

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
DEPARTMENT OF HEALTH AND
HUMAN SERVICES, DIVISION OF
WELFARE AND SUPPORTIVE
SERVICES, CHILD SUPPORT
ENFORCEMENT PROGRAM, AND
KIERSTEN GALLAGHER,
(SOCIAL SERVICES MGR II),

Appellants,

vs.

CISILIE A. PORSBOLL, F/K/A
CISLIE A. VAILE,

Respondent.

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APPELLANTS' REPLY BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The State of Nevada, Department of Health and Human Services, Division of Welfare and Supportive Services, Child Support Enforcement Program, and Kiersten Gallagher (Social Services Manager II) are a “governmental party” and therefore are not required to file a disclosure statement under NRAP 26.

DATED this 13th day of May, 2019.

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Appellants, STATE OF NEVADA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF WELFARE AND SUPPORTIVE SERVICES, CHILD SUPPORT ENFORCEMENT PROGRAM AND KIERSTEN GALLAGHER (SOCIAL SERVICES MGR II) (Nevada CSEP), by and through their attorneys, AARON D. FORD, Attorney General, GREGORY L. ZUNINO, Deputy Solicitor General, and LINDA C. ANDERSON, Chief Deputy Attorney General, file this Reply Brief.

I. INTRODUCTION

Respondent Cisilie A. Porsboll (Porsboll) has every right to be frustrated with her former husband, Robert Scotlund Vaile (Vaile), who has thus far avoided the full amount of his child support obligation as previously adjudicated by Nevada's courts. But Nevada's Child Support Enforcement Program (Nevada CSEP) has no role to play in the divorce proceedings between Porsboll and Vaile. To the contrary, the function of Nevada CSEP is merely tangential to the creditor-debtor relationship between the two former spouses. By law, Nevada CSEP facilitates the collection of child support, but its authority to act in states other than Nevada is limited by the laws of those states, and its limited resources must be used for the collective benefit of the numerous custodial parents whose former partners neglect or refuse to meet their recurring child support obligations.

Opposing counsel, however, perceives no limits to the resources or authority of Nevada CSEP, and has enlisted the Family Division of the Eighth Judicial District

Court (Family Court) in a mission to force Nevada CSEP to act more aggressively on Porsboll's behalf—in the courts of the state of Kansas no less. While there exists a process by which counsel may challenge Nevada CSEP to expend more of its limited resources on Porsboll's behalf—quite possibly to the detriment of other custodial parents—that process requires strict adherence to the Nevada Rules of Civil Procedure (NRCP), the Local Rules of Practice for the Eighth Judicial District Court (EDCR), and the decisions of this Court.¹ Having failed to adhere to applicable rules and judicial precedents, counsel has deprived the District Court of subject matter jurisdiction over Porsboll's request for mandamus relief.

II. ARGUMENT

A. An Action for Mandamus is Governed by the Rules Applicable to Civil Actions Generally.

Implausibly, counsel argues that a private litigant may, through motion practice in a divorce proceeding, pursue mandamus relief against a non-party to that proceeding. The foundation for this argument is counsel's observation that there exists no explicit authority requiring that a mandamus action be filed as an original cause of action with the district court clerk. Ans. Br. 13.

In one important respect, Porsboll's request for mandamus relief in the Family Court is analogous to the commencement of an adversary proceeding in

¹ Citations to the Nevada Rules of Civil Procedure are to those in effect prior to March 1, 2019.

bankruptcy—with the Family Court serving in a similar capacity to that of a bankruptcy court in regards to the payment and collection of debts for the custodial parent. As with an adversary proceeding in bankruptcy, Porsboll’s request for mandamus relief attempted to join a non-party to the proceedings for the purpose of collecting a debt. By counsel’s logic, this is permissible under the “One Family, One Court Rule” as set forth in EDCR 5.103. Ans. Br. 17.

Because of Vaile’s long, well-documented history of avoiding his child support obligations, the Family Court understandably perceived a need to expedite and facilitate the collection of child support on Porsboll’s behalf. AA 109-111. A bankruptcy court performs a similar function when it presides over an adversary proceeding in order to facilitate the collection of debts owed to a bankruptcy estate. But even an adversary proceeding in a bankruptcy requires the filing of a separate complaint and proper service of process as a prerequisite to personal jurisdiction over the adverse party. *See* Fed. R. Bankr. P. 7004. Additionally, there must be a close factual nexus between the bankruptcy action and the claims asserted in the adversary proceeding in order for the bankruptcy court to have subject matter jurisdiction over those claims. *See In re Resorts International, Inc.*, 372 F.3d 154, 166–68 (3rd Cir. 2004). Notwithstanding the One Family, One Court Rule, these same principles of due process and jurisdiction apply in the Eighth Judicial District Court.

