

IN THE SUPREME COURT OF THE STATE OF NEVADA

Sebastian Martinez, and Mikaella Rae Flannery
aka MIKAELLA RAE FREDIANELLI, a minor
By Nevada State Welfare, as Guardian ad Litem,

Plaintiff,

vs.

Kristi Rae Fredianelli and Tony Fredianelli

Defendant

No. 58015
Supreme Court No. 55073
District Court No. D373016

FILED

MAR 24 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *A. Ingos*
DEPUTY CLERK

**PETITION FOR WRIT OF MANDAMUS
AND REQUEST THE NEVADA SUPREME COURT ORDER
IMMEDIATE CONTACT BETWEEN APPELLANT AND HIS CHILD**

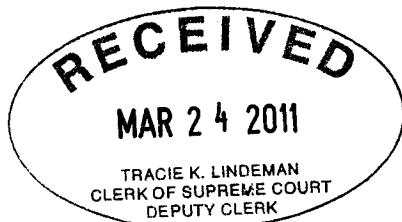
COMES NOW, Appellant SEBASTIAN MARTINEZ, and files this Writ of Mandamus, respectfully requesting that this Court (1) prohibit the Honorable Judge Arthur Ritchie, Judge of the Eighth Judicial District Court, from further participation in the case herein; (2) that the court be prohibited from holding an evidentiary hearing on the issue of valid service, when the Nevada Supreme Court reversed and remanded, with directives that service was valid; and (3) that the Nevada Supreme Court confirm DNA testing overcomes the presumption of paternity, and that immediate visitation be ordered between Appellant and his child.

In support of this petition, Appellant states as follows:

INTRODUCTION

Mandamus is necessary because Judge Ritchie is attempting to hold an evidentiary hearing on a matter already resolved by the Nevada Supreme Court. Any issues or allegations relating to the matter of service was already argued appropriately before the Nevada Supreme Court, and the Nevada Supreme Court made the finding that service was valid. See Exhibit "1", Order of Reversal and Remand.

When Appellant returned to the District Court, seeking for compliance with the Nevada Supreme Court order, the Respondent argued that service was not valid. Appellant contends this



1 issue was already resolved in the Nevada Supreme Court, and it is improper to be heard again, by
2 the District Court.

3 There is a clear appearance of impropriety in this matter, where the judge in District Court
4 completely ignores the Reverse and Remand of the Nevada Supreme Court. Appellant needs the
5 Nevada Supreme Court not only to address the matter of the evidentiary hearing, but also to issue
6 an order establishing contact between Appellant and his daughter. He has been denied contact for
7 the past 18 months due to the manipulations of Respondents.

8 Specifically, it is undisputed that Appellant is the biological father of the child; that he was
9 co-habiting with the child's mother at the conception and birth of the child. That upon being
10 served divorce papers, the child's mother left the relationship with Appellant, and returned to her
11 husband - immediately terminating Appellant's contact with the children, and suddenly alleging
12 paternity based upon his marriage with the mother.

13 In open court, the husbands address was provided, and he was properly served under NRC
14 4. The Nevada Supreme Court has confirmed acceptance of that service. Still, Appellant is unable
15 to obtain emergency visitation with his own child through the District Court. See Exhibit "B",
16 Appellant's Motion to the District Court re: Service and Visitation.

17 Appellant does not understand how the District Court Judge could simply ignore the order
18 confirming appropriate service and to set an evidentiary hearing on the very same issue. See Exhibit
19 "C", Minutes of District Court ordering an evidentiary hearing on the matter of service.

20 In 1994, under Liteky v. U.S., 114 S.Ct. 1147, 1162 (1994) the United States Supreme Court
21 held that if a judge's attitude or state of mind leads a detached observer to conclude that a fair and
22 impartial hearing is unlikely, the judge must be disqualified. Further, should a judge not disqualify
23 himself, then the judge is in violation of due process clause of the United States Constitution, United
24 States v. Sciuto, 521 F.2d 842, 845 (7th Cir. 1996). Also, in Livingston v. State, 441 So. 2d 1083,
25 1087 (Fla. 1983) it was stated "A determination must be made as to whether the facts alleged would
26 place a reasonably prudent person in fear of not receiving a fair and impartial trial."

1 Appellant reasonably fears that Judge Ritchie has, and will continue *not* to be impartial in
2 the case herein. Judge Ritchie's disqualification is necessary in order to avoid even the appearance
3 of impropriety. The public must have the utmost confidence in the judicial process. That is why this
4 Court should grant the Writ of Mandamus, and mandate the removal of the judge from this action,
5 and any subsequent judge to comply with the Federal and Nevada Law.

