

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 HENRY OLIVA AND ROSIE ELENA)
3 MARTINEZ,

4 Appellants

5 v.

6 IGNACIO AVILA, JR.,

7 Respondent
8
9

S.C. DOCKET NO.: 83023

D.C. Case No.: D-15-515892-C
Electronically Filed
Sep 16 2021 11:55 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

10 **APPELLANT'S FAST TRACK STATEMENT**

11 **1. Name of the Party filing this fast track statement:**

12 Henry Oliva and Rosie Elena Martinez
13

14 **2. Name, law firm, address, and telephone number of attorney submitting**
15 **this fast track statement.**

16 Fred Page, Esq.
17 Page Law Firm
18 6930 South Cimarron Road, Suite 140
19 Las Vegas, Nevada 89113
20 (702) 823-2888

21 **3. Judicial district court, and district court docket number of lower court**
22 **proceedings:**

23 Eighth Judicial District Court, Family Division, Clark County, Nevada
24 District Court Docket No. D-15-515892-C.

25 **4. Name of judge issuing judgment or order appealed from:**

26 District Court Judge Nadin Cutter.
27
28

1 **5. Length of trial or evidentiary hearing. If the order appealed from was**
2 **entered following a trial or evidentiary hearing, then how many days did**
3 **the trial or evidentiary hearing last?**

4 Approximately one day.

5 **6. Written order or judgment appealed from:**

6 Findings of Fact, Conclusions of Law, and Judgment filed April 29, 2021.

7
8 **7. Date that written notice of the appealed written judgment or order's**
9 **entry was served:**

10 The Notice of Entry of Order was filed April 29, 2021.

11 **8. If the time for filing the notice of appeal was tolled by the timely filing of**
12 **a motion listed in NRAP 4(a)(4),**

13 (a) Specify the type of motion, and the date and method of service
14 of the motion, and date of filing: N/A

15 (b) Date of entry of written order resolving tolling motion: N/A

16
17 **9. Date notice of appeal was filed: May 28, 2021**

18 **10. Specify statute or rule governing the time limit for filing the notice of**
19 **appeal, e.g., NRAP 4(a), NRS 155.190, or other: NRAP 4(a)**

20 **11. Specify the statute, rule or other authority, which grants this court**
21 **jurisdiction to review the judgment or order appealed from:**

22 NRAP 3(b)(1).

23
24 **12. Pending and prior proceedings in this court. List the case name and**
25 **docket number of all appeals or original proceedings presently or**
26 **previously pending before this court which involve the same or some of**
27 **the same parties to this appeal:**

28 N/A

1 **13. Proceedings raising same issues. If you are aware of any other appeal or**
2 **original proceeding presently pending before this court, which raise the**
3 **same legal disuse(s) you intend to raise e in this appeal, list the case**
4 **name(s) and docket number(s) of those proceedings:**

5 None

6 **14. Procedural history. Briefly describe the procedural history of the case**
7 **(provide citation or every assertion of fact to the appendix or record, if**
8 **any, or to the transcript or rough draft transcript:**

9 On June 3, 2015, Respondent filed a Complaint for Custody against Rosie
10 Martinez, alleging that he was the natural father of Jazlynn Martinez-Oliva nka
11 Jazlynn Martinez-Avila, date of birth, October 25, 2013, (age 1 ½) at the time of the
12 filing. AA000001-AA000004.

13
14 On August 7, 2015, a Stipulation and Order was filed wherein the parties
15 agreed to paternity testing of Jazlynn. AA000069-AA000072.

16
17 On July 22, 2016, a Stipulated Decree of Custody as it relates to custody and
18 visitation of Jazlynn was entered. AA000166-000182.

19
20 On February 8, 2017, an Order Amending Stipulated Decree of Custody, as it
21 relates to visitation of Jazlynn was entered. AA000206-AA000207.

22
23 On March 1, 2017, a First Amended Decree of Custody as it relates to custody
24 and visitation of Jazlynn was entered. AA000212-AA000227.

25
26 On November 1, 2017, Respondent filed a First Amended Complaint for
27 Custody was filed against Appellant, Rosie Martinez, with Respondent claiming that
28

1 he was also the natural father of Alan Martinez date of birth, October 18, 2011 (age
2 8) at the time of the filing. AA000247-AA000253.

3 On November 1, 2017, Respondent filed a Verified Motion to Amend the
4 Complaint for Custody, to Establish Joint Legal and Joint Physical Custody, to Set
5 Aside the Custody Decree, to Modify Custody, for Child Support, and for Attorney's
6 Fees and Costs. Respondent also filed a Motion to Joint Henry Oliva as a Defendant
7 for the Limited Purpose of Determining Paternity of the Minor Child, Alan Oliva.
8 AA000258-AA000265.

9 On January 25, 2018, the district court judge that the Default entered against
10 Henry Oliva be stricken from the record and that Henry added as a Defendant to this
11 case. The district court furthered ordered that it was not ordering a paternity test
12 without a stipulation. At the hearing, the district court summarized the paternity law
13 in the state of Nevada. AA000280-AA000282.

14 On March 29, 2018, the district court entered a Minute Order in which it
15 summarized the procedural history of the case as well as providing a written history
16 of paternity law in Nevada. AA000292-AA000296.

