IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

LEE ANN GARRETT,	)	
	)	
Appellant,	)	**S.C. CASE 24915**
	)	D.C. CASE 136262
vs.	)	
	)	
ROBERT LAWRENCE GARRETT,	)	
	)	
Respondent.	)	

RESPONDENT'S ANSWERING BRIEF

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A. Whether Texas is a "jurisdiction" for the purpose of the Nevada statute stating that the court may consider the cost of transportation of the child to and from visitation if the custodial parent moved with the child from the jurisdiction of the court ordering support and the noncustodial parent remained.

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E. Whether Appellant, having chosen to make a claim under the Nevada child support statute, must abide by the terms of that statute.

STATEMENT OF THE CASE

Appeal from District Court order increasing child support for two children from $700.00 (minus all expenses of visitation) to $700.00 per month. Eighth Judicial District Court, Clark County, Frances-Ann Fine, Judge.

In the course of a return from a child custody evaluation, the court sua sponte elected to revisit child support. The court increased child support, by retaining the $700.00 child support figure previously set by the Referee, which had become a final order, but eliminating the unlimited deduction for travel expenses allowed by the Referee. III ROA 401-402. Appellant, the recipient of the increased child support, filed this appeal claiming that the amount of child support should have been further increased. III ROA 427.

STATEMENT OF FACTS

In December, 1989, while Respondent (Rob) was out of town, Appellant (Lee Ann) relocated to her parent's home in Las Vegas, Nevada. I ROA 120. She then began divorce proceedings in Texas. I ROA 51-78. The parties were divorced in Dallas, Texas, on September 10, 1990. I ROA 55-76. At the time of trial, Lee Ann had denied Rob contact with the children for three months. I ROA 151.

The Decree awarded primary physical custody to Lee Ann, and recited the specific finding that Lee Ann "has not encouraged visitation and that the evidence supports liberal visitation to the extent possible . . . ." I ROA 56-57, 33. It provided for child support of $700.00 per month, but also provided that Rob was entitled to deduct from that sum the amounts he actually incurred in exercising visitation if Lee Ann continued living more than 100 miles from his residence. I ROA 64-65. The sums allowed included air fare, hotel, and car rental expenses. I ROA 65. Pending the decree, Lee Ann claimed that Rob was in arrears in child support, and filed a contempt motion in Texas seeking those arrears and various penalties. I ROA 53, III ROA 328. Travel expenses for visitation exceeded $700.00 per month, and the Texas court rejected Lee Ann's claim that there were any arrearages in child support owed to Lee Ann. I ROA 75.

Just before the younger child, CJ, was to be included in the visitation schedule (I ROA 61), Lee Ann began criminal and civil proceedings in Texas falsely accusing Rob of sexually assaulting the elder child, Ali. I ROA 35. During the pendency of her Texas motion, Lee Ann followed up with virtually identical Nevada proceedings on February 15, 1991. I ROA 1, 47. The courts in both states immediately reacted to the accusations by terminating Rob's contact with both children during the pendency of the investigations in Texas and Nevada. Lee Ann's Texas appeal from aspects of the Texas decree, including her claim for arrears in support and the visitation offset, was filed by December 6, 1990. I ROA 51.

Lee Ann's "Petition for Sole Custody and to Exclude a Parent from Access to a Minor Child" was filed in Nevada on February 15, 1991. I ROA 1. The petition claimed that Nevada had full jurisdiction in the case and should determine matters relating to custody and visitation.

I ROA 4. Rob, not wishing to simultaneously litigate in two states, objected on procedural, jurisdictional grounds. I ROA 21-27.

On March 20, 1991, a hearing was held in Las Vegas. The Referee determined that Nevada had jurisdiction to consider the merits of Lee Ann's motion, since Texas had declined to exercise continuing child custody jurisdiction. I ROA 94-98. No objection was filed, and on April 25, the Referee's Recommendation became an Order.

The Texas intermediate appellate court handed down its decision on July 15, 1991. I ROA 150-55. The court upheld the lower court's denial to Lee Ann of child support arrearages. It held that although "[w]e applaud the efforts of the trial court in attempting to formulate a plan that would foster visitation by [Rob]," it was required to reverse for the absence of wage withholding, which was mandatory per Texas statute. I ROA 153. The court did not reverse the transportation offset, but remanded the case to the lower court asking how the offset could be made workable under Texas law. Id.

