IN THE SUPREME COURT OF THE STATE OF NEVADA

SEBASTIAN MARTINEZ,

Appellant,

vs.

KRISTI RAE FREDIANELLI; ANTHONY FREDIANELLI; and MIKAELLA RAE FLANNERY, AKA MIKAELLA RAE FREDIANELLI, A MINOR, BY NEVADA WELFARE, AS GUARDIAN AD LITEM,

Respondents.

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Tracie K. Lindeman

No. 55073

RESPONSE TO PROPER PERSON STATEMENT

Respondents Kristi Rae Fredianelli (Kristi) and Anthony Fredianelli (Anthony) hereby respond to appellant's proper person appeal statement.[1]

1. The December 11, 2007 proof of service

The court's Order Directing Response requests a response to the following issue: "whether Mr. Fredianelli was properly served with the original and amended petitions as indicated by appellant's proof of service that was filed on December 11, 2007, and it appears that Mr. Fredianelli failed to ever challenge that service of process." [2]

A. Background facts

Appellant filed this suit in an attempt to establish that he is the biological father of Mikaella, whose mother is Kristi. 1 ROA 1. Anthony is Kristi's husband, and there is a

[1]The court's Order Directing Response contemplated that "each respondent" would file a response to the proper person appeal statement. Kristi and Anthony are represented by the same appellate counsel, Robert Eisenberg, who is submitting this joint response on behalf of both respondents.

[2]Although the court's order suggests that Anthony may have been served with the original petition, the proof of service only refers to the amended petition. Indeed, prior to the amended petition, Anthony was not a defendant in the case. Nothing in the record suggests that he was ever served with the original petition.

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statutory presumption that Anthony is Mikaella's father. NRS 126.051(1). Despite appellant's knowledge of the marital relationship between Anthony and Kristi, appellant did not name Anthony in the paternity suit. Instead, he only named Kristi. 1 ROA 1.

On October 15, 2007, the district court held a hearing at which the court determined that Anthony was a necessary party; and the court ordered appellant to amend the petition to add Anthony. 4 ROA 971-72. At the hearing, appellant was provided with Anthony's address of 3728 or 3729 Bayonne, San Diego, California. *Id.* at 978. Appellant filed an amended petition, adding Anthony as a respondent. 2 ROA 269. Appellant's counsel filed a proof of service on December 11, 2007, indicating that the amended petition was served on a person identified only as "Jane Doe," at 3657 Bayonne, San Diego, California. 2 ROA 325-26. This was not one of the addresses previously indicated on the record for Anthony.

At a hearing nine months later, on July 15, 2008, the district court discussed the status of service of the amended petition. Appellant's counsel stated that "there was a question about proper service on Ms. Fredianelli's husband . . ." 4 ROA 984. Counsel stated that she tried to serve Anthony in California, but Kristi's counsel "disputed whether or not my service was any good." *Id.* Appellant's counsel then told the district court: "And then my client [appellant] sort of blew me off and owes me some money. So I filed my motion to withdraw." *Id.*

At that point Kristi's counsel advised the district court that Anthony had not yet been served with the amended petition. 4 ROA 989 ("I don't think this Court has power to issue orders until Husband's been served."). The district court agreed that Anthony still needed to be served. 4 ROA 991 ("We do have to have her husband served . . . .").

Another hearing was held about a month later on August 19, 2008 (ten months after the court ordered appellant to add Anthony to the suit), on an order to show cause. 5 ROA 995. Kristi's counsel informed the district court that Anthony still had not been served. *Id.* at 998 ("So we're sort of at an impasse as to how to proceed while we await his service of process upon the -- my client's husband . . . ."). *Id.* Appellant did not disagree with counsel's assertion that Anthony had not yet been served; nor did appellant mention the alleged service in San

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Diego. *Id.* at 998-1000. Shortly thereafter, Kristi's counsel again informed the district court that Anthony "has not been served." *Id.* at 1007. And again, appellant did not disagree. *Id.*

Moments later, the district court told appellant "you have to serve anyone who could have an interest." *Id.* at 1008. Appellant responded: "Correct. That's fine." *Id.* The district court then advised appellant that Anthony is the presumptive father under the law, and therefore Anthony "has to be served with the paperwork." *Id.* Appellant did not contend that he had already served Anthony. Instead, upon being told that he needed to serve Anthony with the paperwork, appellant acknowledged "I understand." *Id.*

The district court then advised appellant how to serve Anthony: "You hire a process server and they serve him with the complaint." *Id.* at 1009. Appellant responded: "Right." *Id.* The district court then told appellant that "we have to have him formally served." *Id.* Again, appellant acknowledged: "Right." *Id.* at 1010. At that point appellant did mention the attempted substitute service, but Kristi's counsel pointed out that "that service is not valid." *Id.* The district court then gave appellant two more admonitions that "he's got to be served," and "you have to get her husband served." *Id.* at 1010, 1013. Appellant responded "Okay." *Id.*

Eight months later, on April 28, 2009 (more than 18 months after appellant was ordered to add Anthony to the case), the district court had another hearing, at which the district court asked appellant's counsel what efforts had been made to serve Anthony. 5 ROA 1036-37. Appellant's counsel responded: "I do not know" (*Id.* at 1036) and "I don't know what service attempts were made after the October hearing." *Id.* at 1037.

