

IN THE SUPREME COURT OF THE STATE OF NEVADA

LESLIE LYNN MILLER,

Appellant

— v. —

BRETT ROBERT MILLER,

Respondent

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ON APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT,
CLARK COUNTY, NEVADA
District Ct. Case No. D-15-511973-D

RESPONDENT'S ANSWERING BRIEF

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1/18/2017

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Supreme Court No. 69353

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— v. —

BRETT ROBERT MILLER,

Respondent

_____ /

RESPONDENT'S ANSWERING BRIEF

Respondent, Brett Robert Miller, by and through his counsel of record, Christopher P. Burke, Esq., hereby submits his Answering Brief.

Dated: This 18th day of January, 2017

By: /S/Christopher P. Burke, Esq.
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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that Judges of this Court may evaluate possible disqualification or recusal.

There are no such persons, entities, or corporations.

Respectfully submitted this 18th day of January, 2017

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I

Statement of the Issue

This appeal presents the following issue to be determined by the District Court:

(1) Whether the District Court abused its discretion in awarding \$345 in child support?

(2) Whether there is a formula the Supreme Court wants used to determine support in split physical custody cases?

II

Statement of the Case

The nature of the action at the district court was a divorce involving child custody and child support. The parties have two minor children. One child is shared equally, while the mother has primary custody of the other child. The Court awarded child support to the mother. She did not think the amount was sufficient so she appealed.

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III

Statement of Facts

Appellant, Leslie Lynn Miller (“Appellant” or “Leslie”), filed a complaint for divorce on March 24, 2015. (Ex. of Rec., p.1-10) In her complaint, Leslie requested, among other relief, that the district court grant her primary physical custody of the parties’ two minor children: Payton Riley Miller born August 24, 2001, and Jordan Timothy Miller born August 9, 2004. In addition, Leslie requested that she be awarded child support in the amount of 25 percent of Respondent Brett Robert Miller’s (“Brett”) gross monthly income.(Ex. of Rec., p.1-10).

On March 27, 2015, Brett filed his answer and counterclaim. (Ex. of Rec., p.11-15). Leslie filed her reply to counterclaim on April 3, 2015. (Ex. of Rec. p.16-19). Thereafter, the district court referred the parties to the Family Mediation Center (“FMC”) to formulate a custody and visitation agreement. (Ex. of Rec., p.65-70). The parties successfully mediated the custody issues of their case, and entered into a stipulated parenting agreement that resulted in a split physical custody schedule. (Ex. of Rec., p.67). Specifically, the parties agreed to share joint physical custody of their son, Jordan, and for Leslie to have primary physical custody of the parties’ daughter, Payton. (Ex. of Rec.,

1 p.67).

2 The parties reached an agreement on all other issues in their divorce,
3
4 except for child support. (Ex. of Rec., p.73-86) and (Ex. of Rec., p.140-41). On
5
6 September 15, 2015, the district court proved up the divorce. (Ex. of Rec.,
7
8 p.124-25). The parties' stipulated terms were then put on the record. (Ex. of
9
10 Rec., p.125-30).

11 On September 28, 2015, Leslie's counsel submitted a proposed decree
12
13 of divorce to judicial chambers, leaving the child support figure blank as the
14
15 Court requested. (Ex. of Rec., p.73-79 and p.130). The district court then
16
17 signed the decree and entered a handwritten monthly child support number
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19 of \$345 into the parties' decree of divorce. (Ex. of Rec., p.76-79). The decree
20
21 of divorce was entered on September 29, 2015. (Ex. of Rec., p.73).

22 On October 9, 2015, Leslie, filed a "Motion for Reconsideration, to
23
24 Amend Judgment, and for Finding of Fact and Conclusions of Law on Child-
25
26 Support Calculation." (Ex. of Rec., p.87-98). In her motion, Leslie argued that
27
28 while there was no specific Nevada law on the proper calculation of child
support in split physical situations, also that the \$345 per month amount was
below the statutory guidelines, and that it was unreasonable given the parties'
circumstances. (Ex. of Rec., p.94-96).