17 On June 15, 2018, the Order from the district court's Minute Order was filed.
18 AA000303-000311.

19 On July 6, 2018, Respondent filed a Motion to Reconsider the Order Entered
20 June 20, 2018. AA000323-A000338.

1 On September 11, 2018, the hearing on Respondent's Motion to Reconsider
2 was held. At the hearing, the Motion to Reconsider was denied. The Order from
3 the hearing was filed September 21, 2018. AA000355-AA000356.
4

5 On October 18, 2018, Respondent filed his Notice of Appeal, appellate case
6 number 77242. No Answering Brief was ever filed by Rosie Martinez. AA000367-
7 AA000369.
8

9 On February 25, 2020, the Nevada Supreme Court Clerk's
10 Certificate/Judgment-Remanded was filed. AA000483-AA000486.
11

12 On March 2, 2020, a hearing was held and the parties were referred out for
13 paternity testing regarding Alan Oliva and whether Ignacio Avila was the natural
14 father of Alan. AA000537-AA000538.
15

16 On June 23, 2020, the return hearing was held. At the hearing, the district
17 court noted that Respondent was found to be the biological father of the minor child,
18 Alan Oliva. The district court ordered that the Order from the hearing held on
19 September 21, 2018, be set aside. Respondent was ordered to contact the Children's
20 Attorney Project and Respondent was ordered to pay for the guardian ad litem fees.
21 AA000559-AA000561.
22
23
24

25 On January 7, 2021, Appellant, Henry Oliva, filed his Answer to Respondent,
26 Ignacio Avila's, First Amended Complaint for Custody. AA000753-AA000759.
27
28

1 On April 9, 2021, Respondent filed his Pre-Trial Memorandum, and on April
2 12, 2021, Appellant, Henry Oliva, filed his Pre-Trial Memorandum. AA000774-
3 784; AA000785-AA000796.

4
5 On April 29, 2021, the Findings of Fact, Conclusions of Law, and Order and
6 Notice of Entry of Order were entered. AA000799-AA000807.

7
8 On May 28, 2021, the Notice of Appeal was filed. AA000367-AA000369

9 **15. Statement of facts. Briefly set forth the facts material to the issues on**
10 **appeal (provide citations for every assertion of fact to the appendix or**
11 **record, if any, or to the transcript or rough draft transcript):**

12 On June 3, 2015, Respondent filed a Complaint for Custody against Rosie
13 Martinez, alleging that he was the natural father of Jazlynn Martinez-Oliva nka
14 Jazlynn Martinez-Avila, date of birth, October 25, 2013, (age 1 ½) at the time of the
15 filing. AA000001-AA000004.

16
17 On August 7, 2015, a Stipulation and Order was filed wherein the parties
18 agreed to paternity testing of Jazlynn. AA000069-AA000072.

19
20 On July 22, 2016, a Stipulated Decree of Custody as it relates to custody and
21 visitation of Jazlynn was entered. In the Stipulated Decree of Custody, Ignacio was
22 to receive visitation every other weekend, from Friday at 12:00 p.m. until Sunday at
23 4:00 p.m. and during the off weeks, Tuesdays and Thursdays from 12:00 p.m. until
24 6:00 p.m. AA000167
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1 On February 8, 2017, an Order Amending Stipulated Decree of Custody, as it
2 relates to visitation of Jazlynn was entered. The Order included required language
3 needed by the Department of Vital Statistics to change the birth certificate.
4 AA000207.

6 On March 1, 2017, a First Amended Decree of Custody as it relates to custody
7 and visitation of Jazlynn was entered. AA000212-AA000227.

9 On November 1, 2017, Respondent filed a First Amended Complaint for
10 Custody was filed against Appellant, Rosie Martinez, with Respondent claiming that
11 he was also the natural father of Alan Martinez date of birth, October 18, 2011 (age
12 8) at the time of the filing. AA000247-AA000253.

15 On November 1, 2017, Respondent filed a Verified Motion to Amend the
16 Complaint for Custody, to Establish Joint Legal and Joint Physical Custody, to Set
17 Aside the Custody Decree, to Modify Custody, for Child Support, and for Attorney's
18 Fees and Costs. Respondent also filed a Motion to Join Henry Oliva as a Defendant
19 for the Limited Purpose of Determining Paternity of the Minor Child, Alan Oliva.
20 AA000258-AA000265.

23 On January 25, 2018, the district court judge that the Default entered against
24 Henry Oliva be stricken from the record and that Henry added as a Defendant to this
25 case. The district court furthered ordered that it was not ordering a paternity test
26 without a stipulation. At the hearing, the district court summarized the paternity law
27
28

1 in the state of Nevada. The district court sent the parties out for mediation.
2 AA000292-AA000296.

