

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

Supreme Court No. 58015  
District Court No. D373016

PROPER PERSON  
RECEIVED/ENTERED

APR 06 2011

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT

FILED

APR 07 2011

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY [Signature]  
DEPUTY CLERK

**EMERGENCY MOTION TO STAY EVIDENTIARY HEARING  
IN VIOLATION OF NEVADA SUPREME COURT'S ORDER OF  
REVERSAL AND REMAND AND REQUEST FOR EMERGENCY ORDER  
FOR VISITATION WITH MINOR CHILD**

COMES NOW, Appellant SEBASTIAN MARTINEZ, and files this emergency motion, respectfully requesting that this Court prohibit the Honorable Judge Arthur Ritchie, Judge of the Eighth Judicial District Court, 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 that the Nevada Supreme Court confirm DNA testing overcomes the presumption of paternity, and that immediate visitation be ordered between Appellant and his child.

Dated this 5 th day of April, 2011.

[Signature]  
SEBASTIAN MARTINEZ

**EMERGENCY ISSUE**

Judge Ritchie is attempting to hold an evidentiary hearing on a matter already resolved by the Nevada Supreme Court. See Exhibit "1", Notice of Evidentiary hearing set for April 15, 2011. 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 "2", Order of Reversal and Remand.

In addition to having already been resolved by the Nevada Supreme Court, the Evidentiary Hearing was not set less than fifteen days prior to the hearing, and the Certificate of Mailing is

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8 There is a clear appearance of impropriety in this matter, where the judge in District Court  
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12 Additionally, the entire legal maneuvers by Respondent in this matter have been solely for  
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14 Respondent wins. The alienation is thorough and complete. Appellant requests this court review  
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16 between Appellant and the child be established.

17 Appellant does not understand how the District Court Judge could simply ignore the order  
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19 In 1994, under Liteky v. U.S., 114 S.Ct. 1147, 1162 (1994) the United States Supreme Court  
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26 This matter needs to be addressed on an emergency basis. And given the appearance of  
27 impropriety, Judge Ritchie should be removed from the case - if not the bench.

28 Appellant reasonably fears that Judge Ritchie has, and will continue *not* to be impartial in

1 the case herein. Judge Ritchie's disqualification is necessary in order to avoid even the appearance  
2 of impropriety. The public must have the utmost confidence in the judicial process.

3 **STATEMENT OF THE FACTS AND OF THE CASE**

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

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

23 It is interesting to note that since the determination by the Nevada Supreme Court,  
24 ANTHONY FREDIANELLI's attorney has withdrawn from the case, and Mr. Fredianelli's last  
25 known address is in California; while KRISTI FREDIANELLI's attorney is scheduled to withdraw  
26 on April 18, 2011 (three days after the bogus evidentiary hearing, leading to other questions of  
27 impropriety); and that KRISTI FREDIANELLI's last know address remains in Nevada.

28 In other words, the Fredianelli's are separating again - and possibly divorcing. Mr.

1 Fredianelli knows he is not the child's biological father, and did not claim the child on the last  
2 divorce papers (which were dismissed). This only makes it more appropriate that Appellant, the  
3 child's biological father, be involved in his child's life.

4 Appellant obtained DNA testing and was confirmed that Appellant was the father of the child  
5 before any appeal was ever filed. He also again served ANTHONY FREDIANELLI. Appellant  
6 informed the court that the presumption of paternity had been overcome.

7 Under NRS 126.051, there is a *presumption* of paternity of the husband, which is Mr.  
8 Fredianelli in this matter. Father believes this presumption is overcome under NRS 126.051(2) and  
9 (3).

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

12 However, NRS 126.051(2) states,  
13 "2. A conclusive presumption that a man is the natural father of a child is established if tests for the  
14 typing of blood or tests for genetic identification made pursuant to NRS 126.121 show probability  
15 of 99 percent or more that he is the father except that the presumption may be rebutted if he  
16 establishes that he has an identical sibling who may be the father."

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

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

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

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

28 Logic dictates that the child is the child of SEBASTIAN MARTINEZ, and ANTHONY

1 FREDIANELLI is no longer a necessary party to this action.

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

5 Further, Mr. Fredianelli appears to have abandoned his marriage to KRISTI FREDIANELLI,  
6 as well as any presumed (though overcome) rights to the child at issue.