6 STATEMENT OF THE FACTS AND OF THE CASE

7 Appellant is the father of the minor child at issue. The child was born in Nevada. The
8 child's mother was married at the time of the conception and birth of the child, but was not living
9 with her husband. After the birth of the child, the mother, KRISTI FREDIANELLI, was going back
10 and forth between Appellant and her husband in California. When KRISTI FREDIANELLI's
11 husband, ANTHONY "TONY" FREDIANELLI, filed for divorce, KRISTI FREDIANELLI made
12 her decision to reconcile with her husband. Appellant filed a custody action to obtain shared
13 custody of the child. (It is noteworthy that Mr. Fredianelli stated Mrs. Fredianelli's residence as the
14 State of Nevada in his divorce action; and she was served in Nevada). Significant evidence was
15 produced that demonstrated Appellant and KRISTI FREDIANELLI were involved in a long term
16 relationship, including *hundreds* of pictures of the child from birth, pictures of KRISTI and
17 SEBASTIAN's family; pictures inside KRISTI's home; Appellant receiving the service of divorce
18 papers from ANTHONY FREDIANELLI to KRISTI FREDIANELLI at her home in Nevada;
19 ANTHONY FREDIANELLI failing to name the child at issue as his child in the parties divorce; and
20 DNA testing confirming Appellant was the father of the child.

21 In an attempt to muddy the waters, when KRISTI FREDIANELLI returned to ANTHONY
22 FREDIANELLI,, her attorney convinced the District Court Judge that the action should be amended
23 to name ANTHONY FREDIANELLI as the presumptive father due to the existing marriage.
24 ANTHONY FREDIANELLI was added to the complaint. ANTHONY FREDIANELLI was served
25 the documents, which counsel admits to on the tape of July 8, 2008.

26 Appellant obtained DNA testing and was confirmed that Appellant was the father of the
27
28

1 child. He also again served ANTHONY FREDIANELLI. Appellant informed the court that the
2 presumption of paternity had been overcome.

3 Under NRS 126.051, there is a *presumption* of paternity of the husband, which is Mr.
4 Fredianelli in this matter. Father believes this presumption is overcome under NRS 126.051(2) and
5 (3).

6 Specifically, NRS 126.051(1) indicates that a man is presumed to be the father if he and the
7 mother were married during the conception and birth of the child.

8 However, NRS 126.051(2) states,

9 "2. A conclusive presumption that a man is the natural father of a child is established if tests for the
10 typing of blood or tests for genetic identification made pursuant to NRS 126.121 show probability
11 of 99 percent or more that he is the father except that the presumption may be rebutted if he
12 establishes that he has an identical sibling who may be the father."

13 That is, "a conclusive presumption that a man is the natural father of a child *is established*
14 if tests...."; not 'may be established'; not 'may leave another as the presumptive father'; but a
15 conclusive presumption...*is established*..." with DNA testing.

16 Therefore, under NRS 126.051(2), the presumption is overcome, and Mr. Fredianelli is NOT
17 a necessary party to this action. Father requests the court make an order confirming that Mr.
18 Fredianelli is not a necessary party to this action under NRS 126.051(2).

19 Looking further to NRS 126.151(3), it states:

20 "A presumption under subsection 1 may be rebutted in an appropriate action only by clear
21 and convincing evidence. If two or more presumptions arise which conflict with each other, the
22 presumption which on the facts is founded on the weightier considerations of policy and logic
23 controls."

24 Logic dictates that the child is the child of SEBASTIAN MARTINEZ, and ANTHONY
25 FREDIANELLI is no longer a necessary party to this action.

26 Attorney for KRISTI FREDIANELLI and/or ANTHONY FREDIANELLI sought to have the
27 matter dismissed due to lack of jurisdiction since ANTHONY FREDIANELLI, now a disinterested
28 third party.

The District Court dismissed the action. Appellant appealed, and the Nevada Supreme Court

1 confirmed service as proper and remanded the matter to proceed with this directive.

2 The District Court, instead, set an evidentiary hearing to address the service of process
3 already confirmed by the Nevada Supreme Court.

4 **CUSTODY OF THE CHILD.** In filing a motion in District Court to confirm valid
5 service, Appellant sought immediate contact with his daughter, which had been denied for the past
6 18 months. The District Court did not grant or deny the motion, but merely further delayed justice
7 by seeking an evidentiary hearing - months away - to re-litigate the issue of service which was
8 already resolved by this court.