3
4 On March 29, 2018, the district court entered a Minute Order in which it
5 summarized the procedural history of the case as well as providing a written history
6 of paternity law in Nevada. In its Minute Order, the district court reiterated its
7 summary of paternity law in Nevada. This district court found that the minor child,
8 Alan was over six years of age, that Henry was the named father on the birth
9 certificate, and that Alan had been living with Defendant Rosie and Henry since his
10 birth. The district court ordered that absent clear and convincing evidence of fraud
11 on Rosie's part, or absent a stipulation between the parties, Ignacio's request for
12 Court-Ordered paternity tests of himself and Henry were denied. AA000292-
13
14
15
16 AA000296

17
18 The district court also found that pursuant to NRS 440.610, the facts listed in
19 the child's birth certificate become *prima facie* evidence of the facts stated therein.
20 Thus, a person listed as the father on the birth certificate is presumed to be the father
21 of the child if paternity becomes disputed. NRS 440.610 provides *prima facie*
22 evidence of the facts therein stated. AA000292-AA000296.
23
24

25 The district court further concluded that data pertaining to the father of a child
26 is such evidence if the alleged father is, or becomes, the husband of the mother in a
27 legal marriage; if not, the data pertaining to the father of a child is not such evidence
28

1 in any civil or criminal proceeding adverse to the interests of the alleged father, or
2 of his heirs, devisees or other successors in interest, if the paternity is controverted.

3 AA000292-AA000296.
4

5 The district court extensively briefed its research regarding paternity law in
6 Nevada.¹ The district court found that paternity could not be challenged as the child
7 is now six and one half years old and Ignacio failed to challenge Alan's paternity in
8 a timely manner in the instant case. AA000292-AA000296.
9

10 On June 15, 2018, the Order from the district court's Minute Order
11 incorporating what the district court put into its Minute Order regarding paternity
12 law in Nevada in its entirety was filed. AA000303-AA000311.
13

14 On July 6, 2018, Respondent filed a Motion to Reconsider the Order Entered
15 June 20, 2018. AA000323-AA000338.
16

17 On September 11, 2018, the hearing on Respondent's Motion to Reconsider
18 was held. At the hearing, the Motion to Reconsider was denied. The Order from
19 the hearing was filed September 21, 2018. AA000355-AA000356.
20

21 On October 18, 2018, Respondent filed his Notice of Appeal, appellate case
22 number 77242. AA000367-AA000369. No Answering Brief was ever filed by
23 Rosie Martinez.
24

25
26
27
28 ¹ Much of what the district court used in its Minute Order briefing is liberally used
and is set out below in the legal argument section.

1 On February 25, 2020, the Nevada Supreme Court Clerk's
2 Certificate/Judgment-Remanded was filed. In the Order of Reversal and Remand
3 the Supreme Court stated,
4

5 Avila argues that the district court erred in denying his request for
6 court-ordered paternity testing. We agree. NRS 126.121(1) states that
7 the court "shall upon the motion of a party[] order" tests for
8 determining paternity. *See also* NRS 126.141(3) (stating that where,
9 following an informal hearing and the parties' refusal to accept a
10 settlement recommendation in a paternity action, "blood tests or tests
11 for genetic identification have not been taken, the court shall require
12 the parties to submit to [those] test"). We conclude that the district court
13 acted in contravention of NRS 126.121(1) and NRS 126.141(3) when
14 it refused to order DNA testing and denied Avila's motion.

15 We also point out that, in denying the motion, the district court
16 erroneously concluded that the paternity claim was barred by claim
17 preclusion and was untimely. The paternity claim has not been
18 previously litigated, and an action to establish a father and child
19 relationship in Nevada is not barred until a child reaches the age of 21.
20 NRS 126.081(1). Therefore, we reverse and remand for the district
21 court to order DNA testing pursuant to NRS 126.121. If a valid DNA
22 test establishes that Avila is the biological father, the district court must
23 follow the procedures specified in NRS Chapter 126 to determine the
24 issue of paternity.

25 As to Ignacio's claim of fraud, this Court concluded,
26

27 Avila also contends that the district court was required to hold an
28 evidentiary hearing on his claim that Martinez and Henry Oliva
fraudulently represented to him that he was not the biological father.
Avila raised this claim of fraud in his motion for the purpose of
obtaining relief from the custody decree pursuant to NRCP 60(b)(3).
However, Avila's own assertions to the district court demonstrate that
he learned through a DNA test that he was the biological father several
months before the final custody decree was filed. Thus, because he
failed to show fraud warranting setting aside the custody decree, the
district court did not err in failing to hold an evidentiary hearing on that

1 claim. We note that though Avila did not establish a basis for NRCP
2 60(b)(3) relief, this does not preclude his request to modify the custody
3 decree based on a change of circumstances (his alleged paternity), and
4 we make no decision on whether he is entitled to an evidentiary hearing
on this basis.

5 AA000483-AA000486.

6 On March 2, 2020, in compliance with the Order of Reversal and Remand, a
7 hearing was held and the parties were referred out for paternity testing regarding
8 Alan Oliva and whether Ignacio Avila was the natural father of Alan. AA000537-
9 AA000538.
10

11
12 On June 23, 2020, the return hearing was held. At the hearing, the district
13 court noted that Ignacio was found to be the biological father of the minor child,
14 Alan Oliva. The district court ordered that its Order from the hearing held on
15 September 21, 2018 (denying Ignacio's Motion for Reconsideration) be set aside.
16 Ignacio was ordered to contact the Children's Attorney Project, obtain a guardian ad
17 litem for Alan, and Ignacio was ordered to pay for the guardian ad litem fees.
18
19
20 AA000559-AA000561.
21

22 The district court also stated,

23 [t]he Supreme Court has said we've got to determine paternity. The
24 mere fact that he is the natural father of both of these children is not
25 the end of the inquiry. The inquiry is who is the legal father, and we're
26 going to have an evidentiary hearing, on that issue.

