

IN THE SUPREME COURT OF THE STATE OF NEVADA

David Harrison Degraw,

Petitioner,

vs.

**The Eighth Judicial District Court of
the State of Nevada, in and for the
County of Clark, and The Honorable
Linda Marquis, District Court Judge,**

Respondents,

Misty Jo Degraw,

Real Party in Interest.

Sup. Ct. Docket No. 72528

Dist. Ct. Case No.

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Elizabeth A. Brown
Clerk of Supreme Court

**REPLY TO REAL PARTY IN INTEREST MISTY JO DEGRAW'S
ANSWERING BRIEF**

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I. CLARIFICATION AND REVIEW OF FACTS

David does not agree or admit to the allegations in first seven paragraphs of Misty's Statement of Facts. It is these allegations which are hotly disputed by David in the underlying matter. David asserts the post-separation visitation schedule was mutually agreed upon by the parents after consideration of the children's best interests. Though Misty often requested deviations from the agreed-upon terms – deviations David asserts he regularly agreed to do – the schedule the parties employed was not forced upon Misty. Indeed, David contends Misty continues to receive numerous unscheduled evenings and many more overnights than she admits, however, these matters have not been put before the District Court yet and therefore the record is incomplete in this regard.

David further alleges that Misty was actively involved in the scheduling of those dates after discussion of the children's best interest. The schedule was established in large part because the children were experiencing difficulties in school, exposing Misty's inattention upon their return to David's house. David could fill these pages with stories of the struggles of the children while in Misty's care. However, notwithstanding the inaccuracy of Misty's allegations and the apparent intent to litigate the case before this Court, these competing allegations are not relevant to the question that is before the Court: whether NRS 1.310 is unconstitutional as written or applied. Thus, these disputes will not be discussed

further.

The relevant discussion focuses on whether the District Court erred in requiring an evidentiary hearing during a legislative session of the Nevada Legislature where one party's attorney was a duly elected member of that body.

It is uncontested in the papers that David retained counsel a full month prior to the November 8, 2017 election. It is also undisputed that Misty filed her motion for temporary orders on January 23, 2017, following three months of active negotiations and just two weeks ahead of the start of the legislative session. Indeed, David's initial assumption was that the parties were going to settle the case on their own given their ability to resolve the practical matters over the preceding months. But despite settlement discussions wherein Misty and her counsel were well aware of the imminent limitations on David's counsel's ability to respond, Misty chose to move forward with her motion on the eve of the legislative session.

II. ARGUMENT

A. David's Counsel's Affidavit in Support is sufficient.

Misty's argument that neither David nor his counsel had sufficient beneficial standing or substantive verification to support the petition at issue or the underlying motion is without merit. It is beyond dispute that the beneficial interests in resolving this matter inure to him and not his attorney. Furthermore, in neither the appellate courts of Nevada nor the Eighth Judicial District Courts are verification

of papers restricted to the parties alone.

NRAP 21(a)(5) and EDCR 2.21 clearly contemplate scenarios in which the affidavit provides the factual basis for the motion at hand, rather than the facts being pleaded in the motion, regardless of whether the affiant is the party or the attorney. Attorneys who are personally aware of the relevant facts, and who have been informed of additional facts, may so aver.¹ Furthermore, not all facts alleged in the supporting affidavit must be repeated in the body of the pleadings.² A ruling that all factual allegations are to be “repleaded” in the motion or pleading would be a waste of time, money, resources, and averse to the principles of judicial economy.³ If the petitioner’s attorney is the one whose knowledge is material to the petition, the attorney is authorized by the rules of appellate procedure to file an affidavit in support of the petition for extraordinary relief (*e.g.*, mandamus or prohibition).⁴ Thus, the supporting affidavits are sufficient in all respects.

¹ NRAP 21(a)(5); *See Thompson v. First Judicial Dist. Court, ex rel. Storey Cnty.*, 100 Nev. 352, 683 P.2d 17, 18 n.1 (1984) (explaining in a footnote the requirements for an attorney’s affidavit).

