IN THE SUPREME COURT OF THE STATE OF NEVADA

LILLIAN LACY HARGROVE,

Appellant,

v.

THOMAS REID WARD,

Respondent.

SUPREME COURT CASE NO. 81331

District Court Case No: D-19-585818-C

On Appeal from the Eighth Judicial District Court-Family Division
Clark County, Nevada Department R, Hon. Bill Henderson, Presiding

APPELLANT'S OPENING BRIEF

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DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1

Pursuant to NRAP 26.1, Appellant's counsel Adam J. Breeden, Esq. hereby discloses the following:

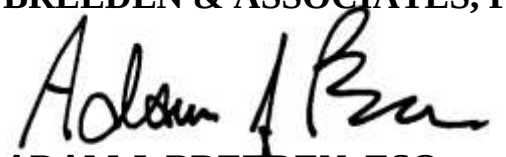
There are no corporations or business entities involved in this appeal and, therefore, there are no related or parent companies to disclose.

The only counsel appearing or expected to appear for the Appellant is Adam J. Breeden, Esq. of the Breeden & Associates, PLLC law firm. Appellant was represented by attorney Brandon Leavitt, Esq. of the Leavitt & Flaxman, LLC law firm at the District Court level.

The Petitioner/Appellant is not using a pseudonym.

Dated this 21st day of December, 2020.

BREEDEN & ASSOCIATES, PLLC



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JURISDICTIONAL STATEMENT

The basis of this Court's appellate jurisdiction is NRAP 3A(b)(1). The Appellant appeals from a District Court order entered on April 26, 2020 (ROA Vol. III at 464) with Notice of Entry of Order served on May 11, 2020 (ROA Vol. III at 472). The Notice of Appeal was filed and served on June 10, 2020, within 30 days of Notice of Entry of Order (ROA Vol. III at 483). The order appealed from was a final, appealable order which disposed of all issues against all parties.

ROUTING STATEMENT

Appellant believes that this appeal concerns several questions of first impression under Nevada law and a question of statewide public importance under NRCP 17(a)(13) and (14) and this appeal should be retained by the Nevada Supreme Court. These issues of first impression include: (1) Whether a parent may file for retroactive support for the time the child was a minor under NRS § 125B.030 *after* the child reaches the age of majority, (2) whether NRS § 126.161(3) conflicts with NRS § 125B.030 and divests the District Court of jurisdiction to make such a retroactive award, (3) due to the absence of controlling precedent, what factors or test should the District Court apply when assessing a request for retroactive child support under NRS § 125B.030, and (4) how specific of a promise to pay child support must be found before said promise is enforceable under NRS § 126.900?

All of these issues are undecided issues of first impression under Nevada law that potentially affect hundreds of cases and would have broad, state-wide implications. Therefore, it is requested that the Nevada Supreme Court retain this matter.

I. STATEMENT OF ISSUES IN APPEAL

1. Did the District Court err in not finding and enforcing a promise to pay child support pursuant to NRS § 126.900?

2. Did the District Court err in finding that the four years of retroactive child support allowed by NRS § 125B.030 is measured from the time of the court's decision as opposed to the time of filing for the support?

3. Did the District Court err as a matter of law by finding that a parent seeking retroactive child support under NRS § 125B.030 must petition the court for the same *prior* to the child's eighteenth birthday and all retroactive support is barred if the filing is made *after* the child's eighteenth birthday?

4. Did the District Court err by applying an "equitable defense" or laches that the mother, while statutorily allowed to seek up to four years of retroactive child support, had waited too long or does said "equitable defense" simply not exist under the law?

5. Did the District Court abuse its discretion by failing to consider other factors supporting the Plaintiff's claim for retroactive child support and instead solely focusing on the timing of when the mother sought the support? More importantly, what factors or legal standard should the District Court consider in ruling on a motion for retroactive child support under NRS § 125B.030?

II. STATEMENT OF THE CASE

The case is an action for determination of paternity and child support filed in the Eighth Judicial District Court, Family Division, on March 12, 2019. The appellant mother sought to enforce a promise to pay child support under NRS § 126.900 or in the alternative for an award of retroactive support under NRS § 125B.030 for the time the child was a minor, despite bringing the action after the child turned eighteen. The father conceded he had not provided any child support for several years prior to the child turning eighteen but made various arguments that there was no agreement to provide child support and the mother's request for retroactive support was barred by Nevada law and/or untimely. The case proceeded to a bench trial. During the case, counsel for both parties and the District Court repeatedly commented on several issues of first impression raised by the case and the lack of any guidance from Nevada's appellate courts on several issues raised. On April 26, 2020, the District Court entered an order denying all requested support. This appeal was then taken.

