IN THE SUPREME COURT OF THE STATE OF NEVADA

KERSTAN MICONE,
N/K/A KERSTAN HUBBS,

Appellant,

vs.

MICHAEL MICONE,

Respondent.

Electronically Filed
Oct 13 2015 09:32 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

S.C. DOCKET NO.: 67934
D.C. Case No. D-08-388334-D

CHILD CUSTODY FAST TRACK STATEMENT

1. Name of party filing this fast track statement:

Kerstan Micone, n/k/a Kerstan Hubbs.

2. Name, law firm, address, and telephone number of attorney submitting this fast track statement:

John D. Jones, Esq., Bar No. 006699
Black & LoBello
10777 West Twain Avenue, Suite 300
Las Vegas, Nevada 89135
Telephone: 702-869-8801

3. Judicial district, county, and district court docket number of lower court proceedings:

Eighth Judicial District Court, Family Division, Clark County, Nevada,

District Ct. Docket No. D-08-388334-D.

4. Name of judge issuing judgment or order appealed from:

District Court Judge Rena G. Hughes

5. Length of trial or evidentiary hearing. If the order appealed from was

Docket 67934 Document 2015-31025

entered following a trial or evidentiary hearing, then how many days did the trial or evidentiary hearing last?

There was no evidentiary hearing.

6. **Written order or judgment appealed from:**

"Order From Hearing January 15, 2015."

7. **Date that written notice of the appealed written judgment or order's entry was served:**

March 31, 2015.

8. **If the time for filing the notice of appeal was tolled by the timely filing of a motion listed in NRAP 4(a)(4),**

   (a) **specify the type of motion, and the date and method of service of the motion, and date of filing:** N/A

   (b) **date of entry of written order resolving tolling motion:** N/A

9. **Date notice of appeal was filed:** April 30, 2015.

10. **Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a), NRS 155.190, or other:** NRAP 4(a).

11. **Specify the statute, rule or other authority, which grants this court jurisdiction to review the judgment or order appealed from:**

NRAP 3A(b)(1).

12. **Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which involve the same or some of the same parties to this appeal:** N/A

13. **Proceedings raising same issues. If you are aware of any other appeal or original proceeding presently pending before this court, which raise the same legal issue(s) you intend to raise in this appeal, list the case name(s) and docket number(s) of those proceedings:** N/A

14. Procedural history. Briefly describe the procedural history of the case (provide citations for every assertion of fact to the appendix or record, if any, or to the transcript or rough draft transcript):

a. Plaintiff, Kerstan Micone, nka, Kerstan Hubbs, "Kerstan", filed for divorce in February 12, 2008 and in April 17, 2009 was granted a Decree of Divorce. (AA/I 1-20).

b. In the decree, Kerstan was designated as the primary custodial parent of the Parties children, Isabella C. Micone (currently 17.5 years old) and Michael J. Micone (currently 10.5 years old). (AA/I at 3:13-16).

c. In August of 2014, both Michael and Kerstan decided to have Isabella, their daughter, enroll in Bishop Manogue Catholic High School in Reno, Nevada, because they both wanted to provide Isabella a college preparatory environment, a smaller school setting, family support, and most importantly support with her diagnosed learning disability. (AA/II at 58:18-22).

d. On October 23, 2014, the Defendant, Michael A. Micone, "Michael", filed a "Motion to Change Custody; Review and Modify Child Support; To Resolve Child Support Arrears and Award Defendant a Credit for Child Support Arrears Overpayments; To Resolve an Issue Regarding an Omitted Debt and Ordering Plaintiff to Refinance a Home Equity Line of Credit to Relieve Defendant of Liability for the Debt", (hereinafter the "Motion for Change of Custody"). (AA/I 21-46).

e. On November 13, 2014, Kerstan opposed the Motion for Change of Custody and countermotioned for status quo, which would entail the Parties' daughter to continue to reside with her paternal grandparents while attending school in Reno and return home to Henderson, NV once school was let out for the summer. (AA/I at 74:3-5).

