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Elizabeth A. Brown
Clerk of Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEVADA

LILLIAN LACY HARGROVE,	)	Supreme Court Case No:
	)	81331
Appellant,	)	
v.	)	District Court Case No.:
	)	D-19-585818-C
THOMAS REID WARD,	)	
	)	
Respondent.	)	
	)	

RESPONDENT'S ANSWERING BRIEF

ROBERTS STOFFEL FAMILY LAW GROUP

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NRAP § 26.1 DISCLOSURE STATEMENT

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

The following persons/ entities are disclosed:

- Amanda M. Roberts, Esq.; and
- Roberts Law Group, P.C., dba Roberts Stoffel Family Law Group.

As to the Respondent there are no other parent corporations or publicly held companies at issue, and Respondent is not using a pseudonym.

Dated this 19th day of February, 2021.

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ROUTING STATEMENT

In this matter, Respondent believes that pursuant to *NRAP* § 17 (b)(10) this matter should be heard and decide by the Nevada Court of Appeals.

STATEMENT OF CASE

On March 12, 2019, the Appellant, Lillian Hargrove ("Lillian") filed a Complaint for Custody ("Complaint"). ROA Vol. I at 000001 through 0000012. The Complaint was based upon Chapter 125C of the Nevada Revised Statutes. The Complaint related to G.W., who was born on December 3, 1999. ROA Vol. I at 000001. At the time the Complaint was filed, G.W. was over nineteen (19) years old. The Complaint included a declaration from Lillian that the Respondent, Thomas Ward ("Thomas"), was the Father of G.W. and listed on the birth certificate of G.W. ROA Vol. I at 000003.

On March 12, 2019, Lillian filed a Motion seeking to establish paternity and/or for genetic testing. ROA Vol. I at 000013 through 0000017. In the Motion, Lillian agreed paternity was not an issue, and she was simply seeking "constructive child support arrearages[.]" ROA Vol. I at 0000015.

On May 30, 2019, Judge Henderson indicated that this matter would move forward "as a paternity action, despite its titling as a custody action." RA Vol. I at 0002. Thereafter, Judge Henderson set the matter for Trial in this matter on September 17, 2019. ROA Vol. I at 000080.

The Trial commenced on November 21, 2019; December 2, 2019; January 17, 2020; and January 24, 2020. ROA Vol. VI at 000464 through 000471. The Court rendered its Decision on January 24, 2020, and the Appeal follows. ROA Vol. VI at 000464; and ROA Vol. VI at 000483.

STATEMENT OF FACTS

There is no dispute that Thomas is the father of G.W., he is listed on the birth certificate. ROA Vol. III at 000224.

Lillian provided the Court a timeline which Judge Henderson simplified on the record for ease. ROA Vol. III at 000270 through 0000272. In her timeline, Lillian originally indicated that Thomas had no contact with G.W. from January of 2014 until after G.W. reached the age of nineteen (19) years old, i.e., December of 2018. ROA Vol. III at 000226 and 0000227. However, she then contradicted herself on cross examination and clarified the record that prior to G.W. reaching the age of eighteen (18) from May of 2017 through October of 2017, G.W. was actually in Thomas' care and custody. ROA Vol. III at 000287. Additionally, Thomas clarified through testimony that G.W. was in his care in December of 2016, for his birthday, during a visit to Las Vegas. ROA Vol. IV at 000356.

Lillian indicated that after October of 2014, she decided contacting Thomas was not worth her time so she just stopped doing it. ROA Vol. III at 000300 and 0000302. Moreover, according to Lillian, on or about May 15, 2013, which was before G.W. turned eighteen (18) years of age, she knew that she could seek child support through the District Attorney. ROA Vol. III at 000304 and 0000305.

Lillian testified that Thomas had been at his job for a long period. ROA Vol. III at 000242. Lillian further testified that Thomas had been at his job "longer than 15 year" as a scrub tech at a hospital in downtown Sacramento. ROA Vol. III at 000278.[1] In fact, Lillian testified Thomas had been at the same job since the Parties' were in a relationship. ROA Vol. III at 000279. Lillian indicated that she had the telephone number for the hospital where Thomas was employed. ROA Vol. III at 000282.

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[1] Thomas clarified in his testimony that it was more than thirteen (13) years. ROA Vol. IV at 000335.

SUMMARY OF ARGUMENT

The first argument is whether child support can be brought, for the first time, after the child has reached the age of majority.

The second argument is whether *NRS* § 125.030 is applicable to situations where the first request for a child support Order is after the child reaches the age of majority and what is appropriate for the District Court to consider when determining application of the lookback period.

