ORIGINAL

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

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.

SEBASTIAN MARTINEZ

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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

11-10282

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When Appellant returned to the District Court seeking compliance with the Nevada Supreme Court order, the Respondent argued that service was not valid. **Appellant contends this issue was already resolved in the Nevada Supreme Court, and it is improper to be heard again, by the District Court.** The sole purpose of the repeat evidentiary hearing is to further delay Appellant a relationship with his child. He has been kept from contact for the past 19 months by actions brought in bad faith with unclean hands.

There is a clear appearance of impropriety in this matter, where the judge in District Court completely ignores the Reverse and Remand of the Nevada Supreme Court. Appellant needs emergency relief. He needs this court to stay the evidentiary hearing on an emergency basis. To proceed would be a travesty of justice.

Additionally, the entire legal maneuvers by Respondent in this matter have been solely for purposes of delaying a relationship between Appellant and his child. As long as there is delay, Respondent wins. The alienation is thorough and complete. Appellant requests this court review the original appeal, and the present Writ, and order that some temporary contact and relationship between Appellant and the child be established.

Appellant does not understand how the District Court Judge could simply ignore the order confirming appropriate service and to set an evidentiary hearing on the very same issue.

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

This matter needs to be addressed on an emergency basis. And given the appearance of impropriety, Judge Ritchie should be removed from the case - if not the bench.

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

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

STATEMENT OF THE FACTS AND OF THE CASE

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

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

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

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

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

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

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

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

However, NRS 126.051(2) states,

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

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

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

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

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

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

FREDIANELLI is no longer a necessary party to this action.

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

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

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

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

TEMPORARY EMERGENCY VISITATION WITH THE CHILD

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

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

CUSTODY, VISITATION, COMPENSATORY VISITATION
CHILD CUSTODY STATUTES

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

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

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

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

> "In determining custody of a minor child in a action brought under this chapter, the sole consideration of the court is the best interest of the child. If it appears to the court that joint custody would be in the best interest of the child, the court may grant custody to the parties jointly.
>
> No preference may be given to either parent for the sole reason that the parent is the mother or father of the child.
>
> The court shall award custody in the following order of preference unless in a particular case the best interests of the child requires otherwise:
>
> > (a) To both parents jointly pursuant to N.R.S. 125.490 or to either parent. If the court does not enter an order awarding joint custody of a child after either parent has applied for joint custody, the court shall state in its decision the reason for its awarding custody to either parent, the court shall consider, among factors, which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent. ."

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

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

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

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 determinating primary physical custody of the child.

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

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

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

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

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

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

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

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

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

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

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

Dated this 5 day of April, 2011.

SEBASTIAN MARTINEZ

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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
****

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

T ARTHUR RITCHIE, JR
DISTRICT JUDGE
FAMILY DIVISION, DEPT H
LAS VEGAS, NV 89155

Ex 11 | 11

CERTIFICATE OF MAILING

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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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. Scrimer 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

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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).[1]

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.[2] 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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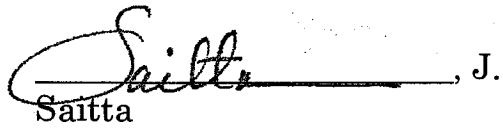
[1]We note that even if Kristi had standing to challenge the service of process on Anthony, no formal motion doing so was ever filed by Kristi. See NRCP 12(b).

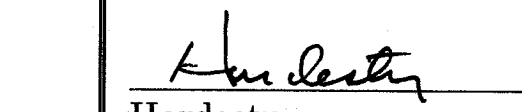
[2]We note that the decision that the December 2007 service of process was invalid was initially made by the Honorable Gloria S. Sanchez.

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

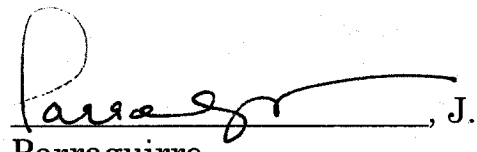
ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[4]



Saitta, J.



Hardesty, J.



Parraguirre, J.

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[3]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.

[4]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

ORIGINAL

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

FREDIANELLI is no longer a necessary party to this action.

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

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

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

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

TEMPORARY EMERGENCY VISITATION WITH THE CHILD

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

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

CUSTODY, VISITATION, COMPENSATORY VISITATION
CHILD CUSTODY STATUTES

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

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

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

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

> "In determining custody of a minor child in a action brought under this chapter, the sole consideration of the court is the best interest of the child. If it appears to the court that joint custody would be in the best interest of the child, the court may grant custody to the parties jointly.
>
> No preference may be given to either parent for the sole reason that the parent is the mother or father of the child.
>
> The court shall award custody in the following order of preference unless in a particular case the best interests of the child requires otherwise:
>
> > (a) To both parents jointly pursuant to N.R.S. 125.490 or to either parent. If the court does not enter an order awarding joint custody of a child after either parent has applied for joint custody, the court shall state in its decision the reason for its awarding custody to either parent, the court shall consider, among factors, which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent. ."

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

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

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

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 determinating primary physical custody of the child.

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

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

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

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

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

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

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

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

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

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

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

Dated this 5 day of April, 2011.

SEBASTIAN MARTINEZ

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03/30/2011 11:02:21 AM

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

****

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

T ARTHUR RITCHIE, JR
DISTRICT JUDGE
FAMILY DIVISION, DEPT H
LAS VEGAS, NV 89155

Ex "11"

CERTIFICATE OF MAILING

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. Scrimer 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

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).[1]

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.[2] 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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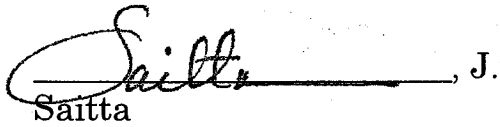
[1]We note that even if Kristi had standing to challenge the service of process on Anthony, no formal motion doing so was ever filed by Kristi. See NRCP 12(b).

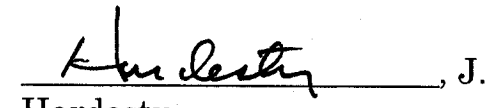
[2]We note that the decision that the December 2007 service of process was invalid was initially made by the Honorable Gloria S. Sanchez.

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

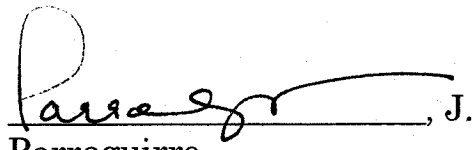
ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[4]



Saitta, J.



Hardesty, J.



Parraguirre, J.

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[3]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.

[4]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