IN THE SUPREME COURT OF THE STATE OF NEVADA

WESLEY ALLEN LEWIS, Appellant, v. MARIA DANIELA LEWIS, Respondent.	Supreme Court Case No.: 66497 Dist. Court Case No.: D-10-427054-D

REPLY BRIEF OF APPELLANT

Tami D. Cowden, Esq.
Nevada Bar No. 8994
GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway
Ste. 400 N
Las Vegas, Nevada 89169
Attorney for Appellant

CORPORATE DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, Appellant Wesley Allen Lewis, through his undersigned counsel, states:

Appellant Wesley Allen Lewis is an individual.

The following attorneys and law firms have represented Mr. Lewis in this litigation:

Greenberg Traurig, LLP

Patricia A. Marr, Esq.

Dated this 9th day of December, 2015.

GREENBERG TRAURIG, LLP

/s/ Tami D. Cowden
Tami D. Cowden, Esq.
Nevada Bar No. 8994
3773 Howard Hughes Parkway
Ste. 400 N
Las Vegas, Nevada 89169
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

STATUTES AND RULES

Appellant, Wesley Allen Lewis, through his counsel of record, Greenberg Traurig, LLP, respectfully submits his Reply Brief.

INTRODUCTION

The record reveals that Mr. Lewis was not afforded a fair opportunity to defend his custody rights. The District Court abused its discretion in changing custody, because even though, as Respondent correctly points out, the District Court *articulated* the proper standard for a change of custody from a joint custody arrangement, the District Court did not actually analyze or consider the factor relevant to that standard. Nor did the District Court make *specific* factual findings, as Nevada appellate courts have stated must be made. Instead, the District Court merely made a conclusory finding.

Moreover, the record reveals that the District Court's conclusory finding was itself based upon the Court's inaccurate perception that Mr. Lewis had failed to comply with the District Court's orders and was behind in his child support payments, rather than upon evidence relevant to the statutory factors that were required to be considered and relating to which specific findings were required. As a result, the change in custody here was imposed to punish Mr. Lewis, rather than to advance the best interests of the minor child.

In addition, the Court imposed criminal contempt sanctions, without affording Mr. Lewis any of his constitutional rights. The sanctions imposed are criminal because Mr. Lewis is unable to purge the sanctions through compliance with orders. Furthermore, the District Court's findings of contempt due to a purported failure to bring the minor child to tutoring are not supported by the record, as the Order expressly required Mr. Lewis to

bring her to tutoring after school, and moreover, had expired under its own terms due to Bella's excellent school progress and testing results.

Finally, the record as a whole reveals that the District Court displayed significant bias against Mr. Lewis, by precluding him from presenting evidence, punishing him for being unrepresented by counsel, interrupting his efforts to present a case, preventing objections by threatening to fine Mr. Lewis for interruptions, and generally browbeating and berating him throughout the hearing. While Respondent's counsel callously suggest that the District Court's purported exasperation with a *pro se* litigant be indulged, the District Court's conduct goes far beyond any sort of justifiable response to a *pro se* litigant, particularly since the record does not show any indication that Mr. Lewis had misbehaved in any way during the court proceedings. Indeed, here the Court imposed unequal standards, allowing Ms. Perdomo to admit vast quantities of evidence that would, with competent counsel, result in objections, while *sua sponte* shutting down Mr. Lewis's efforts to present a case.

Because the record reveals clear indications that the District Court failed to make specific factual findings regarding the appropriate standard for custody modification, failed to accord Mr. Lewis his due rights, and failed to make a fair and unbiased determination, the judgment must be vacated, and the cause remanded for a new hearing.

ROUTING STATEMENT

Pursuant to NRAP 17(2), this matter, which involves family law matters, falls within the presumptive assignment of the Nevada Court of Appeals.

LEGAL ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN MODIFYING CHILD CUSTODY.

