IN THE SUPREME COURT OF THE STATE OF NEVADA

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CINDY LEE, fka CINDY HERMANSON,	)	
Appellant,	)	S.C. CASE 25113
	)	D.C. CASE 90-134515-D
vs.	)	
DAVID HERMANSON,	)	
Respondent.	)	

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE ISSUES

I. WHETHER THE STANDARD OF REVIEW IS THAT OF SUBSTANTIAL EVIDENCE AND LEGAL ERROR

II. WHETHER THE DISTRICT COURT ERRED IN ELECTING TO APPLY A PROVISION OF THE CALIFORNIA EVIDENCE CODE TO THE ISSUE OF PATERNITY IN THIS NEVADA DIVORCE

A. Whether, Under Nevada Law, the District Court's Ruling Was Error

B. Whether, Presuming, Arguendo, that the California Evidence Code Provisions for Determining Paternity Were Applicable, Those Provisions Compelled the Result Reached by the District Court

III. WHETHER THE DISTRICT COURT ERRED IN DETERMINING THAT THE FACTS OF THE CASE COULD SUPPORT ESTOPPEL AGAINST CINDY

IV. WHETHER NEVADA RECOGNIZES ANY LAW OF "EQUITABLE ADOPTION" OR OTHER SUCH THEORY THAT CAN BE USED TO THWART THE WISHES OF A NATURAL PARENT

STATEMENT OF THE CASE

Appeal from Decree of Divorce incorporating interlocutory Order that applied California law to conclusively name the husband to be a child's father, and finding mother estopped from denying husband's paternity, all despite admitted blood tests and parties' stipulation that husband has no biological relation to child; Hon. Gloria Sanchez, Eighth Judicial District Court, Clark County, Nevada.

Plaintiff Cindy Lee, then known as Cindy Hermanson ("Cindy") filed for divorce on December 13, 1990. The parties had been previously married and divorced, and a number of divorce actions were filed but not completed during the second marriage. Cindy's Complaint asserted that there were no minor children the issue of the marriage, although the name of Defendant David Ray Hermanson ("David") appeared on the birth certificate of Cindy's son James. I ROA 1. She also asserted that David knew, and always had known, that he was biologically unrelated to the child. David denied Cindy's assertions. I ROA 15.

In January, 1991, David filed a motion requesting that the child be named "the defacto child" of David "even if he is not the biological son of [David]." I ROA 6. Cindy opposed the motion and requested blood tests as to paternity. I ROA 20; VII ROA 1210. The motion was heard by then-Domestic Relations Referee Terrance Marren. The Referee's Recommendation, in June, 1991, stated that "this case is similar to Frye v. Frye (Equitable Adoption), based on the conduct of the parties," and that David "is found to be the real father of the child and should be declared the real father." I ROA 106. The Referee also established a visitation schedule and ordered that David pay child support.

Cindy and David each filed Objections to the Referee's Recommendation -- she as to the "real father" recommendation, and he as to the child support amount. I ROA 87, 99. David

subsequently withdrew his Objection, and argued that the court should not order blood tests to determine the fact of paternity as Cindy had requested. I ROA 111.

After further filings, and on the district court's regular law and motion calendar, Judge J. Charles Thompson sustained Cindy's Objection and referred the parties to a paternity hearing master with direction to order blood tests. II ROA 217-18. The Paternity Master amended the pleadings to name the child as a party to the complaint, and ordered DNA testing. VII ROA 1253, 1280. The blood tests conclusively proved that David was not the father of James, and the parties so stipulated. VII ROA 1281, 1298-1299; II ROA 263. After still further filings, the matter returned to Judge Thompson's regular law and motion calendar in November, 1991. After hearing argument, and requesting additional written arguments, Judge Thompson issued a decision on February 3, 1992 (amended February 4, 1992).[1]

The decision made significant factual findings as to the parties' actions and intentions, and found that Cindy had failed to rebut a presumption in the California Evidence Code that James was the issue of her marriage to David. III ROA 412-13. The court added that Cindy was barred by estoppel from denying that David had a right to custody of James as his father. III ROA 416. The court therefore overruled Cindy's objection to the Referee's Report.[2]

Cindy hired new counsel and attempted to appeal the Order of February 4, 1992. III ROA 499 (Appellant's Opening Brief). The appeal was fully briefed. III ROA 532, 563. This

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[1] The "amended decision" filed February 4, 1992, appears to be identical but for correction of a typographical error on page 4. For clarity, all following references will be to the Amended Decision.