² *See* EDCR 2.21(b) (requiring an affidavit identify the declarant, and separately the party on whose behalf it is submitted, implying they can be different); *Mizrachi v. Mizrachi*, 132 Nev. Adv. Op. 66, at *17 (Nev. Ct. App. Sep. 15, 2016) (“an evidentiary hearing may be held to resolve disputed factual contentions raised in affidavits and declarations that support motions.” (emphasis added)). *See generally* EDCR 5.505.

³ *Id.*

⁴ NRAP 21(a)(5); *Thompson*, 683 P.2d at 18 n.1.

B. David has a Right to the Counsel of his Choice

Misty claims that it is David's attorney's interests, not David's, that are at issue. She further believes that David should be ordered to retain the services of alternate counsel. Both of these positions are misplaced. A party's choice of attorney should be protected, as suggested by the Supreme Court Rules, the Eighth Judicial District Court Rules, and the Nevada Rules of Professional Conduct: the talisman for attorney representation is client consent.⁵ Indeed, the only mechanism whereby a court may order an attorney other than the one chosen by the client is that of disqualification, and such an action is limited to the possible exception where a conflict exists or "real harm is likely to result."⁶

This Court has stated a right to a choice of counsel in civil proceedings.⁷

⁵ See SCR Rules 46 – 48; EDCR 7.40(b); NRPC 1.7, 1.8, 1.9, 1.10.

⁶ See *Leibowitz v. The Eighth Judicial Dist. Court of the State of Nev. ex rel. Cty. of Clark*, 119 Nev. 523, 532, 78 P.3d 515, 521 (2003) ("Imputed disqualification is considered a harsh remedy that should be invoked if, and only if, the court is satisfied that real harm is likely to result from failing to invoke it.") (internal quotations and citations omitted); cf. *Ryan's Express v. Amador Stage Lines*, 128 Nev. Adv. Op. 27, 279 P.3d 166, 170 (2012) ("In applying the rule of imputed disqualification, we restrict the client's right to choice of counsel."); cf. *In re Smith*, 507 F.3d 64, 71 (2d Cir. 2007) ("In exercising its approval function, however, the bankruptcy court should interfere with the trustee's choice of counsel only in the rarest cases, such as when the proposed attorney has a conflict of interest, or when it is clear that the best interest of the estate would not be served by the trustee's choice.") (internal quotations and citations omitted).

⁷ *Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court ex. rel.*, 152 P.3d 737, 742-43 (Nev. 2007) citing *Brown v. Dist. Ct.*, 116 Nev. 1200, 1205, 14 P.3d 1266, 1269-70 (2000).

Although that was found in the context of disqualification of counsel, the right to choice of counsel is no less in this case. The importance to choice of counsel has been found in other jurisdictions and analyzed in federal courts including the US Supreme Court.⁸ Although it generally arises in a criminal context those cases frame the importance of the choice of counsel in our legal system. The reasoning still holds that courts should not, against the wishes of a client, expressly force them to have different counsel except in exceptional cases. Thus, contrary to Misty's argument that NRS 1.310 works only to Counsel's benefit, NRS 1.310 protects David's choice of counsel. The attorney-legislator's benefits are, at best, ancillary thereto.

Analyzing whether disqualification due to counsel's legally required presence in Carson City would be inappropriate. Here, the parties both argue that the only harm that results from a brief delay is additional parental visitation.⁹ The dispute is only whether Misty would receive more or less parenting time than she currently receives. Misty makes no mention of any other harm, except to say the delay is merely an intrusion to her fundamental rights. She does not articulate what that intrusion truly means, how it would manifest in the children's lives, or how

⁸ United States v. Koblitz, 803 F.2d 1523, 1528-1529 (11th Cir.1986), United States v. Gonzalez-Lopez, 548 U.S. 140, 146, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006).

⁹ See PA 15-41 and PA 48-56 generally.

the compensatory time contemplated in NRS 125C.020 would not be able to remedy it. At worst, Misty has missed a few days each month in visitation, which can easily be restored to her as expressly contemplated in the statutory remedy available in NRS 125C.020 should the lower court deem their agreement to be insufficient. But to require David to hire new counsel simply because Misty thinks she deserves more parenting time, despite following a similar schedule for many months prior, would be both improper and a violation of David's right to choose his counsel.

