.). Black's defines parens patriae as the following: "The state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for them-BLACK'S LAW DICTIONARY 1221 (9th ed. 2009).

¹⁰⁶ Wexler, *supra* note 97, at 785.

¹⁰⁷ It has been widely recognized that divorce negatively affects children. See generally Catherine D. Bridwell, The Psychology of Divorce—A Guide for Non-Mental Health Professionals, 10 N.J. Prac. Series, Fam. L. & Prac. §1A.5 (2008), available at Westlaw 10 NJPRAC § 1A.5; Joan B. Kelly, Developing Beneficial Parenting Plan Models for Children Following Separation and Divorce, 19 CHILD CUSTODY AND SHARED PARENTING 49, 50 (Nat'l Bus. Inst.) (2006), available at Westlaw 33778 NBI-CLE 48. 108 Ellis, 161 P.3d at 241.

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made its decision to grant joint physical custody, but there is nothing in the opinion that explicitly states this or anything in NRS § 125.480 that compels it to be taken into consideration.

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Because issues like adjustment, stability, and the fact that divorce is a process all have the propensity to greatly affect a child involved in a custody battle, these factors should be included in NRS § 125.480 to provide a complete analysis of the best interests of the child. However, there are other considerations that the statute should specifically exclude from a court's consideration in determining custody.

B. Factors to Be Omitted Under the Best Interests of the Child Standard in NRS § 125.480

While the Nevada Legislature should consider inserting the aforementioned factors into NRS § 125.480, there are other factors that have no place in the analysis of the child's best interests. In other jurisdictions, inclusion of such factors leads to an abuse of discretion on the judge's part and a decision that may not be in the best interests of the child. 109 To prevent this from happening in Nevada, the legislature should consider explicitly stating that some factors should not be considered when determining whether custody modification is in the best interests of the child. Such factors may include religion, lifestyle, parents' sexual orientation, parents' gender, parents' financial situation, and the child's preference.

1. Religion

Some courts have considered the religious beliefs of parents and children when making custody decisions. Although the Free Exercise Clause of the First Amendment of the United States Constitution prohibits discrimination based on religion, 110 judges are generally allowed to bring religion in as a factor when it interferes with the best interests of the child. The general rule is that there must be some showing of harm to justify modifying custody based on religion.112

For example, in *Bentley v. Bentley*, ¹¹³ a New York appellate court decided that a father could not instruct his children on being a Jehovah's Witness or

¹⁰⁹ See Gould v. Gould, 342 N.W.2d 426, 429, 432 (Wis. 1984) (lower court modified custody because mother was living with man to whom she was not married); but see S.E.G. v. R.A.G., 735 S.W.2d 164, 165-66 (Mo. Ct. App. 1987) (despite ruling that both parents provided loving environments for the children, court affirmed custody modification because it thought that mother's homosexuality would entice others to make fun of her children); Boykin v. Boykin, 370 S.E.2d 884, 886 (S.C. Ct. App. 1988) (custody is modified based on mother's "flagrant promiscuity").

¹¹⁰ The First Amendment's Free Exercise Clause states the following: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . ." U.S. Const. amend. I.

¹¹¹ Bentley v. Bentley, 448 N.Y.S.2d 559, 560 (N.Y. App. Div. 1982).

¹¹² Id. ("The Family Court was well within its broad discretionary power in reaching its determination that the best interests of these children dictate that they be reared in only one religion.").

¹¹³ Bentley v. Bentley, 448 N.Y.S.2d 559 (N.Y. App. Div. 1982).

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take them to religious events. 114 The father claimed that this decision was a violation of his first amendment rights. 115 The court held that there was evidence that the children were being harmed by their exposure to their father's religion; the children felt strained because their parents were attempting to instruct them in different religions. 116 Therefore, the lower court's ruling prohibiting the father's instruction of his children in his religion was affirmed because there was evidence that the children were being harmed. 117

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In order to prevent an abuse of discretion and to avoid a violation of constitutional rights, the Nevada legislature should consider revising NRS § 125.480 to explicitly state that religion may only be taken into consideration under the best interests of the child standard if there is some evidence that religion, or lack thereof, will harm the child.