9 Appellant contends ANTHONY FREDIANELLI was served; served was admitted; the
10 presumption he was the father was overcome by DNA testing - and his own filing of a divorce failing
11 to claim the child as his own; and that it is inappropriate to dismiss this matter due to lack of
12 jurisdiction. Still, the District Court has failed to allow him contact with his child. He therefore
13 requests this court establish emergency contact pending further manipulations in the District Court.
14 The actions of KRISTI FREDIANELLI and ANTHONY FREDIANELLI are an abuse of process,
15 meant solely to keep Appellant from a relationship with his child; and NOT in any respect in
16 consideration of the child's best interest.

17 **ARGUMENT**

18 **A. STANDARD OF REVIEW.**

19 Mandamus is the appropriate and necessary remedy in this case, where the judge has failed
20 to follow Nevada law; and has set an evidentiary hearing regarding the issue of service that was
21 already resolved by the Nevada Supreme Court.

22 **CUSTODY, VISITATION, COMPENSATORY VISITATION**

23 **CHILD CUSTODY STATUTES**

24 N.R.S. 125.510 states in pertinent part as follows:

25 In determining custody of a minor child in a action brought under this chapter, the
26 court may:

27 (a) During the pendency of the action, at the final hearing or at
28

1 any time thereafter during the minority of any of the children of the
2 marriage, make such an order for the custody, care, education,
3 maintenance and support of the minor children as appears in their best
4 interest;

5 N.R.S 125.480 states in pertinent part as follows:

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

10 No preference may be given to either parent for the sole reason that the parent is the
11 mother or father of the child.

12 The court shall award custody in the following order of preference unless in a
13 particular case the best interests of the child requires otherwise:

14 (a) To both parents jointly pursuant to N.R.S. 125.490 or to either
15 parent. If the court does not enter an order awarding joint custody of
16 a child after either parent has applied for joint custody, the court shall
17 state in its decision the reason for its awarding custody to either
18 parent, the court shall consider, among factors, which parent is more
19 likely to allow the child to have frequent associations and a
20 continuing relationship with the noncustodial parent. ."

21 SEBASTIAN MARTINEZ has never been properly awarded custody of his child. Two
22 judges have made statements about the paternity of the child; and need for contact with the child:

23 On 10/15/07 at 11:21 a.m. Judge Sanchez: "The contact is critical, and if he is confirmed
24 as the biological father we need to get this going."

25 Then, two years later, on 4/28/09 at 9:51:50 a.m., Judge Duckworth stated: "DNA testing is
26 a conclusive presumption."

27 Both judges were aware that DNA testing confirmed paternity of the child, and that, under
28 Nevada law, and NRS 125.510 and NRS 125.480 that it was in the best interest of the child that he
develop a relationship with the child.

Both judges failed the child.

SEBASTIAN MARTINEZ requests the court confirm once and for all, that the presumption
of paternity is overcome by the DNA testing; that he is the father of the child; and that he be awarded
joint legal custody of the child. The significant alienation of the child by the Fredinellis' should not

1 be held against SEBASTIAN MARTINEZ in determinating primary physical custody of the child.
2 Additionally, he should be given compensatory visitation with the child for the length of time that
3 he was denied access to the child.

4 SEBASTIAN MARTINEZ has not had contact with his child for the past 18 months. When
5 this court incorrectly denied jurisdiction, he filed an action in California explaining that the
6 jurisdiction was being challenged in the Nevada Supreme Court, and he was seeking a temporary
7 visitation order pending results. He was unable to obtain visitation even upon those efforts.

8 He has REPEATEDLY contacted the law offices of opposing counsel, asking for Christmas
9 visitation; asking for the child's birthday visitation - February 5 - asking for any visitation with his
10 child - all to no avail.

11 The psychological damage done by not providing visitation cannot be undone. A bell cannot
12 be unrung. However, it is completely appropriate that Plaintiff have compensatory contact for a
13 period of 18 months - the length of time he has been denied contact.

14 Additionally, it is his belief that KRISTI FREDINELLI and the child are once again residing
15 in Nevada. The California move was simply a further attempt at alienation of the child. The court
16 should make judicial notice that Defendant, at every turn, has not looked to what is in the best
17 interest of the child, but to what was in the best interest of KRISTI FREDINELLI.