III. STATEMENT OF FACTS

Appellant Lillian Hargrove and Respondent Thomas Ward met in California and were in an unmarried relationship from January 1999 through June of 2001. (ROA Vol. II at 322, 466). They had a son, G.W., born on December 3, 1999. (ROA Vol. III at 466). G.W. was later diagnosed with autism and needed speech therapy

(he was originally non-verbal), occupational therapy and adaptive physical education at a young age. (ROA Vol. II at 224-225). After discussions with Ward, Hargrove moved to Las Vegas, Nevada with the child in March of 2009, when the child was nine years old. (ROA Vol. II at 231-232, 323). Ward remained and lived on the California side of the Lake Tahoe area. (ROA Vol. II at Vol. II at 235, 301). No formal custody or child support order was sought at that time. (ROA Vol. III at 469). The move brought about a period wherein Ward was only minimally involved in his child's life.

Originally when the move to Las Vegas happened, Hargrove agreed that amounts Ward would owe for child support would be spent on travel so Ward could maintain a relationship with his son. (ROA Vol. II at 232). However, from March 2009 to April 2012, Ward saw the child only four to seven times. (ROA Vol. II at 243-244, Vol. III at 467). In 2012-2013 (when the child was 12 and still living in Las Vegas under the care of his mother) Hargrove fell into financial difficulties. Evidence established that she sent text messages to Ward insisting that he begin paying child support and documenting that she was having financial difficulty due to her own medical issues, needed money to pay for rent and utilities and was the only person providing for food, clothes, educational supplies, and the therapy/ medical/prescription care for their child. (ROA Vol. I at 138). Hargrove alleged that in April of 2012 a verbal agreement was reached for Ward to pay $400/month

in child support by depositing the money into her Wells Fargo bank account; although no payments were made in April through July of 2013 and a smaller $300/month amount was paid by Ward to her from July 2013 to January 2014, at which time the payments stopped. (ROA Vol. II at 253-261, 326-327, Vol. III at 467). Although his testimony (ROA Vol. II at 264, 324-325) and financial records (ROA Vol. I at 151-206) establish that either $400 or $300/month was paid by Ward to Hargrove for over a year, he initially disputed an agreement for child support was made. However, upon cross-examination, he did admit that "I did send her money because I was hoping the money would go towards my son's care." (ROA Vol. II at 345). Once the child support payments stopped in January 2014, Hargrove alleges she was unable to contact Ward, who changed phone numbers, stopped his social media, stopped contacting Hargrove, and stopped paying any financial support for his son. (ROA Vol. II at 261). Ward explained he simply "couldn't come up with money" to financially support his son. (ROA Vol. II at 262). Hargrove's testimony was disputed by Ward, who argued that Hargrove knew where he worked and had other information to contact him if she wished. (ROA Vol. II at 355).[1]

The child turned eighteen on December 3, 2017. One year and three months later, on March 12, 2019, Hargrove filed a pro se Complaint with the Eighth Judicial

[1] The District Court generally summarized the salient background facts at ROA Vol. II at 399-404.

District Court seeking to establish paternity and child support, including retroactive child support from June 2013 when she alleged Ward agreed to pay her support. (ROA Vol. I at 1-12, most specifically at 4). The matter came to a bench trial with the District Court hearing several days of testimony and argument between November 2019 and January 2020. (ROA Vol. II & III at 207-463). During trial, Hargrove, through counsel, argued two theories of recovery. First, she argued that on January 2014 Ward breached an enforceable contract under NRS § 126.900 between the parents to pay child support in the amount of $400/month. (ROA Vol. II at 383, 404-405). Under this theory, Hargrove would be entitled to $18,800 in unpaid support.[2] Alternatively, if no contract were found to exist, Hargrove argued that under NRS § 125B.030[3] she could be awarded up to four years of retroactive support to the extent that the four years covered a certain period of time that the child was still a minor. (ROA Vol. II at 211, 380-382, 406-407). This theory would have entitled Hargrove to recover approximately $26,400 in support,[4] although neither

[2] There are to be 47 months, inclusive, from February 2014 to December 2017 at $400/month, totaling $18,800.