Contrary to Misty's contention, a brief continuance (continuances of various sorts are not unusual in the normal course of proceeds family proceedings), to allow David's counsel to finish his obligations in the Legislature does not present the type of harm necessary to require the disqualification of his chosen attorney forcing David to choose different counsel. Misty has a statutory remedy for any loss the district court may find.

C. Statutory Interpretation , Construction and Standards of Review

Statutory interpretation is a question of law which is reviewed *de novo*, even in the context of a writ petition.¹⁰ Generally, when a statute's language is plain and its meaning clear, the courts will apply that plain language.¹¹ If a statute "is

¹⁰ *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 179 P.3d 556, 559 (2008)

¹¹ *Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 715 (2007)

ambiguous, the plain meaning rule of statutory construction" is inapplicable, and the drafter's intent "becomes the controlling factor in statutory construction."¹² An ambiguous statutory provision should also be interpreted in accordance "with what reason and public policy would indicate the legislature intended."¹³ Furthermore, this Court will "construe statutes to give meaning to all of their parts and language, and this Court will read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation."¹⁴ No part of a statute should be rendered meaningless and its language "should not be read to produce absurd or unreasonable results."¹⁵

NRS 1.310 simply provides for a temporary suspension of litigation while a party's attorney serves in the Legislature. It is an important balance to strike: the needs of the State v. the needs of the individual. It is written in such way as to show sufficient deference to the Judiciary while also claiming a certain amount of respect to its own functions.

In evaluating the constitutionality of the statute it is presumed that statutes are constitutional, and "[i]n case of doubt, every possible presumption will be made in favor of the constitutionality of a statute, and courts will interfere only when the

¹² *Harris Assocs. v Clark County Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003)

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

Constitution is clearly violated.”¹⁶ The burden required to show a statute is unconstitutional is “beyond a reasonable doubt.”¹⁷

D. NRS 1.310 Does not violate Separation of Powers and therefore is not unconstitutional on its face.

Misty argues that NRS 1.310 has no ambiguity and that it mandates a continuance, citing the following language from the statute “must be granted without imposition of terms”.¹⁸ This language read as written does not stand for the proposition that a court must grant the continuance read using its plain language meaning. What it does stand for is that *when a continuance is granted* under this statute, a court cannot impose terms in the granting of the continuance such as requirements on counsel during the continuance. Thus, utilizing this Court’s standards, the language in question does not have a mandate that affords no discretion that raises questions of being facially unconstitutional.

Misty in her argument further ignores the rest of the language of the statute, and, without replicating the entire arguments made in Amicus Brief from the Legislative Counsel Bureau (“LCB Amicus”), does not address the first section of NRS 1.310. The “sufficient cause” language as argued in LCB Amicus has been

¹⁶ *List v. Whisler*, 99 Nev. 133, 137, 660 P.2d 104, 106 (1983)

¹⁷ *Cauble v. Beemer*, 64 Nev. 77, 101 (1947); *State ex rel. Lewis v. Doron*, 5 Nev. 399, 408 (1870) (“[E]very statute is to be upheld, unless plainly and without reasonable doubt in conflict with the Constitution.”).

¹⁸ See Misty’s Opposition page 19

interpreted in other jurisdictions to allow courts limited exceptions to the similarly worded statutes such that the constitutionality is maintained in those jurisdictions. The statute does not specifically carve out an exception for such contingencies but that does not mean that it foreclosed such exceptions, as Misty argues.

Misty further argues that the statute from Oklahoma case Booze v. Dist. Court of Lincoln County 365 P.2d 589, 592 (Okla. Crim. App. 1961) where that court found the continuance unconstitutional support finding NRS 1.310 as unconstitutional. Misty states in her own brief that the statute analyzed in that case is significantly different from Nevada's Statute. In addition, Oklahoma's legislature meets on an annual basis where such a statute is more intrusive.¹⁹ Importantly the delay was that for a felony criminal trial not a civil matter. The only connection is the argument that NRS 1.310 is mandatory without exception. But as articulated herein, this proposition is not true, and as argued in the LCB Amicus and the writ petition, the court retains an ability to have judicial discretion where necessary in situations of irreparable harm, emergency or similar exigent circumstances.