27 AA001060-AA1061.
28

1 The district court further stated, “. . . I read the Supreme Court decision, I
2 think we need to go back and do what the Court said and that is, is that on both of
3 these children, go back to square one and determine who is the legal father.”
4
5 AA001063.

6 After Ignacio and his counsel continuing to argue with the district court, the
7
8 district court stated,

9 [t]he Court has first of all directed that we set up the issue of paternity
10 as to whether you are the legal father, not the – not the – the natural
11 father. We concede that you’re the natural father of the child, but
12 whether or not you’re the legal father is something that has yet to be
determined.

13 AA001085.

14
15 On August 17, 2020, the Order from the June 23, 2020, hearing was filed. The
16 Order stated,

17
18 **IT IS HEREBY ORDERED** that The Court’s Order from the hearing
held on September 21, 2018 shall be set aside.

19
20 **IT IS FURTHER ORDERED** that on the issue of paternity hearing
shall be for both children.

21
22 **IT IS HEREBY ORDERED** that The Court’s Order from the hearing
held on September 21, 2018 shall be set aside.

23
24 **IT IS FURTHER ORDERED** that on the issue of paternity hearing
shall be for both children.

25
26 **IT IS FURTHER ORDERED** that contact shall be made with the
27 Children’s Attorney Project (CAP) as soon as possible
28

1 **IT IS FURTHER ORDERED** that Plaintiff/Ignacio Avila, Jr. shall
2 pay the Guardian ad Litem fees. Issues as to the fees for the Guardian
3 ad Litem shall be discussed at time of the trial.

4 **IT IS FURTHER ORDERED** that the Non-Jury Trial is set for August
5 31, 2020 at the hour of 9:00 a.m. re: Paternity.

6 AA000559-AA000561.

7 On January 7, 2021, Appellant, Henry Oliva, filed his Answer to Ignacio
8 Avila's, First Amended Complaint for Custody. AA0753-AA00759.

9 On April 9, 2021, Ignacio filed his Pre-Trial Memorandum. AA000785-
10 AA000796. In his Pre-Trial Memorandum, Ignacio argued that NRS 126.051
11 provides various "presumptions" of paternity and went through the language of NRS
12 126.051(1)(d) which, provides that a man can have a presumption of paternity if,
13 "[w]hile the child is under the age of majority, he receives the child into his home
14 and openly holds out the child as his natural child."
15

16 Ignacio further argued that NRS 126.051(2) states:
17

18 [a] conclusive presumption that a man is the natural father of a child is
19 established if tests for the typing of blood or tests for genetic
20 identification made pursuant to NRS 126.121 show a probability of 99
21 percent or more that he is the father except that the presumption may
22 be rebutted if he establishes that he has an identical sibling who may be
23 the father."
24

25 Then when there is a conflict NRS 126.051(3) provides "if two or more
26 presumptions arise which conflict with each other, the presumption which on the
27 facts is founded on the weightier considerations of policy and logic controls. The
28

1 presumption is rebutted by a court decree establishing paternity of the child by
2 another man.”

3 Ignacio then only requested the following orders in his Pre-Trial
4 Memorandum.
5

6 THE COURT HEREBY ORDERS that Ignacio Avila’s paternity is
7 confirmed as to Alan Olivia.

8 THE COURT FURTHER ORDERS that Alan’s Birth Certificate shall
9 be Amended to Remove Henry Olivia’s name as Alan’s Father, and add
10 Ignacio Avila.

11 THE COURT FURTHER ORDERS that Alan’s birth certificate shall
12 also be amended to change his name from Alan Olivia to Alan Avila.
13

14 At best, Ignacio argued that “it is in Alan’s best interest to have this
15 relationship confirmed so he can visit his Dad with his sister Jazlynn.”
16

17 On April 12, 2021, Henry filed his Pre-Trial Memorandum. AA000774-
18 AA000784. In his Pre-Trial Memorandum, Henry framed the issues as being
19 paternity, the failure by Ignacio to retain a guardian ad litem, legal paternity of Alan,
20 visitation as to Jazlynn and Alan, even though that was not part of the Order filed
21 August 17, 2020, and attorney’s fees.
22
23

24 On April 16, 2021, the evidentiary hearing regarding paternity of Alan Olivia
25 was held. Testimony was taken from Henry, Rosie and Ignacio. The guardian ad
26 litem was never retained by Ignacio as previously ordered, and as a result, there was
27
28

1 no testimony from the guardian ad litem reflecting Alan's perspective. AA000823-
2 AA001052.

3 At the conclusion of the evidentiary hearing the district court issued its orders.
4
5 The district court made a number of findings claiming that fraud took place.
6 Specifically, the district court made findings:

7
8 **THE COURT FURTHER FINDS** that Ignacio asked Rosie about
9 Alan's paternity after the child's birth and even while Rosie was
10 pregnant with Alan and was lied to.

