IN THE SUPREME COURT OF THE STATE OF NEVADA

Leslie Lynn Miller,

Appellant,

vs.

Brett Robert Miller,

Respondent.

Supreme Ct. Case No. **69353**
District Ct. Case No. **D-15-511973-D**

An Appeal from a Final Judgment Setting Forth Child Support Under a Split Physical Custody Timeshare; Eighth Judicial District Court, Clark County, Nevada; Hon. Charles J. Hoskin, Esq.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

A. THE DISTRICT COURT ACKNOWLEDGED THE LACK OF LAW ON HOW TO DETERMINE SPLIT-CUSTODY CHILD SUPPORT, AND SPECIFICALLY STATED THAT IT WOULD LIKE GUIDANCE ON THIS ISSUE.

Respondent asserts that because there is no Nevada statute or case law on how to calculate child support in a split-custody situation there can be no abuse of discretion. This is a strange argument because its logical, or rather illogical, conclusion is that this Court can never reverse a district court's calculation of child support where parents have split-custody of their children. Surely this cannot be the case. The laws of our state should be uniformly applied to similarly situated litigants.[1] The district court clearly recognized the lack of uniformity at present, and specifically suggested that this Court provide guidance. Again, the district court stated the following on the record.

> - With regard to the calculation of child support under [a split custody] scenario as I've indicated, the supreme court has not given us guidance on that. AA 134.

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[1] *See DeRosa v. First Judicial Dist. Court of State ex rel. Carson City*, 115 Nev. 225, 235, 985 P.2d 157, 164 (1999), as amended on denial of reh'g (Dec. 14, 1999) overruled on other grounds by *City of Las Vegas v. Walsh*, 100 P.3d 658 (Nev. 2004) overruled on other grounds by *City of Las Vegas v. Walsh,* 121 Nev. 899, 124 P.3d 203 (2005) (citing the Equal Protection Clause of the United States Constitution and *City of Cleburn, Tex. v. Cleburn Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)).

- I don't know if it's appropriate for me to ask Mr. Fleeman to take this one up on appeal so that we get a resolution on that…." AA 134-35.

- We would all love some clarification with regard to [the calculation of child support in a split custody situation] because I know I've had conversations with my colleagues, and we all do it slightly different…. AA 135.

Undersigned counsel imagines that the district court's apprehension on the record and its clear request for guidance is related to the fact that the district court's discretion in this case is limited because the court is required to follow Nevada's child support guidelines, deviating only where the deviation factors listed in NRS 125B.080(9) allow.[2] Where the district court has based its child support determination on deviations, as Respondent claims it did here, the district court must "[s]et forth findings of fact as to the basis

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[2] *Westgate v. Westgate*, 110 Nev. 1377, 1380, 887 P.2d 737, 738 (1994), *citing Lewis v. Hicks,* 108 Nev. 1107, 1111, 843 P.2d 828, 831 (1992); *see also Anastassatos v. Anastassatos*, 112 Nev. 317, 320-21, 913 P.2d 652, 654 (1996).

for the deviation from the formula."[3] A "district court's failure to set forth findings of fact as to the basis for the deviation constitutes reversible error." [4]

B. THE LACK OF FINDINGS IN THIS CASE IS REVERSIBLE ERROR.

The district court did not set forth any specific findings as to how the specific final child support number was determined. The court issued only general comments as follows:

> But I can make the findings that I did run the calculations that we have been given. I've compared the calculations. As a result, I'm making a finding that the award that I previously entered at 345 per month is in the best interests of the minor child [*sic*.]. 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 I run those calculations.

AA 135.

When undersigned counsel pressed for specific findings on the calculations, stating "I'm not sure what the calculations are," the court's response, in part, was "I would love to give you the exact calculations; but I don't have my notes when I did it." AA 135. The court added that it looked at

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[3] NRS 125B.080(6)(a).

[4] *Anastassatos*, *supra*, 112 Nev. at 321, 913 P.2d at 654.

the "comparative income of the parties" and that it ran "the deviation factors . . . under .080." However, the court failed to provide any specific findings as to what those deviation factors were. This is reversible error.[5]

Despite the clear lack of findings, Respondent contends that the district court's determination of child support was not error because the court "looked at the percentage and deviation factors such as the costs of **health insurance**, the age of the children, **and the amount of time the child spends with each parent** . . . ." *See* Respondent's Answering Brief at p. 8 (emphasis in original).