The other case Misty relies upon is Waites v. Sondock, 561 S.W.2d 772 (Texas 1977). The Waites court held, as Misty cites, that the legislative continuance is mandatory except in those cases in which the party opposing the

¹⁹ O.K. Const. art. V §26

continuance alleges that a substantial existing right will be defeated or abridged by delay.²⁰ The Waites court did not find the statute in Texas unconstitutional.²¹ Certainly it is not the case, as Misty implies, that all Family Court matters are at a level that will defeat any request for a continuance because they are at the level stated in Waites. What Waites does support is that a procedure should be taken to determine whether the continuance should be granted or not, and that determination in itself should not defeat the underlying purpose of NRS 1.310. This follows the string of cases cited in the LCB Amicus from numerous jurisdictions that have come to similar conclusions.²²

Misty also ignores that the statute is akin to a scheduling statute that is commonly found throughout NRS, giving courts deadlines upon which their calendars must be set.²³ The body of NRS is replete with statutes giving courts a certain amount of time in which to hold hearings or other scheduling matters.

²⁰ Waites v. Sondock, 561 S.W.2d 772, 776 (Texas 1977)

²¹ Id.

²² See LCB Amicus Brief page 19 for supporting case citations

²³ Small sample set in just in NRS Title 11: NRS 125C.0661 Expedited hearing. If a motion to grant custodial responsibility is filed before a deploying parent deploys, the court shall conduct an expedited hearing.

NRS 128.055 Proceedings to be completed within 6 months after filing of petition. Except as otherwise required by specific statute, the court shall use its best efforts to ensure that proceedings conducted pursuant to this chapter are completed within 6 months after the petition is filed.

NRS 128.090(1) At the time stated in the notice, or at the earliest time thereafter to which the hearing may be postponed, the court shall proceed to hear the petition

Certainly they must fall within the bounds of Due Process, but if this scheduling statute is held an unconstitutional boundary on the Courts, then all such laws may be held in question as interfering with the Court's judiciary powers under the Nevada Constitution. This however is an absurd result and, as held in *Harris Assoc.*, the statute should not be interpreted to bring about such absurd results.

E. There are countervailing interests of the Nevada Legislature to retain its elected members and the reverse risk of the Judiciary interfering with Legislatures Schedule and Powers.

Misty's assertion that the State's interest in its efficient legislative operations un-compelling is truly surprising.²⁴ As the entirety of the duties of the Legislature is performed in a mere 120 days every two years, nothing could be more compelling than the presence of one of its few members during the deliberation and votes cast to decide the laws of the state. Moreover, the district court ordered an evidentiary hearing be held during the session, requiring David's counsel to appear or to attempt to conduct an evidentiary hearing over the telephone. David's counsel is unaware of any precedent or process for presenting evidence or documents for a court's consideration by telephone, let alone examining or cross-examining witnesses, where such documents and witnesses are outside the view of the attorney. Indeed, it appears impossible.

²⁴ Answer at 27.

In striking the balance between the interests of one entire branch of government against the unexplained purported harm created by an alleged intrusion of a fundamental right (a right whose impairment, if proven, is already granted a statutory remedy), this Court must look at the circumstances surrounding the children.²⁵ In order to find that David's request to continue the hearing for a short time should be denied, this Court must find that the interest of the Nevada Legislature in retaining its members for the brief legislative session fails to overcome Misty's interest despite the statutory remedy afforded her. Misty has simply failed to articulate the harm that would result. She merely states that her fundamental rights have been abridged and alleges that abridgement alone justifies the denial of the continuance.

Moreover, given (1) the compelling interests of the Nevada Legislature to have its members present during the 120 day legislative session, (2) David's interest in retaining the counsel of his choice, and (3) the fact that Misty already has a statutory remedy for the harm she claims will obtain, David urges this Court to find that the district court erred in ordering an evidentiary hearing requiring the participation of an attorney-legislator during the brief legislative session.