The district court issued an order after the April 28, 2009 hearing, in which the court specifically found that appellant had been ordered to serve Anthony, and that "no such service has been accomplished." 3 ROA 630. The district court also found that Anthony "has not been served with a copy of the Petition, has not been served with a copy of the Amended Petition, and was not provided with notice of this hearing." *Id.*

Another hearing was held four months later on August 26, 2009. Although there was a general discussion of the alleged 2007 service in San Diego, it was generally agreed that this was not valid service. 5 ROA 1085-93. The district court observed that "it was not sufficient

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service." *Id.* at 1093. The district court also found that Anthony "hadn't been actually served." *Id.* at 1097.

Prior to the hearing on August 26, 2009, Anthony was served with the amended petition, and his counsel filed a motion to dismiss based, in part, on the 120-day limitation for service. 3 ROA 653. As indicated in the motion, Anthony had not been served until the end of May, 2009. *Id.* at 660. It was obvious that Anthony's counsel was unaware of the Proof of Service filed on December 11, 2007, regarding the purported service on an unidentified woman at the wrong San Diego address. 3 ROA 658 (Anthony's counsel stating that appellant "did not serve, nor attempt to serve, Tony with the [amended petition].").

Therefore, at the hearing on August 26, 2009, Anthony's counsel discussed service issues, but he had no reason to address the sufficiency of the purported service in 2007, because nobody was relying on this service, and the district court had already found that it was not sufficient service.[3] 5 ROA 1097-1103. The district court also observed that at the August 2008 hearing, the prior judge had found that "service has not been properly effectuated" on Anthony (5 ROA 1118), and that the purported service in 2007 "was found to be ineffective by Judge Sanchez."[4] *Id.* at 1123.

In its written order after the hearing on August 26, 2009, the district court made specific findings of fact regarding the lack of service of process prior to May of 2009. The court found that as of the date of a hearing on July 15, 2008, the amended petition "had not been properly served on Tony at that time." 4 ROA 840. The district court also made the factual finding that

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[3]Anthony's counsel did mention the attempted service in San Diego, but this was only in the context of observing that Judge Sanchez had previously ruled that the attempted service in San Diego was not sufficient. 5 ROA 1100.

[4]It is noteworthy that appellant filed his amended petition in October of 2007, adding Anthony as a respondent in the case caption, and making allegations against Anthony. 2 ROA 269-72. Nevertheless, appellant filed several subsequent district court papers, without including Anthony in the case caption. E.g., 2 ROA 390; 3 ROA 502. Additionally, on May 18, 2009, appellant filed a notice directed to Anthony regarding a motion to establish joint legal and primary physical custody. 3 ROA 578-79. Nothing in the record indicates that appellant ever served this paper on Anthony or, for that matter, on anyone else.

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as of August 19, 2008, "service had not been effected on Tony." *Id.* The district court then made another factual finding that as of the hearing on October 13, 2008, "service had not been effectuated and that the case was lingering." *Id.* The district court also made a factual finding that as of the hearing on April 28, 2009, "service had not been effectuated on Tony at that time." *Id.* at 841.

B. Discussion

A district court's findings of fact should be upheld unless they are clearly erroneous. *Radaker v. Scott*, 109 Nev. 653, 657, 855 P.2d 1037 (1993). The "clear error" standard of review applies to findings of fact on a motion to dismiss for insufficient service of process. See *Prewitt Enterprises, Inc. v. Organization of Petroleum Exporting Countries*, 353 F.3d 916, 920 (11th Cir. 2003).