7 The District Court dismissed the action. Appellant appealed, and the Nevada Supreme Court  
8 confirmed service as proper and remanded the matter to proceed with this directive.

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

11 **TEMPORARY EMERGENCY VISITATION WITH THE CHILD**

12 In filing a motion in District Court to confirm valid service, Appellant sought immediate  
13 contact with his daughter, which had been denied for the past 19 months. The District Court did  
14 not grant or deny the motion, but merely further delayed justice by seeking an evidentiary hearing -  
15 months away - to re-litigate the issue of service which was already resolved by this court.

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

24  
25 **CUSTODY, VISITATION, COMPENSATORY VISITATION**  
26 **CHILD CUSTODY STATUTES**

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

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

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

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

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

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

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

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

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

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

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

28 Both judges were aware that DNA testing confirmed paternity of the child, and that, under  
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  
be held against SEBASTIAN MARTINEZ in determining primary physical custody of the child.

1 Additionally, he should be given compensatory visitation with the child for the length of time that  
2 he was denied access to the child.

3 SEBASTIAN MARTINEZ has not had contact with his child for the past 19 months. When  
4 this court incorrectly denied jurisdiction, he filed an action in California explaining that the  
5 jurisdiction was being challenged in the Nevada Supreme Court, and he was seeking a temporary  
6 visitation order pending results. He was unable to obtain visitation even upon those efforts.

7 He has REPEATEDLY contacted the law offices of opposing counsel, asking for Christmas  
8 visitation; asking for the child's birthday visitation -January 30 - asking for any visitation with his  
9 child - all to no avail.

10 The psychological damage done by not providing visitation cannot be undone. A bell cannot  
11 be un-rung. However, it is completely appropriate that Plaintiff have compensatory contact for a  
12 period of 19 months - the length of time he has been denied contact.

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

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

24 In awarding custody, NRS 125.480 states, in pertinent part, "... the court shall consider,  
25 among factors, **which parent is more likely to allow the child to have frequent associations and**  
26 **a continuing relationship with the noncustodial parent.**" There can be no doubt as to which  
27 parent has already denied the other parent 19 months of contact.

28 KRISTI FREDINELLI knew SEBASTIAN MARTINEZ is the biological father of the child.

1 She knew DNA testing established paternity. She knowingly denied contact between the father and  
2 child for no valid reason whatsoever. There is no justification for her actions. There should be  
3 consequences to make things right for the child.

4 Plaintiff, SEBASTIAN MARTINEZ should be entitled to primary custody of the child, and  
5 KRISTIFREDINELLI should be entitled to specified visitation - SEBASTIAN MARTINEZ would  
6 not alienate her from the child as she has attempted to do to him.

7 Nevada should be confirmed as the appropriate jurisdiction in this matter for all future child  
8 related actions in terms the District Court will comply with.

9 Dated this 5 day of April, 2011.

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13 SEBASTIAN MARTINEZ  
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DISTRICT COURT  
CLARK COUNTY, NEVADA

  
CLERK OF THE COURT

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IN THE MATTER OF THE PETITION BY:  
SEBASTIAN MARTINEZ, PETITIONER.

CASE NO: D-07-373016-P  
DEPARTMENT H

ORDER SETTING EVIDENTIARY HEARING

HEARING DATE: April 15, 2011

IT IS HEREBY ORDERED that the above-entitled case is set for an Evidentiary Hearing – Remand from Supreme Court, in Department H on April 15, 2011, at the hour of 9:00 AM for a period of three (3) hours at the Regional Justice Center, 200 Lewis Avenue, Courtroom 14A, Las Vegas, Nevada.

IT IS FURTHER ORDERED that no continuances will be granted to either party unless written application is made to the Court, served upon opposing counsel, and a hearing held at least three (3) days prior to the Evidentiary Hearing.

DATED: This 30th day of March, 2011.

  
T. ARTHUR RITCHIE, JR.  
District Court Judge  
Department H

Ex "11"

**CERTIFICATE OF MAILING**

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I hereby certify that on or about the above file stamped date:

I mailed, via first-class mail, postage fully prepaid the foregoing Order Setting


Evidentiary Hearing to:

Sebastian Martinez  
261 Lenape Heights Ave  
Las Vegas NV 89148

Anthony Fredianelli  
3657 Bayonne Drive  
San Diego CA 92109

I placed a copy of the foregoing Notice of Rescheduling of Hearing in the appropriate attorney folder located in the Clerk of the Court's Office:

Michael P. Carman, Esq.