11 **THE COURT FURTHER FINDS** that Ignacio confronted Rosie
12 about Alan's paternity in 2016 and 2017 and was lied to again.

13 **THE COURT FURTHER FINDS** that at 11:50 a.m. during the
14 parties' evidentiary hearing, Rosie lied to the Court two times.

15 . . .

16 **THE COURT FURTHER FINDS** that, here there was either a
17 material mistake of fact or fraud when Henry signed the VAP of Alan.

18 AA000799-AA000807.

19
20 The district court further found that there is a conclusive presumption under
21 NRS 126.051(2) that Ignacio is Alan's father. The district court then ordered that
22 Ignacio and Rosie would have joint physical custody of Alan with Ignacio having
23 custody of Alan from Thursday at 2:00 p.m. until Sunday at 8:00 p.m. each week.
24
25 No analysis under *Ellis v. Carucci, infra* was provided.

26
27 Passing reference was made to NRS 125C.0035(4), when one of the factors
28 regarding facilitating a relationship was mentioned. The Court then ordered Ignacio

1 to pick up Alan from Henry's home immediately after the evidentiary hearing ended
2 and begin exercising his custodial time.

3 On April 29, 2021, the Findings of Fact, Conclusions of Law, and Order and
4 Notice of Entry of Order were entered. AA000799-AA000807.
5

6 On May 28, 2021, the Notice of Appeal was filed.
7

8 **16. Issues on appeal. State concisely the principal issues(s) in this appeal.**

- 9 1. Whether the district court erred in concluding that the presumption of
10 paternity in NRS 126 that being the biological father outweighs the fact
11 Henry Has Been the Legal Father from October 18, 2011, to April 16, 2021
12
- 13 2. Whether the district court erred by failing to make findings under *Ellis v.*
14 *Carucci*, 23 Nev. 145, 161 P.3d 239 (2007) and in failing to apply the legal
15 standard under *Ellis v. Carucci* as to whether the elements for a change in
16 custody had been met as well as failing to provide an analysis under NRS
17 125C.0035.
18
- 19 3. Whether the district court committed legal error by finding fraud as a basis
20 to set aside Henry's paternal rights and award Ignacio joint physical
21 custody.
22
- 23 4. Whether the district court erred in allowing the evidentiary hearing to
24 proceed forward without obtaining compliance with the prior order that a
25 guardian ad litem be appointed for Alan.
26
27
28

17. Legal argument, including authorities:

I. WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT THE PRESUMPTION OF PATERNITY IN NRS 126 THAT BEING THE BIOLOGICAL FATHER OUTWEIGHS THE FACT HENRY HAS BEEN THE LEGAL FATHER FROM OCTOBER 18, 2011, TO APRIL 16, 2021

As stated, the orders on remand were for paternity testing and that the conclusion that claim preclusion applied was in error. What was remanded from this Court was fairly narrow.

The district court judge at the time, the Hon. Jennifer Elliot, extensively briefed her research regarding paternity law in Nevada. The legal analysis provided by the district court judge in her March 29, 2018, Minute Order from March was and is still extremely applicable and is reused liberally below. AA000292-AA000296. The fact that the Legislature has added in genetic testing as a factor as to who is a biological father does not change the fact a district court still has to determine who is the legal father.

Pursuant to NRS 440.610,² the facts listed in the child's birth certificate become *prima facie* evidence of the facts stated therein. A person listed as the father

² NRS 440.610, states,

Each certificate, as provided for in this chapter, filed within 6 months after the time prescribed for their filing, shall be *prima facie* evidence of the facts therein stated. Data pertaining to the father of a child is such evidence if the alleged father is, or becomes, the husband of the mother

1 on the birth certificate is presumed to be the father of the child if paternity becomes
2 disputed. NRS 440.610 provides *prima facie* evidence of the facts therein stated.

3 Under the statutory scheme for determining paternity, the district court is not
4 compelled to determine, on the basis of deoxyribonucleic acid (DNA) test, that a
5 man is or is not a child's father as a matter of law, NRS 126.051, 126.121. *Love v.*
6 *Love*, 114 Nev. 572, 959 P.2d 523 (1998).
7

8
9 “This statutory scheme clearly reflects the legislature's intent to allow
10 nonbiological factors to become critical in a paternity determination.” *Love v. Love*,
11 114 Nev. 572, 959 P.2d 523 (1998), citing to *In re Marriage of Freeman*, 45
12 Cal.App.4th 1437, 53 Cal.Rptr.2d 439, 447 (1996) (California statute made clear
13 that “biology is not the predominant consideration in determining parental
14 responsibility once a child has reached his or her third year of life.”). “Thus, where
15 factors conflict, as they may here, the district court must use its discretion to apply
16 considerations of policy and logic to the relevant evidence.” *Id.*
17
18

19
20 “The Legislature has made it clear that although it is now possible to
21 determine biological paternity with certainty, biology is not the predominant
22 consideration in determining parental responsibility once a child has reached his or
23
24

25
26 in a legal marriage; if not, the data pertaining to the father of a child is
27 not such evidence in any civil or criminal proceeding adverse to the
28 interests of the alleged father, or of his heirs, devisees or other
successors in interest, if the paternity is controverted.