This court's Order Directing Response questions whether Anthony was properly served with the amended petition, "as indicated by appellant's proof of service that was filed on December 11, 2007." Here, two district judges consistently determined, as a matter of fact, that the purported service in San Diego was not sufficient. Moreover, appellant and his various attorneys were repeatedly advised by the district judges that Anthony needed to be served, yet appellant and his attorneys did not contend that the purported service in San Diego in 2007 was effective and sufficient.[5]

Significantly, appellant's opposition to Anthony's motion to dismiss admitted the following: "Service was effectuated on TONY in May, 2009, as stated in TONY's Motion to Dismiss." For ROA 753 (line 4). Appellant contradicted this admission later in his opposition,

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[5]As noted above, the purported service took place at an address that was different from the address provided for Anthony at the first hearing on this issue. Even if this was Anthony's residence, the proof of service does not indicate the identity of the person on whom service was made, and it does not indicate that this unidentified person was actually a resident of that address. See NRCP 4(d)(6) (allowing service by leaving copy at defendant's home, with person of suitable age "then residing therein"). And nothing indicates that the unidentified recipient of the service was authorized to accept service for Anthony. See NRCP 4(d)(6) (allowing service on agent authorized to accept service).

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when he alleged that "TONY had been served in San Diego, California." *Id.* at 754 (line 1). His contradictory positions did not require the district court to change its prior factual determinations or to accept appellant's bald assertion that Anthony had been effectively served in San Diego.

Finally, the court's Order Directing Response states that "it appears that Mr. Fredianelli failed to ever challenge that service of process." Actually, Anthony did indirectly challenge the alleged 2007 service of process, when Anthony contended that he had never been served prior to May 2009. 3 ROA 660. Additionally, Anthony's counsel had no reason to challenge any purported service in 2007, because nothing in the record shows that counsel was even aware of this purported service (until the August 26, 2009 hearing). And in any event, the district court repeatedly found that service had not been effected earlier; therefore, Anthony's counsel had no reason to challenge the earlier purported service.

Accordingly, there is no basis for any reliance on the December 2007 proof of service as a ground for reversal.

2. Waivers based upon answer and amended answer

The Order Directing Response identifies two related issues. The first issue is whether Anthony waived his right to contest timely service of process when he filed his original answer without asserting an affirmative defense based upon untimely service of process. The second issue is whether Anthony preserved his right to challenge untimely service of process when he filed an amended answer that included an affirmative defense challenging service of process. Because these issues are related and governed by the same case law, the issues will be addressed together in this response.

Anthony filed his original answer on June 30, 2009, without including an affirmative defense based upon insufficient service of process. 3 ROA 633. Sixteen days later, on July 16, 2009, Anthony filed an amended answer, which included a Fourteenth Affirmative Defense: "This matter should be dismissed for insufficiency of process and/or insufficiency of service of process." 3 ROA 640, 643.

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Pursuant to NRCP 12(h)(1), the defenses of insufficiency of process and insufficiency of service of process are waived unless raised by a motion or included in a pleading "or an amendment thereof permitted by Rule 15(a) to be made as a matter of course." And pursuant to NRCP 15(a), if a pleading is one to which no responsive pleading is permitted (such as Anthony's answer in the present case), it may be amended at any time within 20 days after it is served. An affirmative defense asserted in the amended pleading "relates back to the date of the original pleading." NRCP 15(c).

Prior to *Hansen v. District Court,* 116 Nev. 650, 6 P.3d 982 (2000), a defendant who wanted to challenge service of process was required to make a special appearance. If the defendant made a general appearance or requested any relief other than relief involving the defective service of process, a defendant was deemed to have waived the jurisdictional defense. *Id.* at 653-55. The *Hansen* court abrogated the doctrine of special/general appearances. *Id.* at 656. The court held that a defendant may raise its defenses, including those relating to jurisdiction and service of process, in a responsive pleading. *Id.* "Objections to personal jurisdiction, process, or service of process are waived, however, if not made in a timely motion or not included in a responsive pleading such as an answer." *Id.* The court further held: "Thus, to avoid waiver of a defense of lack of jurisdiction over the person, insufficiency of process, or insufficiency of service of process, the defendant should raise its defenses either in an answer or pre-answer motion." *Id.*

Accordingly, to determine whether the defense was waived, the court must consider Rule 12(h)(1) and Rule 15(a) and (c). Under these rules, if the defendant asserts the defense in an amended answer, the amendment relates back to the date of the original pleading [NRCP 15(c)], and the defense is not waived [NRCP 12(h)(1)].

In the present case, Anthony filed his answer on June 30, 2009. He had 20 days in which to file an amended answer as a matter of course, without leave of court, pursuant to NRCP 15(a). He filed his amended answer on July 16, 2009, within the 20-day time limit. His amended answer included the affirmative defense of insufficiency of process and/or insufficiency of service of process. Accordingly, he did not waive the defense, and he

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adequately preserved it. See *Leach v. BB&T Corporation,* 232 F.R.D. 545, 551 (N.D.W. Va. 2005) (answer was amended under Rule 15(a), to assert defense of insufficient service of process; amended answer prevented waiver of the defense, pursuant to Rule 12(h)).