f. On March 31, 2015, the District Court decided this matter, without an evidentiary hearing, and issued an Order from Hearing January 15, 2015, after "having read and reviewed all papers and pleadings on file, and having heard oral argument of counsel..." (AA/II 276-289).

g. Of major importance was that, given the opportunity, Kerstan could have demonstrated to the court that the following representations made to the court were largely untrue:

i. That Michael was enjoying regular visitation with his...his [children] from Tuesday to Sunday every other week. (VTS 10:37:27 at 5:4-5).

ii. That Isabella had a 1.0 GPA down in Las Vegas (VTS 10:37:27 at 5:9).

iii. That the parties "came to an agreement that said Bella was moving up to Reno." (VTS 10:37:37 at 5:15-16).

iv. That Michael was "getting a lot of visitation, seeing his – both of his children on a regular basis. (VTS 10:37:37 at 5:20-21).

v. That Michael had "daily activity involved with Bella at that point and saw her grades in the 2012-2013 school year..." (VTS 10:37:37 at 6:2-3).

vi. That Isabella's GPA had [come] up to a "3.3..." and that Michael spent "most of the summer with both his kids, this past—this past summer." (VTS 10:37:27 at 6:8-10).

vii. That Michael spend the "[latter] part of the summer with–with Bella—and—and her—his son up in Reno". (VTS 10:37:27 at 6 19-21).

viii. That Bella stated that "I'm at Grandma and Grandpa's because if I don't, I've got to go back to Vegas." (VTS 10:37:27 at 7:5-7).

ix. That Michael's own parents excluded Michael or were gatekeeper's to their granddaughter Isabella. (VTS 10:37:27 at 7:20-22).

x. That Michael's own parents said, "You can't come to the house anymore." (VTS 10:37:27 at 7:23).

xi. That Michael "can't go to the house anymore, to his own parent's house. So they control that...And we've watched her grades slip again. (VTS 10:37:27 at 8:13-19).

xii. That in the decree Kerstan had two years to refinance the mortgage. (VTS10:37:27 at 11:15-16).

xiii. That Michael's parents are aligned with Kerstan and serve as

gatekeepers. (VTS 10:37:27 at 12:19-20).

xiv. That the value of the real property in Graeagle, CA was valued at $320,000.00 at the time of transfer to Kerstan. (VTS 10:37:27 at 28:1).

h. Of primary importance to this appeal is the order issued as to the Parties daughter, Isabella Micone, and her physical custody; the court found that there "had been a material change in circumstances regarding the physical custody of [Isabella]". The court ordered "Isabella to remain in the custody her paternal grandparents, and that she may exercise teenage discretion in any visitation with either Michael or Kerstan, given her age of 17 years." (AA/II at 286:10-26).

i. Kerstan in her subsequent Motion to Reconsider and/or Set Aside Order tried to show the court that at no time were the paternal grandparents, a third party, a participant or party to this action and that they did not petition the court for custody of the Parties' daughter, Isabella, however this motion was not heard by the court due to the Notice of Appeal. (AA/II at 294:28); (AA/II 297:20-24); (AA/II at 298:13-16).

j. Of secondary importance to this appeal is the order issued concerning the alleged child support arrears owed to Kerstan from Michael prior to June of 2013. (AA/II at 285:8-27); (AA/II 286:1-8).

k. Kerstan filed a Motion to Reconsider and/or Set Aside the Order on April

13, 2015, and in addition, filed a Notice of Appeal on April 30, 2015, as the hearing on the motion to set aside was slated to take place after the 30 day time frame for Plaintiff to appeal the Order. (AA/II 290-302).

l. Michael then opposed the Kerstan's Motion to Reconsider and/or Set Aside and countermotioned to sanction Kerstan for bringing the motion. (AA/II 304-322).

m. On June 2, 2014, the court issued a minute order stating that "Pursuant to EDCR 2.23(c) and 5.11(e), the [District] court can consider a motion and issue a decision on the papers at any time without hearing...In light of the appeal, the District Court does not have jurisdiction to hear any further matters until authorized by the Supreme Court." (AA/II 10:15-16); (AA/II 11:12-13).

n. After the court ordered a Settlement Conference on August 5, 2015, Michael filed another motion on September 9, 2015 attempting to take custody of the Parties' younger son, Michael. (AA/II 368-394).

o. Kerstan, again, opposed this motion on November 4, 2015. (AA/II 396-475).