1 her third year of life,” (*In re Marriage of B.*, *supra*, 124 Cal.App.3d at p. 531, 177
2 Cal.Rptr. 429.) *In re Marriage of Freeman*, 45 Cal. App. 4th 1437, 1449, 53 Cal.
3 Rptr. 2d 439, 447 (1996).

4
5 “The state has an interest in preserving and protecting the developed parent-
6 child and sibling relationships which give young children social and emotional
7 strength and stability. [Citation omitted.] This interest is served notwithstanding
8 termination of the mother's marital relationship with the presumed father. (*Susan H.*
9 *v. Jack S.*, *supra*, 30 Cal.App.4th at pp. 1442 1443, 37 Cal.Rptr.2d 120.), *In re*
10 *Marriage of Freeman*, 45 Cal. App. 4th 1437, 1450, 53 Cal. Rptr. 2d 439, 448
11 (1996).

12
13
14
15 Biology will only control a determination of paternal responsibility for a
16 limited period early in a child's life and thereafter the predominant consideration
17 must be the nature of the presumed father's social relationship with the child. *In re*
18 *Marriage of Freeman*, 45 Cal. App. 4th 1437, 1446, 53 Cal. Rptr. 2d 439, 446
19 (1996). Under California Statutory Law, In 1980 the Legislature added what is now
20 section 7541 providing for rebuttal of the presumption by blood testing requested
21 within two years following a child's birth, *In re Marriage of Freeman*, 45 Cal. App.
22 4th 1437, 1444, 53 Cal. Rptr. 2d 439, 444-45 (1996).

23
24
25
26 “In the case of an older child the familial relationship between the child and
27 the man purporting to be the child's father is considerably more palpable than the
28

1 biological relationship of actual paternity. A man who has lived with a child, treating
2 it as his son or daughter, has developed a relationship with the child that should not
3 be lightly dissolved and upon which liability for continued responsibility to the child
4 might be predicated. This social relationship is much more important, to the child at
5 least, than a biological relationship of actual paternity.” *In re Marriage of Freeman*,
6 45 Cal. App. 4th 1437, 1445, 53 Cal. Rptr. 2d 439, 445 (1996).
7

8
9 Where there is an older child (age 3 or older), absent clear and convincing
10 evidence of fraud, the policy of the law in determining paternity falls on the side of
11 societal interests in protecting children by providing consistency, security, support
12 and maintaining the known family structure. This may include the attachment and
13 bond they have developed as family members which is deemed more compelling
14 than biology when a man has been standing in the role as the child's father, holding
15 the child out as his own, and they have developed an identity as parent and child--as
16 a family. AA000799-AA000807.
17
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19

20
21 It should be apparent from the Findings of Fact, Conclusions of Law, and
22 Order that the district court judge failed to distinguish between biological paternity
23 and legal paternity as referenced by Judge Hardcastle. Accordingly, the matter
24 should be remanded back to the district court for a proper determination of legal
25 paternity.
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1 **II. WHETHER THE DISTRICT COURT ERRED BY FAILING TO**
2 **APPLY *ELLIS V. CARUCCI*, 23 NEV. 145, 161 P.3D 239 (2007) AND IN**
3 **FAILING TO APPLY THE LEGAL STANDARD UNDER *ELLIS V.***
4 ***CARUCCI* AS TO WHETHER THE ELEMENTS FOR A CHANGE IN**
5 **CUSTODY HAD BEEN MET.**

6 There was no factual dispute from the record or the trial testimony, that Rosie
7 and Henry had custody of Alan from the date of his birth October 18, 2011, until
8 April 16, 2021, when the district court ordered Alan out of home from the only father
9 he had known for his entire life and into Ignacio's home. AA000823-AA001052.

10 This Court in *Ellis v. Carucci*, 123 Nev. 145, 161 P.3d 239 (2007), held that
11 a modification of primary physical custody is warranted only when (1) there has
12 been a substantial change in circumstances affecting the welfare of the child, and (2)
13 the modification serves the best interest of the child.

14 The trial transcript and Findings of Fact, Conclusions of Law, and Order have
15 been reviewed. AA000823-AA1052; AA000799-000807. .At no point did the
16 district court engage in any analysis regarding *Ellis v. Carucci, supra*.

17 At no point did the district court find that there had been a substantial change
18 in circumstances affecting the welfare of the child. There was no evidence and there
19 was no finding by the district court, as it relates to Rosie and Alan, that there had
20 been any material change in circumstances affecting Alan's welfare. At no point
21 did the district court engage in any analysis as to how taking Alan away from the
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1 only father he had known for the entirety of his life, nine years, serves Alan's best
2 interests.

3 In addition, there was only a limited analysis under NRS 125C.0035(4),
4
5 regarding whether it would be in Alan's best interests for his custody to be changed.