ARGUMENT

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

According to Lillian's argument in 2012, the Parties had an oral agreement for Thomas to pay her child support at a rate of $400.00 per month. Further, she alleges that agreement was an enforceable contract which Thomas breached. Lillian alleges the breach occurred in January of 2014; however, that is not supported by the finding of the Court. Rather, the Court found that Lillian's timeline provided that Thomas followed through on their oral agreement from April 2012 until April 2013 by putting $400.00 into her checking account. ROA Vol. VI at 000467. Thereafter, the Court found that from April of 2013 through July of 2013,

no payments occurred. ROA Vol. VI at 000467. Factual finding, such as this, are reviewed for an abuse of discretion on the part of Judge Henderson. *Kilgore v. Kilgore*, 135 Nev. Adv. Op. 47, 449 P.3d 843 (2019) *citing Ogawa v. Ogawa*, 125 Nev. 660, 221 P.3d 699, 704 (2009). Here, Thomas would allege there has been no abuse of discretion regarding this factual findings which were supported by the record.

If the alleged agreement was a contract as Lillian argues, breach occurred in May of 2013, when Thomas stopped paying child support. As such, pursuant to *NRS* § 11.190 (2)(c), the alleged oral contract expired four (4) years after the breach which was the latest possible date of May 31, 2017. Here, Lillian did not bring her action until March 12, 2019 which was more than a year after the statute of limitations had run.

The specific language of the statute is very important and must be considered which reads, "[a]ny 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." Here, Thomas would argue that the key word in that statute is "promise[.]" If the Court reviews the actual text messages they are not from Thomas promising child support, but from Lillian demanding child support. They

specific message reads, "I want the $250 for this month immediately and for there on out its $300 a month by the 4th of each month, no excuses or exceptions . . . I recommend you take this offer and following [*sic*] through on it, it's definitely the cheaper way out." ROA Vol. II at 000138. Looking through the text messages, there is no promise by Thomas to do anything, there is an offer by Lillian; in fact, it is the exact word she uses, but Thomas never makes any promise in writing. ROA Vol. I at 000137 through 000143.

In her Opening Brief, Lillian admits the Parties' "did not write out anything that looked like a formal contract with signature[.]"[2] Then, Lillian alleges that Thomas' testimony that he made some payments to her was him admitting to an agreement.[3] However, again there is a fatal flaw in the argument because the specific statute that she relies upon requires that Thomas make a "promise in writing." Lillian argues that the payments themselves are an agreement to pay child support which was confirmed in

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[2] *See* page 9.
[3] *Id.*

writing.[4] However, it would be a stretch for the Court to determine a payment by Thomas is a "promise in writing."

Additionally, Thomas would argue that when Judge Henderson issued an Order, that this matter would be treated as a paternity action rather than a custody action, the specifics regarding the issues in this case must be considered under *NRS* § 126.011 through 126.900. ROA Vol. I at 000001 through 0000012. In doing so, the Court must look at the specific facts in this matter which will establish that under the parentage portion of the legislation, Lillian's request for child support cannot stand.

NRS § 126.053 (1) provides that a voluntary acknowledgment of paternity has "the same effect as a judgment or order of a court determining the existence of the relationship of parent and child if the declaration is signed in this or any other state by the parents of the child." Here, there is no dispute that Thomas voluntarily acknowledged paternity and was included on G.W.'s birth certificate. ROA Vol. I at 000003. Therefore, Thomas argues that a paternity suit is procedurally improper and defective because by voluntarily acknowledging G.W. as his child, there was no need

[4] *See* page 10.

under *NRS* § 126.053 (1) because the father child relationship was already deemed to exist by law. Therefore, there was no viable Order that could be issued because the law presumed the relationship. Moreover, the only manner in which the District Court could enter a child support Order pursuant to this Chapter of the Nevada Revised Statutes is if child was a minor because the statute specifies same and states at *NRS* § 126.161 (3), "[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*[.]"

Chapter 126 do not define "minor." However, Chapter 126 is under Title 11 of the Nevada Revised States which are the chapters related to domestic relations. In that Chapter, the first time that child is defined is under *NRS* § 125A.035 which provides that a child is "a person who has not attained 18 years of age." *NRS* § 125B.050 (1) specifies "minor child" and indicates a tolling of the statute of limitation for bringing an action for child support. In the cases that Lillian references, specific reference is again made to "minor child" and in this action, G.W. was an adult at the time the action was brought. At the time the Complaint was filed, G.W.

was over nineteen (19) years old. Therefore, this case is distinguishable from the authorities Lillian relies upon.[5]

Based upon the foregoing, Thomas requests the Court determine that there was no "promise in writing" to provide support. As such, pursuant to *NRS* § 126.900 (1) there was not an enforceable agreement or contract for child support.

