IN THE SUPREME COURT OF THE STATE OF NEVADA

RONALD ALAN BARBER,

Appellant,

vs.

BRIANNA TEAL BARBER

Respondent

Supreme Court No.: 83201

CHILD CUSTODY FAST TRACK STATEMENT

1. Name of Party Filing this fast track statement: Ronald Alan Barber
2. Attorney Submitting fast track statement:

   Lisa M. Szyc, Esq. Nevada Bar No, 11726
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3. Judicial District:

   Eighth Judicial District Court of the State of Nevada
   In and for the County of Clark
   Case No.: D-20-609450-D
4. Name of Judge Issuing Judgment: The Honorable Bryce C. Duckworth
5. Length of Trial or Evidentiary Hearing: N/A
6. Written order of judgment appealed from: Order Denying Motion to Set Aside Default Decree
7. Date that written notice of the appealed written judgment or order's entry was served: June 10, 2021
8. If time was tolled by timely filing of NRAP4(a)(4): N/A
9. Date Notice of Appeal Filed: July 6, 2021
10. Specify statute or rule governing the time limit for filing the notice of appeal: NRAP4(a)(1)

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

A. JURISDICTIONAL STATEMENT FOR APPEAL

This court has jurisdiction pursuant to NRAP 3A(b)(1) and 3(A)(b)(7), which permits a party to appeal from "[a] final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered" and "[a]n order entered in a proceeding that did not arise in a juvenile court that establishes or alters the custody of minor children."

12. Pending and Prior proceedings in this court: N/A

13. Proceedings raising same issues. N/A

14. Procedural History:

B. STATEMENT OF CASE INCLUDING PROCEDURAL HISTORY

This case arises out of a divorce proceeding which was obtained by Default Decree of Divorce in the Eighth Judicial District Court. BBJA000039. The Amended Summons and Amended Complaint were filed by Brianna Barber in September of 2020. BBJA000010; BBJA000001. The documents were served on Ronald Alan Barber's criminal attorney. BBJA000013.[1],[2] Alan's criminal attorney was not

[1]Ronald Alan Barber is the Appellant who will hereinafter be referred to as "Alan" as he is referred to in documents filed in the lower court.

[2] Alan was arrested on or about June 24, 2020 on several counts of lewdness with a child and sexual assault against a child under 14. He was in the Clark County Detention Center and hired a criminal defense attorney to represent him on the criminal case and the criminal case only.

authorized or retained to accept service or otherwise act on Alan's behalf in this matter. BBJA000079. No answer or otherwise responsive pleading was filed by Alan. On or about October 28, 2020, a Three-Day Notice of Intent to take Default was filed and was also delivered to Alan's criminal defense attorney. BBJA000013**.** On November 4, 2020, a Default was filed with the Court. BBJA000014. On December 17, 2020, a Notice of Entry of Default was filed with the Court. BBJA000035.

On or about December 2, 2020, a hearing was held and a prove up conducted in which no specific findings of facts were made as to the division of the marital assets or marital debts. BBJA000033. There were no specific findings of the best interest factors with respect to the findings of child custody. *id***.** The court did make a calculation of child support based on testimony of Brianna's belief of Alan's income, but no further analysis or factors considered. *id*. The lower Court's analysis of the calculation of child support was not included in the Default Decree. BBJA000055.

Following the December hearing a Default Decree was entered and again served on Alan's criminal counsel. BBJA000052-53. In March of 2021 Brianna filed a pro-per motion "seeking relief from the court to sign a quick[sic] claim deed on behalf of defendant so plaintiff can refinance home." BBJA000067. There was no certificate of service filed or attached with the motion. *id.* In April Alan filed on

Opposition and Counter Motion. BBJA000076. There was a reply with supporting exhibits filed by Brianna and a hearing was held in May. BBJA000093; BBJA000100. Alan timely filed the underlying appeal.

15. Statement of Facts:

C. CONCISE STATEMENT OF MATERIAL FACTS

The parties were previously married in Las Vegas, Nevada on March 8, 2013, in Las Vegas, Nevada. BBJA000002. There are two minor children adopted and born as the issue of this marriage to wit: Olivia Barber born March 4, 2005, and Eowyn Barber born September 4, 2013. BBJA000002. Alan is accused of sexual assault against the party's oldest daughter. *id.* A criminal case against Alan is still pending. *id.* Alan has had no contact with his children since his arrest in June of 2020, due to a Temporary Protection Order currently in place. *id.,* BBJA000106.

There are no findings of fact regarding the best interest factors of the minor children in the decree of divorce. BBJA000055. There are no findings of fact as to the calculation of child support in the Default Decree. *id.* There are no specific findings of fact as to the equitable division of marital assets listed in the decree of divorce. *id.*

Alan through his counsel of record argued that his criminal defense attorney did not have authorization, consent, or anything resembling permission, to accept service on his behalf or otherwise act on Alan's behalf in the family court matter.

