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IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTINA CALDERON STIPP,

Appellant,

v.

MITCHELL DAVID STIPP

Respondent.[1]

SUPREME COURT CASE NO.: 62299

DISTRICT COURT CASE NO.: D389203

DEPT. NO.: M

REPLY TO APPELLANT'S RESPONSE TO ORDER TO SHOW CAUSE AND OPPOSITION TO MOTION TO CONSOLIDATE APPEALS, FOR AN AWARD OF DAMAGES AND COSTS FOR RESPONDENT'S FRIVOLOUS APPEAL AND FOR OTHER RELATED RELIEF

On April 29, 2013, the Nevada Supreme Court issued an order to show cause why the appeal of Christina Calderon Stipp ("Christina") in the above-referenced matter should not be dismissed (Docket

[1] Mr. Stipp filed a motion to dismiss his appeal (Docket No. 13-10938), which was not opposed by Ms. Stipp, and was granted by the Court (Docket No. 13-12495). Accordingly, Ms. Stipp is now the appellant and Mr. Stipp is now the respondent.

No. 13-12495). Mitchell Stipp ("Mitchell"), by and through his co-counsel of record, Radford J. Smith, Esq., of the firm of Radford J. Smith, Chartered, hereby submits his response and opposition as set forth below. Before addressing the matters before this Court, Mitchell notes that Christina's response and motion (Docket No. 13-15713) ("Christina's Response") appears improperly to reargue the substantive matters before the district court rather than specifically addressing why her appeal should not be dismissed as directed by this Court's order. She misrepresents facts (and the record which is not before this Court on appeal) and attacks Mitchell personally, cites to law that is inapplicable and distorts other law to support her positions, and asks for relief for which there is no legal basis and is beyond the jurisdiction of this Court. Moreover, the portion of Christina's Response that purportedly addresses the Court's order is untimely as it was due on May 28, 2013 (which was the date set by the clerk upon Christina's request for a telephonic extension).

I.

POINTS AND AUTHORITIES

A. Mitchell's Appeal was not frivolous, and he should not have to pay Christina's attorney's fees and costs for filing her cross-appeal.

Mitchell filed his notice of appeal in the district court on December 6, 2012, which was docketed in this Court on December 17, 2012, of the written decision of Judge William Potter of Department M, Eighth Judicial District, Clark County, State of Nevada, which decision was entered on November 9, 2012 (the "Appealed Order"). Mitchell filed his Docketing Statement on January 10, 2013 (Docket No. 13-01138) ("Mitchell's Docketing Statement"). Item No. 9 of Mitchell's Docket Statement identifies two (2) issues that were the subject of Mitchell's appeal:

1. May the district court refuse to review Mitchell's child support obligations as required by NRS125B.145(b) and delegate its judicial authority to review child support to the Family Support Division of the Office of the District Attorney for a determination of the appropriate level of support?

2. May the district court refuse to offset insurance premiums and medical expenses paid by Mitchell without contribution by Christina against amounts allegedly due Christina under the terms of their marital settlement agreement as incorporated into their decree of divorce?

Mitchell believes the district court erred by delegating the matter of the review of the parties' child support obligations to the Family Support Division of the Office of the District Attorney ("DAFS"). It is Mitchell's position that upon an application by a party, the district court is required to review child support under NRS 125B.145(b). However, Mitchell recognizes that a party may independent of any request to the district court file an action with DAFS. In other words, Judge Potter's decision not to review child support and to direct the parties to DAFS was clear error, which was reviewable by this Court on appeal. Christina's motion before the district court was for the district court to review and determine the parties' child support obligations. The fact that either party could file an action with DAFS does not cure Judge Potter's error under NRS 125B.145(b).