[3] Ward never disputed in front of the District Court that NRS § 125B.030 can be used by parents who have never been married. The Nevada Supreme Court noted that the statute does "appear" to apply to couples having never been married but reserved determination of that legal issue for another case raising those facts in Mason v. Cuisenaire, 122 Nev. 43, 49, 128 P.3d 446, 450 (2006). This case squarely presents those facts.

[4] Because the District Court did not award any retroactive child support, we can only approximate what might have been awarded under this alternative theory. The

party discussed the actual dollar amounts apparently leaving that for the District Court to determine the dollar amount based on its ruling.

The District Court orally announced its order on January 24, 2020 (ROA Vol. III at 449-462) and a written order was entered on April 26, 2020. (ROA Vol. III at 464-471). The Court's order is at times vague and refers to Ward's decision about child support to "blow [ ] off an obligation he had established" (ROA Vol. III at 451) as a "moral, not legal, issue" (ROA at 449) which is striking language when referring to child support. The District Court never clearly explained why, under NRS § 126.900, it would not find a promise for support had been formed, despite written texts confirming the agreement to pay support and the court's finding that there was an obligation that "he [Ward] had established," (ROA Vol. III at 451) and full or part performance which should have enabled the court to find a promise to pay monthly support at $400 a month. Instead, while the District Court bluntly stated that "[t]he Court would maintain some level of an obligation or at least arrears" but the "totality of the law" would not allow it. (ROA Vol. III at 450). The opinion then

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statute allows up to four years or 48 months of retroactive support. However, during that four-year period Ward would not have owed support for 15 of those months as the child reached majority in December 2017 so Ward would not have owed support for January 2018 through March of 2019, a period of 15 months, meaning at most 33 months of support could be awarded. Ward disclosed a gross monthly income of $5,455.64 (ROA Vol. I at 127), making his statutory obligation under NRS Chapter 125B as it existed at the time to be presumptively capped at $800/month under law in effect in 2019. This amount for 33 months would be $26,400.

found "equitable defenses" to ordering retroactive child support—a legal concept never before recognized by any appellate court to a child support action—insomuch as Hargrove knew how to reach Ward earlier yet did not seek to establish a prior order. (ROA Vol. III at 468). The District Court then declared that the four years of retroactive support is assessed as of the time of the decision, not the time of filing, and therefore the Court could at most award about two years of support since the child at the time of the decision was 20. (ROA Vol. III at 469). Seemingly ignoring Ward's legal obligation to financially support his child, the District Court then solely focused on one factor—that Hargrove "could have established an Order at any time during 2012, 2013, 2014 through 2017"—and on the basis of that one factor alone without any mention of any other factors that would have heavily supported Hargrove, an award of support was denied. (ROA Vol. III at 469). The District Court then also announced new law that a parent must establish retroactive child support for a child before the child turns eighteen and, for that reason, denied all retroactive support. (ROA Vol. III at 470). Hargrove was not awarded one penny for child support from January 2014 through December 2017, each party was to bear their own attorney's fees and costs. (ROA Vol. III at 470). This appeal followed.

IV. SUMMARY OF THE ARGUMENT

First, appellant Hargrove argues that the District Court erred in not finding and enforcing a promise to pay child support formed by the parties in 2012 under

NRS § 126.900.

Second, should this appellate Court not find an enforceable agreement, Hargrove argues that the District Court erred by misinterpreting NRS § 126.161(3) to divest the District Court of jurisdiction to enter a retroactive award of child support under NRS § 125B.030, erred by finding NRS § 125B.030 can be used only before the child attains the age of eighteen and erred in not correctly considering all applicable factors when assessing Hargrove's request for retroactive child support.

V. ARGUMENT

A. The District Court erred in not finding an enforceable contract for child support between the parents under NRS § 126.900

At trial Hargrove alleged that in 2012 she and Ward had entered into an agreement for Ward to furnish her with child support at a rate of $400 per month, which he breached by failing to make child support payments to her after January 2014. (ROA Vol. II at 253-261, Vol. III at 467). An enforceable contract requires "an offer and acceptance, meeting of the minds, and consideration." May v. Anderson, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). Further, a contract may be formed once the material terms are agreed upon, even if details are to be determined later. Id., citing Higbee v. Sentry Ins. Co., 253 F.3d 994, 998 (7th Cir. 2001). In interpreting a contract, "the court shall effectuate the intent of the parties, which may be determined in light of the surrounding circumstances if not clear from the contract itself…" and performance may be considered as to the terms of the

contract. Davis v. Nevada National Bank, 103 Nev. 220, 223, 737 P.2d 503, 505 (1987). Nevada has a special statute which makes one parent's written promise to pay child support enforceable on its terms without any additional consideration. NRS § 126.900.[5] The statute does not require signatures of the parties, only "any promise in writing." Presumably, in enacting the statute the legislature realized that parents sometimes reach informal support agreements without resorting to expensive and adversarial court action and as a matter of public policy those agreements should be enforceable.