B. **Whether the District Court erred in refusing to award retroactive child support pursuant to *NRS* § 125B.030.**

NRS § 125B.030 states,

> Where the parents of a child do not reside together, the physical custodian of the child may recover from the parent without physical custody a reasonable portion of the cost of care, support, education and maintenance provided by the physical custodian. In the absence of a court order for the support of a child, the parent who has physical custody[6] may recover not more than 4 years' support furnished before the bringing of the

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[5] *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).

[6] The term "has" indicates present sense meaning that the parent seeking a recovered under *NRS* § 125B.030 would actually be required to have physical custody at the time the request was made for child support. However, after the child reaches the age of majority, the parent no longer "has" physical custody of a minor child. Thus, a request for relief should be barred under this statute. The pronoun is important in this matter because the legislature could have used past tense such as "had" reading, has or had physical custody.

> action to establish an obligation for the support of the child.

First, Thomas would point out that *NRS* § 125B.030 permits the District Court through the use of the word "may" to award support, but does not require it to be awarded. Next, Thomas would point to *NRS* § 125B.050 regarding the period limitation on request for support. *NRS* § 125B.050 (1) specifically references "minor child[.]" Here, Thomas would argue that because the period of limitation in the absence of an Order specifies "minor child" it indicates legislative intent that a request for child support must be brought during the minority of the child.

Lillian argues that Judge Henderson made a statement during Trial without legal authority. Specifically, the statement is that Thomas' Counsel "correctly states the law we cannot for the first time post-majority create a - - child support order." ROA Vol. III at 000209. However, Thomas would point out this was not a specific finding during the Trial or in the Court's decision. Rather, it was dialog with Counsel only and should hold no weight when considering the arguments made in this matter. Even if given weight, it would be harmless error, because it was not the basis of denying Lillian's requested relief under *NRS* § 125B.030.

Lillian then argues that *NRS* § 125B.030 provides no limitation on when a claim can be brought. While, under that specific statute that may be true; however, *NRS* § 125B.050 deals with the period of limitation related to all Orders for child support. *NRS* § 125B.050 (1) specifies child support for a "minor child" in the absence of an Order, which would be the case in this matter. Therefore, the statutory scheme has a framework for cases where there is no Order and that a claim for child support cannot be brought after a child's minority unless specific action is taken to toll that period. Here, Lillian would have had to have mailed a demand to Thomas' last known address before G.W. reached the age of eighteen (18) to toll the running of the statute of limitation to bring an action. The only time that there is no statute of limitations on a claim for child support is when there is an existing Order. *NRS* § 125B.050 (2) and (3)(a).

Additionally, *In Re: D.J.G., Salins v. Gulick*, 100 Nev. 125, 128, 676 P.2d 801,804 (1984), the Supreme Court indicated that before relying upon the age of majority when determining an issue of child support pursuant to *NRS* § 129.010, a District Court must determine if there is an Order. Specifically, this Court has indicated "a parent's obligation to pay child support is unaffected by the statutory age of majority where the obligation

arises from a settlement agreement which is incorporated into the divorce decree." *Id. citing Bingham v. Bingham*, 91 Nev. 539, 539 P.2d 118 (1975) and *Norris v. Norris*, 93 Nev. 65, 560 P.2d 149 (1977). As such, it can be inferred that if there was no Order, application of the age of majority is appropriate when deciding on an initial child support request for the first time post-majority.

C. Whether the District Court erred when determining that *NRS* § 126.161 (3) barred Lillian's request for retroactive child support under *NRS* § 125B.030.

In order to comprehend the full extent of *NRS* § 126.161, the Court should breakdown the statute. *NRS* § 126.161 (1) states, "[a] judgment or order of a court, or a judgment or order entered pursuant to an expedited process, determining the existence or nonexistence of the relationship of parent and child is determinative for all purposes." As set forth herein, there was no need to establish a relationship because one already deemed to exist under *NRS* § 126.053 (1) because Thomas signed a voluntary acknowledgement and was included on the child's birth certificate. Therefore, Judge Henderson never addressed paternity because it had already been established prior to Lillian's filing. ROA Vol. I at 000003.

Thereafter, the statutory scheme provides that if such an Order is issued to determine "the existence or nonexistence of the relationship of parent and child" then it must include an Order for support for a "minor child." *NRS* § 126.161 (1) and (3). *NRS* § 126.161 (3) clearly states, "[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[.]" If there is no basis to issue such an Order, then there can be no basis to Order child support and surely not after the child reaches the age of majority. Moreover, if the legislature intended there to be support of a child who had reached the age of majority, it is logical that the legislature would not have made the distinction of "minor child."

The limitation regarding when a claim can be brought is not solely in *NRS* § 126.161 (3), but also in *NRS* § 125B.050 (1). Therefore, the Court did not err when it determined that Lillian could not retroactively seek child support for G.W. who had reached the age of majority prior to the commencement of the action.

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D. Whether the District Court erred in applying equitable defenses when a Party could have filed sooner.