After the filing of his appeal and Mitchell's Docketing Statement, on or about January 14, 2013, the Clark County District Attorney's Office notified Mitchell that Christina filed an action with DAFS (UPI-095435200A). Within the time requirements of NRS 3.415, Mitchell believes the Clark County D.A. will initiate an IV-D case to establish the appropriate level of child support of the parties. At the time Mitchell made the decision voluntarily to dismiss his appeal, he believed this would likely occur before any resolution of Mitchell's case on appeal. NRS 125B.150 requires the District Attorney's Office to proceed with reviewing a child support order upon the request of an applicant for such services Furthermore, NRS 425.3835 provides that IV-D cases go forward regardless of parallel proceedings before the district court or matters before this Court. Therefore, Mitchell's appeal was not frivolous; however, as a practical matter, he no longer believed that pursuit of an appeal made sense if the goal was a review and determination of the child support obligation of the parties. The likely result of the appeal

would be a reversal of Judge Potter's decision; however, Mitchell could not predict when this decision would occur given this Court's caseload. With IV-D cases, NRS 3.415 imposes specific timeframes for matters to be decided because the federal government imposes financial sanctions if Nevada's program fails to meet deadlines for order establishment.

Mitchell believes that DAFS would agree with his position that Judge Potter should have performed his judicial responsibilities and reviewed the parties' child support obligations. If all district court judges simply referred child support matters to DAFS, the result would be a flood of cases on the IV-Court calendar eliminating times for hearings for other IV-D cases for parties who do not have the financial means to pursue matters privately through the district court. Neither of the parties need the assistance of the Clark County D.A. to establish, modify or enforce an order of child support. From a public policy perspective, the parties' case should not be permitted to use up a valuable slot on a burdened IV-D Court calendar because the matter was properly before the district court for consideration. However, this is the current state of circumstances of the parties' child support review.

The Court granted Mitchell's request to withdraw his appeal. Christina did not oppose his motion or ask the Court at that time to impose sanctions because she believed the appeal was frivolous. Accordingly, the Court ordered each party to bear its own attorney's fees and costs. Christina offers no legitimate reason now why the Court should change its decision and award her attorney's fees and costs of pursuing her own appeal.

Christina was not "forced" to file a cross-appeal as she claims. NRAP 3A(a) provides that "[a] party who is aggrieved by an appealable judgment or order may appeal from that judgment or order, with or without first moving for a new trial." The law on cross-appeals is set forth in Nevada is *Ford v. Showboat Operating Co.*, 110 Nev. 752, 877 P.2d 546 (1994). In *Ford*, the Nevada Supreme Court held that a respondent who prevails in the district court and who does not wish to alter any rights of the

parties arising from the judgment is not aggrieved by the judgment and may not file a cross-appeal; however, such respondent may still advance any argument in support of the judgment even if the district court rejected or did not consider the argument. *Id.* In other words, Christina was not forced to file a cross-appeal to address Mitchell's issues on appeal. However, Christina is faced with an order to show cause why her appeal should not be dismissed and she improperly blames Mitchell for this circumstance. These are issues on appeal that Christina raises (not Mitchell). If the Court does not have jurisdiction to consider Christina's issues on appeal, Mitchell should not have the bear the costs and expenses of Christina's jurisdictionally defective appeal.

B. Christina's appeal should <u>not</u> be consolidated with Nevada Supreme Court Case No. 57327.

NRAP 3(b) regarding Joint or Consolidated Appeals provides as follows:

(1) When two or more parties are entitled to appeal from a district court judgment or order, and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant.

(2) When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the Supreme Court upon its own motion or upon motion of a party.

In this case, the parties are the same ***<u>but the actions are different</u>***.

1. Case No. 57327.

The district court issued its stipulated Decree of Divorce on March 6, 2008 (the "Decree"). The Decree incorporates a February 20, 2008 Marital Settlement Agreement ("MSA"). The parties agreed in the MSA to have joint legal and physical custody of their children, Mia, born October 19, 2004, and Ethan, born March 24, 2007.

On December 17, 2008, Christina moved to be designated "primary physical custodian" of the children. Mitchell opposed Christina's motion and filed a countermotion seeking additional time with

the children. Though voluminously briefed, the district court, Judge Frank Sullivan, denied all motions and countermotions without findings.

On April 27, 2009, Mitchell filed his motion for reconsideration or in the alternative a motion to modify the timeshare arrangement. On June 2, 2009, Christina filed a motion to continue the hearing scheduled for June 4, 2009 and to extend the time for filing of her responsive pleading. On June 3, 2009, Mitchell filed his opposition and response to Christina's motion to continue and extend time. At the hearing on Mitchell's motion held on June 4, 2009, Judge Sullivan ordered the parties to attend mediation (but also scheduled an evidentiary hearing to resolve outstanding issues if mediation was unsuccessful).