15. Statement of facts. Briefly set forth the facts material to the issues on appeal (provide citations for every assertion of fact to the appendix or record, if any, or to the transcript or rough draft transcript):

Primary at Issue on Appeal:

a. The Parties' never agreed to a transfer of physical custody of their daughter to a 3rd party, the paternal grandparents, and Kerstan, the primary physical custodian is not an unfit mother. (AA/II 294:25-27); (AA/II at 295: 13-17).

b. The paternal grandparents, Chuck and Carol Burr, were not a party to the action and did not request or seek physical custody of the Parties' daughter Isabella Micone. (AA/II 298:13-16).

c. The court did not conduct an evidentiary hearing on this Motion for Change of Custody. (AA/II 294:26-28).

d. The court, issued the Order from Hearing January 15, 2015 establishing "findings of fact" and issuing orders based on one hearing on the motion and opposition, a short brief supplied by counsel for both Parties as to a 529 Plan created during the marriage for the benefit of the children, that was later depleted by Michael, and a transcript of the June 2013 hearing concerning several financial issues brought to the court's attention a few years back. (AA/II 285:98-27); (AA/II 286:1-8).

Secondary Issue on Appeal:

d. Res judicata should not apply to: Michael's child support arrearages owed prior to June 25, 2013. (AA/II 294:14-21); (AA/II 295:1-7).

16. Issues on appeal. State concisely the principal issue(s) in this appeal:

a. Primary physical custody of the Parties' minor child, Isabella Micone, should not have been awarded to her paternal grandparents, Chuck and Carol Burr, *as they were not a party to the action and did not intervene pursuant to Nevada Rules of Civil Procedure (NRCP) 24*, they were not seeking physical custody of the Parties' daughter Isabella, and they did not receive notice or have an opportunity to be heard on the matter as required under NRS 125A.345 and NRS 125A.23. Additionally, Kerstan, the prior physical custodian of Isabella and current joint legal custodian of her daughter, is not an unfit parent and an award to a third party was in contravention of NRS 125.500.

b. Kerstan's attorney requested an evidentiary hearing prior to any change of physical custody of the Parties' minor daughter, Isabella Micone, and this was not provided by the court and is contrary to the evidentiary hearing afforded the Parties in *Ellis v. Carucci* 123, Nev. 145 (2007), established precedent for a change of custody of a minor child in the primary physical custodianship of one of their parents.

c. Res judicata does not apply to Michael's child support arrearages owed prior to June 25, 2013 as these matters have not been decided on the merits and did not become final, nor were the issues actually and necessarily litigated at the hearing conducted in June of 2013.

17. Legal argument, including authorities:

A. THE COURT SHOULD NOT HAVE AWARDED PHYSICAL CUSTODY OF THE PARTIES' DAUGHTER, ISABELLA, TO HER PATERNAL GRANDPARENTS WITHOUT AN EVIDENTIARY HEARING BECAUSE THE PATERNAL GRANDPARENTS WERE NOT A PARTY TO THIS ACTION AND BECAUSE A CHANGE IN PHYSICAL CUSTODY CONTRAVENED: THE PARENTAL PREFERENCE DOCTRINE, NRS 125.500, NRS 125A.345, NRS 125A.23 AND NEVADA PRECEDENT UNDER *ELLIS V. CARUCCI.*

The court incorrectly awarded physical custody of the Parties' minor child to an outside, non-party to the action, (the paternal grandparents), without the parents' consent and without a finding that the award of custody to a parent would be detrimental to the child, which is required under NRS 125.500, (the Parental Preference Doctrine). Furthermore, the paternal grandparents neither properly intervened as required under the Nevada Rules of Civil Procedure (NRCP) 24, nor did the court provide them notice of the hearing or allow them to be heard as to this matter at all, which is required under NRS 125A.345 and NRS 125A.23, respectively. Lastly, the court also did not hold an evidentiary hearing on the matter which would have allowed Kerstan to provide evidence to the court as to how there was no "changed circumstances" under *Ellis v. Carucci*, 123, Nev. 145 (2007), which must be established by solid evidence prior to modifying custody of a child who is happy and doing well in the primary custodianship of their parent.