The District Court abused its discretion in modifying custody of the minor child. While, as Respondent noted in her Answering Brief, the District Court did *articulate* the correct standard for a change in custody from a joint physical custody arrangement, **II SUPP. APP. 363:8-10, see also, NRS 125.510(2)**, the District Court failed to make the requisite specific findings as to the best interests of the child, using the statutory factors set forth in NRS 125.480(4). Indeed, the Court made no written *findings regarding Bella's best interests,* other than a conclusory assertion that a change was in the minor child's best interests. **IV APP. 889.** But the District Court's oral "findings" indicate this conclusion was based upon the District Court's perception that its orders had been disobeyed, rather than upon factors actually related to the minor child's interests. **II SUPP. APP. 363:8- 373:24.**

Moreover, the District Court made contradictory "findings" by asserting that Mr. Lewis did not respond stating that the counselor unilaterally employed by Ms. Perdomo had left voice messages for Mr. Lewis, while also berating Mr. Lewis because he did not have voice mail.[1] **II SUPP. APP. 368:1-133:8- 373:24.** Because the District Court abused its discretion in ordering the modification of

[1] The Court's conclusion that Mr. Lewis did not have voice mail "so he doesn't have to deal with major issues involving his child," apparently ignored the considerable testimony proffered that demonstrated that the parties communicated through text messages and emails. *See* e.g., I Supp. App. 61:2-7 (Ms. Perdomo testifying that Bella and Mr. Lewis frequently text each other); II Supp. App. 314:11-19 (Respondent's counsel reading text message into record); 318:22-24(Respondent's counsel reading email into record); 343:23-344:19 (testimony referencing emails).

custody, the order must be vacated, and the matter remanded to the District Court for a new hearing addressing the best interests of the child.

A. The District Court Erred by Failing to Make the Specific Findings Required to Order a Modification of Custody.

It is the policy of the state of Nevada for both parents to have a continuing relationship with their children, and share child rearing rights and responsibilities, after separation or divorce. NRS 125.460. The Nevada appellate courts have emphasized this policy. *See Davis v. Ewalefo,* 131 Nev. ——, —— 352 P.3d 1139, 1143 (2015); *Rivero v. Rivero*, 125 Nev. 410, 426, 216 P.3d 213, 223 (2009). To that end, the Nevada legislature set forth a set of mandatory (albeit, nonexhaustive) factors that a Court "shall consider and set forth its specific findings concerning" whenever making a determination of the best interest of the child. NRS 125.460(4).

Nothing in the record indicates that the District Court gave *any* consideration to the statutory factors set forth in NRS 125.480(4), let alone the requisite specific findings. The District Court was required to explain how the relevant statutory factors support the court's decision, and was required to "tie the child's best interest, as informed by specific, relevant findings" on the best interest factors, "to the custody determination made." *See Davis v. Ewalefo, supra*. By failing to make such specific factual findings relating to the statutory factors, the District Court violated Nevada law. *Davis*, 352 P.3d at 1143 (lack of specific findings "violate[s] Nevada law, which requires express findings as to the best interest of the child in custody and visitation matters."). Accordingly, the District Court's failure to make specific, relevant findings on each NRS 125.480(4) factor was an abuse of discretion that requires this Court to reverse and remand the District Court's decision on the custody modification.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN FINDING MR. LEWIS IN CRIMINAL CONTEMPT.

The District Court's contempt findings were made in violation of Mr. Lewis's constitutional rights. Indeed, one of the findings of contempt was based upon an Order that was itself too ambiguous to support a contempt Order. As a matter of both law and logic, a failure to take a child to tutoring on non-school days *cannot* be a violation of an order that required the child be taken to tutoring "after school."

A. The District Court's Actions Violated Mr. Lewis's Sixth Amendment Right to Counsel.

The District Court violated Mr. Lewis's rights by proceeding to hearing and sentencing him to a definite and fixed term of imprisonment. In a case directly on point, the Nevada Supreme Court held that when a fixed term of imprisonment, even though such sentence was suspended, constituted a criminal sanction, rather than remedial sanction. *In re the Determination of Rights of Claimants*, 118 Nev. 901, 911, 59 P.3d 1226, 1232 (2002) (suspended sentence of three days jail time was criminal because it imposed an absolute sentence.). Here, as in *Rights of Claimants*, absolute jail sentences were imposed; the continued suspension of those sentences might depend on future compliance, but the sentences themselves cannot be purged by compliance; nor would they, once commenced, be terminated by compliance.