The criminal investigation in Texas continued; on August 2, 1991, the Nevada court ordered psychological testing of both parties, and a full evaluation of the child. I ROA 103-104. Rob's contact with his children, terminated by Lee Ann's accusations in December, 1990, did not re-commence until September 30, 1991. I ROA 101-104.

On October 16, 1991, the Texas lower court reviewed the appellate decision and held a hearing; the court could not find a way to make the transportation offset workable under the mandatory terms of the Texas wage withholding statute. On October 21, the court entered an order striking the transportation offset from the decree, setting child support at $700.00 per month, and finding no arrearages, with the first child support payment due November 1, 1991. III ROA 419-423. By this time the criminal investigations had been concluded, finding no evidence whatsoever of any sexual or other child abuse by Rob.

Rob filed his first Nevada motion for change of physical custody on October 28, 1991, protesting Lee Ann's interference with visitation, the bad psychological environment in her parent's home (where she was living with the children), and her false abuse allegations. I ROA

118-130. The Referee requested Affidavits of Financial Condition from both parties to be submitted a week prior to the hearing. III ROA 464.

Lee Ann filed an Opposition, stating in part that the Nevada courts should not enter any decisions relating to child support. I ROA 131, 138. The Opposition also included a copy of her psychological evaluation, in the course of which she openly confirmed her intention to thwart Rob's contact with the children by any and all means, even if that meant defying court orders and being jailed. I ROA 145.

Rob's response reiterated his request for custody. II ROA 161. He requested, in the event custody was not changed, that the court alter visitation so that the burden of transportation was Lee Ann's responsibility, since she could arrange for free flights as part of her job as a flight attendant. II ROA 167.

A hearing was held before the Referee on November 26, 1991. The Referee found that he had jurisdiction to consider all matters at issue, and issued Findings and Recommendations on January 14, 1992. III ROA 466-65. The Referee noted all prior proceedings in both states, including the evidentiary hearing in Nevada at which both parties testified at length. II ROA 168. The court recited that after a year of investigation, "The Referee considers it fortunate that in this case, there was not only no substantiation of sexual abuse, but the child does not exhibit any characteristics consistent with child abuse." II ROA 169; III ROA 466. The Referee determined that Lee Ann's accusations of child abuse by Rob "should be put to rest." II ROA 169; III ROA 466.

The court found Rob to be a credible witness, and a loving and caring father. II ROA 169; III ROA 466. He found that Lee Ann "was less credible, and exhibited a true bitterness and anger toward [Rob] because of his alleged actions during the parties' marriage. This is not healthy . . . ." II ROA 170; III ROA 466.

The Referee found, however, that Lee Ann's false abuse allegations were not "malicious or intentional," and declined to grant a change of custody to Rob. II ROA 169-70; III ROA 466. The Referee added the caution, however, that

> it is noted for the record that should there be any future interference with or deprivation of [Rob's] time with the children by [Lee Ann], or any future noncompliance by her with court-ordered visitation, [Rob's] position would have tremendous support; in fact, the Court should find that it would have little option and would be very much inclined to change custody if such circumstances occur in the future.

II ROA 170; III ROA 466.

Turning to visitation, the Referee noted the request for compensatory visitation for the nine months Rob was denied all access to his children, found that Rob was entitled to relief, but that the children's ages and routines, and the parents' work schedules, did not support "a tremendous alteration" of the visitation schedule. II ROA 170; III ROA 466. The Referee therefore set up a two month transitional period, after which Rob was to have the children one week per month as specified in the original Texas divorce decree. The Referee found:

> Given the substantial time [Rob] has lost with his children, coupled with the expenses associated therewith, [Lee Ann] shall be responsible for transporting the children. The expense to [Lee Ann] is minimal and reasonably compensates [Rob] his lost time.

II ROA 171; III ROA 465.

The Referee's order as to child support was that while the Referee "does not necessarily agree with [Lee Ann's] contention that the Court lacks jurisdiction to modify the existing child support order (entered in Texas), the arrangement is fair, equitable, and obviates the need to modify the same." II ROA 171; III ROA 465. Again, no objection was filed; the Recommendation was signed by Judge Pavlikowski and became an Order on February 14, 1992. II ROA 168. The Referee had all necessary information for Rob before him; the Referee again ordered Lee Ann to supply an Affidavit of Financial Condition.[1] III ROA 467.

