

IN THE SUPREME COURT OF THE STATE OF NEVADA

HENRY OLIVA AND
ROSIE ELENA MARTINEZ,

Appellants,

v.

IGNACIO AVILA, JR.,

Respondent.

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Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court No.: 83023

CHILD CUSTODY FAST TRACK RESPONSE

1. Name of Party filing this fast track response:

Ignacio Avila, Jr. (hereinafter "Ignacio")

2. Name, law firm, address, and telephone number of the attorney submitting this fast track response:

Emily McFarling, Esq.
Nevada Bar Number 8567
McFarling Law Group
6230 W. Desert Inn Road
Las Vegas, NV 89146
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3. Proceedings raising same issues. If you are aware of any other appeal or original proceeding presently pending before this Court, which raise the same legal issue(s) you intend to raise in this appeal, list the case name(s) and docket number(s) of those proceedings:

None.

4. Procedural history. Briefly describe the procedural history of the case:

In addition to the facts set forth in Appellants' Fast Track Statement, Respondent adds the following:

The Nevada Supreme Court's Order of Reversal and Remand filed January 23, 2020, states that, although Ignacio did not establish a basis to set aside the parties' Decree based on fraud pursuant to NRCP 60(b)(3), he was not precluded from requesting to modify the Decree of Custody. 3AA000483-486.

In his First Amended Complaint filed November 1, 2017, Ignacio claimed that he is Alan's father and that he verified his paternity with a DNA test, and he requested that the court establish his paternity of Alan. 1AA000248.

Further, Ignacio requested that Alan's birth certificate be amended to add Ignacio as the father and that he and Rosie be awarded joint legal and joint physical custody of the minor children [Jazlynn and Alan]. 1AA000248.

Appellants misrepresent the record by stating that the court held a hearing on March 2, 2020, to refer the parties for paternity testing.¹ On March 20, 2020, pursuant to the Order of Reversal and Remand in Supreme Court of Nevada case #77242, the district court issued a Minute Order referring Ignacio and Rosie to present Alan for paternity testing. 3AA000537-538.

¹ Appellants' Br. 11.

At the hearing on June 23, 2020, the court stated that the issue of legal paternity issue must be resolved, then the court would be able to address child custody and support. 4AA001058-1059.

On April 16, 2021, the court held a trial regarding Ignacio's paternity, with Ignacio, Rosie, and Henry being the only witnesses. 4AA000824-825. The court admitted Ignacio's exhibits 1-5 and 6-7, including DNA test records and text messages. 4AA000826. Rosie did not introduce any exhibits. 4AA000826.

The record does not indicate that child custody modification was an issue at trial; paternity of Alan was the sole issue. 4AA000823-1052. Contrary to Appellants' allegations that there was no dispute that Rosie and Henry had custody of Alan,² Ignacio disputed that a de facto parenting agreement existed between the parties. 4AA000838-839.

At trial, Rosie lied to the court and alleged she was talking to her cat during Ignacio's testimony, when she was talking to her boyfriend. 4AA000919-920.

The court's Findings of Fact Conclusions of Law and Order entered April 29, 2021, state in relevant part as follows:

THE COURT CONCLUDES that, with respect to Henry's Voluntary Acknowledgement of Paternity ("VAP") of Alan, NRS 126.053 governs voluntary acknowledgments of paternity or parentage. Under NRS 126.053(3), after the expiration of the period during which an acknowledgment may be rescinded, a VAP "may not be challenged except upon the grounds of fraud, duress or material mistake of fact."

² Appellant Br. 21.

The burden of proof is on the person alleging the Acknowledgement to establish that the Acknowledgment was signed because of fraud, duress, or material mistake of fact.

THE COURT FURTHER FINDS that the conclusive presumption set forth in NRS 126.051 overcomes any VAP signed by any person that was not the child's biological father.

THE COURT FURTHER FINDS that there is no finding of contempt against Ignacio for failure to retain a guardian ad litem because no Order to Show Cause is pending and there is no contempt proceeding before the Court. 3AA000800-802.

Additionally, the court found that none of the things that have happened are Ignacio's fault and he is innocent as much as Alan is innocent. 4AA001044.

