

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

2 * * * * *

3
4 **AMY COLLEEN LUCIANO,**
5 **N/K/A/ AMY HANLEY,**

6 **Appellant,**

7
8 **vs.**

9 **FRANK LUCIANO,**

10 **Respondent.**
11

Electronically Filed
Supreme Court No. 83522
Mar 26 2022 03:45 p.m.
Elizabeth A. Brown
Clerk of Supreme Court
District Court Case No. D59820

12
13 **REPLY TO FAST TRACK RESPONSE**

14 This Appeal was brought in an attempt to set aside two motions for
15 reconsideration of a patently flawed child custody award. The Fast Track
16 Statement, Opposition and this Reply establish that the substantive law,
17 particularly NRS 125C.0035, was irreparably violated by the lower court.
18

19
20 The Respondent's Response to the Fast Track Statement is both
21 procedurally and substantively inadequate. Procedurally, the Response was filed
22 12 days late without leave of Court to extend that deadline. This was after the
23 automatic seven-day extension granted on February 11, 2022. As a result of this
24 failure, this Court should strike the Response, as a sanction for that failure to
25 follow the rules of this Court. Substantively, the Response failed to negate the
26
27
28

1 major points upon which this Appeal is based, as set forth more fully below.

2 This Appeal arises out of two Rule 60(b), NRCP motions to set aside the
3
4 award of custody of the Appellant's and Respondent's daughter, Gianna Luciano.
5 The first motion was filed on July 21, 2020 (Motion 1) AA0202-0206. The
6
7 second motion was filed on May 31, 2021 (Motion 2). AA0250-273. Both motions
8
9 were denied, Motion 1 by Judge Hoskin after a hearing held on September 16,
10
11 2020. AA324-0360. On August 10, 2021, Judge Almase denied Motion 2 pursuant
12
13 to an Order issued from chambers. AA0274-0276. While neither of Appellant's
14
15 motions were artfully pled, both informed the lower court that certain obvious
16
17 legal errors had occurred.

18 The discussion of the issues of the Fast Track Statement explain the lower
19
20 court's multiple errors. While the normal standard of review is whether court
21
22 abused its discretion, no deference is owed to rulings made as legal errors. *Davis v.*
23
24 *Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1143 (2015).

25 Issue No. 1: The Court erred in its review of the Appellant's First Motion
26
27 because it did not conduct an evidentiary hearing to determine whether the
28
Respondent engaged in one or more acts of domestic violence.

On this issue, Respondent addressed neither the factual allegations nor the
substantive law applicable to child custody determinations. Instead, Respondent
made the wooden argument that Appellant, "pled only that there was a lack of due

1 process.” Response, p. 15. Respondent gave no consideration the Temporary
2 Protective Order (TPO) issued by the 5th Judicial District Court of Utah. AA0212-
3 0217. Moreover, Respondent did not deny this allegation in his Opposition to
4 Motion 1. AA0218-240.

5
6 Here, Judge Hoskin erred by failing or refusing to address the TPO at the
7 hearing held on September 16, 2020. Evidence of domestic violence may be
8 admitted and acted upon at any subsequent hearing. *Castle v. Simmons*, 120 Nev.
9 98, 105, 86 P.3d 1042, 1047 (2004). Further, Judge Hoskin had a duty to assist the
10 Appellant as a *pro se* litigant. See, *Rodriguez v. Fiesta Palms, LLC*, 134 Nev. 654,
11 659, 428 P.3d 255, 259 (2018), holding modified by *Willard v. Berry-Hinckley*
12 *Indus.*, 136 Nev. 467, 469 P.3d 176 (2020); *Gholson v. Siegel Suites*, 130 Nev.
13 1181 (2014). *Christensen v. C.I.R.*, 786 F.2d 1382, 1384–85 (9th Cir.1986)(“*Pro*
14 *se* pleadings are liberally construed, particularly where civil rights claims are
15 involved.”) *Hughes v. Rowe*, 449 U.S. 5, 9, 101 S.Ct. 173, 176, 66 L.Ed.2d 163
16 (1980)(“[A]llegations of a [*pro se*] complaint, however inartfully pleaded are held
17 to less stringent standards than formal pleadings drafted by lawyers.”)(Internal
18 quotes omitted.)