The Nevada courts recognize the parental preference doctrine which

states that a parent has a constitutionally protected liberty interest in the care, custody, and control of his or her child. *Hudson v. Jones*, 122 Nev. 708, 711, 138 P.3d 429, 431 (2006). The state bases it statute, NRS 125.500(1), on a parent's liberty interest and requires that the court "make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interest of the child" before the district court awards custody to a nonparent without the consent of the parents. *Id.* This presumption can only be "overcome either by a showing that the parent is unfit or other extraordinary circumstances." *Litz v. Bennum*, 111 Nev. 35, 38, 888 P.2d 438, 440 (1995). Additionally, when considering a modification of a custody for a child in the primary physical custody of a parent the court may only modify primary physical custody when: (1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the child's best interest is served by the modification. *Ellis v. Carucci*, 123 Nev. 145, 150, 161 P.3d 239, 242 (2007).

Notice and an opportunity to be heard must also be provided to any person having "physical custody of the child prior to a child custody determination." See NRS 125A.345. Also, under NRS 125A.23, a child custody determination made by a court of this state that had jurisdiction pursuant to the provisions of this chapter binds all persons who have been

served in accordance with the laws of this state or notified in accordance with NRS 125A.255 or *who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard.* As to those persons, the determination is conclusive as to all decided issues of law and fact except to the extent the determination is modified. (Emphasis Added).

A party may also intervene into an action under NRCP 24, whether by right or by permission. Under NRCP 24(a), upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Under NRCP 24(b), a party may request permission to intervene by providing timely application to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original

parties.

Kerstan and Michael, both did not consent to give physical custody of their child Isabella Micone to her paternal grandparents at any time. (AA/II 294:24-27). Furthermore, the court did not even hold an evidentiary hearing to determine whether or not granting physical custody to either Kerstan or Michael would be detrimental to the child as required under NRS 125.500. *Id* at ¶¶ 26-28. Isabella's paternal grandparents were not afforded notice or an opportunity to be heard under NRS 125A.345 and NRS 125A.23, they did not properly intervene as required under NRCP 24.

The District Court incorrectly awarded physical custody of a young girl to an outside party, who were not a party to the action (i.e. paternal grandparents), who did not petition the court for custody, and who did properly intervene as required under NCRP 24. This award to a third party violated Nevada Revised Statute NRS 125.500(1), NRS 125A.345, 125A.23, the Parental Preference Doctrine, precedent under *Ellis v. Carruci* and NRCP 24. For these reasons the current Order from Hearing January 15, 2015 should be vacated or deemed void under law as it pertains to a modification of physical custody of the Parties' daughter, Isabella Micone.

B. RES JUDICATA SHOULD NOT APPLY TO CHILD SUPPORT ARREARS UNDER CLAIM OR ISSUE PRECLUSION AS THERE WAS NOT A FINAL JUDGMENT ON THE MATTER BACK IN JUNE OF 2013, THE ISSUE ALTHOUGH MENTIONED BRIEFLY

ON RECORD, WAS NEITHER DECIDED ON THE MERITS AND DID NOT BECOME FINAL, NOR WAS THE ISSUE ACTUALLY AND NECESSARILY LITIGATED.

Under Nevada precedent, *Five Star Capital, Corporation v. Ruby*, 124, Nev. 1048 (2008), the issue preclusion test should apply rather than the claim preclusion test as to child support arrears mentioned in the Order from Hearing January 15, 2015, as there was clearly no final judgment on this matter issued by the court. (AA/II 294:17-19).