BBJA000079. Alan's position is supported on the record by his signed Affidavit. BBJA000088. Alan disputed that criminal counsel being an officer of the court was sufficient for him to act on Alan's behalf if there was no express consent for him to act in the family case on Alan's behalf. BBJA000126.

16. Issues of Appeal:

D. OUTLINE OF ALLEGED DISTRICT COURT ERRORS

i. That the District Court erred in determining that service was proper and therefore erred in granting a Default Decree of Divorce;

ii. That the District Court erred in making default child custody determinations without making any best interest findings of facts in the initial Default Decree and at the subsequent hearing to set aside the Decree;

iii. That the District Court erred in making default child support calculations without making any findings of facts in the initial Default Decree and at the subsequent hearing to set aside the Decree;

iv. That the District Court erred in making default unequal distributions of community property as Default was improper and there was no *prima facie* showing to support the unequal distribution.

17. Legal Argument, including Authorities:

E. LEGAL ARGUMENT

a. THAT THE DISTRICT COURT ERRED IN DETERMINING THAT SERVICE WAS PROPER AND THEREFORE GRANTING A DEFAULT DECREE OF DIVORCE

It is undisputed that a Default Decree of Divorce was entered in this case. BBJA000052. The Default Decree addressed all pertinent issues including child custody, child support, and division of marital asset and debts. BBJA000055-60.

Alan was arrested for alleged criminal offenses. Brianna's lawyers emailed district attorneys and criminal defense attorneys to obtain an address for Alan for purposes of serving the Complaint. BBJA000025. It was represented to the Court that eventually Alan's criminal attorney responded and indicated that he would accept service. BBJA000025-26. There is nothing in the record to support that he had consent to do so. This has effectively created a situation in which no personal service has been made on Alan.

In fact, the record is clear, Alan did not authorize his criminal attorney to accept service on his behalf. NRCP 4(e) generally requires that service of the Summons and Complaint be made within 120 days after the filing of the complaint. Service can be made by delivering a copy of the summons and the complaint to the individual personally or in accordance with NRCP 4.2(a)(3) with an agent **authorized** by appointment or by law to receive service of process. "In the absence of actual specific appointment or authorization, and in the absence of a statute conferring authority, an agency to accept service of process will not be implied." *Zabeti v. Great Am. Ins. Co.*, 2017 Nev.App.Unpub. LEXIS 655, 133 Nev. 1096,

2017 WL 4217040 *citing Foster v. Lewis,* 78 Nev. 330, 333, 372 P.2d 679, 680 (1962).

Although unpublished, *Zabeti* is persuasive and factually on point to the service issues in the instant case. Zabeti asserted that he was never personally served while the Insurance Company maintained that service was perfected because attorney Naomi Arin was authorized to and ultimately did accept service on Zabeti's behalf. Attorney Arin had previously represented Zabeti in his corporate capacity.

At the motion for summary judgment, Zabeti unequivocally stated and argued that no one including Arin was authorized to represent him in his individual capacity. Arin admitted she did not represent him in an individual capacity. There were no other documents on the record to show that Zabeti was properly served in his individual capacity. The Court ultimately held "where the evidence that the person served was not authorized by the defendant to receive service of process is uncontradicted, as in this case, such denial of authority must be taken by the court as try for the purpose of applying NRCP 4(d)(6)". *id.*[3]

Zabeti is on point with the facts at issue in the instant case. At the December hearing, in which, Alan was not present, it was represented by Brianna's counsel that Alan's criminal defense counsel responded to an email and stated "I'm his

[3] NRCP(d) has been recodified as NRCP 4.2(a)(3) since the holding in *Zabeti* was issued.

attorney in the criminal case. I'm not the attorney on the family case. He said I will accept service," BBJA000025. These emails were not included in the record. Nothing in that statement indicates that criminal counsel had consent or authorization to accept service. NRCP 4.2 requires a that an agent be authorized to accept service. It is uncontroverted in this case that Mr. Helmick, Alan's criminal counsel was not authorized to accept service in the family matter. *Zabeti* and *Foster* do not allow or permit agency of service to be implied. Service in this case was not proper or perfected.

It is clear under Nevada law and was argued in the pleadings filed and, at the May hearing by Alan's counsel that Mr. Helmick did not have the authorization to accept service on Alan's behalf. It was further attested in the Declaration Alan signed in support of his opposition that Mr. Helmick did not have authorization to accept service on his behalf. BBJA000088.