Lee Ann never complied with the Order as to visitation, and her attorney withdrew from the case. II ROA 180. Rob was offered, and accepted, a transfer to Denver, Colorado, that allowed him to be closer to his children. II ROA 240, n.1. He filed a second motion for

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[1] Appellant's Opening Brief contains the assertion that Rob's Affidavit of Financial Condition was not before the court. Actually, the record makes it clear that the Referee had Rob's Affidavit of Financial Condition, and was just requesting one from Lee Ann so as to have all necessary information. III ROA 467. It is unknown why Rob's Affidavit of Financial Condition is not part of the formal court file, since it was before the Referee on the date of the hearing; it appears, however, that Lee Ann ignored the Referee's order to produce on both occasions.

change of primary physical custody on March 2, 1992, premised on Lee Ann's failure to abide by the earlier order, her stated refusal to comply with the court's order, and the Referee's threat that custody would be changed if she did not comply. II ROA 182-192.

In May, 1992, Rob obtained a transfer from Denver, Colorado, to Irvine, California, which allowed him to be still closer to his children. II ROA 240, n.1; III ROA 468. Through April and May, 1992, court intervention was required for Rob to obtain even limited visitation. III ROA 468.

On June 19, 1992, the Referee had a further hearing. It was discovered that the younger child, CJ, was a full year delayed in development, but that Lee Ann had taken no steps to have the child evaluated or treated. III ROA 469. Lee Ann had suffered a neck injury on the job in 1990, and chose to have surgery for correction of that injury after being ordered to supply air transportation to facilitate visitation; her doctor drafted a letter indicating that she should restrict her flying, and her employer verified that she was on inactive status with restricted flight availability. II ROA 212-16. The Referee took the matter under submission. III ROA 469.

On September 3, the Referee issued a comprehensive minute entry of Findings and Recommendations. The Referee found that the case file:

> reveals the difficulty that [Rob] has had in exercising and maintaining a relationship with his minor children. There is no doubt in the Court's mind that [Rob] is a fit and able parent to exercise either custodial or visitation responsibilities. [Lee Ann], who in the past has not been overly willing to afford [Rob] contact with the minor children, does not appear to be receptive to the relationship between [Rob] and his children. Nevertheless, this relationship will in fact take place if it means changing primary physical custody.

II ROA 236. The Referee also found that, despite the court's prior orders, Rob "continues to experience some difficulty in exercising his visitation rights and spending substantial time with the minor children." Id.

The Referee declined to enter the contempt finding requested by Rob, on the basis of Lee Ann's surgery, but given Lee Ann's continuing refusal to abide by court orders, he found that custody and visitation were at issue, and directed the parties to contact the Child Custody

Division for a full study. Id. The Referee's direction to the Child Custody Division noted that custody was at issue and that Rob's rights of visitation had been frustrated. II ROA 221.

In view of Lee Ann's refusal to ever abide by the visitation terms previously ordered, and the resultant additional costs to Rob, the Referee further recommended that "given the fact that the exercise of visitation now falls solely upon [Rob's] shoulders, any cost associated with the exercise of visitation should be deducted from his child support obligations." II ROA 236.

Lee Ann filed an untimely Objection to Referee's Report, arguing that the transportation offset was improper and that the Referee was not permitted to find that custody or visitation was at issue on the basis of her failure to abide by court orders. II ROA 225. Rob filed a response, II ROA 238, and Judge Pavlikowski overruled the Objection as untimely filed. II ROA 253-56. No appeal was taken from the resulting final order establishing the travel offset.

Lee Ann then filed a "Motion to Reconsider," without citation to any rule permitting such a filing. II ROA 244. It was nevertheless put on the calendar of Judge Fine, to whose court the matter was randomly reassigned following establishment of the Family Court, and was continued. II ROA 259; III ROA 471.

Rob filed an opposition noting that Lee Ann's filing was improper, that Lee Ann only appeared "injured" when present in the court room, and that she had been flying for her own purposes, although she refused to comply with the court order to fly the children for visitation. II ROA 283-89. Lee Ann filed a document entitled "Schedule of Arrearages," attempting to re-litigate in Nevada the sums to which the Texas courts had held she had no right. II ROA 290. Rob filed an Opposition, III ROA 326-338.

The Family Mediation and Assessment Center completed its study six months after it had been ordered.[2] The report noted the concerns raised previously, but found insufficient changed circumstances to warrant a change of primary physical custody. It recommended joint physical and legal custody and set out a proposed schedule.