Ms. Perdomo's reliance on *Warner v. Second Judicial Dist. Court*, 111 Nev. 1379, 1383, 906 P.2d 707, 709 (1995) is unavailing, as *Warner* is wholly consistent with *Rights of Claimants,* setting forth the exact same rule. Indeed, *Warner* cites *Hicks v. Feiock,* 485 U.S. 624, 633, (1988), for the proposition that a contempt sanction is civil if compliance with the order will *end* the sanction. In *Hicks*, the defendant was sentenced to a jail term for nonpayment of child support.

His sentence was stayed, he was placed on probation, and a condition of his probation was that he pay arrearages (i.e., if he did not pay, he would go to jail). The *Hicks* Court remanded the matter for further findings, because it was not clear whether payment of the arrearages would purge the sentence. If such payment would entirely purge the sentence, then the matter would be civil; but if not, then it was criminal.

Here, Mr. Lewis has no opportunity to purge the sentences – there is an opportunity only to stave them off (by complying not only with the orders purported violated, but also any undisclosed future orders). Under *Hicks*, the absence of an opportunity to purge renders the sanction criminal.

Indeed, another court answered this question squarely. *In State v. Helms*, 108 N.M. 772, 773, 779 P.2d 550, 551 (1989), the director of a hospital was ordered by the Court to accept as a patient a defendant who had been found incompetent to stand trial. After the patient was not admitted, the director was found to be in contempt, and sentenced to a term of imprisonment for 30 days. However, the sentence was stayed for ten days; if the patient were admitted in those ten days, then the sentence would be purged. The director challenged the contempt finding for the lack of procedural protections. The detention center (which had sought the contempt order) cited *Hicks* as indicating that the punishment was coercive, and therefore, civil.

The Court disagreed, noting that the 30 day sentence could not have been purged if the jail term had commenced – that is, admission of the patient after the ten day period would not purge the sentence. The Court stated "As we read ***Hicks,*** however, a provision in a contempt order is a "purging clause" only if it provides that the imprisoned contemnor can get out of jail *at any time* by complying with the court's order." Because the prison sentence had the potential to be punitive, the criminal sanction was punitive.

Because criminal sanctions were imposed on Mr. Lewis, without affording him the procedural protections required in criminal proceedings, the criminal convictions must be reversed. *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 826 (1994) ("Criminal contempt is a crime in the ordinary sense . . . and criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings.") (internal quotation and citation omitted).

B. The District Court also Failed to Determine Mr. Lewis's Present Ability to Pay Arrearages.

Ms. Perdomo contends that there was no error in failing to make a determination of Mr. Lewis's present ability to pay, because Mr. Lewis did not present evidence of his income. However, he *attempted* to do so. *See e.g.*, **II Supp. 283:3-9.** He was precluded from presenting evidence because he responded to discovery late, after the District Court denied his timely request for more time to respond. **I Supp App. 14:9-10, 14:11-18:17.** Furthermore, it would not be Mr. Lewis's burden to prove an inability to pay; contempt requires an express finding that the defendant has a present ability to pay. *Rodriguez v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 120 Nev. 798, 809, 102 P.3d 41, 49 (2004). The District Court's reliance upon a year old decision to impute income to Mr. Lewis cannot satisfy that requirement.

C. The Order Directing Mr. Lewis to Take the Minor Child to the Kumon Program was too Ambiguous to Support a Finding of Contempt.

The District Court abused its discretion when it found Mr. Lewis in contempt for failing to take Bella to the Kumon instruction, as the order was ambiguous. The Order that Mr. Lewis was to take Bella to the Kumon instruction program on Mondays "after school," failed to indicate that Bella was to engage in

the tutoring on non-school days. Accordingly, that Order could not support a subsequent finding of contempt based on a failure to take the child to the program on Mondays for which there is no school, including the summer months.

There was evidence of only a single school day on which Mr. Lewis failed to take Bella to tutoring – the day of a "Daddy-Daughter skating party." **I SUPP. APP. 36:8-42:1.** Missing a single day of tutoring, based on a special event designed to encourage father-daughter relationships, could not reasonably justify a criminal contempt conviction.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN DEVIATING FROM THE CHILD SUPPORT GUIDELINES AND IN ORDERING THE CONTINUED PARTICIPATION IN THE KUMON PROGRAM.