[2] While not entirely clear, the Referee's Report affirmed appears to be the same June, 1991, Referee's Report to which the court had earlier entered an order sustaining Cindy's Objection. See I ROA 105; II ROA 217.

Court noted jurisdictional defects, however, in its order of August 4, 1992. III ROA 608. The Court dismissed the appeal on September 14, 1992. V ROA 824.

During the pendency of the failed attempt at appeal, Cindy had requested re-hearing of the decision at the district court level; the parties engaged in motion practice of some intensity as to procedural and substantive matters relating to David's visitation with James. III ROA 449, 465, 486, 595; IV ROA 612; V ROA 813, 828, 856, 866, 924, 945. Various judicial officers hearing matters after Judge Thompson's Order of February 4, 1992, found that Cindy's request for sterility testing of David was "irrelevant" until this Court ruled on the appellate issues, and that in the interim, David would be treated as James' father, and visitation would be enforced. III ROA 495-97, V ROA 976-78; VI ROA 1039-1040.

The case went to trial April 1, 1993, on all matters other than paternity, and a Decree of Divorce was entered on August 25, 1993. VI ROA 1148. Notice of Entry was filed September 22, 1993. VI ROA 1191. The Notice of Appeal was filed the next day. VII ROA 1363. Cindy prepared a Statement of the Evidence and Proceedings pursuant to NRAP 10(c). VII ROA 1200-1361. It was served on David's counsel. VII ROA 1362. No response was filed, and Cindy moved for entry of her statement of the evidence and proceedings. VII ROA 192. The motion was granted. VII ROA 1425.

This Court ultimately ordered both parties to obtain counsel on appeal. Both parties have complied. This appeal followed.

STATEMENT OF FACTS

As a preliminary matter, it should be noted that there is extreme conflict in this record as to what "facts" are true. Accordingly, it seems best to set out the facts to which both parties and all fact-finders below have agreed, and separately identify areas of conflict in the record. As set out in the argument that follows, the record is problematic because Judge Thompson entered "findings of fact" on a law and motion calendar, without an evidentiary hearing or a record of any factual findings before the Referee, and the judges who resolved other aspects of the case considered his determinations to be unassailable until this Court completed its review. In other words, this appeal is the first proceeding in which all of the facts disclosed by the record were presented to the same decision-maker.

The parties apparently met in 1977 and dated occasionally. II ROA 352. Cindy alleged that from the beginning of their relationship, David beat her, starting in May, 1977. II ROA 352. When he beat her again in July, 1977, she called for help and John Hennessy moved her back with George Hennessy. II ROA 363, 347.

Cindy asserted that she ran into David in December, 1977, after not seeing him for some time and informed him that she was pregnant by George Hennessy. II ROA 363-64. It is undisputed that the child Shannon Hennessy was born to Cindy on June 9, 1978. IV ROA 769. Cindy primarily lived with George's family during her pregnancy with Shannon, and for some nine months thereafter. II ROA 347-48. Cindy and David moved in together in March, 1979, when Shannon was almost a year old. They married April 10, 1979. VI ROA 1061-1062.

Cindy claimed that she told David of the facts relating to Shannon's paternity by George before she and David moved in together, and that she never told him anything different. II ROA

354. David testified before Referee Marren that the parties' first marriage was based on Cindy's mis-representation to him that he was the father of Shannon, who was then nearly a year old. VII ROA 1218. On cross-examination, he admitted that Cindy informed him that George, and not he, was Shannon's father, but added "but she also told me that I could be the father." VII ROA 1223.