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[2] The Report does not appear to be part of the Record On Appeal, but is presumably part of the confidential file lodged in the Supreme Court. It was ordered September 3, 1992, and issued March 10, 1993.

On April 15, 1993, Judge Fine had her first hearing in the case. III ROA 340-394. Judge Fine raised the issue of child support in the absence of a pending motion on that issue, III ROA 344, and after a great deal of discussion concerning the Texas proceedings and the fact that $323.07 bi-weekly is equal to $700.00 per month, eventually found that there were no child support arrearages. III ROA 392-93.

The court observed that Lee Ann was simply not going to cooperate with any visitation provisions, III ROA 392, and left child support set at the previously-established $700.00 per month. The only change made by Judge Fine was removal of Rob's allowance of deducting his costs of visitation from the $700.00; this had the effect of increasing the sum he was required to pay each month. III ROA 371-72, 391-92.

The court found itself unable to find Lee Ann's actions and inactions contemptuous because different judges had entered the earlier orders that Lee Ann had refused to obey, but the court stated that if the matter was back before her for denial of visitation or otherwise, the party responsible "will pay big time in attorney's fees." III ROA 374-75, 393.

Counsel prepared the Order after hearing, which was filed April 21, 1993, and from which this appeal was taken. III ROA 401, 427.

Lee Ann filed a document entitled "Objection to Notice of Entry of Order" on May 3, 1993. III ROA 409. Without notice to counsel, she somehow got a different Judge of the Family Court to sign a different order from the same hearing. III ROA 414. Lee Ann then hired counsel, who filed a Notice of Appeal on May 26, 1993. III ROA 416, 427. Three months later, Lee Ann's new counsel brought a further motion in the district court to "correct" the order appealed from. III ROA 431. He then submitted an "Amended Order" which was filed December 2, 1993. III ROA 451.

ARGUMENT

I. PRELIMINARY JURISDICTIONAL MATTERS.

This case has proceeded on the presumption that the courts of this state have subject matter and personal jurisdiction to enter orders relating to child support.[3] In this case, the district court elected to go forward with custody and visitation matters here because the Texas courts declined to exercise continuing jurisdiction. I ROA 96. It is presumed that Lee Ann's filing of an original petition in Nevada, coupled with Rob's subsequent requests for affirmative relief, granted to the courts of this state power to modify the terms of the Texas child support order. See Grant v. Grant, 38 Nev. 185, 147 P. 451 (1915) (party who invokes jurisdiction of the court is estopped from later denying it); Barnato v. Dist. Court, 76 Nev. 335, 353 P.2d 1103 (1960) (general appearance constitutes submission to jurisdiction of court).

II. THE DISTRICT COURT WAS WITHIN THE BOUNDS OF ITS DISCRETION IN AWARDING RESPONDENT OFFSETS FOR TRAVEL EXPENSES CAUSED BY APPELLANT'S MOVE, IN CALCULATING CHILD SUPPORT BELOW THE PRESUMPTIVE CEILING OF $500.00 PER MONTH PER CHILD.

The lengthy, tortuous history of Lee Ann's abuse of the judicial system is set out above to demonstrate that her motives below, and in bringing this appeal, have almost nothing to do with the legal merits of the travel offset at issue. These proceedings are just a continuation of Lee Ann's apparent quest to prevent Rob from seeing his children by making his efforts to be a parent as difficult and expensive as possible.

The standard of review in this case is "abuse of discretion." The district court has the discretion to alter the sum of child support payable if it sets forth findings of fact as to a different amount. NRS 125B.070(b); Scott v. Scott, 107 Nev. 837, 822 P.2d 654 (1991).

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[3] The United States Supreme Court requires a state to have personal jurisdiction over an obligor parent before a duty to pay child support may be imposed. Kulko v. Superior Court of California, 436 U.S. 84, ___ S. Ct. ___ (1978). Where a Nevada divorce court failed to obtain personal jurisdiction over the defendant, the court's order purporting to terminate a duty of support under a New York statute was void to the extent that it sought to terminate that duty. Estin v. Estin, 334 U.S. 541, 68 S. Ct. 1213 (1948); Vanderbilt v. Vanderbilt, 354 U.S. 416, 77 S. Ct. 1360 (1957). Presumably, the same rule applies to altering the conditions of, rather than terminating, such a duty of support.