19 The TPO attached as an exhibit to Motion 1 (AA0207-2017) clearly and
20 obviously informed lower court that domestic violence occurred. Further,
21
22
23
24

1 Respondent tacitly admitted to engaging in domestic violence by failing to
2 address the allegation. *See*, EDCR 2.20(c). Accordingly, Judge Hoskin failed his
3 duty to Appellant by not addressing or require an evidentiary hearing regarding
4 the allegation of domestic violence. *See*, NRS 125C.0035(5).
5

6
7 Based on the *pro se* litigant's uncontested allegation of domestic violence
8 and Judge Hoskin's failure to address it, the failure or refusal to set aside the child
9 custody award was a clear legal error.
10

11 Issue No. 2: The Court erred in its review of the Appellant's First Motion by
12 failing to require the trial court to make specific findings regarding the best
13 interest of the child as set forth in NRS 125C.0035(4).

14 Here again, the Respondent argues that Motion 1 claimed a lack of due
15 process. Response, p. 16. The Response also notes that the Court indicated a
16 willingness to entertain a motion regarding visitation issues. *Id.* However, the
17 Response failed to address the lack of specific "best interest" findings in the
18 Decree. A lack of specificity regarding the NRS 125C.0035(4) factors is a fatal
19 flaw to a child custody award. As one court explained, "the decree or order must
20 tie the child's best interest, as informed by specific, relevant findings respecting
21 the NRS 125.480(4) and any other relevant factors, to the custody determination
22 made." *Davis, supra*, at 451.
23
24
25
26
27
28

1 The Decree reviewed by Judge Hoskin¹ was completely standardless,
2 containing only a single conclusory statement;
3

4 Based on the testimony of Plaintiff and analysis of factors set forth in NRS
5 125C.0035, it is in the minor child's best interest for the Plaintiff to have
6 SOLE LEGAL and SOLE PHYSICAL custody of said minor child.
7 AA0176.

8 This conclusory statement provides no explanation of the rationale for
9 giving sole legal and physical custody to the Respondent. This Decree provided no
10 information regarding Gianna's health, well being or her familial relationships.
11 Overall, the Decree failed to provide any assurance that the decision was made for
12 appropriate legal reasons.
13

14 The transcript of the September 16, 2020, hearing shows that Judge Hoskin
15 failed to address this obviously defective Decree. *See*, AA0324-360. There was
16 simply no discussion of the factors. Moreover, the transcript of the May 19, 2020,
17 hearing shows that the NRS 125C.0035 factors were never systematically
18 reviewed. *Id.* Left unresolved were important and relevant factors such as,
19 Respondent's acts of domestic violence, Gianna's ability of to maintain
20 relationships with her siblings and her physical and emotional needs.
21
22

23 One particularly misleading allegation that must be addressed here is that
24
25

26
27 ¹Judge Hoskins was also presided over the divorce hearing held on May 19, 2020.
28

1 Appellant abducted Gianna. Response p. 6. This is a false statement. The Order
2 from the February 20, 2020, hearing had stricken specifically those erroneous
3 findings and that Appellant may have withheld some of Respondent's custodial
4 time. AA0138. In fact, the 02/20/2020 Hearing Transcript shows that Respondent
5 had committed an act of domestic violence but Judge Hoskin but was misled by
6 Respondent's legal counsel. AA0288-0296. Moreover, Appellant was never
7 served with the documents noticing the February 20, 2020, hearing. Id.

8
9
10
11 At the September 16, 2020, hearing, Judge Hoskin could have conducted an
12 evidentiary hearing regarding Gianna's best interest or he could have scheduled
13 one for a future date. Unfortunately, Judge Hoskin did neither. Accordingly, the
14 lower court committed a clear error in failing to set aside the Decree.

15
16 The Response then added insult to injury by referencing Judge Hoskin's
17 suggestion that Appellant could move to modify the decree. Response, p. 13.
18 Judge Hoskin said that the Appellant could "file a motion to modify... so that the
19 Court can appropriately consider your requested relief." (AA0354). In other
20 words, the Appellant could fix the lower court's defective child custody award by
21 moving to modify the same.

22
23
24
25 This was an ill-considered suggestion because the child custody award was
26 standardless, it did not provide a base line. Had Appellant attempted to modify the
27

1 award, it would have been impracticable for her to do so because she would not
2 have been able show to any changes to Gianna's circumstances. As the *Davis*
3 court explained,
4

5 [a] parent cannot reasonably be expected to show that a substantial
6 change in circumstances as to the child's best interest warrants
7 modification of an existing child custody determination unless the
8 determination at least minimally explains the circumstances that
9 account for its limitations and terms. *Id.* at 452.

10 Judge Hoskin and Judge Almase are both Family Court judges in the largest
11 community and busiest district court system in our State. Appellant attempted to
12 inform both of the lower courts of the obvious defects to the Decree. However,
13 neither Judge took any action thereon. It is up to this Court then, to see that the
14 law is followed.
15

16
17 Issue No. 3: The Court erred in its review of the Appellant's First and
18 Second Motions because it did not set aside the child custody order issued as a
19 sanction for non-compliance with discovery and procedural orders.