Indeed, the bankruptcy analogy is apropos because it underscores the due process concerns that are common to all civil actions. Like a bankruptcy court, the

Family Court serves as a fiduciary of sorts, but its powers are nonetheless limited by principles of due process and jurisdiction. Those principles are embodied in the Nevada Rules of Civil Procedure, the Local Rules of Practice for the Eighth Judicial District Court, and the decisions of this Court. Counsel is incorrect that the Family Court enjoys broad discretion to join non-parties to a divorce proceeding. *Landreth v. Malik* does not support this proposition because it was decided on the basis of a specific factual scenario not involving a litigant who circumvented applicable pleading, filing, and service requirements. 127 Nev. 175, 251 P.3d 161 (2011).

Counsel is likewise incorrect that EDCR 5.103 relieved Porsboll of any responsibility to file an original cause of action with the court clerk so that the case could be randomly assigned to a judicial department. EDCR 5.103 applies only when a litigant files a motion or pleading pursuant to NRS Chapter 130 in a case to which the subject of the motion or pleading is already a party. As a preliminary matter, an action for mandamus relief is not a case filed pursuant to NRS Chapter 130. Rather, it is a case filed pursuant to NRS Chapter 34. Furthermore, Nevada CSEP was not a party to the divorce proceedings between Porsboll and Vaile. According to its plain language, EDCR 5.103 is inapplicable to the facts of this case. The applicable provision, EDCR 2.05, must be read in conjunction with the Nevada Rules of Civil Procedure.

The Nevada Rules of Civil Procedure are broad in scope insofar as they apply to “all suits of a civil nature whether cognizable at law or in equity.” NRCP 1. Suits

of a civil nature are uniformly characterized as “civil actions.” NRCP 2. A “civil action” must be commenced by filing “a complaint with the court.” NRCP 3. An action for mandamus is undeniably a civil action. Indeed, it is beyond dispute that an action for mandamus relief has “all the attributes of a civil action.” *State v. Gracey*, 11 Nev. 223, 231 (1876) (internal citations and quotations omitted). “The alternative writ and the return thereto are usually regarded as constituting the pleadings in proceedings by mandamus—the writ standing in the place of the declaration or complaint, and the return taking the place of the plea or answer in an ordinary action at law.” *Id.* As a civil action, a request for mandamus relief must be commenced by filing a complaint (or some comparable document) with the court. NRCP 3. It follows that the complaint must be filed with the district court clerk for random assignment pursuant to EDCR 2.05. Once filed, it must be served pursuant to NRCP 4.

Admittedly, Nevada CSEP had notice of the mandamus proceedings and the general nature of the allegations against the agency. AA 38–43. However, it never waived the pleading requirement of NRCP 3 or the service requirement of NRCP 4, and it was further prejudiced by Porsboll’s unilateral selection of the Family Court as the forum in which she litigated her allegations against Nevada CSEP. As with a number of other court rules, EDCR 2.05 is designed to prevent judge shopping of this nature. *See, e.g., Smith v. Eighth Judicial District Court*, 107 Nev. 674, 677, 818 P.2d 849, 852 (holding that exercise of peremptory challenge was governed by

rules intended to prevent judge shopping). Additionally it is unsurprising that Porsboll would want her allegations against Nevada CSEP to be heard by a judge familiar with her long-running dispute with her former husband. But the law won't allow it because there is no factual or legal nexus between Porsboll's claims against her former husband and her allegations against Nevada CSEP. Porsboll's request for mandamus relief is the type of complaint that must be randomly assigned precisely because of the underlying dispute between Porsboll and Vaile.

In other words, Vaile's conduct in avoiding his child support obligations, no matter how egregious, is not relevant to the appropriate inquiry in a mandamus action against Nevada CSEP. The purpose of mandamus is "to compel the performance of an act that the law requires, or to control an arbitrary or capricious exercise of discretion." *Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006). Porsboll alleges that Nevada CSEP failed to perform its statutory duty to collect child support through judicial proceedings in the state of Kansas. This entails a narrow judicial inquiry into the nature and the scope of Nevada CSEP's statutory duties to commence child support enforcement proceedings outside of Nevada. The facts of the underlying dispute between Porsboll and Vaile do not factor into that inquiry except to provide context.