The court is specifically authorized to adjust the sum payable for support of a child based on certain enumerated statutory grounds. NRS 125B.080(9).

A. Texas is a "jurisdiction" for the purpose of the Nevada statute stating that the court may consider the cost of transportation of the child to and from visitation if the custodial parent moved with the child from the jurisdiction of the court ordering support and the noncustodial parent remained.

NRS 125B.080(9)(i) states that, among the factors the court may consider when adjusting the amount of support of a child upon specific findings of fact is "the cost of transportation of the child to and from visitation if the custodial parent moved with the child from the jurisdiction of the court which ordered the support and the noncustodial parent remained."

The relevant facts in this case are undisputed. Lee Ann absconded with the children and relocated to Las Vegas, subsequently bringing a Texas divorce action. She began her proceedings here over a year later. I ROA 56, 1. The Texas court set child support. I ROA 64-65; III ROA 419-423. Rob continued to live in Texas for another year, until he relocated to be nearer to where Lee Ann had taken the children.

Appellant's Opening Brief (AOB) rather disingenuously states that "both parties moved from the jurisdiction of Texas." AOB at 1. In actuality, Lee Ann took the children from Texas while Rob continued to live there.

It is respectfully submitted that Texas is a "jurisdiction" for the purpose of the Nevada child support statute stating that the court may consider the custodian's move from "the jurisdiction which ordered the support" in determining whether to vary from the guideline sum.

A careful reading of Lee Ann's argument shows that it is based on the fact that the Nevada court took steps to examine and enforce the Texas child support order. What Lee Ann is really asking this Court to rule is that NRS 125B.080(9) is ineffective if a parent absconds here to frustrate contact with the other parent, and then this state re-examines child support. AOB at 5.

In the same breath, Lee Ann notes that "Nevada was the court [sic] now establishing child support." Id. In other words, Lee Ann's position is that if a party moves to this state instead of from this state, she can ask for an increase in child support under our laws, but the court is not permitted to consider the offset factors also set out in our laws.

It is respectfully submitted that no such interpretation of the Nevada child support statutes would be reasonable. The statute is carefully phrased so as to include any jurisdiction setting support, not just Nevada. There is no hint in the statute, or in any case, that affirmation of the child support amount in favor of a parent moving here prevents the court from taking into consideration that the parent moved from the jurisdiction that set support, and the other parent, thus increasing the travel costs for visitation.

B. Whether that statute remains relevant even if the noncustodial parent subsequently moves to be closer to the children and lessen the costs of transportation.

The rest of Lee Ann's argument is premised on the fact that her unilateral relocation with the children compelled Rob, a year later, to sell his home and relocate to be closer to his children. Apparently, Lee Ann's argument is that if she can force Rob to make a move from Texas, the court may not examine whether a travel offset is appropriate.

Any such interpretation of the Nevada child support statutes would be illogical, since it would compel noncustodial parents to not minimize expenses by moving closer to the location moved to by custodial parents. This Court has directed that such statutory interpretations are disfavored. In Desert Valley Water Co. v. State Engineer, 104 Nev. 718, 766 P.2d 886 (1988), the Court directed:

> When interpreting a statute, we resolve any doubt as to legislative intent in favor of what is reasonable, as against what is unreasonable . . . . The words of the statute should be construed in light of the policy and spirit of the law, and the interpretation made should avoid absurd results.

Rob moved his residence to the company location nearest to where Plaintiff absconded with his children, long after the divorce and Lee Ann's departure from Texas. Rob's moves were made to be geographically closer to the children and also to cut down on the travel

expenses. It was Lee Ann's unilateral relocation that created the large travel expense. It would be absurd to allow Rob's decreasing of those travel expenses to be used against him on these facts.

C. Whether the District Court may consider Appellant's lengthy history of wrongful behavior in creating transportation costs, and her refusal to utilize virtually free transportation that was available, in determining which of the parties should bear those costs.

As recited in detail above, the transportation offset was originally imposed by the Referee as a means of enforcing his earlier order requiring make-up time for the nine months of visitation that Lee Ann wrongfully denied to Rob. II ROA 171, 236. In the course of a dozen contested hearings, and a full evidentiary, Rob was found to be forthright and in perfect compliance with all court orders, and Lee Ann was found uncooperative, "less credible," and unwilling to abide by the terms established. Lee Ann admitted her adamant refusal to abide by court orders for visitation even if it meant she would be jailed; she did not appear to comprehend the concept of parental alienation. I ROA 145.