2. Lifestyle

Although lifestyle may seem to be a simple, straightforward topic that should be considered when the judge analyzes what is in the best interests of the child, it is not. This is an area that can easily be vulnerable to an abuse of discretion, especially because NRS § 125.480 contains the word "wholesome" without defining what the term encompasses. 118 For the purpose of this note, "lifestyle" refers to the manner a parent lives his or her life.

For example, in Gould v. Gould, 119 a Wisconsin court criticized the lower court's decision to modify custody when the lower court found that the father's home would be a better place for the child to live because the mother was living with a man she was not married to at the time. 120 The Wisconsin Appellate Court ruled that in order to modify custody there must be some harm to the child, which was not present in this case because the child was flourishing in the environment that her mother and her mother's live-in boyfriend provided.121

In order to prevent the courts from abusing their discretion and ruling that a certain lifestyle is not in the best interests of the child, the Nevada legislature should consider revising NRS § 125.480 to explicitly state that there must be a showing of harm to the child before custody is modified based on lifestyle choices of the parents, as was suggested in reference to religion. After revising the statute as suggested, the Nevada legislature will better serve the best interests of the child because the harm test makes it clearer for judges to see if something is truly in the best interests of the child.

116 Id. at 559-60.

¹¹⁸ See Nev. Rev. Stat. § 125.480(3)(b) (2007) (suggesting custody should be vested with the party that can provide the child with "a wholesome and stable environment").

¹¹⁴ Id. at 560.

¹¹⁵ *Id*.

¹¹⁹ Gould v. Gould, 342 N.W.2d 426 (Wis. 1984).

¹²⁰ Id. at 432.

¹²¹ Id. at 431.

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Parents' Sexual Orientation

Some courts have modified custody solely based on the sexual orientation of a parent on the basis that sexual orientation is not a protected class. 122 These courts are not taking the child's best interest into account when they modify custody without a showing of harm to the child. Nevada courts should avoid following this trend because they may not truly be acting in the best interests of the child. Furthermore, in Nevada, sexual orientation is likely a protected class because Nevada already recognizes a person's right to be protected in the employment context.¹²³ Therefore, Nevada should extend this protection to custody decisions as well.

An example of a court acting against the best interests of the child is when a Missouri Appellate Court affirmed the lower court's grant of a modification of custody in favor of the father solely because of the mother's open homosexuality.¹²⁴ Although the court determined that both parents were "loving, caring parents," it ultimately decided that because "homosexuality [was] not openly accepted or widespread [in the town]" and because the court "wish[ed] to protect the children from peer pressure, teasing, and possible ostracizing they may encounter as a result of the 'alternative life style' their mother has chosen," the court modified custody in favor of the children's father. 125 The court never made any finding of harm to the children in this case but instead based its decision on the theory that the attitude of the community would harm a child whose parent was homosexual. 126

This court's decision is especially troubling in light of the best interests of the child standard. The court found that both parents were caring and loving toward their children, yet modified custody because it thought that the mother's homosexuality was a choice she made and imposed on her children.¹²⁷ This is a classic example of a court substituting its own personal beliefs for what is in the best interests of the child. There was no evidence of the children in this case being harmed by the mother's homosexuality; the court's goal of preventing possible teasing and peer pressure was the reason for modification. ¹²⁸ This is not enough to decrease the amount of time a child spends with his/her parent. To prevent undue judicial intervention in Nevada custody cases, the legislature should revise NRS § 125.480 to include a clause that prohibits modification as a result of homosexuality, absent a clear showing of harm to the child.

127 See id. at 166.

¹²² See, e.g., S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987).

¹²³ Nev. Rev. Stat. § 613.330(1)(a) (2007) ("It is an unlawful employment practice for an employer: (a) To fail or refuse to hire or to discharge any person, or otherwise to discriminate against any person with respect to his compensation, terms, conditions or privileges of employment, because of his race, color, religion, sex, sexual orientation, age, disability or national origin. . . . ").

¹²⁴ S.E.G., 735 S.W.2d at 165.

¹²⁵ *Id.* at 165-66.

¹²⁶ *Id*.

¹²⁸ *Id*.