The lower court relied on the premise that Mr. Helmick was an officer of the court, however, as argued without express consent or authority, agency cannot be implied or inferred by the Court. There is nothing in the record to indicate that Mr. Helmick had the authority to accept service on behalf of Alan in the family case. There is, however, a clear record that Alan did not authorize or consent to Mr. Helmick accepting service on his behalf. That Mr. Helmick represented Alan in an unrelated matter is not sufficient to create the agency relationship needed, or

authorized under NRCP 4.2(a)(3), and evidenced by the persuasive holding in *Zabeti*.

There was no proper service in this matter. Thus, any finding of default by the District Court based on the idea that service was properly made or perfected is improper. The Default should be set aside.

b. THAT THE DISTRICT COURT ERRED IN MAKING DEFAULT CHILD CUSTODY DETERMINATIONS WITHOUT MAKING ANY BEST INTEREST FINDINGS OF FACTS IN THE INITIAL DEFAULT DECREE AND AT THE SUBSEQUENT HEARING TO SET ASIDE THE DECREE;

Assuming arguendo that this Court finds there was no issue with service, the Default Decree was still improper, as any determination of child custody should have included best interest findings of facts. NRS125C.0045(1)(a) gives District Courts the specific authority to make custodial determinations during the pendency of any case. The paramount consideration in determining child custody is the best interest of the children. NRS 125C.0035; *Culbertson v Culbertson*, 91 Nev. 230, 533 P.2d 768 (1975); *Sims v Sims,* 109 Nev. 1146, 865 P.2d 238 (Nev. 1993). District Courts have broad discretion in child custody matters. *Ellis v. Carcucci*, 123 Nev. 145, 149, 161 P.3d 241-42 (2007). Specific findings, and an adequate explanation of the reasons for the custody determination are crucial to enforce or modify a custody order and for appellate review. *Lewis v. Lewis* 132 Nev 453, 460, 373 P.3d 878 882 (2016). Failure to cite to NRS 125C.0035(4), nor address any of the factors listed

therein when addressing the issues raised before the court during testimony gives rise to an abuse of discretion as to the issue of physical custody. *Doucettperry v. Doucettperry*, 2020 Nev.App.Unpub. LEXIS 849, 475 P.3d 63, 2020 WL 6445845.

In the instant case, the Decree was issued by Default. In *Blanco v. Blanco*, 129 Nev. 723, 726 311 P.3d 1170, 1172 (2013), a default decree was issued as well. Although, in *Blanco*, the default decree was obtained as a result of case discovery ending sanctions, the *Blanco* analysis still decided what is appropriate and what is not appropriate for determination by default. *Blanco* made it abundantly clear child support and child custody matters need findings of fact and are not appropriately decided by default.

Completely absent from this case both in the initial default decree and after the May hearing in which Alan asked for the Default Decree be set aside is any finding of fact or consideration of any best interest factor. After the May hearing the Court upheld the child custody order issued in the Default Decree again without making any findings or analysis of the best interest factors. BBJA000126.

Thus, as to the issues related to child custody the default decree is improper. As Nevada law clearly requires the lower court to make findings based on the best interest factors, and no such findings were make in the instant case.

c. THAT THE DISTRICT COURT ERRED IN MAKING DEFAULT CHILD SUPPORT CALCULATIONS WITHOUT MAKING ANY FINDINGS OF FACTS IN THE INITIAL DEFAULT DECREE

AND AT THE SUBSEQUENT HEARING TO SET ASIDE THE DECREE;

Assuming arguendo, this court finds that service was proper, the Default Decree was still improper as to the award for child support. The actual default decree made no specific findings as to the calculation of child support. A district court's determination regarding child support is reviewed for an abuse of discretion. *Rivero v Rivero*, 125 Nev. 410, 438 216 P.3d 213, 232 (2009). A district court has authority to modify a child support order if there has been a change in circumstances since entry of the order and the modification is in the best interest of the child. *id.* at 431, 216 P.3d at 228. In the instant case, at the December hearing, Brianna gave testimony regarding Alan's unemployment status and last known income amount. BBJA000029. Based on that testimony, the Court stated

> "the possibility exists that there's nothing out there to obtain if he's not employed. And if he's looking at some time incarcerated which certainly sounds like a realistic possibility given the circumstances even under a plea deal, the child support based on $6,066 per month would be $1,327.00 per month. So, I don't have a problem including that calculation again recognizing that…he may not have any income."

BBJA000032. However, there are no specific findings related to child support or the child support calculation included in the Default Decree. BBJA000040. Then at the May hearing, when Alan filed a request asking for the default Decree to be set aside and for a modification of child support, based on his actual financials, the supporting

Financial Disclosure Form was filed on April 16, 2021, the Court denied Alan's request.