Hargrove provided testimony (ROA Vol. II at 253-261), written correspondence in the form of text messages (ROA Vol. at 137-150) and banking records (ROA Vol. I at 151-206) that Ward had agreed in April of 2012 to begin paying her $400 per month in child support. Admittedly, the parents did not write out anything that looked like a formal contract with signatures, although NRS § 126.900 does not require such formalities. Ward admitted to making the monthly payments at trial. (ROA Vol. II at 326-327). While he tried to characterize the payments as something less formal than for child support, he did under cross-examination admit "I did send her money because I was hoping the money would

[5] NRS § 126.900 *Promise to furnish support for child: Enforcement; confidentiality*. 1. Any promise in writing to furnish support for a child, growing out of a supposed or alleged parent and child relationship, does not require consideration and is enforceable according to its terms.

go towards my son's care." (ROA Vol. II at 345). Thus, we have a father's agreement to make monthly payments to the mother of his child for support, confirmed in written text messages that was partly performed for more than a year. Under NRS § 126.900, such an agreement or promise to pay support should be enforceable without further consideration.

The District Court gave no meaningful analysis of why this agreement, which was performed for over a year, would not be enforced. The District Court correctly asked "[w]hat's his [Ward's] theory, that this is a fit…that he was being helpful or what…?" to which Ward's counsel only replied "[w]ell, there's no order, so she asked for money; he gave her some." (ROA Vol. II at 257). Of course, the lack of a court order is irrelevant under NRS § 126.900, which was intended to enforce informal support agreements. Later, apparently speaking of this agreement in its final Order, the District Court oddly referred to this child support as a "moral obligation rather than a legal one" (ROA Vol. III at 449) and even found that Ward had agreed to those support terms when the District Court held that Ward had "largely blown off an obligation *that he had established*." (ROA Vol. III at 451 emphasis added).

Hargrove believes that Nevada's public policy for the support of children, [6]

[6] Brian M. v. Dep't of Human Res., Welfare Div. (in Re T.M.C.), 118 Nev. 563, 569, 52 P.3d 934, 938 (2002) ("A minor child has a right to support from a parent that cannot be abdicated unless the best interests threshold is satisfied."); Mason v.

NRS § 126.900 providing for enforcement of promises to provide child support and the facts of this case show the District Court erred. While the parties did not have a lawyer draft a formal contract and sign it, NRS § 126.900 exists to capture and enforce these types of informal promises among parents for child support. Respectfully, the District Court's order should be reversed with instructions to enforce the agreement to provide financial support made by the parties.

B. Alternatively, the District Court erred in Refusing to Award Retroactive Child Support under NRS § 125B.030

1. The District Court should have awarded retroactive child support for the time the child was a minor under NRS § 12B.030

Alternatively, if this Court upholds the District Court's finding that no enforceable promise to pay child support exists, this Court should nevertheless reverse the District Court and remand for further consideration of retroactive support under NRS § 125B.030. During the course of litigation, the District Court and both counsels referred to issues of first impression as to whether a parent could seek to establish retroactive support for the time the child was a minor if the filing was made *after* the child reached the age of majority. (ROA Vol. I at 53-54, Vol. II at 212-213, 384). Hargrove believes this can be done and the District Court erred as a matter of law in denying this relief.

Cuisenaire, 122 Nev. 43, 52, 128 P.3d 446, 451 (2006) (referring to the "strong statutory and public policy requiring parents to support their children through the age of majority.").

NRS § 125B.030 states that "[i]n the absence of a court order for the support of a child, the parent who has physical custody may recover not more than 4 years' support furnished before the bringing of the action to establish an obligation for the support of the child." Hargrove maintains that the District Court twice erroneously interpreted this statute to deny her request for retroactive child support.

Initially, the District Court clearly erred as a matter of law by finding that under NRS § 125B.030 the Court could award four years of retroactive support *from the date of the decision* as opposed to the date the custodial parent filed for support. (ROA Vol. III at 469). NRS § 125B.030 plainly states that the four-year period is measured as of *the time the action is filed* ("4 years' support furnished before the bringing of the action…") and not when the district court actually renders a decision.