As a matter of law, then, Porsboll's allegations against Nevada CSEP are completely unrelated to her claims against Vaile. Accordingly, they may only be adjudicated by way of a complaint or petition properly filed, assigned, and served in

accordance with all applicable rules and judicial precedents. Having failed to require compliance with pleading, service, and random assignment requirements, the Family Court exceeded its subject matter jurisdiction when it granted Porsboll's request for mandamus. *See Washoe County v. Otto*, 128 Nev. 424, 282 P.3d 719 (2012).

B. Joinder is Inapplicable When the Allegations Against a Third Party are Factually Unrelated to the Claims in the Underlying Cause of Action.

Counsel reveals for the first time on appeal that Porsboll's request for mandamus relief below was actually a motion to join Nevada CSEP as a party to divorce proceedings in the Family Court. Ans. Br. 14. Counsel cites NRCP 21 in support of the argument that a state agency may be joined by the Family Court, *sua sponte*, as a party to divorce proceedings. Inexplicably, however, counsel makes not even a passing reference to NRCP 19 and NRCP 20 setting forth the applicable standards, respectively, for joining persons whose participation in a case is either necessary or appropriate for a just adjudication. Nor does counsel identify any action by him or the Family Court that would be consistent with the addition of a plaintiff or defendant to an existing cause of action. Indeed, there was no amendment to the complaint in this case as contemplated by NRCP 15, and no associated service of process upon Nevada CSEP as required by NRCP 4.

Counsel argues nonsensically that NRCP 21 is applicable to the facts of this case. NRCP 21 merely excludes dismissal as a remedy for the "misjoinder" or "nonjoinder" of parties. By counsel's own logic, NRCP 21 is inapplicable if, as he

claims, there was an effective joinder, not a misjoinder or nonjoinder, of Nevada CSEP. Although NRCP 21 gives the district court the discretion to add or drop parties when the district court otherwise has subject matter jurisdiction over the claims against those parties, NRCP 21 does not confer subject matter jurisdiction where there is none.

Unlike NRCP 21, NRCP 19 and NRCP 20 govern the joinder of parties, and they expressly limit the types of claims that may be asserted against third parties in the context of a motion for joinder. As a general rule, a third party may not be joined under NRCP 19 or NRCP 20 unless the potential claims by or against that third party derive from essentially the same facts as those giving rise to the claims between the named plaintiffs and defendants.

Under NRCP 19, for example, a person may only be joined to an action as a matter of necessity “if (1) in the person’s absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action.” NRCP 20 imposes a similar requirement that claims against the proposed defendant derive from “the same transaction, occurrence, or series of transactions or occurrences” that give rise to the claims against the existing defendants.

Here, the subject matter of Porsboll’s action against Vaile concerns the amount of Vaile’s post-marital debt for child support. Her allegations against Nevada CSEP, by contrast, concern the nature and scope of the agency’s statutory

duty to pursue collection action on her behalf in another state. Although the general topic is child support, Porsboll's allegations against Nevada CSEP are factually unrelated to her claim against Vaile. As between Porsboll and Vaile, the allegations against Nevada CSEP have no bearing upon the relief that can be accorded or the interests that can be adjudicated. At a high level of generality, Porsboll and Nevada CSEP have related objectives, but Nevada CSEP cannot be joined as a party to a divorce action merely because Nevada CSEP performs a child support enforcement function.

C. Counsel Did Not Cure the Jurisdictional Defect in the Proceedings by Renewing his "Motion" Under a Different Label.

As discussed above, the proceedings before the Family Court are marred by several jurisdictional defects. Counsel argues that he cured those defects by renewing his "motion" for mandamus relief and recasting it as a "petition" for mandamus relief. Ans. Br. 10–11. With respect to both pleadings, however, he more or less admits that he circumvented applicable pleading, filing, and service requirements as set forth at NRCP 3, NRCP 4, and EDCR 2.05. Ans. Br. 12–17.

In short, counsel acknowledges that he simply repeated the conduct that gave rise to the jurisdictional defect in the first place. AA 1–11, 93–104. And after having obtained an invalid Order of Mandamus from the Family Court, AA 109–111, he lorded it over Nevada CSEP with an associated motion to hold the agency's employee in contempt of court, AA 179–196. As a matter of necessity, Nevada

CSEP appeared in the Family Court in an effort to protect the interests of the agency and its employees. AA 17–20, 211–233.