5. Statement of facts. Briefly state the facts material to the issues on appeal:

Respondent adds the following to the Appellants' provided facts:

A. The Parties' Background

Ignacio and Rosie met in 2008 and were in a relationship off and on until approximately 2019. 4AA000851. Henry is Rosie's ex-boyfriend, and she refers to him as her roommate. 4AA000947, 4AA000904. Henry and Rosie met in 1999 and were in a relationship on and off until approximately 2017. 4AA000948.

Ignacio and Rosie have two biological minor children together, to wit: Jazlynn, age 7, and Alan, age 9. 4AA000852.

B. Rosie's initial denial of Ignacio's paternity of Alan

When Rosie was pregnant with Alan in 2011, she told Ignacio she did not know who Alan's father was. 4AA000903.

Upon Alan's birth, Rosie and Henry executed a Voluntary Acknowledgement declaring that Henry was the only possible father of Alan.³ 4AA001027, AA001045.

A week or so after Alan was born, Ignacio told Rosie he would like a paternity test for Alan, but she said, "No, it's a hundred percent no, it's her roommate's, Henry's." 4AA000903-904. Rosie told Ignacio she knew the child was not his and he should move on. 4AA000904.

C. Ignacio's involvement with Alan before confirming paternity

Ignacio first met Alan in 2015. 4AA000974. Ignacio had visits with Jazlynn before the Stipulated Decree of Custody regarding Jazlynn was entered in 2016. 4AA000854. Rosie and Alan were present during some of those visits. 4AA000855, 859-864 & 1RA00060-203.

Between 2015 and 2016 Ignacio saw Alan on Alan's days off from school on Fridays and some other days when he did not have school, but without overnights. 4AA000974-975.

D. Ignacio's paternity of Alan

(1) Rosie's continued denial of Ignacio's paternity

³ While there is no evidence in the record that Rosie signed a declaration for the acknowledgement of Henry's paternity of Alan, a child's mother and purported father are required by NRS 440.283 and 42 U.S.C. § 666(a)(5)(C) to execute a declaration under penalty of perjury acknowledging the purported father's paternity, which permits the man's name to be added to the child's birth certificate. It is undisputed that Alan's birth certificate listed Henry as Alan's father, therefore Rosie and Henry necessarily executed a VAP certifying Henry's paternity of Alan.

Between 2015 and 2016 Ignacio started seeing resemblance between him and Alan. 4AA000855. Ignacio again questioned Rosie, who maintained Alan was not Ignacio's son. 4AA000863. In July 2016, Rosie started distancing herself from Ignacio because of Ignacio's questions about Alan. 4AA000870, 4AA000976-977.

Ignacio's mother also saw the resemblance between Ignacio and Alan. 4AA000874. In 2015 or 2016, Ignacio compared a photo of himself when he was 5 to a photo of Alan at age 5. 4AA000875, 1RA000089. He sent the photos to his sister without context, and she replied, "You have another kid." 4AA000875.

Ignacio began taking screenshots of Rosie's Snapchats to capture pictures of Alan, and he continued asking whether Alan was his son. 4AA000879-880. Rosie replied, "He's not yours, I would have told you." 4AA000879-880.

(2) Henry's false DNA test results

After Ignacio started questioning Alan's paternity, during a custody exchange of Jazlynn, Ignacio asked Henry for his phone number. 4AA000881-883. Ignacio and Henry started text messaging each other in 2016. 4AA000882, 884, 1RA000204-223. Ignacio asked Henry whether he had taken a DNA test for paternity of Alan, to which Henry responded, "Yeah, why?" 4AA000885-886. Ignacio then told Henry he planned to do a DNA test with Alan that week; however, Rosie had asked him to wait because she was stressed. 4AA000887. Ignacio asked Henry if he had a copy of Henry's DNA test in his email and Henry said he would

have to research. 4AA000888. When Ignacio asked Henry when he took the DNA test, Henry said, “Awhile back.” 4AA000892.

On May 21, 2016, Ignacio asked Henry if he found the test results and Henry said, “No...I have an idea where to check...I think this week...” 4AA000892-893.