While the error above goes to the amount of support to award rather than the decision to award retroactive support in the first instance, the District Court also erred in finding that Hargrove could not use NRS § 125B.030 at all because she filed for the retroactive support *after* the child had reached the age of majority. The District Court found that as a matter of law a parent must file to seek a retroactive child support award under NRS § 125B.030 *before* the child reaches the age of majority. (ROA Vol. II at 383-384, Vol. III at 470). The District Court stated without any legal citation that "we cannot for the first-time post-majority create a—child support order." (ROA Vol. II at 209). While the District Court states this in a

conclusory manner, Hargrove believes this is an incorrect statement of the law and nothing in NRS § 125B.030 or the rest of NRS Chapter 125B would prevent a retroactive award of child support for the time a child was a minor to be awarded after the child turns eighteen.

Hargrove maintains that the District Court confused when the obligation of child support *ceases* and when a parent must seek to *establish* support. The former (the obligation of support) ends at age eighteen, the latter (when a case must be filed to seek retroactive support) is limited only by the four-year retroactive period in NRS § 125B.030. As long as a period of time for which retroactive support is sought falls within that four-year window, the action should be permitted.

Hargrove concedes that she could not seek to recover retroactive support for the time *after* December 2017, when the child reached the age of eighteen, because Ward would have no obligation to pay support after that time. However, she filed in March of 2019 and thus was permitted to seek at award for any support accrued from March of 2015 (four years prior to filing) through December 2017. This would be a period of 33 months within four years of her filing during which the child was still a minor and thus Ward's obligation to pay support would exist.

Ward's obligation of support for those 33 months that were *both* within four years of Hargrove filing her action *and* while his son was still minor did not expire upon the child reaching the age of eighteen. In fact, Nevada has a statute, NRS

§ 125B.120, entitled "discharge of parent's obligation" and nowhere in that statue does it state that the obligation of support is discharged once the child turns eighteen, nor is there any statute which states that an order for retroactive child support must be established before the age of majority.

Indeed, the only statute in Nevada speaking to retroactive child support, NRS § 125B.030, contains no limit that prevents its use *after* the child attains the age of majority. Such a provision easily could have been drafted into NRS § 125B.030 but was not. Instead, it simply says that a custodial parent may seek support owed of up to four years retroactive to the date of filing. Grafting a requirement into the statute that *in addition* to seeking the retroactive support the child must not be the age of majority when the action is filed serves to artificially limit the four years of retroactive child support in harsh ways. For example, a mother who has received no financial support from the father filing when the child is 17 years and 364 days old could get the full four retroactive years of support, while a mother who waits just another two days, one day after the child turns eighteen, would be permanently barred from seeking all support. Such a statutory interpretation would not make sense, especially considering that virtually all other Nevada statutes on child support heavily favor payment of said support and enforcement of the non-custodian parent's obligation.[7]

[7] For example, once an order is established, unlike other judgments there is no statute

Respectfully, the District Court erred in its interpretation of NRS § 125B.030 both in (1) finding that the four retroactive years are assessed from the time of the decision rather than the time of filing, and (2) finding that a request for retroactive child support under NRS § 125B.030 can only be made prior to the child turning eighteen. The plain terms of NRS § 125B.030 simply do not provide for either result.

2. The District Court erred as a matter of law in determining that NRS § 126.161(3) barred Hargrove's request for retroactive child support under NRS § 125B.030

Nevada's paternity statutes state that an action to establish paternity "is not barred until three years after the child reaches the age of majority." NRS § 126.081(1). Further, NRS § 126.161(3) states that once a paternity order is made "[i]f the child is a minor, such a judgment or order of this State must provide for the child's support as required by chapter 125B of NRS and must include an order directing the withholding or assignment of income for the payment of the support…" During litigation, the District Court openly pondered why a parent would seek to establish paternity *after* the age of majority if not to seek retroactive child support, with Hargrove arguing that it must be to allow for retroactive child support to be awarded after the child turns eighteen. (ROA Vol. II at 432).

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of limitations for collection of court ordered support. NRS § 125B.050(3). Further, support may continue past the age of majority if the child is handicapped, NRS § 125B.110. It would seem odd that amongst all the statutes to make support as collectible as possible, NRS § 125B.030 would restrict retroactive child support.