The district courts, of course, have plenary power to enforce their judgments. See generally Tandy Computer Leasing v. Terina's Pizza, 105 Nev. 841, 784 P.2d 7 (1989) (explaining power to enforce judgments, due process, and personal jurisdiction). The matter was presented to the court below as making it one for Lee Ann's choice; if she continued to refuse to provide transportation as ordered, the costs associated with that refusal should be deducted form the support to be paid. II ROA 166.

Lee Ann skirted the edge of contempt throughout the proceedings below, and it appears that only the transfer of the case from judge to judge during the transition to the Family Court prevented custody from being changed due to her repeated refusal to permit an ongoing relationship between the children and their father. II ROA 170, 221, 236; III ROA 393.

It would make no sense to have a statutory scheme that permitted the court to allocate the financial and physical burdens of transportation, but not the power to enforce its orders when one of the parties refuses to comply with them. Lee Ann was given every opportunity

imaginable to comply with court directives, over a period of over two years, and she thumbed her nose at the system throughout that time. If anything, the record in this case shows the negative impact on the system, and the other litigant, when the court makes ultimatums and does not act upon them when flouted by a party. Certainly, the court was permitted to consider the history of the parties' behavior in determining how to allocate the transportation burden.

D. Whether the District Court may consider the reality of the financial circumstances of both parties in determining what is equitable in a given case.

As noted above, Lee Ann ignored the court's directive to supply an Affidavit of Financial Condition. III ROA 467. Nevertheless, she admitted that she lives rent free in a house owned by her parents, has no day care expenses, and has had either her entire salary or her $1,100.00 "disability" payments per month, plus the child support.

It is correct that the court may not allocate burdens for child support based solely upon surplus in the primary custodial household. See Lewis v. Hicks, 108 Nev. 1107, 843 P.2d 828 (1992). Of course, that is not what happened here. Nothing in the statutory scheme prevents the court from ascertaining, and taking into consideration, the reality of both parties' circumstances in determining whether a sanction for non-compliance with court orders would have a deleterious effect on the children.

In prior cases, the reality of the parties' incomes and expenses have been considered relevant in determining whether the presumed statutory sum should be paid in child support. See, e.g., Scott v. Scott, 107 Nev. 837, 822 P.2d 654 (1991). The record is devoid of any evidence that Lee Ann was left at "poverty or near-poverty levels" as hinted, but never directly claimed, in Appellant's Opening Brief. See AOB at 2.

If it had been argued by Lee Ann that the $300.00 deducted for the travel costs that she created, and refused to ameliorate, would have injured these children, the court below would have had only the choices of not enforcing its own orders, or changing custody. Lee Ann's great

financial surplus, established before the Referee,[4] gave the court the further option of simply transferring to Lee Ann the cost of her defiance of the court's orders. If anything, the reaction from the bench was too temperate, as it obviously gave her no reason to begin complying with court directives.

In reality, as Rob's expense receipts (filed by Lee Ann herself) established, the monthly costs for Rob to exercise visitation after Lee Ann refused to provide transportation were $390.23 and $425.09 in two consecutive months.[5] The Referee had ordered Lee Ann to absorb all of these expenses. II ROA 236. Judge Fine limited Rob's credit to $300.00, despite his protest that the expense was greater than that sum, based on the court's hope that he could reduce the travel costs and the court's recognition that Lee Ann would never cooperate.[6] III ROA 390-91.

Under the guise of protesting that "the trial [sic] judge essentially invented her own formula for calculating the child support award," Lee Ann attempts to do exactly that. Lee Ann argues that the court must ignore the presumptive ceiling set out in NRS 125B.070 until after granting any offsets, credits, or modifications that the court finds are appropriate under NRS 125B.080. AOB at 3-6. Without citation to any authority of any kind, Lee Ann flatly asserts that:

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[4] There is a presumption that court properly exercised discretion in deciding child's best interest, which cannot be overcome in the absence of substantial evidence in the record. Primm v. Lopes, 109 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 77, May 27, 1993).