20 Here, Respondent made two arguments. First, that Motion 2 was untimely.
21 Response, p. 17. This is in error, Motion 2 was filed, in part, to cause the court to
22 reconsider Motion 1. Specifically, Motion 2 was filed to set aside the order from
23 Judge Hoskin's hearing on Motion 1. This order was filed December 7, 2020,
24 nearly three months after the hearing AA0249. However, the Appellant was not
25
26
27
28

1 served this order. *Id.* Accordingly, the time period for an appeal of the decision on
2 Motion 1 has not run.
3

4 Second, Respondent argued that Judge Hoskin was not required to hold an
5 evidentiary hearing. Response, p. 17. “A District Court may deny a motion to
6 modify child custody without holding an evidentiary hearing if the moving party
7 fails to demonstrate adequate cause.” *Id.* Respondent’s argument entirely misses
8 the point. The Appellant’s motion was for reconsideration of the original child
9 custody award. The Appellant was not moving to modify the child custody award.
10 She was moving to have it set aside because the award was improperly granted in
11 the first place. It was given as a sanction pursuant to EDCR 2.69. AA0306. This is
12 impermissible. See *Blanco v. Blanco*, 129 Nev. 723, 730, 311 P.3d 1170, 1174
13 (2013). Moreover, as previously discussed, the Decree’s omission of findings of
14 fact would make it impracticable for the Appellant to show any changes in
15 Gianna’s circumstances.
16
17

18 Child custody matters must be decided on their merits. *Id.* (“It is well
19 established that when deciding child custody, the sole consideration of the court is
20 the child's best interest.”) The conduct of a parent in litigation is not a relevant
21 consideration for determining the child’s best interest. Courts may not use changes
22 of custody to punish parental misconduct; *Sims v. Sims*, 109 Nev. 1146, 1149, 865
23
24
25
26
27
28

1 P.2d 328, 330 (1993); *Dagher v. Dagher*, 103 Nev. 26, 28 n. 3, 731 P.2d 1329,
2 1330 n. 3 (1987).
3

4 Granted, the Appellant's conduct in the litigation was less than ideal. She
5 refused to comply with discovery requests and failed to appear at scheduled
6 hearings. Response, p. 12. However, the Appellant's behavior is not relevant in
7 determining Gianna's best interest. *Blanco, supra* at 730. Judge Hoskin and Judge
8 Almase failed to request that Appellant and Respondent address the NRS
9 125C.0035 factors when they had the opportunity. Instead, both Judges upheld a
10 decree which allowed Gianna's custody to have been decided as a sanction against
11 the Appellant. This was a legal error.
12
13
14

15 Base upon the above, this Court must remand the matter back to the lower
16 court for an evidentiary hearing to provide "specific, relevant findings respecting
17 the NRS 125C.0035(4) factors." *Davis, supra*, at 452. This is required because no
18 hearing has been conducted where the factors were analyzed. Most critically, an
19 evidentiary hearing should be conducted to determine by clear and convincing
20 evidence whether the Respondent engaged in domestic violence. Thereafter, the
21 Decree must be amended to contain specific findings on these factors.
22
23
24

25 Additionally, this Court should striking the Respondent's Response as a
26 sanction for his late filing.
27
28

1 VERIFICATION

- 2 1. I hereby certify that this fast track statement complies with the formatting
3 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) because:
5 This fast track statement has been prepared in a proportionally spaced
6 typeface using WordPerfect in 14 font size and name of type style New
7 Times Roman.
8
9 2. I further certify that this fast track Reply complies with the page-or
10 type-volume limitations of NRAP 3E(e)(2) because is proportionately
11 spaced, has a typeface of 14 points or more, and contains 1920 words.
12
13 3. Finally, I recognize that under NRAP 3E I am responsible for timely filing a
14 fast track statement and that the Supreme Court of Nevada may impose
15 sanctions for failing to timely file a fast track statement, or failing to raise
16 material issues or arguments in the fast track statement. I, therefore, certify
17 that the information provided in this fast track statement is true and
18 complete to the best of my knowledge, information, and belief.
19
20 4. This document does not contain the social security number of any person.
21
22
23
24

25 Dated this 16th day of March, 2022

26 The Law Offices of Charles R. Zeh. Esq.
27
28

1
2
3 By: /s/ Pete Cladianos III, Esq.
4 Bar Number 8406
5 50 West Liberty St. Ste. 950
6 Reno NV 89501
7 775 323 5700
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8

Julio Vigoreaux, Jr., Esq. - jvigoreaux@gmail.com

/s/ Heather Evans
An Employee of
The Law Offices of Charles R. Zeh, Esq.