  
\_\_\_\_\_  
Katrina Bunnell  
Judicial Executive Assistant  
Department H

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FREDIANELLI, A MINOR, BY NEVADA  
STATE WELFARE, AS GUARDIAN AD  
LITEM,  
Respondents.

No. 55073

**FILED**

**JAN 18 2011**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is a proper person appeal from a district court order dismissing appellant's paternity action. Eighth Judicial District Court, Family Court Division, Clark County; Bryce C. Duckworth, Judge.

Having considered the parties' arguments and the district court record, we conclude that the district court abused its discretion by dismissing appellant Sebastian Martinez's paternity petition for his alleged failure to timely serve process on respondent Anthony Fredianelli. Scrimmer v. Dist. Ct., 116 Nev. 507, 512-13, 998 P.2d 1190, 1193-94 (2000) (reviewing the district court's dismissal of a complaint for failure to serve process for an abuse of discretion). First, the district court improperly determined that the December 2007 service of process on Anthony was invalid, as neither the district court, nor respondent Kristi Rae Fredianelli, could properly challenge the validity of the service of process. See NRCP 12(b) (providing that an affirmative defense is set forth by a party in a pleading, in a 12(b) motion, or at trial); Fritz Hansen A/S v. Dist. Ct., 116 Nev. 650, 656-57, 6 P.3d 982, 986 (2000) (recognizing that a defendant may move for dismissal based on lack of personal jurisdiction, insufficiency of process, or insufficiency of service of process). Also, a

*S. Young*

11-01645

challenge to the sufficiency of service of process is an affirmative defense that must be asserted in the pleadings or by motion or it is deemed waived. See NRCP 12(b) and (h)(1); see also Second Baptist Ch. v. First Nat'l Bank, 89 Nev. 217, 220, 510 P.2d 630, 631-32 (1973) (stating that affirmative defenses not specifically pleaded are waived).<sup>1</sup>

Second, without a proper challenge to the December 2007 service of process, it appears on its face that the December 2007 service meets NRCP 4's service requirements. Additionally, the district court record demonstrates that after the December 2007 service of process was made, appellant's then-counsel used the amended petition's caption on several documents and mailed copies of those documents to Anthony at the same address where service occurred. Third, even if the district court had properly determined that the December 2007 service of process was invalid, its oral decision was of no effect, as no written order quashing such service had ever been entered, until the order challenged on appeal, which was entered on September 21, 2009.<sup>2</sup> See State, Div. Child & Fam. Servs. v. Dist. Ct., 120 Nev. 445, 454, 92 P.3d 1239, 1245 (2004).

Fourth, because the district court abused its discretion in determining that the December 2007 service of process was invalid, it then improperly required Sebastian to re-serve process on Anthony. As the record before us does not clearly establish, however, that the December 2007 service of process was invalid, we conclude that the district court


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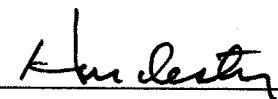
<sup>1</sup>We note that even if Kristi had standing to challenge the service of process on Anthony, no formal motion doing so was ever filed by Kristi. See NRCP 12(b).

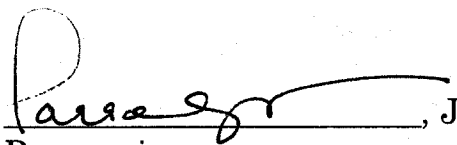
<sup>2</sup>We note that the decision that the December 2007 service of process was invalid was initially made by the Honorable Gloria S. Sanchez.

abused its discretion in determining that Sebastian failed to timely serve process on Anthony under NRCP 4(i).<sup>3</sup> Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.<sup>4</sup>

  
Saitta, J.

  
Hardesty, J.

  
Parraguirre, J.

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<sup>3</sup>As respondents' arguments regarding the December 2007 service of process were not properly raised in the district court, we did not consider them in resolving this appeal.