On December 5, 2016, Ignacio asked Henry where the rest of the DNA test was, as Henry had sent him a screenshot of results that appeared incomplete or falsified. 4AA000895-899; 1RA000052-53, 218. Henry’s last name did not appear on the screenshot, the listed names were misaligned, and several other things did not make sense to him. 4AA000901-902. Ignacio compared the screenshot to the DNA test Ignacio took in 2014 to establish his paternity as of Jazlynn.⁴ 4AA000902-903.

Ignacio then asked Henry to go with him and take a DNA test at Ignacio’s expense, but Henry said, “I don’t know.” 4AA000897. Henry never agreed to go with Ignacio for another test and did not state why. 4AA000898.

(3) Ignacio’s DNA tests

In March 2017 Ignacio sent Rosie a photo of a DNA test he took without her knowledge on January 10, 2017, at LabCorp. 4AA000906-910, 1RA000225. He also sent her the screenshot of the DNA test Henry sent him and told her it was not real.

⁴ Rosie hid the birth of Jazzlyn from Ignacio for several months after she was born, and he was never given the opportunity to sign the birth certificate or be acknowledged as Jazlynn’s father. 1AA000021. As in this case, Ignacio obtained a paternity test on his own, then requested that the court issue an order amending Jazlynn’s birth certificate to reflect his name as the father. 1AA000009-43.

4AA000912, 1RA000229. Rosie said Ignacio must have taken the test behind her back and that the test may not be real. 4AA000912. She also said she was going to have her roommate (Henry) take another DNA test in front of her. 4AA000912. Ignacio admitted he took the DNA test without Rosie's knowledge and all he wanted was to be part of Alan's life because he felt like Alan was his son. 4AA000914.

Ignacio offered to take another DNA test in front of Rosie and offered to pay for it, but Rosie ignored him. 4AA000915, 1RA000235.

On March 19, 2017, Ignacio asked Rosie again about taking another test, to which Rosie responded, "Do whatever you want." 4AA000915-916, 1RA000235.

On March 23, 2017, Ignacio followed up with Rosie again about taking another DNA test the next day, but she said she could not do it because she was going to breakfast with friends. 4AA000917-918. Ignacio asked whether Rosie preferred to have lunch with her friends rather than fix the situation with their son, and Rosie replied that they could obtain a test on Monday. 4AA000918.

Ignacio tried to confirm that Rosie would meet him at the lab on Monday at noon, to which Rosie responded, "I thought you had sent me to court already," adding that she was waiting for the court paperwork. 4AA000919.

On June 29, 2017, Ignacio text messaged Rosie again to ask if she would go with him to take a DNA test of Alan the next day so that Ignacio's parents could meet him when they visited the following week, and because Rosie did not believe

the DNA test he took in January 2017. 4AA000922-923, 2RA000258-259. Ignacio offered to pick Rosie up and she finally agreed. 4AA000922-923, 2RA000258-259.

On June 30, 2017, Ignacio took a paternity test at LabCorp; Alan was 5 years old at that time. 4AA000864-865. Even after taking a second paternity test, Rosie denied Ignacio time with Alan until the existence of a court order. 4AA000924-925.

On May 21, 2020, LabCorp certified the third DNA test confirming Ignacio as Alan's biological father. 1RA000055.

Despite three paternity tests confirming Ignacio's paternity as to Alan and the court's having previously confirmed Ignacio's paternity as to Jazlynn, Henry maintained at trial that he had three children with Rosie, namely: **Jazlynn** and **Alan**, whose last names are now Avila, and Henry Oliva. 4AA000948.

E. Rosie's withholding

Even three DNA tests confirming Ignacio's paternity of Alan, Rosie refused to allow Ignacio to spend Father's Day with Alan or have visits. 4AA000928-929.

Ignacio pays \$400.00 per month in child support for Jazlynn, and he buys Jazlynn and Alan clothes and shoes whenever needed. 4AA000934-935. When Ignacio is allowed to see Alan, Ignacio takes him shopping. 4AA000935.

Ignacio attempted to access Alan's school records but was unable to because he did not have access without a court order confirming his parental rights. 4AA000936. Rosie did not list Ignacio as Alan's emergency contact. 4AA000936.