The parties attended mediation and modified the terms of the MSA through a stipulation and order signed by the parties on July 8, 2009 and entered by the district court on August 7, 2009 ("SAO"). The SAO provided Mitchell additional time with the children and the parties remained joint legal and physical custodians.

In the weeks following the entry of the SAO, the parties' daughter, Mia (now age 8), began suffering the ill effects of a constant barrage of disparagement about Mitchell and his wife, Amy, from Christina. Further, on August 27, 2009, the Nevada Supreme Court issued its opinion in *Rivero v. Rivero*, 216 P.3d 213 (Nev. 2009), in which it re-defined "joint physical custody" as requiring each parent to have physical custody of the children at least 40 percent of the time (or 146 days). On October 29, 2009, Mitchell filed a motion to confirm the parties as joint physical custodians under *Rivero,* and to modify the parties' timeshare arrangement to grant Mitchell equal time with the children. On November 30, 2009, Christina, in proper person, filed her opposition and countermotions. By her countermotions, Christina moved to set aside the SAO, moved for discovery of Mitchell's personal financial affairs, and moved for partition of alleged omitted assets. Mitchell filed his opposition and reply to Christina's

opposition and countermotions on December 7, 2009. Christina filed her reply to Mitchell's opposition on December 8, 2009.

The district court held a hearing on December 8, 2009 and ordered a child custody evaluation to be performed by Dr. John Paglini. Dr. Paglini completed his child custody evaluation and submitted the report to the district court on April 29, 2010. The district court held a non-evidentiary hearing on May 6, 2010 to consider the findings and recommendations of Dr. Paglini and the other motions and matters pending before it (including the supplements filed by the parties). The district court took the matters before it under advisement and indicated at the hearing that it would issue a written decision.

On November 4, 2010, Judge Sullivan issued his written decision from the May 6, 2010 hearing (the "Sullivan Order"). In that order, Judge Sullivan confirmed the parties as joint legal and physical custodians and expanded Mitchell's timeshare by placing them in his care on the third Friday of each month from 9:00 am to 6:00 pm.

The Sullivan Order is the order on appeal in Case No. 57327; however, the Court recently remanded the case to the district court for the limited purpose of explaining how it calculated the parties' timeshare arrangement under *Rivero*. *See NVSCT* Order 13-15375 (May 24, 2013). The parties' custody and timeshare arrangements have ***not*** been changed as a result of the remand.

The issues on appeal in Case No. 57327 are as follows:

(a) Did the district court correctly determine the physical custody status of the parties under *Rivero*?

(b) Did the district court apply the correct legal standard for the modification of the physical custody and/or the timeshare arrangement of the parties?

(c) Was either party entitled to an evidentiary hearing?

(d) Was the evidence used by the district court to support its findings of fact barred by the doctrine of res judicata?

(e) Did the district court err in failing to grant Mitchell an equal timeshare arrangement?

(f) Did the district court err in failing to appoint a parenting coordinator?

(g) Did the district court err in failing to award the specific attorney's fees, costs and expenses requested by the parties?

These issues are not the same issues on appeal in Case No. 62299 except with respect to any error by the district court in failing to award attorney's fees, costs and expenses. However, such error as alleged by Christina arises from a different action.

2. Case No. 62299

Mitchell describes the nature of this appeal in Question 8 of Mitchell's Docketing Statement as follows:

> This is a post-divorce action concerning Christina's motions: (a) for an order to show cause to issue and be enforced against Mitchell for alleged violations of court orders, rules and abuse of proces; (b) to direct child custody exchanges at the parties' residences using the "honk-and-seat belt" rule; (c) to review and increase Mitchell's child support obligations based on Christina's claim that she is the de facto primary physical custodian of the children; (d) for an order reducing to judgement alleged arrears for the children's insurance premiums; (e) for an order requiring Mitchell to pay 1/2 of the children's insurance premiums by no later than the 15th of each month; (f) for an order to disclose tax returns of Aquila Investments, LLC; and (g) for an order of $7,500 in attorney's fees, costs and sanctions.
>
> This post-divorce action also concerns Mitchell's countermotions: (a) to deny Christina's motion in its entirety except that the district court should review Mitchell's child support obligations based on the formula applicable to joint physical custody arrangements set forth in Wright v. Osburn and calculate the "obligation for support" in accordance with NRS 125B.070(1)(b)(2) without any deviations; (b) for a restraining order to prevent Christina from disclosing to third parties his Financial Disclosure Form and any financial information provided by Mitchell related to the review by the district court of Mitchell's child support obligations; (c) for mediation at the Family Mediation Center to resolve parenting issues and matters related to insurance premiums; and (d) for attorney's fees, costs and sanctions against Christina.
>
> The district court (i) denied Christina's request for an order to show cause; (ii) denied Christina's request to pick the children up at Mitchell's residence (but the parties stipulated to exchange the children at Christina's residence using the "honk-and-seat belt" rule); (iii) refused to review Mitchell's child support obligations and delegated its judicial authority to the Family Support Division of the Office of the District Attorney to resolve the matter; (iv) entered a judgement against Mitchell for unpaid insurance premiums in the amount of $970.00 plus interest and penalties without offseting amounts owed to Mitchell by Christina; (v) ordered Mitchell to pay his share of insurance premiums on or before the last day of each month without requiring Christina to provide a bill to Mitchell or other documentation except for notices of premium increases; (vi) failed to address the request for Mitchell to disclose the tax returns of Aquila Investments, LLC (so the relief is deemed denied as a matter of law); (vii) denied Mitchell's request to mediate parenting issues not otherwise decided by the court; and (viii) denied the parties' separate requests for attorney's fees and costs.

The matters before each district court and the disposition of those matters, which are the subject of the appeals, are completely unrelated. Case No. 57327 is a child custody case. Moreover, the interests of the parties and the best interest of their children favors considering the appeals separately because the briefing process in Case No. 57327 is complete and the matter is only awaiting final decision pending clarification on remand to the district court of its basis for calculating the timeshare under *Rivero*. Case No. 57327 has also been pending since December of 2010 based on motions of the parties initially heard by the district court in December of 2009. Consolidating this appeal with Case No. 57327 will likely only delay the Court's final ruling in Case No. 57327 and the outcome of Case No. 62299 has absolutely no bearing on Case No. 57327. Despite Christina's claims to the contrary, consolidating the appeals will not save judicial resources. It unnecessarily complicates this appeal. Accordingly, the appeals should not be consolidated.

C. Christina's Appeal should be dismissed as to matters over which this Court has no jurisdiction.

After reviewing Christina's Docketing Statement (Docket No. 13-02418) ("Christina's Docketing Statement") and Christina's Response, Mitchell believes Christina's issues on appeal may be summarized more succinctly as follows:

1. Did the district court err by denying Christina's motion for an order to show cause?
2. Did the district court err by denying Christina's request for attorney's fees and costs?
3. Did the district court err by failing to find that Christina has primary physical custody for purposes of determining child support?

Issue #1: "Jurisdictional rules go to the very power of this court to act." *Rust v. Clark Cty. School District*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987); accord *Phillips v. Welch*, 11 Nev. 187, 188 (1876) ("Every court is bound to know the limits of its own jurisdiction, and to keep within them."). This Court has consistently explained that unless permitted by rule or statute, no appeal may be taken.

See Taylor Constr. Co. v. Hilton Hotels, 100 Nev. 207, 678 P.2d 1152 (1984); *Kokkos v. Tsalikis*, 91 Nev. 24, 530 P.2d 756 (1975). No rule or statute authorizes an appeal from an order denying a motion to show cause. *See* NRAP 3A(b) (listing orders which may be appealed); NRS Chapter 22 (concerning grounds and procedure for imposing contempt sanctions). Therefore, this Court does not have jurisdiction over an appeal from an order denying a motion to show cause because no rule or statute provides for such an appeal.