6 AA000799-AA000807. Those factors under NRS 125C.0035(4) include:

- 7
8 a. The wishes of the child if the child is of sufficient age and capacity to
9 form an intelligent preference as to his or her physical custody
- 10 b. Any nomination of a guardian for the child by a parent
- 11 c. Which parent is more likely to allow frequent associations and a
12 continuing relationship with the noncustodial parent
- 13 d. The level of conflict between the parents
- 14 e. The ability of the parents to cooperate to meet the needs of the child
- 15 f. The mental and physical health of the parents
- 16 g. The physical, developmental and emotional needs of the children
- 17 h. The nature of the relationship of the child with each parent
- 18 i. Ability of the child to maintain a relationship with any sibling
- 19 j. Any history of parental abuse or neglect of the child or a sibling of the
20 child
- 21 k. Whether either parent has engaged in an act of domestic violence
22 against the child, a parent of the child or any other person residing
23 with the child
- 24 l. Whether either parent or any other person seeking physical custody has
25 committed any act of abduction against the child or any other child
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1 If the district court actually had made a determination regarding legal
2 paternity, the only factor the district court addressed in passing was whether Rosie
3 was willing to facilitate a relationship. AA000799-AA000807. The issue of the
4 guardian ad litem, address below, would have been vital in determining the wishes
5 of Alan.
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8 Accordingly, the district court committed legal error by failing engage in any
9 analysis that there had been a substantial change in circumstances affecting Alan's
10 welfare and by failing to engage in any analysis how changing custody served Alan's
11 best interests as required under *Ellis, supra* and the required analysis required under
12 NRS 125C.0035(4).
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15 **III. WHETHER THE DISTRICT COURT COMMITTED LEGAL ERROR**
16 **BY FINDING FRAUD AS A BASIS TO SET ASIDE HENRY'S**
17 **PATERNAL RIGHTS AND AWARD IGNACIO JOINT PHYSICAL**
18 **CUSTODY.**

19 The law of the case doctrine was defined in *Hsu v. County of Clark*, 123 Nev.
20 625, 173 P.3d 724 (2007), wherein this Court stated,

21 "[w]hen an appellate court states a principle or rule of law necessary to
22 a decision, the principle or rule becomes the law of the case and must
23 be followed throughout its subsequent progress, both in the lower court
24 and upon subsequent appeal." The law of the case doctrine "is designed
25 to ensure judicial consistency and to prevent the reconsideration, during
26 the course of a single continuous lawsuit, of those decisions which are
27 intended to put a particular matter to rest." The law of the case doctrine,
28 therefore, serves important policy considerations, including judicial
consistency, finality, and protection of the court's integrity.

Id. at 629.

1 The law of this case was set out in the Order of Reversal and Remand filed
2 January 23, 2020. In that Order, this Court stated,

3 Avila also contends that the district court was required to hold an
4 evidentiary hearing on his claim that Martinez and Henry Oliva
5 fraudulently represented to him that he was not the biological father.
6 Avila raised this claim of *fraud* in his motion for the purpose of
7 obtaining relief from the custody decree pursuant to NRCF 60(b)(3).
8 *However, Avila's own assertions to the district court demonstrate that*
9 *he learned through a DNA test that he was the biological father several*
10 *months before the final custody decree was filed. Thus, **because he***
11 ***failed to show fraud warranting setting aside the custody decree, the***
12 ***district court did not err in failing to hold an evidentiary hearing on***
13 ***that claim.***

14 (Emphasis added). AA000280-AA000282.

15 The Order of Reversal and Remand was limited in its scope. The Order of
16 Reversal and Remand in this case was to send out the parties for a paternity test. The
17 Order stated and held, "Avila argues that the district court erred in denying his
18 request for court ordered paternity testing. We agree. AA000281.

19 The Order of Reversal and Remand also concluded and ordered that "the
20 district court erroneously concluded that the paternity claim was barred by claim
21 preclusion and was untimely." AA000282. Then, if Ignacio was determined to be
22 the father, then the procedures specified in NRS Chapter 126 were to be followed to
23 determine the issue of paternity.

24 As indicated, fraud, was not one of the claims that Ignacio could make under
25 NRS Chapter 126. AA000282-AA000283. This Court was very specific in its Order
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1 or Reversal and Remand that because Ignacio failed show fraud in warranting setting
2 aside the Decree the district court did not err in failing to hold an evidentiary hearing
3 on that claim. AA000282-AA000283. Despite that order from this Court, the
4 district court made no less than four findings of fraud as part of its basis to strip Alan
5 of the only father he has known in his life and place him with Ignacio. AA000799-
6 AA000803.

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8
9 The district court then explicitly made findings that it was setting aside
10 Henry's status as the only father Alan knew for that past nine years based upon
11 findings of fraud – and then handed Alan to Ignacio that same day for a complete
12 change in custody, and Alan's world. AA000802.

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15 **IV. WHETHER THE DISTRICT COURT ERRED IN ALLOWING THE**
16 **EVIDENTIARY HEARING TO PROCEED FORWARD WITHOUT**
17 **OBTAINING COMPLIANCE WITH THE PRIOR ORDER THAT A**
18 **GUARDIAN AD LITEM BE APPOINTED FOR ALAN.**

19 The orders from the June 23, 2020, hearing were very clear. Ignacio was to
20 obtain a guardian ad litem for Alan.

21 The Order from the June 23, 2020, hearing stated,

22
23 **IT IS FURTHER ORDERED** that contact shall be made with the
24 Children's Attorney Project (CAP) as soon as possible

25 **IT IS FURTHER ORDERED** that Plaintiff/Ignacio Avila, Jr. shall pay the
26 Guardian ad Litem fees. Issues as to the fees for the Guardian ad Litem shall
27 be discussed at time of the trial.