6. Issues on appeal. State concisely the principal issue(s) in this appeal:

- A. 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.
- B. Whether the district court erred by failing to make findings under *Ellis v. Carucci*, 23 Nev. 145, 161 P.3d 239 (2007) and in failing to apply the legal standard under *Ellis v. Carucci* as to whether the elements for a change in custody had been met as well as failing to provide an analysis under NRS 125C.0035.
- C. Whether the district court committed legal error by finding fraud as a basis to set aside Henry's paternal rights and award Ignacio joint physical custody.
- D. Whether the district court erred in allowing the evidentiary hearing to proceed forward without obtaining compliance with the prior order that a guardian ad litem be appointed for Alan.

7. Legal argument, including authorities:

- A. The Court Properly Concluded that the Presumption that Ignacio is Alan's Natural Father Outweighs the Fact that Henry Was the Legal**

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Father for a Period of Time Because Paternity Test Results Create a Conclusive Presumption that Cannot be Rebutted.

NRS 126.051 provides various “presumptions” of paternity. Under NRS 126.051(1)(d), a man is presumed to be a child’s natural father if “[w]hile the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child.”

The presumptions in NRS 126.051(1) “may be rebutted in an appropriate action only by clear and convincing evidence,” and “if two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls.”

In contrast, NRS 126.051(2) states: “[a] **conclusive** presumption that a man is the natural father of a child is established if tests for the typing of blood or tests for genetic identification made pursuant to NRS 126.121 show a probability of 99 percent or more that he is the father....” (Emphasis added).

A conclusive presumption cannot be overcome by additional evidence or argument because it is accepted as irrefutable proof that establishes a fact beyond dispute; it is “irrebuttable.”⁵

Ignacio’s presumed paternity is “conclusive” because he submitted to three DNA tests all showing within 99.9999 percent probability that he is Alan’s father.

⁵ Conclusive Presumption, *Black’s Law Dictionary* (11th ed. 2019).

Appellants rely on *Love v. Love*, 959 P.2d 523 (Nev. 1998) and a California statute to assert that biology is not the predominant consideration in determining parentage once a child has turned three years old.⁶ However, in 2007, nine (9) years after *Love* was decided, Assembly Bill 498 added subsection 2 to NRS Chapter 126, creating a conclusive presumption of paternity in the event of DNA test confirming paternity within 99 percent probability. Assembly Bill 498 also added language to subsection 3 (formerly subsection 2) providing that only presumptions under subsection 1 are rebuttable.

The Nevada Supreme Court in *Love* noted that the Legislature has the power to decide whether the results of biological tests conclusively determine paternity. The legislature later amended NRS 126 in 2007 to provide that the results of a biological test *do* conclusively determine a paternity action; therefore, *Love* is not controlling. Clearly AB 498 was intended to replace the law created in *Love*.

The California statutes and cases cited in Appellant's Fast Track Statement also do not control here: The Nevada Legislature has spoken on the issue of the weight of biology in a paternity action in this state, therefore another state's statutory scheme, public policy, and case law are neither binding nor persuasive.

The district court did not err in concluding that Ignacio's being the biological father of Alan outweighs Henry having been the legal father because DNA test

⁶ Appellants' Br. 18.

results create a conclusive presumption, which is irrebuttable. As such, the decision establishing Ignacio as the father of Alan should be affirmed.

B. The Court Applied the Correct Legal Standard for this Initial Custody Decision Because No Custody Order Had Previously Been Entered between Ignacio and Rosie as to Alan

Pursuant to NRS 126.111(1) courts shall endeavor to resolve the issues raised in a paternity action by an informal hearing. Under NRS 126.111(2), an informal hearing must be held “[a]s soon as practicable” after an action to declare paternity is brought.

After giving an opportunity to undergo pretrial blood tests and gather testimony relevant to paternity, NRS 161.141(1) mandates that the hearing officer “evaluate the probability of determining the existence or nonexistence of the father and child relationship in a trial and whether a judicial declaration of the relationship would be in the best interest of the child.”

Per NRS 126.141(3), the court must make a settlement recommendation to the parties and if the parties refuse to accept it, the action must be set for trial. If the judge finds it unlikely that all parties would accept a recommendation, he or she may terminate the pretrial hearing pursuant to NRS 126.141(5).

Moreover, NRS 126.161(4) provides that an order or judgment determining a parent-child relationship may “[c]ontain any other provision...concerning the duty

of support, the custody and guardianship of the child, visitation with the child...or any other matter in the best interest of the child.”