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4. The "Tender Years" Doctrine and the Sex of the Parent

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Under NRS § 125.480, the court should not base custody modification solely on the fact that the person requesting modification is the mother or father of the child. However, the statute says nothing about allowing the court to use this factor as a part of determining what is in the best interests of the child. It may even constitute a violation of the equal protection clause of the Fourteenth Amendment to consider gender as a factor, as it is has been alluded to in other jurisdictions. However, the court should not be set to be a support of the court to use this factor, as it is has been alluded to in other jurisdictions.

The language of NRS § 125.480 is vague and invites criticism and attack. To prevent this, the Nevada legislature should revise NRS § 125.480 to explicitly state that the gender of the parents should not be considered when deciding whether to modify custody. To do this, the legislature should explicitly state that the "tender years" doctrine established in *Peavey* should not be used. ¹³¹ This would codify that the "tender years" doctrine was overruled and provide for a brighter line as far as what the courts can use for determining the best interests of the child. ¹³²

5. Parents' Financial Situation

NRS § 125.480 does not mention the parents' financial situation as a factor in the best interest analysis. Because the statute is silent on this topic, the courts have broad discretion to use this factor in their analysis. This may lead to an abuse of discretion because courts may simply decide that because one parent is better off financially, placing the child with that parent must be in the best interests of the child. This is not necessarily true, however.

The Nevada legislature should consider revising NRS § 125.480 to include financial conditions of the parents as a factor, but it should be framed in terms of stability. If one parent is having difficulty providing for the basic needs of the child due to lack of finances and the other parent will not have this difficulty, this would be a factor to consider as a part of the best interests of the child. This way, the court is still able to consider this important factor, but the financial condition factor is framed in a manner that limits judicial discretion and bias.

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 $^{^{129}}$ Nev. Rev. Stat. § 125.480(2) (2007) states the following: "Preference must not be given to either parent for the sole reason that the parent is the mother or the father of the child."

¹³⁰ Albright v. Albright, 437 So. 2d 1003, 1004 (Miss. 1983) ("The question before the Court is whether the 'tender age rule' in custody awards is violative of the father's right to equal protection of the law under Fourteenth [sic] Amendment to the United States Constitution."); Pirila v. Pirila, No. C5-03-255, 2003 WL 22079483, at *3 (Minn. Ct. App. Sept. 5, 2003) (Appellant alleged the "tender years" doctrine was a violation of the Fourteenth Amendment); Biel v. Biel, No. 84-0925, 381 N.W.2d 619, at *1 (Wis. Ct. App. Dec. 17, 1985) (noting father's allegation that the court abused its discretion in applying the "tender years" doctrine because it was a violation of his Fourteenth Amendment rights).

¹³¹ Peavey v. Peavey, 460 P.2d 110, 111 (Nev. 1969), overruled by Arnold v. Arnold, 604 P.2d 109, 110 (Nev. 1979).

¹³² See Arnold, 604 P.2d at 110 ("For the reasons expressed below, we overrule Peavey.").

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Child's Preference

While NRS § 125.480 does allow the courts to consider the child's wishes, this is a factor that should be heavily scrutinized. 133 The courts should pay close attention to the actual reasons why the child wishes to reside with one parent over the other parent because some children are not equipped to make a mature decision about what environment is in their best interests. For example, if Geena had stated that she wished to live with her mother because it was Mrs. Ellis that read her bedtime stories, took her to the park to play, and helped her with her homework, this would be a valid reason for taking Geena's preference into consideration. Similarly, if Geena had stated that the reason that she did not want to live with her father was that he left her alone often, this too would be a valid expression of preference that the court should consider.

In evaluating the child's wishes, the courts should pay particular attention to the maturity of the child and his/her capacity to make this decision. Age may not be the best source of guidance for determining if the child is of sufficient maturity. For example, if a child is ten-years-old and has demonstrated a maturity level beyond his age, his preference should not be discounted solely because of his age. Likewise, if a child is fifteen years of age yet demonstrates a maturity that is below his age, this too should be taken into consideration by the judge.

One concern that is apparent with allowing the child to voice his/her preference is that court may feel like an intimidating environment to a child. Also, the child may feel pressured to choose one parent over the other or afraid to choose between the two. This is why the child's maturity should control whether or not the court will consider the child's preference. Also, the child should not be forced to choose between the two parents; the child's preference should only be voiced if the child wishes to be heard. Therefore, the Nevada legislature should revise NRS § 125.480 to specify that consideration of factors like (1) the reasons for a child's choice of parent, (2) the child's maturity, and (3) assurance that the child is not pressured should be paramount to allowing the child to testify as to his/her preference.