Under *Five Star*, the court has held that issue preclusion applies if: 1) the issue decided in prior litigation is identical to the issue presented in the current action; 2) the initial ruling had been on the merits and become final, 3) the party against whom the judgment is asserted had been a party or in privity with a party to the prior litigation; and 4) the issue were actually and necessarily litigated. *Five Star Capital Corporation v. Ruby* at 1055.

Kerstan concedes that third prong is met; the current parties are the same as to the June 26th hearing on record in calendar year 2013. However all other prongs of *Five Star* were clearly not met at the June 2013 hearing that was relied upon by the District Court.

Under the first factor, the issue decided in the prior litigation must be identical to the issue presented in the current action; this is not the case here, at the time of the June 2013 hearing, the Parties had no idea as to the amount

of "arrears" briefly mentioned on record as compared to those at issue at the January 2015 hearing, as 24 months had passed since the June 2013 hearing.

Under the second factor, the issue of arrears was clearly not decided on the merits. Judge Pollock did not even know the value of the real property at issue (Smith Creek Property), the amount due in arrears, and it was not even known if there was sufficient equity in the land to cover any arrears. This statement on record does not reflect a clear decision on the merits of child support arrears due.

Under the fourth factor, the matter was not actually or necessarily litigated. In Nevada, an issue must be "actually litigated", not simply that a party had an opportunity to litigate the issue. *In re Sandoval,* 126 Nev. Adv. Op. 15, 232 P.3d 422, 425 (2010). Kerstan and Michael obviously did not actually litigate this issue. There was no evidence provided to the court, the court made no finding of fact, Kerstan did not even have notice that Michael would raise the issue of arrears as he had failed to file an opposition or countermotion in reply to her motion heard before the District Court on June of 2013. The issue of arrears came out of nowhere and was thrown into the record; this cannot be deemed a "matter actually litigated", even if Kerstan was provided notice that this was going to be lumped into the hearing, under Nevada law, simply having the opportunity to litigate does not mean it was

"actually litigated."

For these reasons above, the financial matter pertaining to any child support arrears is not res judicata. The court should remand these issues to District Court for further evidentiary hearings on both matters.

18. Issues of first impression or of public interest. Does this appeal present a substantial legal issue of first impression in this jurisdiction or one affecting an important public interest: Yes ..X.. No ..... If so, explain:

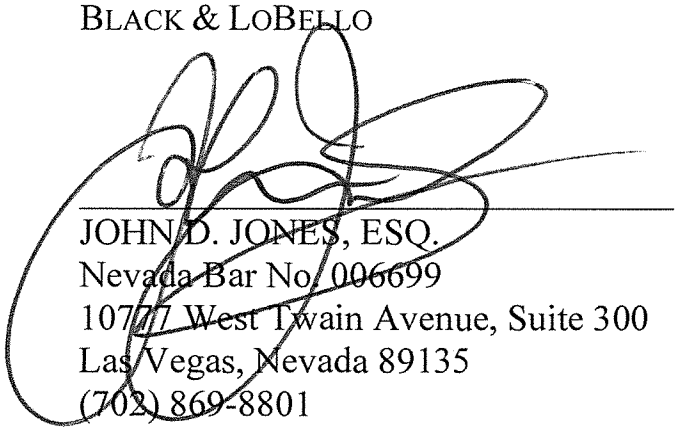
Kerstan did bring to the District Court's attention in her Motion to Reconsider and/or Set Aside that courts in other jurisdictions, particularly California, have assessed similar fact patterns, particularly where a minor child stays outside their primary physical custodian's home for various purposes, including but not limited to: 1) attending boarding school, 2) spending time in daycare, or 3) a disabled child living in a care home, under these circumstances, the California courts have held that it is proper to credit the custodial parent with the parenting time. (AA/II at 294:7-24); (citing *In re Marriage of Whealon*, 53 Cal App. 4th 132 (1997), In *re Marriage of DaSilva,* 119 Cal. App. 4th 1030 (2004), and *In re Marriage of Drake*, 53 Cal. App. 4th 1139, 1160 (1997)). The California court looks to "primary physical responsibility" not actual custody or presence under these circumstances. *In re Marriage* at 1160.