Regarding custody, the court may modify or vacate its child custody order at any time.⁷ Nevada Supreme Court case *Ellis v. Carucci* held that a modification of primary physical custody is appropriate when (1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the modification serves the child's best interest.⁸

Here, while Ignacio filed an Amended Complaint for Paternity and Child Custody upon discovering through DNA testing that he is Alan’s father, a modification of custody was not an issue at the parties’ April 2021 trial; rather, the sole issue was Ignacio’s paternity of Alan. 4AA000823-1052. Indeed, the court noted at a hearing on June 23, 2020, that legal paternity must be resolved before issues of custody and support could be addressed. 4AA001058-1059.

Next, the *Ellis* standard only applies in post-decree child custody matters when a party seeks to modify the current designation for primary physical custody to one parent. Because Ignacio did not even have parental rights to Alan before the parties’ April 2021 trial, and Rosie and Ignacio did not have a custody decree, there was no custody order for Ignacio to modify.

⁷ See NRS 125C.0045

⁸ See *Ellis v. Carucci*, 123 Nev. 145, 150-151, 161 P.3d 239, 242 (2007).

Additionally, in the Order of Reversal and Remand in Nevada Supreme Court case #77242, the Court stated, “If a valid DNA test establishes that Avila is the biological father, the district court must follow the procedures specified in NRS Chapter 126 to determine the issue of paternity.”

The court did follow the procedures in NRS 126: In a Minute Order on March 20, 2020, the court referred Ignacio and Rosie to present Alan for paternity testing. On June 23, 2020, the court set the matter for trial regarding paternity. Next, the court conducted a trial to determine paternity on April 16, 2021. Finally, in its Order confirming Ignacio’s paternity of Alan, the court properly decided physical custody of Alan in accordance with NRS 126.161(4).

The court applied the correct legal standard when it entered the initial child custody order between Ignacio and Rosie regarding Alan. As such, its decision should be affirmed.

C. When a Child is Prevented from Having Proper Paternity Established due to Fraud, It is Inappropriate to Require the Defrauded Parent to Meet a Burden to Modify Custody.

Where a claim is fraudulently advanced and that fraud is so successful that the other party is not aware that he has a particular claim or defense and keeps him away from court, the defrauded party may have a sufficient basis for equitable relief.⁹ This

⁹ *Love v. Love*, 114 Nev. 572, 577, 959 P.2d 523, 526, (Nev. 1998).

Court in *Love* found that extrinsic fraud may have occurred when the minor child's mother "fraudulently concealed the child's parentage" from the child's father.¹⁰

Here, Rosie and Henry's concerted concealment of Ignacio's possible paternity of Alan prevented Ignacio from claiming child custody when he initiated the underlying case, as he was not aware that he had a claim for paternity or custody of Alan. When Ignacio finally discovered through DNA testing that he is Alan's biological father, Ignacio immediately amended his Complaint to request custody of Alan. The delay in Ignacio's request was through no fault of his own; indeed, the court found at the parties' April 2021 paternity trial that none of the things that have happened are Ignacio's fault, and he is innocent in these proceedings.

Ignacio should not now be required to meet the standards in *Ellis v. Carucci* or NRS 125C.0045, or any other standard to modify custody of Alan, because he was prevented from establishing paternity and seeking custody of Alan due to Rosie's and Henry's fraudulent and conspiratorial conduct.

The district court properly applied an initial custody standard; therefore, the resulting custody decision should be affirmed.

D. The Court Did Not Err in Finding Fraud When Henry Signed the Voluntary Paternity Acknowledgment Because Ignacio was not Precluded from Claiming Fraud Under NRS 126.

¹⁰ *See Id.*

Whereas NRCP 60(b)(3) allows a party to be relieved from an order upon such terms as are just based on fraud, misrepresentation, or other misconduct of a party, NRS 126.053 governs voluntary acknowledgments of paternity (“VAPs”). Under NRS 126.053(3), after the expiration of the period during which a VAP may be rescinded, a VAP “may not be challenged except upon the grounds of fraud, duress or material mistake of fact.” The burden of proof is on the person challenging the VAP to establish that it was signed because of fraud or material mistake of fact.