First, as stated above, the district court was required to set forth specific findings regarding deviation factors, and it did not.

Second, Respondent is wrong in his assertion that the court used the health insurance amount as a deviation factor.

Under the deviation factor for health insurance listed in NRS 125.080(9)(a), a district court is permitted to increase a parent's child support obligation by one-half of the total cost of health insurance premiums (paid by

[5] *Id.*

the other parent) associated with the children's coverage.[6] In this case, because Appellant pays $320 per month, Respondent's obligation was found to be $160 per month. AA 129. That amount was specified in the order separate from the child support amount, and not as a deviation to the $345 child support figure. AA 76. Specifically, the order states as follows:

> **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that ***Brett*** shall pay Leslie $345 per month for child support for the minor children. ***This amount does not include*** the $160 Brett pays to Leslie as part of his one-half of the current health insurance premium cost.

AA 76 (emphasis in original).

Thus, it is clear from the order that there was no deviation for health insurance included in the $345 child support amount - the health insurance is paid equally by the parties apart from the child support.

In sum, there are no findings in the record to support Respondent's contention that the district court's child support calculation of $345 was based on specific deviation factors. Furthermore, even if this Court could surmise

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[6] *See* also NRS 125.020(1), stating that "The parents of a child . . .have a duty to provide the child necessary maintenance, health care, education and support."

that deviations exist, the law requires that the district court state specific findings on the record. That did not happen in this case.

It is also important to note that the lack of specific findings presents a dilemma in this case. It is possible that this Court could decide to simply reverse and remand for the district court to issue specific findings. However, it is undersigned counsel's opinion that that type of remand, without direction on how properly calculate child support in split-custody situations, would be costly to the parties. The district court has openly stated that it would like guidance from this Court. Accordingly, a remand without guidance for to the district court to follow would likely lead to increased litigation, and further delay of a final resolution for these parties. Accordingly, should this Court reverse the district court's decision, Appellant respectfully requests that this Court provide guidance to the district court, and all district courts, by enunciating the proper method of calculating child support in split-custody orders in Nevada.

C. RESPONDENT'S PROPOSED FORMULA

Respondent proposes a potential formula for this Court. Appellant cannot specifically respond to the rationale behind that proposed formula as

none is given. Appellant can, however, respond to Respondent's claim that other than the proposed formula is "probably easier."

Neither of the alternative methods set forth in Appellant's Opening are particularly difficult. *See* Opening Brief at pp. 18 – 20. Method #1, set forth in the Opening Brief, uses the statutory percentage for the number of children at issue – 25% of each parent's gross income in this case – and prorates it to 12.5% per child.[7] This method is reasonable, rational, and complies with the statute. The percentage is derived directly from the statute because it specifically uses the 25%, and the proration is rational because it attributes the support amount equally among the number of children.

Method #2 is also reasonable, rational, and in compliance with the statute is. This method uses the statutory percentage for each child in accordance with the custody timeshare for that child. For the number of children in a joint physical custody arrangement, the correct statutory percentage is used in a *Wright v. Osburn* calculation.[8] For the number of children in a primary physical custody arrangement, the straight statutory percentage is applied.

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[7] *See* NRS 125.070(1)(b)(2).

[8] *See* Wright, 114 Nev. 1367, 1369, 970 P.2d 1071, 1072 (1998).

In contrast to these two methods, Respondent's proposed method is far less reasonable. Respondent's proposed method is unreasonable because it is far more arbitrary in its approach. Specifically, Respondent asks that this Court determine that split-custody child support calculations require that the statutory percentage be applied in accordance with the number of children in a joint physical custody arrangement first, with the difference in the percentages (obtained by subtracting the number of children in primary arrangements from those in joint arrangements) added to the child support obligation. The problem with this approach is illustrated as follows:

If a Parent 1 has primary physical custody of three children, and joint physical custody of one additional child, the calculation under Respondent's proposed child support formula would be a *Wright v. Osburn* calculation using 18% of both parties' incomes, with an addition of only 13% for the remaining three children.[9] This means that while Parent 1 would receive only about 4.3% of Parent 2's income per child in his or her primary care. This is well below the cost of raising a child, and would result in an unjust and inappropriate award.

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[9] *See* NRS 125B.070, stating that 18% is applicable to one child, and 31% is applicable to four children.