18 This court and Defendant need to understand: Plaintiff is not going away. He is the father
19 of this child, and all the legal maneuvers and money will not stop him from pursuing an appropriate
20 relationship with his child. He requests PRIMARY PHYSICAL CUSTODY OF THE CHILD, upon
21 reunification with the child; he also that the court direct KRISTI FREDINELLI to ensure the child
22 knows that SEBASTIAN MARTINEZ is his father; that only SEBASTIAN MARTINEZ be referred
23 to as "Father", "Dad", "Daddy", etc.; and that the child attend counseling at the expense of KRISTI
24 FREDINELLI for the damage done in the past 18 months, the extent of which is presently unknown.

25 In awarding custody, NRS 125.480 states, in pertinent part, "... the court shall consider,
26 among factors, **which parent is more likely to allow the child to have frequent associations and**

1 **a continuing relationship with the noncustodial parent.”** There can be no doubt as to which
2 parent has already denied the other parent 18 months of contact.

3 KRISTI FREDINELLI knew SEBASTIAN MARTINEZ is the biological father of the child.
4 She knew DNA testing established paternity. She knowingly denied contact between the father and
5 child for no valid reason whatsoever. There is no justification for her actions. There should be
6 consequences to make things right for the child.

7 Plaintiff, SEBASTIAN MARTINEZ should be entitled to primary custody of the child, and
8 KRISTI FREDINELLI should be entitled to specified visitation - SEBASTIAN MARTINEZ would
9 not alienate her from the child as she has attempted to do to him.

10 Nevada should be confirmed as the appropriate jurisdiction in this matter for all future child
11 related actions.

12 **B. DUE PROCESS REQUIRES DISQUALIFICATION**

13 Due process under the Federal Constitution requires that Judge Ritchie be disqualified from
14 deciding this case. “A fair trial in a fair tribunal is a basic requirement of due process.” In re
15 Murchinson, 349 U.S. 133 (1995); see also Aetna Life Insur. Co. v. Lavoie, 475 U.S. 813, (1986)
16 (impartial tribunal is “fundamental” component of due process); Weiss v. United States, 510 U.S.
17 163, 178 (1994) (fair tribunal is a “basic requirement” of due process); Bracy v. Gramley, 520 U.S.
18 899 (1997) (Fair tribunal is “floor” established by Due Process Clause) (quoting Withrow v. Larkin,
19 421 U.S. 35, 46 (1975). A basic component of a fair tribunal is an impartial judge. See Weiss, 510
20 U.S. at 178. The constitutional requirement of impartiality prohibits not only actual bias, “even the
21 probability of unfairness.” See Murchison, 349 U.S. at 136.

22 The Supreme Court has noted that, in accessing the fairness and impartiality of a tribunal,
23 the Court must consider “circumstances of relationships.” In this matter, the apparent relationship
24 of Judge Ritchie and counsel for Respondents must be considered. The judge has chosen to ignore
25 the Nevada Supreme Court order confirming proper service.

26 The Supreme Court states there should be no appearance of impropriety or bias.
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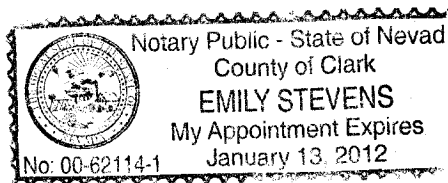
1 **III. CONCLUSION**

2 The court record, pleadings, and transcripts show that Judge Ritchie has failed to comply with
3 the Order of the Nevada Supreme Court.

4 Dated this 21 day of MARCH, 2011.

5
6 
7 SEBASTIAN MARTINEZ

8
9 Subscribed and sworn
10 before me this 21 Mar 11.
11 Emily Stevens
12 Notary Public



1 ROC
2 SEBASTIAN MARTINEZ
3 261 Lenape Height
4 Las Vegas, NV 89148
5 *Defendant in Proper Person,*

6
7 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

8 SEBASTIAN MARTINEZ,)
9 *Plaintiff,*)

SUPREME CASE NO. : 55073
DISTRICT COURT NO. : D-07-373016
DEPT NO. : H

10 KRISTI FREDIANELL,)
11 ANTHONY FREDIANELL,)
12 *Defendant,*)

13
14 **Receipt of Copy**

15 I Hannani Magalanes, acknowledge receiving a copy of the PETITION
16 FOR WRIT OF MANDAMUS AND REQUEST THE NEVADA SUPREME COURT
17 ORDER IMMEDIATE CONTACT BETWEEN APPELLANT AND HIS CHILD on this

18 21st day of March, 2011. @ 2:18 pm
19 *[Signature]*

20 Dated this 21st day of March, 2011
21 *[Signature]*

22 *[Signature]*
23 An Employee of Edward L Kainen, ESQ.
24 300 S Fourth St. Ste 901.
25 Las Vegas, NV 89101
26