<sup>4</sup>We are concerned by the fact that the original district court judge appointed a guardian ad litem for the minor child in name only, as notice was not required to be served on the appointed guardian ad litem, namely respondent Nevada State Welfare. This court has recognized that a guardian ad litem's purpose is to represent a minor's interest, which may be separate from the minor's parents' interests, and to protect the minor. See Linthicum v. Rudi, 122 Nev. 1452, 1457 n.18, 148 P.3d 746, 750 n.18 (2006); Baker v. Baker, 59 Nev. 163, 87 P.2d 800 (1939), modified on rehearing on other grounds by Baker v. Baker, 59 Nev. 163, 96 P.2d 200 (1939). Moreover, the guardian ad litem is expected to take part in paternity action proceedings on behalf of the minor. See generally NRS 126.141(4); NRS 126.171. Thus, on remand, we are confident that the district court will ensure that a proper appointment of a guardian ad litem is made for the minor child.

We admonish respondent Nevada State Welfare for failing to respond to this court's orders directing a response to appellant's civil proper person appeal statement.

cc: Hon. Bryce C. Duckworth, District Judge, Family Court Division  
Sebastian Martinez  
Attorney General/Carson City  
Attorney General/Las Vegas  
Ecker & Kainen, Chtd.  
Kunin & Carman  
Lemons, Grundy & Eisenberg  
Eighth District Court Clerk

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

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

23 It is interesting to note that since the determination by the Nevada Supreme Court,  
24 ANTHONY FREDIANELLI's attorney has withdrawn from the case, and Mr. Fredianelli's last  
25 known address is in California; while KRISTI FREDIANELLI's attorney is scheduled to withdraw  
26 on April 18, 2011 (three days after the bogus evidentiary hearing, leading to other questions of  
27 impropriety); and that KRISTI FREDIANELLI's last know address remains in Nevada.

28 In other words, the Fredianelli's are separating again - and possibly divorcing. Mr.

1 Fredianelli knows he is not the child's biological father, and did not claim the child on the last  
2 divorce papers (which were dismissed). This only makes it more appropriate that Appellant, the  
3 child's biological father, be involved in his child's life.

4 Appellant obtained DNA testing and was confirmed that Appellant was the father of the child  
5 before any appeal was ever filed. He also again served ANTHONY FREDIANELLI. Appellant  
6 informed the court that the presumption of paternity had been overcome.

7 Under NRS 126.051, there is a *presumption* of paternity of the husband, which is Mr.  
8 Fredianelli in this matter. Father believes this presumption is overcome under NRS 126.051(2) and  
9 (3).

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

12 However, NRS 126.051(2) states,  
13 "2. A conclusive presumption that a man is the natural father of a child is established if tests for the  
14 typing of blood or tests for genetic identification made pursuant to NRS 126.121 show probability  
15 of 99 percent or more that he is the father except that the presumption may be rebutted if he  
16 establishes that he has an identical sibling who may be the father."

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

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

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

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

28 Logic dictates that the child is the child of SEBASTIAN MARTINEZ, and ANTHONY

1 FREDIANELLI is no longer a necessary party to this action.

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

5 Further, Mr. Fredianelli appears to have abandoned his marriage to KRISTI FREDIANELLI,  
6 as well as any presumed (though overcome) rights to the child at issue.

7 The District Court dismissed the action. Appellant appealed, and the Nevada Supreme Court  
8 confirmed service as proper and remanded the matter to proceed with this directive.

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

11 **TEMPORARY EMERGENCY VISITATION WITH THE CHILD**

12 In filing a motion in District Court to confirm valid service, Appellant sought immediate  
13 contact with his daughter, which had been denied for the past 19 months. The District Court did  
14 not grant or deny the motion, but merely further delayed justice by seeking an evidentiary hearing -  
15 months away - to re-litigate the issue of service which was already resolved by this court.

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

24  
25 **CUSTODY, VISITATION, COMPENSATORY VISITATION**  
26 **CHILD CUSTODY STATUTES**

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

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

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

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

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

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

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

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

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

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

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

28 Both judges were aware that DNA testing confirmed paternity of the child, and that, under  
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  
be held against SEBASTIAN MARTINEZ in determining primary physical custody of the child.

1 Additionally, he should be given compensatory visitation with the child for the length of time that  
2 he was denied access to the child.

3 SEBASTIAN MARTINEZ has not had contact with his child for the past 19 months. When  
4 this court incorrectly denied jurisdiction, he filed an action in California explaining that the  
5 jurisdiction was being challenged in the Nevada Supreme Court, and he was seeking a temporary  
6 visitation order pending results. He was unable to obtain visitation even upon those efforts.