[5] Lee Ann irresponsibly asserts that: "There were absolutely no facts presented to factually justify the court believing the transportation costs for visitation was [sic] $300 per month." AOB at 8. The assertion is obviously false on the face of the record. Lee Ann herself complained that the transportation costs exceeded the full amount of child support while Rob was living in Texas, which is why the Texas court found no child support arrearages for a substantial period of time. I ROA 55; III ROA 419. The actual costs for visitation had been explored at great length before the Referee, when the child support sum was confirmed in Nevada, and the court had before it the receipts for two months incurred just prior to the hearing. II ROA 266-272. The court indicated personal familiarity with flight costs and expenses. III ROA 371, 391-92. It is hard to imagine what other "facts presented" could have "justified" the court's determination to fix the transportation offset at $300.00.

[6] It should be noted that it was only at the hearing that Lee Ann revealed that she had returned to active flight status, and still had no intention of honoring the previous court order to provide transportation for visitation. III ROA 372-374.

> what should have occurred was that . . . the court should have applied a 25 percent formula . . . . Thereafter, the court could consider factors to reduce the dollar amount of the 25 percent [sic]. After providing that deduction, if the total amount was still over $500 per month per child, the court could still further reduce the support award to $500 per child.

AOB at 6.

The new formula proposed by Lee Ann is not contained in the Nevada child support statutes. That approach was not even suggested in the comprehensive, three-volume report by the State Bar of Nevada on Nevada's child support statutes. See Child Support Statute Review Committee Report to Nevada Legislature (Aug. 1, 1992, State Bar of Nevada, Family Law Section). Nor is the new formula suggested by Lee Ann an apparent feature of any of the other child support statutory schemes reviewed by that committee. Id. at vol. III, Appendix I (Factor-by-factor analysis of 50 states guidelines).

In other words, Lee Ann has made up an approach that favors her, but has supplied no authority indicating it is appropriate, financially or logically, and has no evidence in the record before this court that such a new formula is fitting or necessary for these parties and the children at issue given the totality of expenses incurred for their direct support and the costs of visitation. In fact, the Bar Review Committee's commentary on this Court's decision in Barbagallo v. Barbagallo, 105 Nev. 546, 779 P.2d 532 (1989), stated:

> After going over the details of [Barbagallo], the Committee saw no inherent difficulties with the comparative values given to the factors, wherein the court assigned primacy to the standard of living and circumstances of each parent, their earning capacities and the relative financial means of the parents. The court assigned lesser value to the time spent with each parent.
>
> Nothing in the legislative history supplies any reason to recommend altering this ranking of factors. If the legislature had a different ranking in mind, of course, it would be a simple matter to list the factors in the order desired by the legislature for the courts to consider, and to indicate it was doing so. If there was a specific legislative intent to have them equally weighed, that too could be easily provided.

Child Support Statute Review Committee Report to Nevada Legislature, supra, vol. 1, at 51.

A review of the case Lee Ann relies upon suggests that this Court looked to the $500.00 per month "statutory cap" before looking at whether the factors set out in the lower court's order justified deviation from the formula. See Lewis v. Hicks, supra, 108 Nev. at 1111. Certainly,

nothing in that case or Lee Ann's brief indicates that this approach is improper, if it was followed by the lower court in this case.

Actually, what the district court did was let stand the Referee's child support amount, with a modification that favored Lee Ann by reducing the transportation offset available to Rob. The Referee entered his child support Recommendation only after a protracted evidentiary hearing, at which both parties were permitted to testify at length as to their standard of living and circumstances.[7] III ROA 466-65. It should be noted that there was no timely objection filed to either of the Referee's Recommendations setting child support at $700.00 and discussing the travel offset, and no appeal from the resulting final orders. II ROA 168, 235.

Judge Fine, in reviewing the transportation offset, invented no new formula, but confirmed that the transportation burden imposed upon Lee Ann had not been honored by her, and set the maximum extent of the transportation offset at $300.00 pursuant to the discretion granted to her under the statute. III ROA 391-92.

As a final procedural point, Lee Ann attempts to set up a straw man of former EDCR 5.32(b),[8] which requires the filing of an Affidavit of Financial Condition by a party seeking to oppose a motion for child support. AOB at 8-9.