1 In support, Leslie noted that Brett's gross monthly income was
2 \$4,304.97 according to his September 10, 2015 financial disclosure form,
3 while hers was slightly less at \$3,986.66 per month. (Ex. of Rec., p.41, 46, 91).
4 Leslie also set forth her calculation of the parties' specific custodial
5 timeshares, showing that Brett had physical custody of Jordon for 36.9% of
6 the time, and Payton 14.3% of the time. (Ex. of Rec. p.91). Based on the
7 disparity in the custody timeshare, and the fact that she earned less than Brett,
8 Leslie argued that under the statutory guidelines set forth in NRS 125B.070
9 and the *Wright v. Osburn* case, she should receive between \$590.40 and
10 \$850.18 per month in child support, not the \$345 per month awarded. (Ex.
11 of Rec., p.94-95).

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17 Brett opposed her motion. He argued: (1) the amount was appropriate
18 because Leslie failed to object to the interim child support award of \$200 per
19 month; and (2) the amount was appropriate because Leslie makes slightly less
20 than Brett. (Ex. of Rec. p.102, 104, 108).

21
22 On November 17, 2015, the district court heard oral argument on Leslie's
23 motion and Brett's countermotion. (Ex. of Rec., p.113-14, 142). At the hearing,
24 the district court denied Leslie's motion, and issued a finding that the \$345
25 per month child support amount was in the children's best interests. (Ex. of
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1 Rec. p.114). Further, the district court found that the \$345 per month was
2 based on Nevada’s statutory percentages, the statutory deviation factors, and
3 “all circumstances.” (Ex. of Rec., p.114).
4

5 The district court roughly explained how it arrived at its \$345 child
6 support figure. (Ex. of Rec., p.113-14, 132-37). In so doing, the district court
7 stated that the court could use some guidance on how to calculate child
8 support in a split physical custody situation. (Ex. of Rec., p.134). It added,
9 that because there is no set formula, parties in split physical custody situations
10 could receive different presumptive child support amounts based upon which
11 judicial department is hearing the child support case. (Ex. of Rec. p.135). It
12 noted that “[w]ith regard to the calculation of child support under [a split
13 custody] scenario as I’ve indicated, the Supreme Court has not given us
14 guidance on that.” (Ex. of Rec., p.134). Finally, the court added, “we would all
15 love some clarification with regard to [the calculation of child support in a
16 split custody situation] because I know I’ve had conversations with my
17 colleagues, and we all do it slightly different . . .” (Ex. of Rec., p.135). Despite
18 these remarks, the District Court felt comfortable in the amount it awarded in
19 this case.
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1 Appellant filed her Notice of Appeal on December 7, 2015. (Ex. of Rec.,
2 p.115-16). This appeal is related to the issues of whether the district court
3 abused its discretion in calculating child support, and for a determination of
4 the proper method of determining child support in a split physical custody
5 situation in the State of Nevada.
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7

8 9 10 **IV**

11 **Argument**

12 **1. District Court did not abuse its discretion.**

13
14 First, Brett argues the District Court did not abuse its discretion. Why?
15 Because if there is no specific statute on how to calculate the amount, it could
16 not have abused its discretion. The Ninth Circuit has held, that to abuse its
17 discretion, a courts decision must be illogical, implausible or have no support
18 in the record. *United States vs. Hinkson*, 585 F.3d 1247, 1262 (9th Cir.
19 2009)(en banc).
20
21

22 In this case, Leslie calculates that actual amount of child support she
23 was awarded is about 7.15% (Appellant Br. p.27). However, this number is
24 reasonable under the formula used by the District Court. How? Well, since
25 there is shared custody with one child, we take Bretts income of \$4,304.97 at
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28

1 the time,¹ 18% of that is \$774.89. If we then take 18% of Leslies income of
2 \$3,986.66, we get \$717.59, a difference of \$57.30. Next, if we take 7%² of
3 Bretts income, we get \$301.34. If we add in the \$57.30, the total child support
4 would equal \$358.64. This is roughly equivalent to the \$345, the Court
5 awarded, taking into consideration the “deviation factors” and “all the
6 circumstances” (Ex. of Rec., p.136, ln. 2-4). An appellate court can affirm on
7 any basis in the record. *In re Siriani*, 967 F.2d 302, 304 (9th Cir. 1992). And
8 here, it should, as the record amply provides for that option.
9

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11
12 Besides, contrary to what the appellant implies, the Court did not just
13 make up a number out of thin air. The District Court explained how it came
14 up with the \$345 child support numbers by specifically stating how it reached
15 its conclusion. First, the Court followed *Wright v. Osburn*, 114 Nev. 1367, 1369
16 (1990), by “[c]alculat[ing] the appropriate percentage of gross income for
17 each parent; [then] subtract[ing] the difference between the two and
18 requir[ing] the parent with the higher income [Brett] to pay the parent with
19 the lower income that difference”.
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27 1. Bretts income is now about \$3,600 per month.