7 He has REPEATEDLY contacted the law offices of opposing counsel, asking for Christmas  
8 visitation; asking for the child's birthday visitation -January 30 - asking for any visitation with his  
9 child - all to no avail.

10 The psychological damage done by not providing visitation cannot be undone. A bell cannot  
11 be un-rung. However, it is completely appropriate that Plaintiff have compensatory contact for a  
12 period of 19 months - the length of time he has been denied contact.

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

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

24 In awarding custody, NRS 125.480 states, in pertinent part, "... the court shall consider,  
25 among factors, **which parent is more likely to allow the child to have frequent associations and**  
26 **a continuing relationship with the noncustodial parent.**" There can be no doubt as to which  
27 parent has already denied the other parent 19 months of contact.

28 KRISTI FREDINELLI knew SEBASTIAN MARTINEZ is the biological father of the child.

1 She knew DNA testing established paternity. She knowingly denied contact between the father and  
2 child for no valid reason whatsoever. There is no justification for her actions. There should be  
3 consequences to make things right for the child.

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

7 Nevada should be confirmed as the appropriate jurisdiction in this matter for all future child  
8 related actions in terms the District Court will comply with.

9 Dated this 5 day of April, 2011.

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13 SEBASTIAN MARTINEZ  
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DISTRICT COURT  
CLARK COUNTY, NEVADA

*Steven L. Johnson*  
CLERK OF THE COURT

\*\*\*\*

IN THE MATTER OF THE PETITION BY:  
SEBASTIAN MARTINEZ, PETITIONER.

CASE NO: D-07-373016-P  
DEPARTMENT H

ORDER SETTING EVIDENTIARY HEARING

HEARING DATE: April 15, 2011

IT IS HEREBY ORDERED that the above-entitled case is set for an Evidentiary Hearing – Remand from Supreme Court, in Department H on April 15, 2011, at the hour of 9:00 AM for a period of three (3) hours at the Regional Justice Center, 200 Lewis Avenue, Courtroom 14A, Las Vegas, Nevada.

IT IS FURTHER ORDERED that no continuances will be granted to either party unless written application is made to the Court, served upon opposing counsel, and a hearing held at least three (3) days prior to the Evidentiary Hearing.

DATED: This 30th day of March, 2011.

*T. Arthur Ritchie, Jr.*  
T. ARTHUR RITCHIE, JR.  
District Court Judge  
Department H

Ex 11/11

**CERTIFICATE OF MAILING**

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I hereby certify that on or about the above file stamped date:

I mailed, via first-class mail, postage fully prepaid the foregoing Order Setting

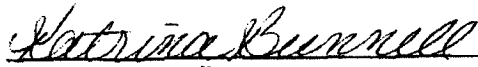
Evidentiary Hearing to:

Sebastian Martinez  
261 Lenape Heights Ave  
Las Vegas NV 89148

Anthony Fredianelli  
3657 Bayonne Drive  
San Diego CA 92109

I placed a copy of the foregoing Notice of Rescheduling of Hearing in the appropriate attorney folder located in the Clerk of the Court's Office:

Michael P. Carman, Esq.

  
\_\_\_\_\_  
Katrina Bunnell  
Judicial Executive Assistant  
Department H



IN THE SUPREME COURT OF THE STATE OF NEVADA

SEBASTIAN MARTINEZ,  
Appellant,

vs.

KRISTI RAE FREDIANELLI; ANTHONY  
FREDIANELLI; AND MIKAELLA RAE  
FLANNERY, A/K/A MIKAELLA RAE  
FREDIANELLI, A MINOR, BY NEVADA  
STATE WELFARE, AS GUARDIAN AD  
LITEM,  
Respondents.

No. 55073

**FILED**

**JAN 18 2011**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is a proper person appeal from a district court order dismissing appellant's paternity action. Eighth Judicial District Court, Family Court Division, Clark County; Bryce C. Duckworth, Judge.