Here, by executing Henry’s VAP, Rosie declared that Henry was the only possible father of Alan. Based on the paternity test results, that is clearly not true. As such, Rosie’ sworn statement in the VAP is fraudulent.

Appellants erroneously rely on the reasoning from this Court’s Order of Reversal and Remand to assert that Ignacio failed to show fraud by Rosie and Henry. However, this Court’s prior finding of no showing of fraud was specifically tied to Ignacio’s NRCP 60(b)(3) request to set aside a Decree of Custody; the Court found that Ignacio failed to show that the Decree was entered because of fraud.

During the parties’ April 2021 trial, however, the court found fraud or material mistake of fact under NRS 126.053(3), which permits a party to challenge a VAP on grounds of “fraud, duress or material mistake of fact.” This Court did not preclude Ignacio from claiming fraud under NRS 126; it only found that fraud was not sufficiently shown to warrant setting aside the Decree. *See* 3AA000780.

Finally, if this Court wished to preclude Ignacio from claiming – and the trial court from finding – fraud as a basis for Ignacio to challenge Henry’s VAP under NRS 126, it could have expressly done so. However, this Court did not address the issue of Henry’s VAP.

The district court did not err in finding that the VAP was the result of fraud, setting the VAP aside, or establishing paternity for Ignacio. As such, the decision establishing Ignacio as the father of Alan should be affirmed.

E. The Court Did Not Err in Finding Fraud When Henry Signed the Voluntary Paternity Acknowledgment Because It Was Not the Basis for the Paternity Decision.

Per NRS 126.051(2), “[a] **conclusive** presumption that a man is the natural father of a child is established if tests for the typing of blood or tests for genetic identification made pursuant to NRS 126.121 show a probability of 99 percent or more that he is the father....” (Emphasis added).

A conclusive presumption cannot be overcome by additional evidence or argument, as it is accepted as irrefutable proof establishing a fact beyond dispute.¹¹

Here, while the court found there was either a material mistake of fact or fraud when Henry and Rosie signed the VAP of Alan, the court concluded that the conclusive presumption set forth in NRS 126.051(2) overcomes any VAP signed by

¹¹ Conclusive Presumption, *Black’s Law Dictionary* (11th ed. 2019).

any person that is not the child's biological father. The court's conclusion that Ignacio's presumed paternity overcame any presumption established by the VAP signed by Henry was based on the Legislature's statute for conclusive versus rebuttable presumptions – not on its finding of fraud or mistake.

Whether or not Henry likes it, Ignacio is Alan's biological father, and that is the basis on which the court relied to establish Ignacio's paternity. Therefore, the court did not err in finding fraud as to Henry's signing the VAP and the decision establishing paternity to Ignacio should be affirmed.

F. Even If It Were the Basis for the Paternity Decision, The Court Did Not Err in Finding Fraud When Henry Signed the Voluntary Paternity Acknowledgment Because It Was Fraud.

As to VAPs, pursuant to NRS 440.283, the State Board of Health shall “[d]evelop a declaration to be **signed under penalty of perjury** for the voluntary acknowledgment of paternity in this State....” (Emphasis added.)

Agencies authorized to provide a declaration pursuant to NRS 440.283 must ensure that the mother and the person who wishes to acknowledge paternity are given notice, orally and in writing, of the rights, responsibilities, and legal consequences of signing the declaration for the acknowledgment of paternity.¹²

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¹² NRS 440.283(3).

Here, Rosie and Henry signed a VAP pursuant to NRS 440.283 under penalty of perjury knowing the consequences of signing the same. By signing the VAP, Rosie declared that Henry was the only possible father of Alan. Rosie and Henry signed it knowing it was a lie and that there was at least a possibility that Ignacio was Alan's father. Therefore, even if the court *had* relied on its finding of fraud by Henry and Rosie to establish paternity of Alan, this reliance would have been proper because Rosie and Henry signed a VAP under penalty of perjury knowing it could be false.

G. The Court Appropriately Allowed the Evidentiary Hearing Despite Not Having a Guardian Ad Litem for Alan.

If the court determines it is necessary for a child to be made a party to the action, the court may make the child a party to the action.¹³ If the child is a minor and the court determines that it is necessary to appoint a guardian ad litem (hereinafter, "GAL") to represent the child, the court may appoint a GAL for the child.¹⁴ Pursuant to NRS 126.141, the GAL may accept or refuse to accept pretrial recommendations.