At trial, Ward argued that NRS § 126.161(3) operated to provide a limitation such that the law *only* allows the District Court to order child support if the child is a minor at that time paternity was established (ROA Vol. I at 94, Vol. II at 212, 381, 385-386). Ward argued that NRS § 126.161(3) then actually divests the District Court of jurisdiction to enter an award of retroactive support under NRS § 125B.030 if the child happens to be over the age of eighteen when paternity is established. The District Court agreed with this argument. (ROA Vol. III at 459). Hargrove believes this is error.

It is well established that statutes are to be given their "plain meaning," where possible a statute shall be read "in harmony with other rules or statutes" and there is a presumption that when the legislature enacts a statute, it did so "with full knowledge of existing statutes relating to the same subject." Div. of Ins. v. State Farm Mut. Auto. Ins. Co., 116 Nev. 290, 295, 995 P.2d 482, 485 (2000). In reading the plain meaning of NRS § 126.161(3), the statute provides a conditional, not a limitation or restriction and it plainly *never* uses the word "only" as argued by Ward. The statute does provide that "*[i]f* the child is a minor" when a paternity order is issued, then support must be addressed in that order. However, Ward and the District Court incorrectly read that statute as if it read that *only* if the child is a minor once paternity is established can the district court enter a support order. (ROA at 94). However, the statute plainly does not contain words of limitation addressing a less

common scenario which this case presents wherein retroactive support is sought after the child is no longer a minor. Instead, the statute is simply silent on what action the court should take if the action is brought within the three-year period between when the child reaches the age of majority. A reading that NRS § 126.161(3) somehow limits the district court's ability to make a retroactive child support award under NRS § 125B.030, would not be interpreting those two statutes in harmony. Moreover, given that NRS § 126.161 is codified in the paternity statutes, it is fair to assume that its primary concern was on paternity, not support or limiting the scope of NRS § 125B.030. By its own plain terms, NRS § 126.161 simply does not say—one way or another—what the court must or must not do if the action is filed after the age of majority, but the parent seeks retroactive support. Therefore, Hargrove believes the District Court erred and NRS § 126.161 does not bar an award of retroactive support. Neither the plain terms of the statute nor a harmonious reading with NRS § 125B.030 dictate such a result.

3. *The District Court erred as a matter of law by finding that there was an "equitable defense" to the child support action because the mother could have filed sooner*

The District Court found that Ward had an "equitable defense" that Hargrove should have moved for child support earlier and barred her child support claim based in part on that equitable defense. (ROA Vol. III at 468). This "equitable defense" is found nowhere in Nevada's statutes, case law, treatises or other legal sources.

Instead, the very fact that NRS § 125B.030 allows up to four years of retroactive child support would seem to tacitly eliminate such an "equitable defense" by statute.

The District Court is perhaps referring to the equitable defense of laches, although it never uses the term laches in its decision and, per NRS § 125B.030, an action for retroactive support up to four years is expressly allowed by law and therefore should not be barred by laches. Moreover, nowhere in its oral or written decision did the district court address the actual requirements of application of a laches doctrine, which would include an inexcusable delay, an implied waiver and prejudice to the other party. Nevada v. Eighth Judicial Dist. Court of State, 116 Nev. 127, 135, 994 P.2d 692, 697 (2000).

Moreover, blaming the custodial parent for not seeking court intervention earlier despite a statute that expressly allows up to four years of retroactive support seems like poor public policy. There are many reasons that a parent might not seek to immediately establish an order for child support and a parent should not be punished solely because they waited. For example, the parent might be doing okay financially at the time but struggle later. The financial expenses of the child may increase over time. The parent may fear the other parent out of abuse. The parent may not be able to afford an attorney to bring the action earlier. Or, as both actually happened in this case, the parent may have thought there was already an enforceable support agreement in place, or the other parent is difficult to locate. Indeed, it was

admitted that one of the reasons Hargrove hesitated to act earlier was that she was fighting a custody battle over another child and lacked the resources to litigate another simultaneously and feared the different non-custodial fathers of her two children might coordinate against her. (ROA Vol. II at 268). Especially in light of those last factors, if the "equitable defense" of blaming a parent for not filing a support action exists at all, this particular case seems like a poor case to apply it. Lastly on this issue, since by definition *all* parents seeking retroactive child support under NRS § 125B.030 could hypothetically be criticized for not seeking court ordered support sooner, applying this "equitable defense" to some parents but not all is simply arbitrary and capricious and is an abuse of discretion.