28 AA000559-AA000561.

1 In the nine months that passed from that hearing, the record is absent of any
2 evidence that Ignacio did anything to contact the Children's Attorney Project and
3 obtain a guardian ad litem for Alan. Despite those clear and unambiguous orders,
4 the successor district court judge decided to dispense with that requirement for a
5 guardian ad litem.
6

7
8 Nevada Revised Statute 3.220 provides that district court judges possess equal,
9 coextensive and concurrent jurisdiction and power. One district court judge may not
10 sit as an appellate court to another. Similarly, District Court Rule 18 provides:
11

12 When any district judge shall have entered upon the trial or hearing of
13 any cause, proceeding or motion, or made any ruling, order or decision
14 therein, no other judge shall do any act or thing in or about such cause,
15 proceeding or motion, unless upon the written request of the judge who
16 shall have first entered upon the trial or hearing of such cause,
17 proceeding or motion.

18 In *Rohlfing v. Second Judicial Dist. Court in and For County of Washoe*, 803
19 P.2d 659, 106 Nev. 902 (1990), the Supreme Court held that district courts of this
20 state have equal and coextensive jurisdiction; therefore, the various district courts
21 lack jurisdiction to review the acts of other district courts). *See also, Warden v.*
22 *Owens*, 93 Nev. 255, 563 P.2d 81 (1977) (same).
23

24 It is submitted that the successor judge, the Hon. Nadin Cutter, lacks the
25 authority to act as an appellate judge over the prior orders from the Hon. Gerald
26 Hardcastle that a guardian ad litem be utilized. It should be apparent that Judge
27 Hardcastle concluded that it was important to get the input from a 10 year old child
28

1 regarding a significant part of his life. There was no reason given for not requiring
2 that a guardian ad litem be present and give testimony. For this reason as well, the
3 Findings of Fact, Conclusions of Law, and Orders should be reversed and remanded.
4

5 **18. Issues of first impression or of public interest. Does this appeal present a**
6 **substantial legal issue of first impression in this jurisdiction or one affecting an**
7 **important public interest: Yes X No If so, explain:**
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9 There should be greater clarity in making sure that district court judges
10 understand the distinction between being a biological father and being a legal father.
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VERIFICATION

1
2 1. I hereby certify this fast track statement complies with the
3 formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP
4 32(a)(5) and the type style requirements of NRAP 32(a)(6).
5

6 [X] This fast track statement has been prepared in a proportionally
7 spaced typeface using [Word 2013 in 14 point, Times New Roman
8 Font; or
9

10 [] This fast track statement has been prepared in a monospaced
11 typeface using [state name and version of word processing program]
12 with [state number of characters per inch and name of type style]
13
14

15 2. I further certify that this fast track statement complies with the
16 page- or type volume limitations of NRAP 3E(e)(2) because it is either:
17

18 [X] Proportionally spaced, has a typeface of 14 points or more, and
19 contains 6,614 words; or
20

21 [] Monospaced, has 10.5 or fewer characters per inch, and contains
22 _____ word or _____ lines of text; or
23


24 [] does not exceed _____ pages.
25

26 3. Finally, I recognize that under NRAP 3E I am responsible for
27 timely filing a fast track statement and that the Supreme Court of Nevada may
28 impose sanction for failing to timely file a fast track statement, or failing to raise

1 material issues or arguments in the fast track statement. I therefore certify that the
2 information provided in this fast track statement is true and complete to the best of
3 my knowledge, information, and belief.
4

5 DATED this 16th day of September 2021

6 PAGE LAW FIRM
7

8 
9

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14 (702) 823-2888
15 Attorney for Appellants
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1 **ROUTING STATEMENT – RETENTION IN THE SUPREME COURT**

2 This case is presumptively assigned to the Court of Appeals per NRAP
3
4 17(b)(5), as the issues relate to Chapter 125. Because this case raises issues of
5 statewide public importance, the Supreme Court may wish to hear it. NRAP
6 17(a)(14).

7
8 The issue is primarily whether district court judges properly understand the
9 distinction between biological paternity and legal paternity.

10
11 DATED this 16th day of September 2021

12 Respectfully submitted,
13 PAGE LAW FIRM

14
15 


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20 (702) 823-2888
21 Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Page Law Firm and that on September 16, 2021, I electronically filed with the Supreme Court a true and correct copy of the above and foregoing **APPELLANTS' FAST TRACK STATEMENT**.

I further certify that on September 16, 2021, I served a true and correct copy of the above and foregoing **APPELLANTS' FAST TRACK STATEMENT** via e-service and U.S. Mail, postage prepaid, to the following:

Emily McFarling, Esq.
6230 West Desert Inn Road
Las Vegas, Nevada 89146
Attorney for Respondent



An employee of Page Law Firm