Adding in some hypothetical incomes helps illustrate this example. Let's say that both parents earn $5,000 gross per month. This would result in a payment of $650 from the non-custodial parent to the custodial parent.[10] This $650 would need to be stretched to cover the care of three children full-time – which is roughly $217 per child per month. This is grossly inadequate for the support of a child under these circumstances.

Now, using Method #1 and the same facts, each party has a prorated obligation, per child, of $387.50 per child.[11] This results in neither party having an obligation of support to the other for the child over whom they share joint physical custody, and Parent 2 having a child support obligation of $1,162.50 for the three children over whom Parent 1 has primary physical custody. This is a much more equitable result, it fits within the statutory scheme, and it is more in line with the children's best interests. This is evident in the fact that the $650 under Respondent's proposal is a full $900 less ($1,550 - $650) than the amount Parent 1 would receive if he or she had primary physical custody of just one more child. The $387.50 per child

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[10] (($5,000 x 0.18) – ($5,000 x 0.18) + ($5,000 x (.31 - .18))

[11] ($5,000 x .31) / 4

under Method #1 is much more reasonable and fits with the best interests considerations that must be given in child support calculations.[12]

Under Method #2, and the hypothetical facts above, Parent 2 would pay 29% of his or her gross income for the three children under Parent 1's primary care, with the 18% for the child over which the parents share joint physical custody offsetting.[13] This would result in a payment from Parent 2 to Parent 1 in the amount of $1,450 per month ($5,000 x .29). This amount is also much more reasonable than $650 per month when one considers the monthly cost of raising children.

II. CONCLUSION

The district court abused its discretion and erred when it (1) deviated from the statutory guidelines in its calculation of Brett's child support; (2) failed to set forth specific findings of fact as a basis for its deviation; (3) and issued a finding that the child support calculation was in the children's best interests without sufficient evidence to support the same. Furthermore, there

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[12] *Fernandez v. Fernandez*, 126 Nev. 28, 40, 222 P.3d 1031, 1039 (2010), *citing Lewis v. Hicks*, 108 Nev. 1107, 1114 n. 4, 843 P.2d 828, 833 n. 4 (1992), and *Barbagallo v. Barbagallo*, 105 Nev. 546, 551 n. 4, 779 P.2d 532, 536 n. 4 (1989).

[13] *See* NRS 125B.070(1)(b).

is a need for this Court to provide guidance, likely in the way of a formula, to the district courts as to how to properly calculate child support in a split physical custody arrangement. Appellant respectfully submits that Methods #1 and #2 listed in her Opening Brief could each be considered appropriate methods under the statutes and case law in Nevada, and rejects Respondent's proposed formula because is not reasonable and ignores the required best interests analysis.

RESPECTFULLY SUBMITTED this 17th day of February, 2017

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CERTIFICATE OF COMPLIANCE

1. Pursuant to NRAP 28.2, I hereby certify that this Appellant's Reply 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 Appellant's Reply Brief has been prepared using the proportionally spaced Times New Roman type face provided in the WordPerfect X4 word-processing program. This Appellant's Reply Brief has further been prepared using a 14-point type face in a plain roman style excepting any italics and bolding.

2. I further certify that this Appellant's Reply Brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding parts of the Appellant's Reply Brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 2,163words.

3. Finally, I hereby certify that I have read this Appellant's Reply 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 Appellant's Reply Brief complies with all applicable Nevada Rules of

Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the Appellant's Reply 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.

4. I understand that I may be subject to sanctions in the event that the accompanying Appellant's Reply Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 17th day of February, 2017.

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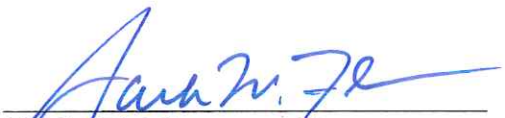

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NRAP 26.1 DISCLOSURE

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 the justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: None

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

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Law Office of Gerald J. Sufleta, Esq.

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3. If litigant is using a pseudonym, the litigant's true name: None

DATED this 17th day of February, 2017.

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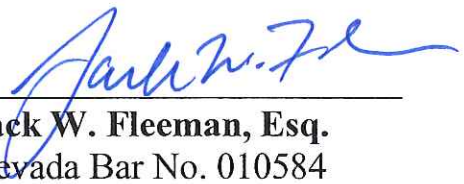

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of February, 2017, the foregoing "Appellant's Reply Brief" was served via this Court's electronic service to:

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