Indeed, Ward offered no prejudice to him based on the delayed timing of the filing, which would be required under a laches analysis. It is not as if he argued he thought his support was waived, that Hargrove told him he never needed to pay support (she said just the opposite, asking for support as early as age five, ROA Vol. II at 232), that Hargrove was financially well off (the opposite is true, Hargrove was financially struggling) or he did not even know he had a son (he knew from birth and never contested paternity). Perhaps most remarkable from an equitable and abuse of discretion point of view is that the District Court felt it was equitable that the father, in the court's words, blew off any financial obligation toward his child for years and once the mother finally stood up for herself and filed in court, she was

turned away. This is perhaps the clearest case *in favor* of retroactive support, yet it was denied. This was error by the District Court, the law simply does not have an "equitable defense" of failure to file for support sooner--it is written right into the law that four years of retroactive child support can be awarded.

Nor is the Nevada Supreme Court's decision in Parkinson v. Parkinson, 106 Nev. 481, 796 P.2d 229 (1990), argued by Ward, instructive. (ROA Vol. II at 420). In Parkinson, there was an order for child support, but the father ceased paying the support. The mother did nothing to collect support for five and half years and prevented the father from seeing his child, telling him to "stay away" and that she would prevent all visitation. These facts are readily distinguishable from the present case. However, the District Court neither cited to Parkinson in its decision, nor made findings of an intentional relinquishment of a known right or an assessment of whether fraud or duress existed or whether waiver would be injurious to the child, all of which would have to be analyzed by the District Court if it were relying on Parkinson. Id. at 483. Furthermore, waiver is an affirmative defense under NRCP 8(c)(1)(s) and was not pleaded in Ward's Answer (ROA Vol. I at 119-125) and thus could not even be asserted by him at trial.

Respectfully, Hargrove believes the custodial parent's delay in seeking support is not an absolute defense to an action for retroactive child support but rather one of several factors (see below) the District Court should consider, and the District

Court erred in considering this as an absolute defense in this case.

4. The District Court abused its discretion by failing to award retroactive child support by failing to consider all available factors and applying no legal standard in denying any award

Perhaps the biggest problem driving the uncertainty of the District Court as to what to do with this case is that neither Nevada's appellate courts nor the Nevada legislature has set forth a cogent list of factors for the District Court to weigh when considering a request for retroactive child support under NRS § 125B.030. The public policy of the state of Nevada is that parents should financially support their children and the District Court should enforce that obligation unless it is in the best interests of the child not to do so.[8] "'Retroactive child support' is a repayment of monies expended for the care of the child in the past. It represents funds the non-supporting parent owed to the child, as well as funds owed the supporting parent to discharge his or her proportionate duty of financial support to the child."[9] NRS § 125B.030 states that "In the absence of a court order for the support of a child, the parent who has physical custody may recover not more than 4 years' support

[8] Brian M. v. Dep't of Human Res., Welfare Div. (in Re T.M.C.), 118 Nev. 563, 569, 52 P.3d 934, 938 (2002) ("A minor child has a right to support from a parent that cannot be abdicated unless the best interests threshold is satisfied."); Mason v. Cuisenaire, 122 Nev. 43, 52, 128 P.3d 446, 451 (2006) (referring to the "strong statutory and public policy requiring parents to support their children through the age of majority.").

[9] In the Interest of Valadez, 980 S.W.2d 910, 913 (Tex. App. 1998).

furnished before the bringing of the action to establish an obligation for the support of the child."[10] The statute is not limited to itemized past expenses but encompasses a regular, monthly child support payment. Unfortunately, the permissive word "may" in this statute has created a system where some parents seek and are awarded four years of retroactive support and some do not, based on the whim of the District Court judge assigned to the case with no real application of a legal standard or factors to weigh. There is virtually no appellate court guidance on determinations under NRS § 125B.030 and certainly none on the issues raised in this case.