If these types of factors are considered in the court's analysis of whether custody modification is in the best interests of the child without the abovementioned safeguards, the propensity for an abuse of discretion is great. Courts may begin to substitute their personal values or biases for what is truly in the best interests of the child. If judges are permitted to substitute their personal beliefs and values in place of the best interests of the child standard as mandated by NRS § 125.480, not only will this inevitably lead to decisions that are not always in the best interest of the child, but the system will be unstable. In order to prevent this, the Nevada legislature should consider revising NRS § 125.480 to reflect this list of factors that should be omitted from the best interests of the child analysis. Through this revision, courts would have more guidance to make a decision that is in the best interests of the child.

¹³³ Nev. Rev. Stat. § 125.480(4)(a) (2007) states that in determining the best interest of the child, the court shall consider "[t]he wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his custody.'

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C. The Addition of Court Appointed Special Advocates (CASAs)

One other possible way to ensure that the best interests of the child are represented would be for the legislature to include a provision in NRS § 125.480 that suggests that the child have a Court Appointed Special Advocate (CASA) to represent his/her best interest in court, if possible.

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CASAs are trained volunteers who research, facilitate, advocate, and monitor the case that they are assigned to represent.¹³⁴ "When the judge appoints a CASA volunteer to a child's case, the CASA volunteer becomes responsible for developing a consistent, emotionally supportive relationship with the CASA child, gathering information from all appropriate sources, and making the most suitable recommendations to the judge about what is in the child's best interest."¹³⁵ The United States Congress promoted expanding the CASA program by incorporating the program into the Child Abuse and Neglect Act in 1990.¹³⁶ As a result, there were forty-nine states with active CASA programs in 2005.¹³⁷

Although CASA was originally developed to represent the best interests of the child in abuse and neglect proceedings, the program has been expanded for general use in family court to represent the child's interest. Nevada should expand the roles of CASA volunteers to include possible participation in custody modification proceedings. However, the provision should explicitly state that first judges must satisfy the demand for CASAs in abuse and neglect proceedings before appointing CASAs in custody modification proceedings. Because the court has limited information on the child's situation, someone who has been trained and checks-in with the child routinely would be a great asset because the CASA will have the opportunity to get a better understanding of the child and his/her best interest. Also, because CASAs are trained volunteers and not paid employees, they have no interest but the best interests of the child. CASAs are not presenting the child's wishes; they only present what

¹³⁴ CASA Las Vegas, http://www.casalasvegas.org/become-a-casa/faqs (last visited Apr. 30, 2010).

¹³⁵ CASA Las Vegas, http://www.casalasvegas.org/about/mission-statement/ (last visited Apr. 30, 2010).

¹³⁶ See 42 U.S.C. § 13011 (2009) (Congress finds that CASAs can be appointed in child abuse and neglect hearings).

¹³⁷ Jean Koh Peters, *How Children are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 Nev. L.J. 966, 1002 n.116 (2006) (stating that the only state lacking a CASA program was North Dakota).

¹³⁸ CASA of Shawnee County, http://www.casaofshawneecounty.org/ (last visited Apr. 30, 2010) (states that CASA in Kansas is involved in "advocat[ing] for the best interest of children and youth involved in the court system," not only abuse and neglect proceedings); Email from Hon. Frank P. Sullivan, District Court Judge, Family Court Division, Department O, to Brianna F. Issurdutt (Oct. 2, 2009, 08:31 PST) (on file with author) (states that Nevada also used the services of CASAs on an informal and limited basis in custody matters in the past).

¹³⁹ See Nev. Rev. Stat. § 432B.505 (2007) (provides qualifications of special advocate for appointment as guardian ad litem in Nevada).

¹⁴⁶ Sullivan, *supra* note 138 (states that while CASAs will be helpful in custody modification proceedings, the need for CASAs in abuse and neglect proceedings should be satisfied before the using CASAs in custody modification proceedings).

