IN THE SUPREME COURT OF THE STATE OF NEVADA

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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 HARGROVE'S REPLY 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:

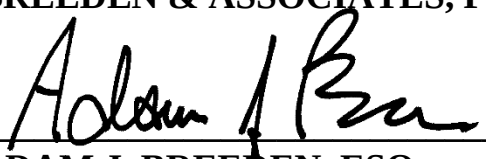
There are no corporations or business entities involved in this appeal and, therefore, there are no related or parent companies to disclose.

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 15th day of March, 2021.

BREEDEN & ASSOCIATES, PLLC



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I. REPLY ARGUMENT

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

Hargrove's Opening Brief presents the alternate arguments that (1) the District Court erred in not finding a binding agreement for child support under NRS § 126.900, however (2) even if a binding agreement was not formed, the District Court nevertheless had authority to make a retroactive child support award under NRS § 125B.030 and erred by not doing so.

Ward's Answering Brief in several places tries to make a technical argument as to whether Hargrove was proceeding under NRS Chapter 126 given that paternity was not in dispute, as opposed to proceeding under NRS Chapter 125B, or that Hargrove cannot rely on any provision of NRS § 126.900 since she did not raise a bona fide paternity issue under NRS Chapter 126. Hargrove fails to see the significance in this distinction. Some provisions of NRS Chapter 126 seem to blend or overlap with NRS Chapter 125B and how the actual laws are codified should not be interpreted as a limitation. Hargrove used a court-approved, pre-printed form complaint when she filed her case. Her complaint plainly put Ward on notice that child support arrears were sought. (ROA Vol. I at 1-12, most specifically at 4). Proper person pleadings are often held to "less stringent standards than formal pleadings drafted by lawyers." *Northrop v. State*, 132 Nev. 1012 (2016), citing *Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972).

Therefore, Hargrove does not think it is a compelling argument for Ward to debate technical points about her pleadings if Nevada law does provide her a remedy. Hargrove should not be prevented from using NRS § 126.900 or other provisions in NRS Chapter 126 simply because Ward admitted to paternity. Moreover, even if paternity were presumptively established by Ward being on the birth certificate, Hargrove was likely entitled to a formal order of paternity confirming this under NRS Chapter 126.

Next, Ward tries to distinguish or narrow the use of the word "promise" as used in NRS § 126.900 to argue he entered into no such agreement to pay child support. The plain text of the statute requires only a "promise in writing to furnish support for a child." There is little to no case law interpreting NRS § 126.900 and some guidance from an appellate court would admittedly be helpful. Ward argues as if that language in the statute requires a specific promise from him, in his writing or signed by him. This would be the most restrictive possible interpretation of the statute and inconsistent with Nevada's broad public policy regarding payment of support and formation of contracts. Typically, "promise" is interpreted synonymously with "contract" except for the consideration requirement which NRS § 126.900 eliminates. *Smith v. Recrion* Corp., 91 Nev. 666, 669, 541 P.2d 663, 665 (1975) ("both parties intended to contract…and that promises were exchanged."). Therefore, Hargrove believes the better interpretation of the statute is that of general

contract law which requires only a meeting of the minds and some writing to confirm it, which existed in this case. Given the writings of one if not both parties and the part performance, Hargrove believes a binding promise of Ward to pay child support should have been found and enforced.

Part of the purpose of NRS § 126.900 would be defeated if this Court did not broadly interpret it to give legal effect to these informal agreements. Many parents try to avoid going to court, due to the financial burden of hiring counsel or a desire to avoid the adversarial nature of court proceedings. Many parents avoid formal litigation because they believe they have formed a binding agreement between themselves and rely on that as a reason not to file a lawsuit. If our court system does not interpret what the parties in this case did to be a binding agreement to furnish support, the purpose of NRS § 126.900 in enforcing these agreements would be frustrated. Ward obviously agreed to pay money for child support: He had no other financial obligation to Hargrove, made the payments only after Hargrove's requests for child support and Ward provided no other financial support for his son at that time. Moreover, upon cross-examination, Ward did frankly 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). These facts should have established an enforceable agreement between the parties.

Lastly, Ward makes a statute of limitations argument that even had an

agreement been found under NRS § 126.900, Hargrove did not file to enforce it in time. The Nevada Supreme Court has never decided whether a promise to pay child support under NRS § 126.900 falls under NRS § 125B.050 (which states there is no statute of limitations to enforce *an order* for support) or whether such an agreement is governed under the four-year statute for an oral contract under NRS § 11.190(2)(c) or the six-year statute of limitations for a written contract under NRS § 11.190(1)(b). Ward argues for the most restrictive four-year requirement for oral contracts under NRS § 11.190(2)(c). However, it would seem that even if NRS § 125B.050 did not apply to eliminate the statute of limitations altogether, by definition if a "promise in writing to furnish support for a child" under NRS § 126.900 were found, such a writing would plainly fall under NRS § 11.190(1)(b) which requires "[a]n action upon a contract, obligation or liability founded upon an instrument in writing" to be filed within six years. Therefore, Ward's argument for a four-year statute of limitations for obligations under NRS § 126.900 simply cannot be correct. If a "promise in writing" were found, it would surely qualify for the six-year statute of limitations under NRS § 11.190(1)(b). As a final technical point, Hargrove also disagrees with Ward's assertion of when the breach of said agreement occurred. The District Court found that Ward stopped paying in January 2014 (Joint Appx. Vol. VI at ROA000467 ln. 16-19), not May of 2013 as Ward states, although either date is within six years of the date Hargrove filed her Complaint on March 12, 2019.