The Nevada Legislature, and by extension its members, meets at the seat of

²⁵ NRAP 8(d); *see generally* Amicus Curiae Brief of Nevada Legislature in Support of Petitioner's Emergency Petition, at Section III.

government of the state: Carson City. Each member's presence is necessary to enter their votes; their attendance may be compelled by arrest, and such attendance maybe necessary to achieve quorum.²⁶ NRS 1.310 seeks to balance the needs of both branches of government by allowing the lawyer-legislator to fulfil their legislative duties by give the short continuance necessary to not interfere with the legislative session.²⁷ Misty's arguments, taken to the fullest, allow the Judicial Branch to compel the legislator-lawyer to be put in the position of interfering with the duties and powers of the Legislature to meet at the seat of government and execute votes to enact laws. This result flips the argument of separation of powers so that now the legislative branch, with its short session whose length is limited by the Nevada Constitution, will be required to take away time to fulfill judiciary branch duties. The statutory interpretation should not end in such a result. Instead, the statute should be read and interpreted so that both branches of government can have the least interference with either's power and duties, and it is this balance that is sought in NRS 1.310. Reading of the legislative minutes is informative as the legislature specifically weighed the concerns of using the statute to unreasonably delay judicial proceeding and modified the statute such to strike that balance. Therefore it should found to be constitutional to protect both branches and maintain

²⁶ N.V. Const. art. 4 § 1, 13, 18

²⁷ Assem. B. 148, 71st Sess. (NV 2001) Minutes from March 8, 2001 Assembly Committee Judiciary page 4

separation of powers and that a balance is achieved between the coequal branches of Nevada's government.

F. Misty fails to make a proper as applied challenge because the District Court did not apply NRS 1.310 to her case and therefore she cannot challenge it on that basis

An 'as applied' challenge requires the application of the statute against a party for there to be a review as to whether that statute was applied to them in a manner that was unconstitutional.²⁸ The as applied concern in this case was raised that it is possible if a court applied NRS 1.310 as requiring as mandatory continuance in all situations. Only at that point would a constitutional 'as applied' question arise by interfering with the right of parties to have cases of controversy on justiciable issues heard before a court in reasonable time.

However, as argued *supra*, that is not the case here as Misty has not raised issues that rise to the level of interfering with the strong language to protect both the lawyer-legislator and the client they represent. Her issue is only one of increasing her custodial time and the continuance is short - a few months – which is not uncommon length to wait for the normal due course of case scheduling. There is not interference in her fundamental right to parent because the right and

²⁸ *Rico v. Rodriguez*, 121 Nev. 695, 704, 120 P.3d 812, 817 (2005) requiring the presentation of evidence of the application.

that time exists. Misty has cited no facts or authority that conflate having less parenting time during a proceeding implicates the fundamental right to parent while she is exercising visitation and has been doing so continuously since the parties' separation. Most importantly the District Court did not apply the statute under these facts. Therefore Misty as applied challenge has no merit.

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III. CONCLUSION

The law and fact of this case do not support a finding that NRS 1.310 is unconstitutional on its face and has not been applied in this case for an as applied challenge. That the statute should be interpreted to allow exceptions and that determination should be made in such a way as not to force the lawyer-legislator into a position requiring their appearance interfering with their legislative duties. The exception should occur only in limited circumstance where emergency, substantial right defeated or other exigent circumstances. Specifically for this case that there is standing and that the right to choice of counsel does not allow a party ask the court to force new counsel in these cases. Finally that the facts of this case do not rise to the level where an exception to the continuance from NRS 1.310 should apply as there are not concerns of emergency or irreparable harm in fact there is already a statutory cure for missed custodial time embodied in NRS 125C.020.

DATED this 12th day of May, 2017.



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CERTIFICATE OF COMPLIANCE

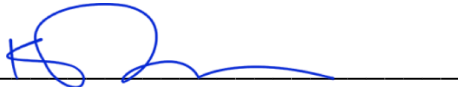
1. I certify that the foregoing Reply complies with the formatting requirements of NRAP 29(d) and NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in 14 point font and Times New Roman type.

2. I certify that the foregoing Reply complies with the typevolume limitations of NRAP 32(a)(7) because, excluding the parts of the reply exempted by NRAP 32(a)(7)(C), is proportionately spaced, has a typeface of 14 points or more, and contains 3762 words, which is less than the type-volume limit of 7,000 words.

3. Finally, I hereby certify that I have read this Reply, 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 Reply 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 12th day of May, 2017.



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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the 12th day of May, 2017, pursuant to NRAP 25 and NEFCR 8 and 9, I filed and served a true and correct copy of the foregoing Reply to Real Party in Interest Misty Jo Degraw's Answering Brief in the manner noted below, directed to the following:

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