¹⁴¹ § 432B.500(2) (2007) (providing that "[n]o compensation may be allowed a person serving as a guardian ad litem pursuant to this section"); § 432B.505(1) (2007) (requiring that a

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they think is in the child's best interest. 142 If a CASA is utilized, the judge will have even more information available when determining the best interests of the child, thereby decreasing the possibility of an abuse of discretion or a wrong decision.

IV. A Proposal to Modify NRS § 125.480

In its current form, NRS § 125.480 allows for an abuse of discretion in child custody modifications. Therefore, this Note proposes that the Nevada legislature revise the statute. Many topics are not addressed in NRS § 125.480 and the statute should be amended to include a discussion of these topics. Without such a discussion, the statute remains vague and does not further the goal of acting in the child's best interests as well as it could.

The first modification that this Note proposes is a legislative amendment to address the issue of adjustment because it is not discussed in NRS § 125.480. To ensure that the courts consider this issue when modifying child custody, the Nevada legislature should look to other states that have such a provision in their statutes and emulate their statutes.

For example, Delaware's child custody statute explicitly states that the child's adjustment should be a factor that the court considers as a part of the child's best interests. 143 Another state with a child custody statute that discusses adjustment as a factor to be considered under the child's best interests is Arizona, whose statute reads identical to Delaware's with respect to this provision. 144 Connecticut's child custody statute also has a similar provision. 145 Nevada's statute has no such provision; the legislature should consider inserting a provision similar to these states' provisions on adjustment to ensure that this factor is considered by the courts and that the best interest of the child is better represented.

A second proposed modification is a legislative amendment addressing the issue of stability because it is not discussed in NRS § 125.480. Some states currently have provisions in their statutes that discuss how the court should consider stability. For example, California's statute states that the child should be in a stable environment. 146 Connecticut also has a statutory provision that states that the stability of the child's residence should be a factor considered by the court.¹⁴⁷ Florida's statute has a provision that explains that the courts

special advocate for appointment of a guardian ad litem "must be a volunteer from the community who completes an initial 12 hours of specialized training and, annually thereafter, completes 6 hours of specialized training.").

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¹⁴² § 432B.500(3)(g) (2007) (providing that a guardian ad litem shall "[i]nform the court of the desires of the child, but exercise his independent judgment regarding the best interests of the child ").

¹⁴³ Del. Code Ann. tit. 13, §722(a)(4) (2006) states that the court should consider "[t]he child's adjustment to his or her home, school and community."

¹⁴⁴ ARIZ. REV. STAT. ANN. § 25-403(A)(4) (2009) (providing for court to consider "[t]he child's adjustment to home, school and community").

¹⁴⁵ CONN. GEN. STAT. ANN. § 46b-56(c)(9) (West 2007 & Supp. 2009) (providing for court to consider "the child's adjustment to his or her home, school and community environments").

¹⁴⁶ Cal. Fam. Code § 3040(a)(2) (West 2004).

¹⁴⁷ Conn. Gen. Stat. Ann. § 46b-56(c)(11) (2009).

should focus on the "desirability of maintaining continuity." Although these provisions provide a good foundation for the legislature to emulate, the Nevada legislature should be more specific in guiding the courts. The legislature should consider adding a provision that explains that stability should be considered because of how important stability is to the best interests of the child.

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The third modification that this Note proposes is amendment to NRS § 125.480 that addresses the issue of divorce as a process. It appears that the Nevada Supreme Court did in fact consider this as part of its analysis in *Ellis*, but the Court never explicitly states that it did so. ¹⁴⁹ The Nevada legislature should consider inserting a provision in NRS § 125.480 that states that the courts should bear in mind that divorce is a process that all the parties must adjust to at their own rate. This would effectively remind courts to use caution when they modify custody on the basis that the child is not performing well.

The fourth modification proposed by this Note is a amendment to NRS § 125.480 concerning issues like religion, lifestyle, parents' sexual orientation, the sex of the parent, parents' financial condition, and the child's preferences because these issues are especially complicated. With respect to the religion, lifestyle, parent's sexual orientation, and parents' financial condition, the legislature should amend the statute to state that these factors should only be applicable to a court's child custody modification decision when the factor will harm the child. Otherwise, the courts will be intruding into the private lives of families, which is not part of their domain. Allowing courts to consider such factors when they harm the child allows the court to uphold the best interests of the child while also respecting the privacy of the family.