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 § 125B.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's decision to deny retroactive child support and remand for further consideration of retroactive support under NRS § 125B.030.

Ward argues that an award of retroactive support under NRS § 125.030 is discretionary because the statute uses the term "may." While this statement taken in the abstract is correct, this issue is not dispositive of this appeal because the Nevada Supreme Court has repeatedly stated that failure to exercise discretion in the appropriate case can be an abuse of discretion. *Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993) ("[W]here a trial court exercises its discretion in clear disregard of the guiding legal principles," it "may constitute an abuse of discretion."); *Goodman v. Goodman*, 68 Nev. 484, 487-88, 236 P.2d 305, 306 (1951) (explaining court discretion and stating "if the discretion is abused, the abuse may be reviewed and corrected by a higher tribunal."). Therefore, Ward cannot prevail merely by noting the statute provides some discretion since the nature of Hargrove's appeal is that the District Court abused or erred in failing to exercise its discretion.

Ward also notes that NRS § 125B.050 uses the term "minor child." Hargrove

does not find this of relevance because she is seeking only retroactive support for the time that the child was a minor in the four years prior to her request. Ward's argumentative leap that the use of the term "minor child" in the statute means that a request for child support must be filed during the minority of the child is not a requirement of the statute, is not stated in any legislative history and no legislative intent can be drawn from the plain language of the statute. Instead, it appears that the statutes are merely silent as to whether a custodial parent can file for and seek a retroactive support award for the time the child was a minor, but the filing occurs *after* the child attains the age of majority. The legislature appears to have created a four-year window under NRS § 125B.030 to do just that. Hargrove argues that the District Court made an error of law in holding that such a retroactive award cannot be made as a matter of law. (ROA Vol. III at 000209, Answering Brief at pg. 10). Ward attempts to argue this as "harmless error," but this was the most crucial legal issue in the case assuming the District Court found no enforceable promise to pay support under NRS § 126.900, so Ward's argument of harmless error should be found unconvincing. Hargrove believes a custodial parent is *not* foreclosed from seeking retroactive support for the time the child was a minor simply because the request was filed after the child attained the age of majority. For the same reason, the Court should reject Ward's argument that Hargrove should have mailed a written demand under NRS § 125B.050(1) to toll the statute. NRS § 125B.050(1) appears

to address situations where one parent seeks to recover *more than* the four years of retroactive support otherwise permitted under NRS § 125B.030. The statute does not place any other requirement of a written demand on a parent seeking to look back no more than four years.

Hargrove also does not believe Ward's citation to *In re Custody of Gulick*, 100 Nev. 125, 676 P.2d 801 (1984) is helpful to the legal issues in this appeal. In *Gulick*, the legal issue concerned mostly choice of law issues between Nevada and Maryland. A secondary issue in that case was whether the divorce settlement agreement between the parties could alter the years the non-custodial parent was obligated to support the child (it could), when if not for the settlement agreement the obligation of support would be extinguished. However, *Gulick* did not involve a parent seeking a retroactive support award after the child attained the age of majority, which is the legal issue addressed in this appeal.

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 the language of the statute therefore must be to allow for retroactive child support to be awarded after the child turns eighteen. (ROA Vol. II at 432).

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.

Ward continues to argue in his Answering Brief that somehow NRS § 126.161 bars Hargrove's request. However, 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 as a matter of law 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. Ward offered no new citations of case law or legislative history to support his statutory interpretation argument and the plain terms of the statute do not support Ward either.

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.*

In response to Hargrove's argument that the District Court erred in finding "equitable defenses," Ward responds that the Court's comments are harmless error. Ward reasons that the Court only mentioned that hypothetically if it "were going to take that leap [that the statute allowed retroactive support to be established after the child attains majority]" that "equitable defenses would matter." Therefore, Ward argues the appellate court need not consider the merit of this ruling further.

Hargrove disagrees. If the rest of the District Court's Order is read, it becomes apparent that the District Court did rest its opinion on an "equitable defense." The Order plainly reasons that "it will not be a tremendous inequitable injustice that occurs if the Court denies Plaintiff's request," "an obligation on [Hargrove's] side to establish an Order prior to the child's age of eighteen" and that Hargrove bore some blame because she "could have established an Order at any time during 2012, 2013, 2014 through 2017." (ROA Vol. VI at 000469). Therefore, the District Court very much did consider some new "equitable defense" in denying Hargrove's relief. It appears the District Court was applying an equitable defense of latches, but the

Court never used the term latches and did not properly apply the law of latches and conduct a prejudice analysis as required.