3. Other potential waivers

The Order Directing Response asks Anthony to address the question of whether he waived the right to challenge service of process when he filed a response to appellant's motion requesting a change in custody evaluator, or when he issued subpoenas. Anthony's appellate counsel is uncertain as to the legal issue forming the basis of this inquiry. Research has disclosed no applicable current case law holding that a defendant waives the right to challenge any service of process by filing a response to a motion or by issuing subpoenas.

As noted above, previous case law held that a party waived the right to challenge service of process if the party made a general appearance or sought relief other than relief dealing with the service of process. In *Hansen v. District Court*, this court abrogated the doctrine of special/general appearances. The court held that a party does not waive challenges to service of process if the party includes the defense in a responsive pleading (or an amended responsive pleading). In other words, a defendant can make a general appearance by filing an answer, and the defendant can participate in the litigation without waiving the defense of insufficient service, if the answer (or amended answer) includes the appropriate affirmative defense.

In *Hansen* itself, this court denied a motion to stay the district court proceedings pending a writ petition challenging service of process. In denying the stay motion, and as part of the opinion holding that objections to service of process can be asserted in the defendant's answer, the *Hansen* court observed that the defendant would be participating in various litigation activities, including discovery, trial preparation and trial. *Hansen*, 116 Nev. at 658. Despite this participation, there was no waiver of the defense of insufficient service. Nothing in *Hansen* or subsequent case law suggests that a defendant who asserts the defense of insufficient process in an answer waives the defense by participating in the litigation after filing the answer.

Here, Anthony filed his amended answer on July 16, 2009, asserting insufficient process as an affirmative defense. He subsequently participated in the litigation by responding to

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appellant's motion regarding the custody evaluation, and by issuing subpoenas duces tecum relating to jurisdictional issues pending at that time. He also filed a motion to dismiss, which was filed the day after he filed his amended answer, seeking a dismissal based, in part, on appellant's violation of NRCP 41(i), i.e., the 120-day rule. There was no waiver under these circumstances.

4. Other Issue

The Order Directing Response also requests respondent to address "the arguments made in appellant's civil proper person appeal statement." Although it is difficult to discern the issues in the proper person appeal statement, we will attempt to do so. It appears that there is only one additional issue not already discussed in this response. Appellant seems to contend that the district court erred by not finding that Anthony was no longer a necessary party after DNA testing allegedly determined that appellant is Mikaella's biological father.

A district court's factual determinations in determining a necessary party issue are reviewed for clear error. *Janney Montgomery Scott, Inc. v. Sheppard Niles, Inc.*, 11 F.3d 399, 404 (3rd Cir. 1993). A district court's finding that a person is a necessary party is reviewed for abuse of discretion. See *Hooper v. Wolfe*, 396 F.3d 744, 747 (6th Cir. 2005).

Here, the district court was presented with appellant's petition seeking to establish paternity. Yet Anthony, as Kristi's husband, was entitled to a statutory presumption of paternity. Any ruling in appellant's favor would have affected Anthony's rights. Thus, Anthony was obviously a necessary party. NRCP 19(a).

Appellant contends that he had DNA testing accomplished; that the results prove he is Mikaella's biological father; and that Anthony is no longer a necessary party. The alleged DNA test results have never actually been offered or admitted as evidence; and the validity of appellant's alleged DNA testing has never been established by appellant or determined by the district court. Anthony has certainly never had an opportunity to evaluate appellant's alleged DNA testing and to challenge its validity. And even if the DNA test results are eventually shown to be valid and accurate, this will still not eliminate Anthony's presumption of paternity. At most, it will create competing presumptions, requiring the district court to determine how

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the presumptions should be applied. See *Love v. Love*, 114 Nev. 572, 577-78, 959 P.2d 523 (1998) (discussing paternity presumptions involving DNA); NRS 126.051(3) (application of two or more presumptions in conflict with each other).

In the present case, Anthony was clearly a necessary party in appellant's paternity action, because Anthony's rights as the presumptive father would be adversely affected by any ruling in appellant's favor. Both district judges agreed. They did not abuse their discretion.

Other issues raised in the proper person appeal statement, to the extent that they can be identified, have been addressed above.

5. Conclusion

For the foregoing reasons, the judgment should be affirmed.

DATED: Oct. 12, 2010

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CERTIFICATE OF MAILING

Pursuant to NRAP 25, I certify that I am an employee of Lemons, Grundy & Eisenberg and that on this date I caused to be deposited for mailing at Reno, Nevada, a true copy of **Response to Proper Person Statement** addressed to:

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DATED this 12th day of October, 2010.

Margie Nunn

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