Having considered the parties' arguments and the district court record, we conclude that the district court abused its discretion by dismissing appellant Sebastian Martinez's paternity petition for his alleged failure to timely serve process on respondent Anthony Fredianelli. Scrimmer v. Dist. Ct., 116 Nev. 507, 512-13, 998 P.2d 1190, 1193-94 (2000) (reviewing the district court's dismissal of a complaint for failure to serve process for an abuse of discretion). First, the district court improperly determined that the December 2007 service of process on Anthony was invalid, as neither the district court, nor respondent Kristi Rae Fredianelli, could properly challenge the validity of the service of process. See NRCP 12(b) (providing that an affirmative defense is set forth by a party in a pleading, in a 12(b) motion, or at trial); Fritz Hansen A/S v. Dist. Ct., 116 Nev. 650, 656-57, 6 P.3d 982, 986 (2000) (recognizing that a defendant may move for dismissal based on lack of personal jurisdiction, insufficiency of process, or insufficiency of service of process). Also, a



*S. Young*

11-01645

challenge to the sufficiency of service of process is an affirmative defense that must be asserted in the pleadings or by motion or it is deemed waived. See NRCP 12(b) and (h)(1); see also Second Baptist Ch. v. First Nat'l Bank, 89 Nev. 217, 220, 510 P.2d 630, 631-32 (1973) (stating that affirmative defenses not specifically pleaded are waived).<sup>1</sup>

Second, without a proper challenge to the December 2007 service of process, it appears on its face that the December 2007 service meets NRCP 4's service requirements. Additionally, the district court record demonstrates that after the December 2007 service of process was made, appellant's then-counsel used the amended petition's caption on several documents and mailed copies of those documents to Anthony at the same address where service occurred. Third, even if the district court had properly determined that the December 2007 service of process was invalid, its oral decision was of no effect, as no written order quashing such service had ever been entered, until the order challenged on appeal, which was entered on September 21, 2009.<sup>2</sup> See State, Div. Child & Fam. Servs. v. Dist. Ct., 120 Nev. 445, 454, 92 P.3d 1239, 1245 (2004).

Fourth, because the district court abused its discretion in determining that the December 2007 service of process was invalid, it then improperly required Sebastian to re-serve process on Anthony. As the record before us does not clearly establish, however, that the December 2007 service of process was invalid, we conclude that the district court

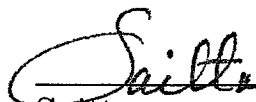
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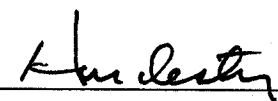
<sup>1</sup>We note that even if Kristi had standing to challenge the service of process on Anthony, no formal motion doing so was ever filed by Kristi. See NRCP 12(b).

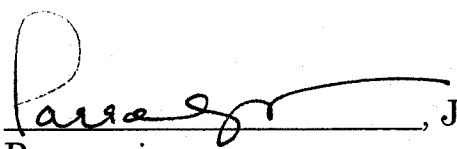
<sup>2</sup>We note that the decision that the December 2007 service of process was invalid was initially made by the Honorable Gloria S. Sanchez.

abused its discretion in determining that Sebastian failed to timely serve process on Anthony under NRCP 4(i).<sup>3</sup> Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.<sup>4</sup>

  
Saitta, J.

  
Hardesty, J.

  
Parraguirre, J.

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<sup>3</sup>As respondents' arguments regarding the December 2007 service of process were not properly raised in the district court, we did not consider them in resolving this appeal.

<sup>4</sup>We are concerned by the fact that the original district court judge appointed a guardian ad litem for the minor child in name only, as notice was not required to be served on the appointed guardian ad litem, namely respondent Nevada State Welfare. This court has recognized that a guardian ad litem's purpose is to represent a minor's interest, which may be separate from the minor's parents' interests, and to protect the minor. See Linthicum v. Rudi, 122 Nev. 1452, 1457 n.18, 148 P.3d 746, 750 n.18 (2006); Baker v. Baker, 59 Nev. 163, 87 P.2d 800 (1939), modified on rehearing on other grounds by Baker v. Baker, 59 Nev. 163, 96 P.2d 200 (1939). Moreover, the guardian ad litem is expected to take part in paternity action proceedings on behalf of the minor. See generally NRS 126.141(4); NRS 126.171. Thus, on remand, we are confident that the district court will ensure that a proper appointment of a guardian ad litem is made for the minor child.

We admonish respondent Nevada State Welfare for failing to respond to this court's orders directing a response to appellant's civil proper person appeal statement.

cc: Hon. Bryce C. Duckworth, District Judge, Family Court Division  
Sebastian Martinez  
Attorney General/Carson City  
Attorney General/Las Vegas  
Ecker & Kainen, Chtd.  
Kunin & Carman  
Lemons, Grundy & Eisenberg  
Eighth District Court Clerk