A casual glance at the record will show that there was no motion to increase or decrease child support pending before the court. Lee Ann filed no such affidavit (at that time, or earlier when directly ordered to do so by the Referee), so to the extent she wants to pretend there was such a motion pending, she must acknowledge that she was in violation of former EDCR 5.32(a). Pursuant to that rule, the lack of an Affidavit of Financial Condition accompanying her imaginary motion "may be construed as an admission that the motion is not meritorious and cause for its denial," and exposed her to attorney's fees or other sanctions. See Perri v. Gubler,

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[7] The evidentiary hearing before the Referee was not transcribed, and no party requested an evidentiary hearing before the District Court Judge. This Court has recently and repeatedly held that where there appears to be substantial evidence in the file, factual determinations will not be set aside, since without transcripts, this Court is without evidence to assess a claim of error. See Primm v. Lopes, 109 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 77, May 27, 1993); Toigo v. Toigo, 109 Nev. ___ , ___ P.2d ___ (Adv. Opn. No. 52, March 24, 1993).

[8] Since the hearings at issue, new local rules have been established by this Court.

105 Nev. 687, 782 P.2d 1312 (1989) (support change after judgment must be based on changed circumstances; where custodial parent filed false affidavit of financial conditions, court had no valid basis to modify order).

The court below properly took notice of the entire record, and the realities of the parties and their behavior in exercising the discretion granted to her by statute.

E. Whether Appellant, having chosen to make a claim under the Nevada child support statute, must abide by the terms of that statute.

Lee Ann has demonstrated that, characteristically, she wishes to perceive only that which supports her position. She wants this Court to make up new mandatory rules for enforcing some parts of the child support statutes (the first half of NRS 125B.070(b)), but ignore the rest of it (the second half of that provision, plus all of NRS 125B.080). If she wants to determine child support under the Nevada statutory scheme, then the entirety of that statutory scheme applies.

Her position is similar regarding case law. After absconding with the children, defying court orders from two states to permit visitation, filing various false abuse charges in two states, and interfering with Rob's contact with his children in every conceivable way for two years, she actually has the chutzpah[9] to argue that child support should be maximized because of Rob's limited contact with the children. AOB at 9.

The argument is so shockingly outrageous that it is difficult to address it in greater detail. At the least, though, it should be noted that this Court has held that "time spent" is not to be a primary consideration in setting child support. See Barbagallo v. Barbagallo, 105 Nev. 546, 779 P.2d 532 (1989).

Lee Ann wants the Court to strictly construe its case law indicating that deviations from the statutory guideline percentage should be "the exception." AOB at 3. She apparently believes that this Court's other family law decisions, holding that false abuse charges and

[9] The classic definition of "chutzpah" is that quality enshrined in a person, who having killed his mother and father, throws himself on the mercy of the court because he is an orphan. Williams v. Georgia, 190 S.E.2d 785 (1972) (quoting Leo Rosten, The Joys of Yiddish).

visitation interference are not to be tolerated and could justify a change in custody, do not apply to her. See Schwartz v. Schwartz, 107 Nev. 378, 812 P.2d 1268 (1991) (false abuse allegations "extremely harmful to children and traumatic to those who are falsely accused, and cannot be tolerated"). Lee Ann, having chosen to utilize the courts of this state, has subjected herself to the entirety of our family laws.

CONCLUSION

This case presents a primary custodian who has filed false abuse charges, refused to comply with repeated court orders, and who has promised to continue doing so in the future. The Referee, the prior district court judges, and the current family court judge have been far more patient and tolerant of Lee Ann's petulance than is warranted, and have restricted the penalties against her to some portion of the economic harm caused by her refusal to follow court orders.

Lee Ann has provided absolutely nothing in this record, or in her brief, to establish that the new formula approach she is urging on this Court is mandatory by law, logic, or the facts of this case. The record is entirely devoid of any evidence of any harm to the children at issue by the lower court's discretionary allowance of a travel offset as allowed by statute. That offset was clearly warranted, by Lee Ann's absconding from the jurisdiction that set child support, by her refusal to eliminate the costs of visitation that she created, and by her refusal to comply with court orders.

Lee Ann certainly has not demonstrated any legal or factual error by the court below, nevertheless any abuse of the court's discretion. If this Court has any inclination to re-interpret the child support statutes in the manner demanded by Lee Ann, it is respectfully suggested that it should do so in a case setting forth some plausible legal, factual, and equitable grounds why that interpretation is appropriate.

There are no such grounds in this case, which is in reality merely a battle chosen by Lee Ann in her seemingly endless war of attrition intended to make Rob abandon his efforts to be

a father to his children. That she can never do, and this Court should do nothing to further her ignominious intention.

It is respectfully submitted that the Order of the District Court should be affirmed, with costs to Respondent.

Respectfully submitted,
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By:_____
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