Despite these appearances by Nevada CSEP, counsel identifies not one statement in the record that could reasonably be construed as a waiver by Nevada CSEP of its right to be personally served with process in accordance with NRCP 4. Nor does he dispute the incontrovertible principle that subject matter jurisdiction cannot be waived. *See Vaile v. Eighth Judicial District Court*, 118 Nev. 262, 275, 44 P.3d 506, 515 (2002). Although counsel claims to have “mooted” the jurisdictional issues in this case with curative pleadings on his part, the fact remains that Nevada CSEP was never properly served with a complaint or petition over which the district court could lawfully exercise subject matter jurisdiction. *See K-Kel, Inc. v. State Department of Taxation*, __Nev.__, 412 P.3d 15, 17 (holding that a petitioner’s failure to adhere to statutory pleading requirements deprives the district court of jurisdiction to review an administrative agency’s action).

D. Counsel’s Arguments about the Statutory Duties of Nevada CSEP are Unavailing Because the Family Court Issued no Findings on this Subject.

Counsel argues that the judges of the Family Court have expansive powers. Ans. Br. 15–16. The implication is that their powers are so expansive as to relieve them of any responsibility to articulate the legal and factual grounds for their decisions. But NRCP 52(a) contains no such exemption. To the contrary, NRCP 52(a) requires that a trial court judge articulate separate findings of fact and

conclusions of law “[i]n all actions tried upon the facts without a jury.” Although it was tried in an impromptu fashion with very little formality, this matter was tried upon facts without a jury.

Furthermore, it is clear from counsel’s argument that the disposition of a mandamus action must, in this context, be based upon a finding that Nevada CSEP failed to “take all steps necessary to enable an appropriate tribunal of this State, another state or a foreign country to obtain jurisdiction over the [child support debtor].” Ans. Br. 23. This necessarily entails a detailed factual inquiry, as well as an evaluation of the legal requirements set forth at NRS 130.307 governing child support-enforcement agencies. To address Porsboll’s request for mandamus relief, the Family Court was obligated to explain how and why Nevada CSEP failed to meet its obligations under NRS 130.307.

Yet the Family Court provided no legal analysis of NRS 130.307, and articulated no findings as to what, if any, “necessary steps” Nevada CSEP failed to take on Porsboll’s behalf. AA 109–111. The focus of the Family Court’s inquiry was whether a Nevada court order must prevail over a Kansas court order. This has no relevance to a mandamus action, and counsel cannot now, on appeal, supply the arguments that he should have proffered below.

In summary, counsel’s arguments concerning the statutory duties of Nevada CSEP are misplaced because they do not dovetail with anything that the Family Court stated in its Order of Mandamus dated August 31, 2018. *Id.* Nor do they align

with anything that the Family Court stated in its Order of for Hearing held July 24, 2018. AA 105–108. Without findings of fact and conclusions of law that specifically track the standards for granting mandamus against a state agency, this Court has no way to determine whether the Family Court abused its discretion. Aside from the jurisdictional issues in this case, there is an insufficient record to support counsel’s argument that the Order of Mandamus should stand. At a minimum, the Order must be vacated and this matter remanded for further proceedings.

III. CONCLUSION

This case provides a textbook example of why rules of civil procedure are important. While they govern the conduct of attorneys, they also constrain the exercise of judicial power so as to promote the orderly administration of justice. The proceedings below were casual and haphazard, resulting in an unnecessary clash between independent branches of government, and culminating in a hearing at which the Family Court was asked to punish an executive branch employee with a fine of \$1,000. AA 179–194. As an agency of the executive branch of state government, Nevada CSEP is entitled to exercise considerable discretion when determining how best to allocate its resources for the benefit of custodial parents who are owed child support. It is simply not the function of the Family Court to manage or direct the activities of Nevada CSEP in the same way that a cabinet official or state

administrator may manage or direct the activities of Nevada CSEP. Therefore, it is respectfully requested that this Court vacate the Family Court's Order of Mandamus.

Respectfully submitted this 13th day of May, 2019.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP, the type face 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 Microsoft Word 2010 in font size 14 and font style Times New Roman.

2. 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 3708 words.

3. 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 28e(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 13th day of May, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on May 13, 2019.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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