When amending NRS § 125.480 with respect to the child's preference, the legislature should outline three factors for the court to analyze: (1) the child's reasons for choosing the parent, (2) the maturity of the child, and (3) any evidence of a parent pressuring the child to testify as to preference. When courts use the child's preference as a factor, they should be especially cautious to ensure that the child is mature enough to make the decision and that the child is making the decision for the right reasons.

The statute should do more than state that a parent's sex should not be the sole consideration in a custody decision: the legislature should amend the statute to explicitly state that the sex of the parent should never be a part of the court's consideration. Some states explicitly state that the parents' gender should not be a factor considered in custody modification. In Delaware, the legislature drafted the statute such that it outlaws a preference for one parent based solely on the parent's gender. Nevada has a similar provision in NRS § 125.480, but it is still vague. The Nevada legislature should add a provision to this section that explicitly states that the "tender years" doctrine no longer applies to custody modification decisions, thereby eliminating the possibility that the courts rely on the outdated doctrine.

The fifth and final proposed amendment to the statute that the Nevada legislature should consider is a provision to NRS § 125.480 that provides for

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 $^{^{148}}$ Fla. Stat. Ann. § 61.13(3)(d) (West 2006 & Supp. 2010).

¹⁴⁹ Supra notes 59-83 (all text in reference to the Ellis decision).

¹⁵⁰ Del. Code Ann. tit. 13, § 722(b) (West 2006).

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the possibility of the court using a Court Appointed Special Advocate (CASA) to represent the child's best interests. Although CASAs are primarily used in abuse and neglect cases, some states have expanded their role into other areas of family law. 151 Nevada should follow this trend because the explicit purpose of a CASA is to represent the best interests of the child, the same goal as NRS § 125.480. An excellent way to ensure that the best interests of the child are represented would be to utilize a CASA. Because Nevada is already experiencing a shortage of volunteer CASAs, ¹⁵² courts should fulfill the need for CASAs in abuse and neglect proceedings before allowing CASAs in custody modification proceedings. Therefore, the Nevada legislature should consider inserting a provision in NRS § 125.480 to allow courts to appoint CASAs in child custody modification cases when the need for CASAs in abuse in neglect proceedings has been satisfied.

THE REALISTIC EFFECT OF THE PROPOSED MODIFICATIONS

Although courts will still need to use discretion in deciding whether there is a need for custody modification, courts need more guidance in making these decisions. If the legislature does not provide this guidance, Nevada will continue to be at risk for abuses of judicial discretion in the area of child custody modification. Furthermore, the Nevada Supreme Court will have to continue to shoulder the burden of reviewing all of these cases unnecessarily if nothing is changed.

As a result of implementing the modifications to NRS § 125.480 proposed in this Note, the goal of preventing abuses of discretion is furthered. This way, judges will have clearer guidelines to follow, the legislature will have further reduced the risk of an abuse of discretion and arbitrary changes of custody, and, most importantly, the child's best interest will be served.

VI. CONCLUSION

The Court's ruling in *Ellis* was a step in the right direction towards achieving the legislature's goal of focusing on the best interest of the child. However, the potential for courts to make decisions that are contrary to the best interest of the child still exists because of the current language of NRS § 125.480. Under NRS § 125.480, judges currently have the ability to substitute their personal judgment for what is in the best interests of the child because the statute is drafted vaguely, giving little guidance as to what constitutes the best interests of the child.

If the legislature revises the statute to be more explicit with respect to issues discussed in this Note, the possibility that critics will characterize Nevada's best interest standard as vague or susceptible to abuse of discretion will be lessened. Furthermore, if this statutory revision can be accomplished,

¹⁵¹ CASA of Shawnee County, supra note 138 (states that CASA in Kansas is involved in "advocat[ing] for the best interest of children and youth involved in the court system[,]" not only abuse and neglect proceedings); Sullivan, supra note 138 (states that Nevada also used the services of CASAs on an informal and limited basis in custody matters in the past).

¹⁵² Sullivan, *supra* note 138 (states that there is currently a shortage of CASAs in Nevada).

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the courts in Nevada will have a greater possibility of considering all relevant issues when deciding whether to allow custody modification and therefore truly will be acting in the best interest of the child.

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