In this matter, Lillian argues that equitable defenses were improperly applied by the District Court. However, a review of the actual Order provides the Court did not apply equitable defenses. Rather the Order reads,

> THE COURT FURTHER FINDS that pursuant to *NRS* § 126.081 (3) a claim for paternity is valid three (3) years after emancipation; however, the statutes regarding custody and parentage do not include language regarding post-emancipation child support and are dominated by language regarding child support. Therefore, it would be a leap for the Court to grant same without legal authority to award same because when the purpose of the statute is to grant support, then the legislature would have stated as much to avoid speculation. (Time Stamp 01:37:10 and 01:39:18)
>
> THE COURT FURTHER FINDS if the Court were going to take that leap, equitable defenses would matter including that Plaintiff knew how to reach Defendant two (2) years prior to commencement of this action through contact with Paternal Grandmother, plus she knew where he worked and it has been the same for years. (Time Stamp: 01:38:35) ROA Vol. VI at 000468.

Here, the Order itself indicates the Court is not going to take the leap wherein, a paternity action can be brought post majority, that as Lillian

alleges she can also claim child support post majority. Therefore, the Court indicated that since it did not make that leap, it was not applying equitable defenses. The Court goes on to indicate that if it were going to take that leap, then equitable defenses may be applicable including that Lillian knew how to reach Thomas two (2) years prior to the commencement of the action which is the period that Thomas actually had G.W. in his custody for six (6) months from May to October of 2017. ROA Vol. III at 000287.

E. Whether the District Court abused its discretion in failing to award retroactive support by failing to consider all available factors and apply no legal standard in denying an award.

Lillian alleges that *NRS* § 125B.030 provides to much discretion for District Court Judges when it comes to determining whether or not to grant support, prior to the issuances of an Order. Lillian requests the Court look at only a portion of the statute, whereas Thomas alleges the Court should review the statute in its entirety. *NRS* § 125B.030 states,

> Where the parents of a child do not reside together, the physical custodian of the child may recover from the parent without physical custody a reasonable portion of the cost of care, support, education and maintenance provided by the physical custodian. 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 furnished before the bringing of the action to establish an obligation for the support of the child.

The first portion of the statute requires the physical custodian of the child, i.e. Lillian, to establish "a reasonable portion of the cost of care, support, education and maintenance provided by the physical custodian." Here, there was no presentation of information regarding expenses related to G.W.'s care, support, education and maintenance. As such, it would be difficult for the District Court in this matter to assign any amount given there was no presentation of facts related to the requirement set forth in the statute.

The second portion of the statute permits the Court, but does not require the Court, to award four (4) years prior to the commencement of the action. In this matter, the Complaint was filed on March 12, 2019. Using the chronology, a backward glance four (4) years begins March 12, 2015. G.W. was a minor for the period of March 12, 2015 through December 3, 2017. That period is thirty-three (33) months; however, from May of 2017 through October of 2017 (a period of six months - which Lillian does not dispute), G.W. was actually in Thomas' care and custody. ROA Vol. I at 000287. This means of the thirty-three (33) month period, excluding the

six (6) months G.W. was in Thomas' care, the longest possible period the Court could have considered was twenty-seven (27) months.

Here, Lillian is requesting this Court adopt a list of factors that the Court must consider and apply to this case based upon a request for remand. However, the fact of the matter is that there is a statute of limitations in child support matters as set forth in *NRS* § 125B.050. It would be impracticable and against public policy to review *NRS* § 125B.030 without also considering the statute of limitations. Again, under the statute of limitations in *NRS* § 125B.050 (1) if there is no Order (which is the case in this situation), the only way to preserve a claim for child support was for Lillian during G.W.'s minority to mail something to Thomas' last known address. By failing to do so, the Court has lost jurisdiction to consider Lillian's claims.

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CONCLUSION

Based upon the foregoing, Thomas requests the Court deny Lillian's requested relief and uphold the Decision entered on April 26, 2020.

Dated this 19th day of February, 2021.

ROBERTS STOFFEL FAMILY LAW GROUP

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CERTIFICATE OF COMPLIANCE (*NRAP* § 28.2 and 32)

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

[ ] This brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

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:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains approximately 4,082 words; or

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[X] Does not exceed 30 pages.

3. I further certify that I have read this Respondent's Answering 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 N.R.A.P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a page reference to the page 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 19th day of February, 2021.

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. 25, I hereby certify that on the 19th day of February, 2021, a copy of the foregoing Respondent's Answering Brief was served via the Court's E-Flex system on all registered users as follows:

Adam Breeden, Esq.
Breeden & Associates, PLLC
Attorney for Appellant

By: /s/ Colleen O'Brien
Attorney or Employee of
Roberts Stoffel Family Law