28 2. Difference between the 25% for a second child and 18% for one child.

1 The Court, then looked at the percentage and deviation factors such as
2 the costs of **health insurance**, the age of the children, **and the amount of**
3 **time the child spends with each parent** to calculate the child support.
4 See NRS 125 B.080.9(a),(d) and (j). (Ex. of Rec., p.2, 100, 114, 123, and 124).
5

6 As the Court explained:
7

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10 **NRS 125 B.080.9(a)**
11 **Health Insurance**
12

13 Mr. Fleeman: The only other thing is, I think on the child
14 support amount, there's *health insurance* for the
15 children that my client pays for. He's currently
16 paying half. Half is 160 a month.

17 Mr. Miller: Uh-huh.

18 Mr. Fleeman: And he's current. They're all current on that.

19
20 The Court: Okay.

21 Mr. Fleeman: In terms of the child support figure, I mean, we
22 haven't discussed that with him. That may -- it's
23 a split custody arrangement. So I think the Court
24 may need to calculate that based on the FDFs.

25 The Court: Okay.

26 (Ex. of Rec. p.123, ln.12-24)(emphasis added)
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Mr. Miller: Oh, geez. One – I had a question.

The Court: Yes, sir.

Mr. Miller: As far as the chi– child support goes, does that include *health care* or is that –

The Court: *Health care* would come off of it.

Mr. Miller: Okay.

The Court: It would be deducted from it depending on who’s paying it.

Mr. Miller: Okay. She’s paying it, and then I’d --

The Court: Yeah, you’d get a -- you’d get a credit, whether it’s you’re paying and you get a credit or it goes -- however we -- it’s taken off of that. It’s considered as part of the child –

Mr. Miller: Okay.

The Court: -- support. So yeah, I would calculate it. You guys in your agreement came up with an unusual twist that I have to actually run numbers on to be able to get you a final amount –

Mr. Miller: Okay.

The Court: -- on that. . . .

(Ex. of Rec. p.124, ln.5-24)(emphasis added)

- - -

1 The Court: And you understand that the Court will take that
2 decision that you've made, apply the child
3 support formulas that -- that exist and come up
4 with a child support amount that's appropriate?

5 Ms. Miller: Yes, sir.
6 (Ex. of Rec. p.127, ln.20-24)

7 - - -

8 Mr. Fleeman: Just for clarification, that the *health insurance*
9 is 320 a month that mom pays.

10 The Court: Okay.

11 Mr. Fleeman: Total.

12 The Court: Which is the 160 that we came up with.

13 Mr. Fleeman: Right.
14 (Ex. of Rec. p.129, ln.16-21)(emphasis added)

15 - - -

16 The Court: Questions?

17 MS. Miller: Thank you.

18 Mr. Miller: Will you read the - the information that I -- I have
19 on the -- as far as the child support goes?

20 The Court: Yes.

21 Mr. Miller: Do you read -- okay.

22 The Court: Yeah, yeah, I'll take all of that into consideration
23 before I enter that part of it.

24 (Ex. of Rec. p.130, ln.10-17)

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26

2 **Time spent with children**

3
4 The Court:

5 There is a request that I make a finding that the
6 custodial arrangement is actually a primary
7 physical custodial arrangement rather than a
8 joint physical of Jordan. In looking at what the
9 parties agreed to just a few months ago, as well as
10 running the analysis under the Rivero standards,
11 I find that the arrangement with regard to
12 Jordan is a joint physical custodial arrangement
13 with the defendant having at least *40 percent of*
14 *the time with the child* as a result of that.

15
16 With regard to the calculation of child support,
17 under that scenario as I've indicated, the
18 Supreme Court has not given us guidance on
19 that. I don't know if it's appropriate for me to ask
20 Mr. Fleeman to take this one up on appeal so that
21 we get a resolution on that, but I'll leave that to
22 you and your -- and your counsel.