This system of court discretion but without a clear set of factors for the District Court to consider leads to a system of inherent unfairness, inconsistent application of the law and arbitrary decisions. This case and Nevada's law can be contrasted to a state such as Texas where by statute the family court is to consider factors in granting or denying retroactive support such as (1) the net resources of the obligor, (2) whether the mother of the child made any previous attempts to notify the obligor of his paternity, (3) whether the obligor had knowledge of his paternity, (4) whether retroactive child support will impose an undue financial hardship on the obligor, and

[10] The Nevada Supreme Court, sadly, has never addressed the term "may" in the statute, which indicates judicial discretion, and when said discretion should or should not be exercised, only briefly stating that "In the absence of jurisdictional or waiver issues, a retroactive award of child support may be made when no support order exists." Mason v. Cuisenaire, 122 Nev. 43, 52, 128 P.3d 446, 451-52 (2006)

(5) whether the obligor provided actual support before the action was filed.[11] Other states have considered the extent to which the father knew or should have known of the birth and his parentage and the extent to which the mother concealed the child or the child's parentage from the father.[12] Yet Nevada has offered no guidance whatsoever on this issue, either statutorily or through case decisions.

In this case, the District Court laser focused on one factor to deny all retroactive support, i.e., that the mother hypothetically could have filed sooner. Seemingly none of the factors that weigh heavily in favor of support were given any express consideration, including but not limited to (1) the father's superior financial position, (2) the father's failure to pay the support he previously agreed to, (3) the father's total failure to provide any support for his child for at least three years of the child's minority, (4) the father's full knowledge that he had a son, and (5) difficulty of the mother locating the father. In the only case where the Nevada Supreme Court has discussed NRS § 125B.030, where the father was found to have never been ordered to previously pay support the Nevada Supreme Court in a conclusory manner stated that "a retroactive child support order is appropriate" under that circumstance, albeit under North Carolina law which controlled that particular case.

[11] See Tex. Fam. Code § 154.131(b).

[12] Burnine v. Dauterive, No. W2010-02611-COA-R3-JV, 2011 Tenn. App. LEXIS 406, at *12-13 (Ct. App. July 27, 2011)

Mason v. Cuisenaire, 122 Nev. 43, 52, 128 P.3d 446, 452 (2006) (remanding for an award of retroactive child support). The District Court considered none of these factors heavily weighing in favor of a retroactive award in this case.

Denial of the retroactive support simply because the mother could have sought the support sooner is arbitrary because the District Court could deny *any* retroactive support request under NRS § 125B.030 on this basis. Surely even if the custodial parent's delay were one factor of many to consider, there were many factors in this case which would counterbalance that factor.

Hargrove asks this Court to adopt a list of non-exhaustive factors for the District Court to consider her request for retroactive support under NRS § 125B.030 and to reverse and remand for full consideration of those factors, to include the following:

1. The best interests of the child and the public policy of the state of Nevada to provide financial support to children;
2. Any special needs or expenses of the child increasing the costs of raising the child in the past;
3. The financial situation of the custodial parent, both at present and in the past due to the lack of support from the non-custodial parent;
4. The financial situation of the non-custodial parent, both at present and how it was changed by not paying past support;

5. Whether the non-custodial parent would be unusually prejudiced or financially burdened in some manner beyond what any parent paying support would be;
6. The reasons why the custodial parent delayed in bringing a formal request for child support, including whether informal payments or promises had been earlier made by the non-custodial parent;
7. Whether the custodial parent made formal or informal demands for child support prior to the request for retroactive support;
8. Whether the custodial parent had difficulty contacting, locating, serving or identifying the non-custodial parent;
9. Whether the custodial parent believed there was already an enforceable agreement of the non-custodial parent to provide support;
10. If the non-custodial parent is the father, whether the father knew of his child or there was an issue of paternity.

Hargrove believes it was error for the District Court not to consider all available factors and that it was an abuse of discretion and arbitrary to deny her request merely because it might have been made sooner. Hargrove requests that this Court adopt her factors and remand for further consideration of an award.

VI. CONCLUSION

In closing, Appellant Hargrove believes the District Court erred in failing to find an enforceable promise to pay support, finding that NRS § 125B.030 could not be used by the Appellant, and in denying her request for retroactive support on the basis of one factor without fair consideration of all other factors involved.

Hargrove seeks reversal of the District Court's decision with instructions on remand to either enforce the promise to pay support made by Ward or to reconsider her request for support after a determination of all applicable factors instead of simply finding that her request was barred because she could have filed earlier.

Respectfully submitted this 21st day of December, 2020.

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CERTIFICATION PURSUANT TO NRAP 28.2

1. I hereby certify that this 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:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word, 2020 edition in 14-point Times New Roman font; or

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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 either:

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[X] Does not exceed 26 pages.

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 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 21st day of December, 2020.

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. 25, I hereby certify that on the 21st day of December, 2020, a copy of the foregoing **APPELLANT'S OPENING BRIEF** was served via the Court's E-Flex system on all registered users as follows:

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