The Default Decree does not state that the income determined by the Court is imputed on Alan BBJA000040. Nor does it indicate that he is unemployed, as was clearly a factor considered by the Court at the time of the hearing when the calculation of child support was made. Based on the Financial Disclosure Form filed at the time of the Opposition it is clear that Alan's income was less than that which was testified to by Brianna, necessitating a change in the calculation of child support, an issue which was not addressed by the Court at the hearing in May, other than to deny Alan's request for relief.

d. THAT THE DISTRICT COURT ERRED IN MAKING DEFAULT UNEQUAL DISTRIBUTIONS OF COMMUNITY PROPERTY AS DEFAULT WAS IMPROPER AND THERE WAS NO *PRIMA FACIE* SHOWING TO SUPPORT THE UNEQUAL DISTRIBUTION.

Assuming arguendo, this court finds that service was proper, the Default Decree was still improper as to the unequitable division of marital assets.

NRS 125.150(1)(b) states in pertinent part:

> In granting a divorce, the court Shall, to the extent practicable, make an equal disposition of the community property of the parties, including, without limitation, any community property transferred into an irrevocable trust pursuant to NRS 123.125 over which the court acquires jurisdiction pursuant to NRS 164.010, except that the court may make an unequal disposition of the community property in such proportions as it deems just if the court finds a compelling

> reason to do so and sets forth in writing the reasons for making the unequal disposition.

In the instant case, the Decree was issued by Default. In *Blanco v. Blanco*, 129 Nev. 723, 729 311 P.3d 1170, 1175 (2013), a Default Decree was issued as well. Although, in *Blanco*, the default decree was obtained as a result of case ending discovery sanctions, the *Blanco* analysis still decided what is appropriate and what is not appropriate for determination by default. With respect to the division of community property and community debt, the *Blanco* court concluded that division must be made in accordance with the law. NRS 125.150(1)(b) requires the court to make an equal distribution of property upon divorce, unless the court finds a compelling reason for an unequal disposition and sets forth that reason in writing. *id.* The *Blanco* court expressly held that "the equal disposition of community property may not be dispensed with through default." *id.*

Property acquired after marriage is presumed to be community property unless the presumption is overcome by clear and convincing evidence. *Forrest v. Forrest*, 99 Nev. 602, 604-605, 668 P.2d 275, 277 (1983). The community is entitled to a *pro rata* ownership share in property which community funds have helped acquire. *Malmquist v. Malmquist*, 106 Nev. 231, 238, 792 P2d 372, 376 (1990). A court must make an equal disposition of community property in a divorce unless there is "compelling reason" to make an unequal disposition. *Kogod v. Cioffi-Kogod*,

135 Nev. 64, 75 439 P.3d 397, 406 (2019). Generally, the dissipation which a court may consider refers to one spouse's use of marital property for a selfish purpose unrelated to the marriage in contemplation of divorce nor at a time when the marriage is in serious jeopardy or is undergoing an irretrievable breakdown. *id.*at 75- 76, 439 P.3d at 406-407.

In the instant case, a review of the division of community property listed in the Amended Complaint and addressed at the December hearing, that was ultimately incorporated into the final Default Decree, was inequitable. BBJA000033. The Default Decree awards the entirety of the proceeds the marital home to Brianna. BBJA000041. The Default Decree awards the entirety of the YMCA Retirement account to Brianna. *id.* The Default Decree does award Alan his retirement account without a note as to the value of his account, so the record does not indicate if this is an equal offset of retirement accounts. BBJA000042. Absent entirely from the hearing in December and the Default Decree, is any finding of this court for any basis for the unequal distribution of the marital assets.

There is not an allegation in the Amended Complaint that Alan engaged in an act of marital waste to warrant such an unequal distribution of the community property assets. There is nothing on the record to indicate why the court awarded the bulk of the community property assets to Brianna in the Default Decree, despite that Nevada law requires findings for unequal distributions of property. It is not

sufficient, that Brianna gave testimony that she believed the division of property to be fair and equitable. BBJA000030. The statute requires that the court must make an equal disposition of community property, absent a compelling reason to do so.

Thus, the record supports that the unequal distribution of marital assets in instant case was improper.

18. Issues of First Impression or of public interest: N/A

F. STATE REGARDING CASE PLACEMENT RE: NRAP RULE 17

Pursuant to NRAP 17(b)(10) this case is appropriately assigned to and should be heard by the Nevada Court of Appeals. Appellant sets forth no legal basis or argument in which the case should otherwise heard.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this fast-track statement 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 statement has been prepared in proportionally spaced typeface using Microsoft Word Microsoft 365 in Times New Roman font size 14.

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

[XX] Proportionately spaced, has a typeface of 14 points or more, and contains 3711 words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

[XX] Does not exceed 16 pages.

3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track statement and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track statement or failing to raise material issues or arguments in the fast-track statement or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast-track statement is true and complete to the best of my knowledge, information and belief.

Dated this 13th day of September 2021

/s/: Lisa M. Szyc _____

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