23
24 But I can make the findings that I did run the
25 calculations that we have been given. I've
26 compared the calculations. And as a result, I'm
27 making a finding that the award that I previously
28 entered at 345 a month is in the best interest of
the minor child. It's consistent with the codified
child support formulas as I'm interpreting them,
given the time share and the other factors under
NRS 125B.070 and .080 as -- as I run those
calculations.

We would all love some clarification with regard
to that because I know I've had conversations
with my colleagues, and we all do it slightly

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different, but we all try and stay consistent with the statutes as much as possible.

So I'm - I'm presuming those are sufficient findings for you to be able to do what you need to do from this point, Mr. Fleeman.

(Ex. of Rec. p.134, ln.12-24 and p.135, ln.1-17)(emphasis added)

- - -

The Court: . . . I know I've had conversations with my colleagues, and we all do it slightly different, but we all try and stay consistent with the statutes as much as possible.

- - -

The Court: Yeah and -- and I would love to give you the exact calculations; but I don't have my notes when I did it. Essentially, how I run those calculations is I take a look at the 18-percent calculation and the 25-percent calculation. I look at the comparative incomes of the parties. And then I run the deviation factors under .0 -- under .080 [NRS 125B.080] in order to get me to a number that I think is appropriate given all the circumstances that the parties present to me, as well as the custodial arrangement.

- - -

Mr. Fleeman: Okay.

The Court: Not a formula, as I am prohibited from using a formula at that point. But yeah, hopefully that's sufficient to get you there.

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Mr. Fleeman: Okay.

(Ex. of Rec., p.135, ln. 12-24 and p.136, ln. 1-10)

Notably, at the time of this exchange, Mr. Fleeman was satisfied with the Courts answer. In fact, he never requested further clarification.

2. Potential formula from here forward.

Second, notwithstanding the District Courts decision below, this Court can still create a set formula going forward. But, it should not change the amount of child support in this case. Here, the formula and deviation factors used by the District Court and described above, were not an abuse of discretion.

As to a potential formula going forward, it is probably easier to take the *Wright* formula on shared custody children, then subtract the standard percentages based on the number of remaining children. For instance, in this case, that would be the difference between 25% - 18% or 7%. Then, add those numbers together to get the total child support.

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V

Conclusion

The District Court did not abuse its discretion. The Court indicated the formula it has been using, and that formula has not been held unconstitutional. Therefore, the decision of the District Court should be affirmed. Alternatively, and at worst, it should be remanded for the District Court to explain its exact calculation line by line. But in no case, should any increase in child support be retroactive.

DATED this 18th day January, 2017.

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1 CERTIFICATE OF COMPLIANCE

2
3 1. I hereby certify that this Brief complies with the formatting
4 requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5)
5 and the type style requirements of NRAP 32(a)(6) because:

6 This brief has been prepared in a proportionally spaced typeface, using
7 WordPerfect X4 in Georgia 14 point font, or

8
9 2. I further certify that this brief complies with the page-or type-
10 volume limitations of NRAP 32(a)(7) because, excluding the parts of the Brief
11 exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of
12 14 points and contains 2,555 words and it does not exceed 30 pages.

13 3. Finally, I certify that I have read this Respondent's Answering
14 Brief, and to the best of my knowledge, information and belief, it is not
15 frivolous or interposed for any improper purpose. I further certify that this
16 brief complies with all applicable Nevada Rules of Appellate Procedure, in
17 particular Nev. R. App. Pro. 28(e)(1), which requires every assertion in the
18 Brief regarding matters in the record to be supported by a reference to the
19 page and volume number, if any, of the transcript or appendix where the
20 matter relied on is to be found. I understand that I may be subject to sanctions
21 in the event that the accompanying brief is not in conformity with the Nevada
22 Rules of Appellate Procedure.

23 Dated: This 18th day of January, 2017

24 By: /S/Christopher P. Burke, Esq.
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1 **CERTIFICATE OF SERVICE**

2
3 I hereby certify that on this 18th day of January, 2017, a true and correct
4 copy of the **RESPONDENTS’ ANSWERING BRIEF** was served upon all
5 counsel of record by electronically filing the document using the Nevada
6 Supreme Court’s electronic filing system.
7

8
9
10 By /s/ Adriana Pelayo
11 Employee of
12 Christopher P. Burke, Esq.
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