The District Court failed to set forth sufficient factual findings to justify the deviation from the child support guidelines that resulted from continuing an obligation that Bella participate in tutoring. There was no evidence in the record to support that Bella had special needs requiring additional tutoring. To the contrary, the evidence showed that Bella had tested at or above her grade level in the CCSD standardized tests. **I Supp. App. 103: 20-21; 149:24-151:7.** Thus, not only had the terms of the December 2013 order been satisfied for the conclusion of such tutoring, but there was no basis to mandate that Bella continue with the testing**.** The Court did not make the specific findings necessary to permit a deviation from the statutory child support guidelines by imposing the tutoring costs on Mr. Lewis. **See** NRS 125B.080 (9). Nor would the record have supported any such findings, in light of the undisputed evidence of Bella's excellent school progress.

IV. THE DISTRICT COURT DISPLAYED SUFFICIENT BIAS SO AS TO TAINT THE FAIRNESS OF THE PROCEEDING.

Finally, the record as a whole amply demonstrates that the District Court failed to satisfy the requirement that a "trial judge must not only be totally indifferent as between the parties, but he must also give the appearance of being so." *Kinna v. State,* 84 Nev. 642, 647, 447 P.2d 32, 35 (1968). The record clearly indicates that the "trial ambiance [was] is discernibly **unfair** to [Mr. Lewis] when viewed from the cold record on appeal. " *McNair v. State*, 108 Nev. 53, 62, 825 P.2d 571, 577 (1992). The mere fact that the Court had taken a dislike to Mr. Lewis in earlier proceedings does not excuse the Court's frequent display of biased behavior.

Ms. Perdomo's efforts to soften the District Court's conduct by calling it "less than soothing" are laughable when viewed against the display of the District Court's repeated interruptions of Mr. Lewis's examination of Ms. Perdomo; indeed, the Court essentially coached Ms. Perdomo's testimony. ***See, e.g, id.* at 101:8-12.** Nor can a threat to fine a pro se litigant for speaking up – thus precluding any objections – be fairly described as "less than soothing," particularly when that pro se litigation has *not* misbehaved or acted inappropriately in any way. **I. Supp. App, 38:11-16.**

The Court refused a timely request for a discovery extension (the first requested for that deadline), and then imposed devastating sanctions for the pro se litigant's submission of documents without Bates stamps. **II Supp. App. 369:8-16.** The Court imposed differing evidentiary standards on the two parties. *See e.g.***II Supp. App. At 229:9-13; 250:1-251:10.** In short, the Court took repeated steps to interfere with Mr. Lewis's presentation of favorable evidence.

No reasonable person, reviewing the record here, and knowing all of the facts, would believe the District Court impartial. *In re Varain*, 114 Nev. 1271, 1278, 969 P.2d 305, 310 (1998) (internal quotations and citations omitted). Accordingly, the District Court's Orders must be vacated, and the cause remanded for a new hearing.

CONCLUSION

For the reasons set forth above, Appellant requests the Court vacate the Orders entered by the District Court, and remand for appropriate proceedings.

Respectfully submitted this 9th day of December, 2015.

GREENBERG TRAURIG, LLP

/s/ Tami D. Cowden
Tami D. Cowden, Esq.
Nevada Bar No. 8994
3773 Howard Hughes Parkway
Ste. 400 N
Las Vegas, Nevada 89169
Attorney for Appellant

CERTIFICATE OF COMPLIANCE WITH NRAP 28 AND 32

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MS Word 2003 in Times New Roman 14.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 2,917 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 9th day of December, 2015.

GREENBERG TRAURIG, LLP

/s/ Tami D. Cowden
Tami D. Cowden, Esq.
Nevada Bar No. 8994
3773 Howard Hughes Parkway
Ste. 400 N
Las Vegas, Nevada 89169
Attorney for Appellant

CERTIFICATE OF SERVICE

This is to certify that on December 9, 2015, a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANT** was served via this Court's e-filing system, on counsel of record for all parties to the action below in this matter, as follows:

THE FINE & PRICE LAW GROUP
Frances Ann Fine, Esq.
Nevada Bar No. 0025
8975 South Pecos Road, Suite 5
Henderson, Nevada 89074
fran@thefinelawgroup.com

/s/ Shayna Noyce
An employee of Greenberg Traurig, LLP