Christina attempts to distinguish the case of *Pengilly v. Rancho Sante Fe Homeowners Ass'n.*, 116 Nev. 646, 5 P.3d 569 (2000) (holding that contempt orders must be challenged by an original petition pursuant to NRS Chapter 34). However, she misses the point: if the Court does not have jurisdiction to consider an appeal of an order of contempt imposed under NRS Chapter 22, how does the Court have jurisdiction to consider a denial of a motion for an order to show cause why Mitchell should not be held in contempt under the same statute? The fact is that the Court does not have jurisdiction to hear this issue. *Cf. Pengilly,* 116 Nev. 646.

Christina also mistakenly believes that she has some statutory or constitutional right (i.e., due process) to have a hearing to prove Mitchell has violated court orders and to force the district court to punish him. Nothing in the Nevada Constitution, U.S. Constitution or NRS Chapter 22 requires the district court to issue any such order upon Christina's motion.

Moreover, a writ of mandamus is not available to Christina under these circumstances. A writ of mandamus will issue to compel the performance of an act which the law requires as a duty resulting from an office, trust, or station, and where there is no plain, speedy, and adequate remedy in the ordinary course of law. *Hickey v. District Court*, 105 Nev. 729, 782 P.2d 1336 (1989); NRS 34.160. A writ of mandamus is available when the respondent has a clear, present legal duty to act, or to control an arbitrary or capricious exercise of discretion. *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 637

P.2d 534 (1981). The writ of mandamus is the appropriate remedy to compel performance of a judicial act. *Solis-Ramirez v. Eighth Judicial Dist. Court ex rel. County of Clark*, 112 Nev. 344, 913 P.2d 1293 (1996). As to such a writ, it is intended to resolve legal, not factual disputes. *Round Hill Gen. Imp. Dist.*, 97 Nev. 601.

In this case, the essential facts are in dispute. *See* Mitchell's Opposition and Countermotion, pgs. 17-26, filed on September 13, 2013 (notice of out-of-state travel, out-of-state travel itineraries, telephonic communication, location of timeshare exchanges, and payment for insurance premiums). However, there is no dispute as to matters of law with respect to the district court's duty to act, which duty Mitchell believes has not been violated by the district court. As stated above, there is no legal authority that requires the district court to enter an order to show cause upon Christina's motion. Therefore, there is no basis for an order by way of an extraordinary writ from this Court.

Accordingly, this Court should dismiss Christina's appeal and alternative request to treat the appeal as a writ of mandamus to the extent that it raises any issues related to the district court's denial of her motion to show cause.

Issue #2: Mitchell does not have a position on whether Christina has the right to appeal the district court's denial of an award of attorney's fees and costs.

Issue #3: Contrary to statements contained in this Court's order, Christina does not raise on appeal whether the district court erred by failing to review child support. In fact, she makes it very clear in Question 7 and paragraph 1 of Question 20 of Christina's Docketing Statement that she agrees with Judge Potter's decision to delegate the matter of child support review to DAFS. *See also* Christina's Docketing Statement, Question 9(d) and Christina's Response, pg. 5, para. 4. However, Christina believes that Judge Potter should have made a finding that Christina had primary physical custody of the children for purposes of calculating child support.

The issue of child custody is the subject of Case 57327. In *Mack-Manley v. Manley*, 122 Nev. 849, 138 P.3d 525 (2006), the Court addressed the limits on the district courts' jurisdiction once a child custody decision has been appealed:

> This court has consistently explained that "a timely notice of appeal divests the district court of jurisdiction to act and vests jurisdiction in this court" and that the point at which jurisdiction is transferred from the district court to this court must be clearly defined. Although, when an appeal is perfected, the district court is divested of jurisdiction to revisit issues that are pending before this court, the district court retains jurisdiction to enter orders on matters that are collateral to and independent from the appealed order, i.e., matters that in no way affect the appeal's merits.
>
> Applying these basic jurisdiction premises to the child custody context, the district court has no authority to rule on a post-judgment motion to modify a child custody arrangement while an appeal is pending and the custody issue is squarely before this court. Consequently, even though NRS 125.510(1)(b) purportedly authorizes the district court to change a child custody arrangement "at any time," the district court may only modify child custody when it has jurisdiction to do so — *i.e.,* when no perfected appeal pertaining to the child custody arrangement is pending.
>
> The proper procedure to be followed when a party seeks to change a child custody order during an appeal challenging the child custody arrangement is a remand under *Huneycutt v. Huneycutt.* Under the *Huneycutt* procedure, a district court may hear a motion, in the first instance, to modify custody while an appeal is pending. If the district court is inclined to grant the motion, then it may certify its inclination to this court. At that point, the moving party would file a motion in this court for remand to the district court. This court could then, in its discretion, remand the matter to the district court for a determination on the motion to modify custody. If the only issue on appeal concerned child custody and this court granted the motion for remand, then the appeal would be dismissed. If, however, the appeal raised additional issues other than child custody, this court could order a limited remand and direct the district court to enter an order resolving the motion to modify within a specific time period and to transmit the order to this court. On remand, once the district court entered its order concerning custody, any aggrieved party could appeal from the order by filing a timely notice of appeal.
>
> Although the district court lacks jurisdiction to revisit a child custody order that is on appeal, the district court's jurisdiction to make short-term, temporary adjustments to the parties' custody arrangement, on an emergency basis to protect and safeguard a child's welfare and security, is not impinged when an appeal is pending. If the district court's emergency order will necessitate a longer-term custody change or will implicate the custody issues on appeal, then the party seeking the change must immediately move for a remand from this court and attach to that motion the district court's emergency order.

Id. at 529-530 (citations omitted).

The issue of physical custody is squarely before this Court in Case No. 57327, and Christina did not seek for the case to be remanded pursuant to the procedures outlined in *Huneycutt v. Huneycutt*. Therefore, Judge Potter did not have jurisdiction to make any findings regarding physical custody (even for purposes of calculating child support). Therefore, this Court should dismiss Christina's appeal to the extent that it raises any issues related to the district court's failure to make findings regarding child custody as requested by Christina for purposes of calculating child support.

D. The Court should consider only the matters in the district court record it determines are relevant.

The entire record before the district court is voluminous. If the Court believes there are matters that are relevant in its consideration of Christina's appeal in this case, it has the right to request them. However, Mitchell believes that ordering the clerk of the district court to forward the entire record (whether relevant to the appeal) covering more than four (4) years of litigation before the district court hardly seems necessary or appropriate. Under the circumstances, it appears that the only issue on appeal may be Christina's right to attorney's fees, costs and expenses as denied by Judge Potter.

E. Mitchell should have the right to make filings in this case as the respondent.

Christina's position that Mitchell should not have the right to participate in the appeal process (including briefing) in this case is not supported by any facts or law. Such rights are provided to him pursuant to the Nevada Rules of Appellate Procedure. Mitchell is not and has not been determined to be a vexatious litigant.

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II.

CONCLUSION

Based on the foregoing, the Court should dismiss Christina's appeal as set forth above (and alternative request to treat the appeal as a writ) and deny all of Christina's motions before this Court.

DATED this 5 day of June, 2012.

RADFORD J. SMITH, CHARTERED

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Radford J. Smith, Chartered ("the Firm"). I am over the age of 18 and not a party to the within action. I am "readily familiar" with firm's practice of collection and processing correspondence for mailing. Under the Firm's practice, mail is to be deposited with the U.S. Postal Service on the same day as stated below, with postage thereon fully prepaid.

I served the foregoing document described as "Reply to Appellant's Response to Order to Show Cause and Opposition to Motion to Consolidate Appeals for an Award of Damages and Costs for Respondent's Frivolous Appeal and for Other Related Relief" on this 5th day of June, 2013, to all interested parties as follows:

☒ BY MAIL: Pursuant To NRCP 5(b), I placed a true copy thereof enclosed in a sealed envelope addressed as follows;

☐ BY FACSIMILE: Pursuant to EDCR 7.26, I transmitted a copy of the foregoing document this date via telecopier to the facsimile number shown below;

☐ BY ELECTRONIC MAIL: Pursuant to EDCR 7.26, I transmitted a copy of the foregoing document this date via electronic mail to the electronic mail address shown below;

☐ BY CERTIFIED MAIL: I placed a true copy thereof enclosed in a sealed envelope, return receipt requested, addressed as follows:

Patricia L. Vaccarino
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An employee of Radford J. Smith, Chartered