Here, the court did not make any pretrial recommendations for the GAL to consider.

¹³ NRS 126.101(1).

¹⁴ *Id.*

(1) There is No Need for a Guardian Ad Litem in a Paternity Proceeding with a Conclusive Presumption of Paternity, as the Court Must Grant Paternity to the Biological Parent.

For the reasons stated above, courts must grant paternity to the biological parent. As Ignacio's paternity of Alan is conclusive under Nevada law, the court need not consider Alan's best interest or Alan's wishes to determine his paternity. Therefore, a GAL for Alan was not necessary for the parties' paternity trial, the court properly proceeded to trial without a GAL for Alan, and its decisions should be affirmed.

(2) Rosie and Henry Did Not Take Action to Set Up the GAL.

The refusal to obey a lawful order issued by the court is an act of contempt.¹⁵ The facts of contempt must be presented to the court through an affidavit.¹⁶

Per EDCR 5.510, a motion seeking an order to show cause for contempt must be accompanied by a detailed affidavit identifying the specific provisions, pages and lines of the existing order alleged to have been violated, the acts or omissions constituting the alleged violation, harm suffered, and the need for a contempt ruling.

Here, while the court ordered Ignacio to pay a GAL's fees to represent Alan and he did not do so, neither Rosie nor Henry filed a Motion for an Order to Show

¹⁵ NRS 22.010(3).

¹⁶ *Id.*

Cause. Thus, at trial, the court made no finding of contempt against Ignacio for failure to retain a GAL, because the court was not properly moved to consider contempt.

Moreover, neither Rosie nor Henry contacted the Children's Attorneys Project ("CAP") to attempt to obtain a GAL. The record shows Rosie and Henry did not take any action to obtain a GAL, to request for Ignacio to obtain a GAL, or to request Ignacio pay the GAL's fees. Therefore, the court did not err by allowing the trial to proceed without a GAL, and its decisions should be affirmed.

(3) The District Court is Allowed to Modify Its Orders and/or Proceed Without a GAL.

If the court required input from the child as to his paternity, it would have made Alan a party to the underlying paternity and custody action. The court did not add Alan as a party.

Next, while the court ordered that CAP be contacted to obtain a GAL for Alan, the court did not specify the GAL's purpose in the parties' litigation or the scope of the prospective GAL's role, i.e. whether the GAL would be tasked with representing Alan's best interest, representing Alan's wishes, or making an impartial recommendation as to Alan's paternity or custody. The court also did not issue pretrial recommendations that the GAL would have been able to consider.

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Lastly, Appellants failed to state legal authority that prevents the court from modifying its orders or that requires a GAL to proceed with an evidentiary hearing as to paternity.

Therefore, the court appropriately allowed the evidentiary hearing despite not having a GAL. As such, the district court's orders should be affirmed.

VERIFICATION

1. I hereby certify that this fast track response 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 this fast track response has been prepared in a proportionally spaced typeface using Microsoft Word–Office 365 Business in font type Times New Roman size 14.

2. I further certify that this fast track response complies with the page- or type-volume limitations of NRAP 3E(e)(2) because it is proportionately spaced, has a typeface of 14 points or more and contains 454 lines of text;

3. Finally, I recognize that under NRAP 3E I am responsible for timely filing a fast track response and that the Supreme Court of Nevada may impose sanctions for failing to timely file a fast track response, or failing to raise material issues or arguments in the fast track response. I therefore certify that the information provided in this fast track response is true and complete to the best of my knowledge, information, and belief.

DATED this 14th day of October, 2021.

MCFARLING LAW GROUP

/s/Emily McFarling

Emily McFarling, Esq.

Nevada Bar Number 8567

Attorney for Respondent,

Ignacio Avila Jr.

CERTIFICATE OF SERVICE

I, an employee of McFarling Law Group, hereby certify that on the 14th day of October, 2021, I served a true and correct copy of this Child Custody Fast Track Response as follows:

via the Supreme Court's electronic filing and service system (eFlex):

Fred C. Page, Esq.
Fpage@pagelawoffices.com

/s/Alex Aguilar
Alex Aguilar