Kerstan argued that parents need to be able to have options for

disabled children and children with educational needs, similar to Isabella, who may attend school away from home without risking the loss of primary physical custody. At times decisions to send children away to school may actually be in the child's best interest and should be considered a factor in placing a child in the custody of those who support their academic environment and success.

RESPECTFULLY SUBMITTED this 13 day of October, 2015.

BLACK & LOBELLO



JOHN D. JONES, ESQ.
Nevada Bar No. 006699
10777 West Twain Avenue, Suite 300
Las Vegas, Nevada 89135
(702) 869-8801
Attorneys for Appellant
KERSTAN MICONE, n/k/a
KERSTAN HUBBS

VERIFICATION

1. I hereby certify that this fast track statement 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:

[x] This fast track statement has been prepared in a proportionally spaced typeface using Word 2013 in 14 point, Times New Roman Font; or

[ ] This fast track statement has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

2. I further certify that this fast track statement complies with the page- or type-volume limitations of NRAP 3E(e)(2) because it is either:

[x] Proportionately spaced, has a typeface of 14 points or more, and contains 4,199 words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains ___ words or ___ lines of text; or

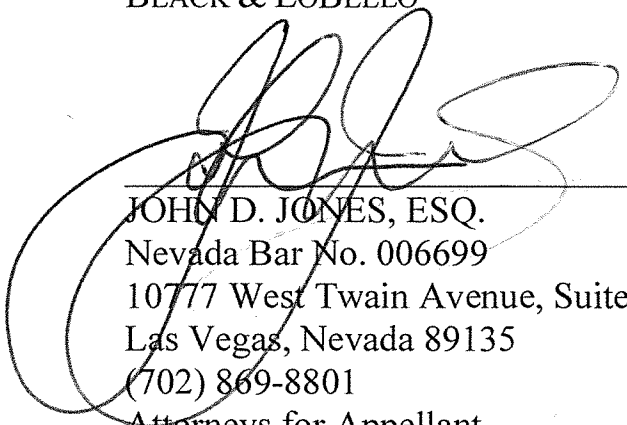
[ ] Does not exceed 15 pages.

3. Finally, I recognize that under NRAP 3E I am responsible for timely filing a fast track statement and that the Supreme Court of Nevada may impose sanctions for failing to timely file a fast track statement, or failing to raise material issues or arguments in the fast track statement. I therefore certify that the information

provided in this fast track statement is true and complete to the best of my knowledge, information, and belief.

RESPECTFULLY SUBMITTED this 13 day of October, 2015.

BLACK & LOBELLO



JOHN D. JONES, ESQ.
Nevada Bar No. 006699
10777 West Twain Avenue, Suite 300
Las Vegas, Nevada 89135
(702) 869-8801
Attorneys for Appellant
KERSTAN MICONE, n/k/a
KERSTAN HUBBS

PROOF OF SERVICE

I, Cheryl Berdahl, declare:

I am over the age of eighteen (18) years and not a party to the within entitled action. I am employed at Black & LoBello, 10777 West Twain Avenue, Las Vegas, Nevada 89135. I am readily familiar with Black & LoBello's practice for collection and processing of documents for delivery by way of the service indicated below.

On October 13, 2015, I served the following document:

APPELLANT'S CHILD CUSTODY FAST TRACK STATEMENT

On the interested party(ies) in this action as follows:

Donn W. Prokopius, Esq.
PROKOPIUS & BEASLEY
931 South Third Street
Las Vegas, NV 89101
Attorneys for Respondent

By Mail. By placing said document in an envelope or package for collection and mailing, addressed to the person(s) at the address(es) listed above, following our ordinary business practices. I am readily familiar with the firm's practice for collection and processing of mail. Under that practice, on the same date that mail is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope or package with the postage fully prepaid.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed on October 13, 2015, at Las Vegas, Nevada.

Cheryl Berdahl