Ward does not address the merits of this newfound "equitable defense" which seeks to graft a new requirement into NRS § 125B.030 that the support sought go back no further than four years *and* the new equitable requirement that the parent must move as soon as possible in whatever fashion the court with hindsight deems the most efficient. Again, there is a panoply of public policy reasons to reject this new requirement, including (1) this "equitable defense" is nowhere in the statute, (2) the statutes are read broadly to favor support of children, not limit it, and (3) there are many reasons like parental fear, inability to retain counsel for financial reasons or otherwise, mistrust of the court system, the desire to work out an informal arrangement without suing the other party, inability to locate the other party and a belief that an enforceable promise was entered into that may cause a parent to not seek to immediately establish support.

Hargrove asks that the appellate court reject the new "equitable defenses" upon which the District Court relied. By its very terms, NRS § 125B.030 allows up to four years of retroactive child support to be awarded and no additional requirements should be read into the plain language of the statute.

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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.*

Ward's Answering Brief argues that Hargrove believes the District Court is given too much discretion under NRS § 125B.030. This is not a good summary of the argument made by Hargrove. Instead, Hargrove is noting that while NRS § 125B.030 provides the District Court discretion, no appellate court has yet explained what test or factors the District Court should weigh when exercising that discretion. The Nevada Supreme Court has explained that even where discretion exists, a disregard of guiding legal principals or failing to exercise discretion can constitute an abuse of discretion. *Bergmann v. Boyce*, 109 Nev. 670, 856 P.2d 560, 109 Nev. Adv. Rep. 103, 1993 Nev. LEXIS 108 (Nev. 1993) ("where a trial court exercises its discretion in clear disregard of the guiding legal principles, this action may constitute an abuse of discretion."); *Willmes v. Reno Mun. Court*, 118 Nev. 831, 835, 59 P.3d 1197, 1200 (2002) (concluding that a court's failure to exercise its available discretion can constitute a manifest abuse of discretion).

Ward then argues that NRS § 125B.030 places a burden on the custodial parent requesting retroactive child support to produce actual itemized receipts for the "reasonable portion of the cost of care, support, education and maintenance provided by the physical custodian," without which no retroactive support can be awarded. Hargrove is not aware of any case interpreting NRS § 125B.030 so

restrictively. Such an interpretation would ignore the legislature's judgment that a non-custodial parent's monetary obligation is presumptively as set forth by statute in NRS § 125B.070 (former) and NRS § 125B.080 without inquiry into actual dollars spent. The Court should reject any approach to retroactive support under NRS § 125B.030 that would require actual invoices or line-item expenses. Parents rarely keep such meticulous records for years, and such a system would require the court to prorate or allocate expenses like the rent or mortgage where the child lives or the amount of groceries purchased for the family that actually went in the child's mouth. An itemized expense requirement under NRS § 125B.030 would make it practically impossible to make an award to a parent under that statute and worse yet custodial parents would not be on notice of the need to keep such records. Moreover, it does not appear that Ward urged such an interpretation at the District Court level, therefore this argument is waived.

As to Hargrove's request that the Court adopt a non-exhaustive list of factors for the District Court to consider and weigh, Ward does not contest the wisdom of the individual factors but instead pleads that there is a "statute of limitations for child support matters as set forth in NRS § 125B.050." However, NRS § 125B.050 does not resolve this dispute. It contains no statute of limitation beyond the four-year statute of limitations for seeking arrears contained in NRS § 125B.030. Indeed, given that NRS § 125B.050, which allows tolling upon a written demand for support,

is closely codified just after NRS § 125B.030, it stands to reason that its purpose is to allow recovery of *more* than four years of retroactive support if there has been a written demand further back in time than four years. Nowhere in NRS § 125B.050 does that statute seek to lessen the four years of retroactive support that can be requested under NRS § 125B.030.

Hargrove's broader point, however, is this: If the District Court has no guiding factors to consider, how can it properly exercise its discretion? This case presents a ripe legal issue for the appellate court to clarify what factors are relevant in the District Court's analysis when considering a request for retroactive support under NRS § 125B.030.

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 Hargrove, and by denying her request for retroactive support on the basis of one factor without fair consideration of all other factors involved.

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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 15th day of March, 2021.

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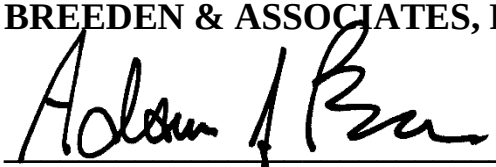

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CERTIFICATION PURSUANT TO NRAP 28.2

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

[ ] 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 3,430 words; or

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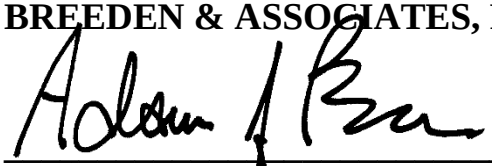
3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable

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 15th day of March, 2021.

BREEDEN & ASSOCIATES, PLLC



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CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. 25, I hereby certify that on the 15th day of March, 2021, a copy of the foregoing **APPELLANT'S REPLY BRIEF** was served via the Court's E-Flex system on all registered users as follows:

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