All agree that Cindy and David were married for the first time on April 10, 1979, in Las Vegas, but separated a month later, in May, 1979. VI ROA 1061-62; IV ROA 659. Cindy fled back to George a month after her marriage to David, after David continued to be violent toward her. II ROA 355. She testified that George seized Shannon and began proceedings to take legal custody of the child when she later spoke of returning to David. II ROA 355. This account was confirmed by John Hennessy. II ROA 348. George Hennessy was specifically established as Shannon's father, and David was specifically excluded, by HLA blood tests performed in October, 1979. IV ROA 641-42.

Cindy did return to David, but again left him in November, 1979. She claimed that this break-up followed David pushing her down a flight of stairs, injuring her. II ROA 356-57; IV ROA 624. David claimed that Cindy was drunk and fell down the stairs. I ROA 43. In any event, the parties separated for about a year starting November, 1979, until late 1980. Cindy and David were formally divorced in California on February 6, 1980. IV ROA 648.

It is undisputed that after the blood tests, Cindy and George entered into a stipulation whereby George had primary custody of Shannon, with visitation to Cindy, as of December, 1979. IV ROA 643-46. David testified that Cindy lost custody of Shannon to George because she was an unfit mother and alcoholic. IV ROA 1218. On cross-examination, however, David

conceded that George obtained custody in light of the unstable relationship Cindy had with David, but he insisted that she was an unfit mother. IV ROA 1223.

From 1980 through mid-1982, Cindy was working and visiting Shannon, who lived primarily with George. II ROA 357-58. Cindy and David had at least intermittent contact. It is also obvious that Cindy maintained another relationship following the parties' first divorce. She became pregnant about January, 1982, and has identified the natural father throughout these proceedings as Donald Pellington. II ROA 285; VII ROA 1229, 1236.

The parties are in agreement that they married for the second time, again in Las Vegas, on June 25, 1982, when Cindy was six months pregnant. I ROA 1, 14. That is the marriage terminated by the divorce at issue in this appeal. The divorce trial was April 1, 1993, with formal entry of the decree on August 25, 1993. VI ROA 1148. The parties are in some disagreement as to their statements and understandings at the time of their second marriage.

Cindy stated that after she knew she was pregnant, she informed David, who "refused to accept that the baby I was carrying was not his." II ROA 359; IV ROA 633. Cindy claimed that the child was to be hers and hers alone, and that David was not to be listed on the birth certificate or named as the father, and that this was a pre-condition to their second marriage. VI ROA 1063; VII ROA 1237; II ROA 361. She claimed that David was uninvolved in the preparations of the child's birth, and that the second marriage was intended to allow her access to military insurance and prenatal care. II ROA 361. Cindy recited that she had told her family, friends, and neighbors that David was not the father of her unborn child. II ROA 365; VII ROA 1230. She testified that David would beat her and pin her to the ground until she said that the baby was "his baby," but that she immediately recanted whenever she got free. II ROA 360; VII ROA 1238.

Cindy also testified that David himself complained loudly that she was pregnant with the baby of another man, and that from February, 1982, through June 25, 1982, David shouted in the hearing of the neighbors that Cindy was pregnant with another man's baby. On several occasions neighbors or Cindy would summon police assistance. II ROA 360. On cross-examination, David conceded that the neighbors probably did hear him shouting that Cindy had "cheated" on him, and that the baby was not his. VII ROA 1225.

David, by contrast, claimed that Cindy had misled him -- again -- into believing that she was pregnant with his child. I ROA 41. On cross-examination, however, he admitted that Cindy never told him that he was the father of her unborn child. VII ROA 1223. He then vacillated, and claimed that Cindy "sometimes . . . would tell me that I wasn't the father, and other times, she would tell me that I was." He denied that she said so only when he physically forced her to say so. VII ROA 1224. He claimed that on remarriage "it was understood that I would be the child's father," although "we didn't talk much about it." VII ROA 1243.

On the basis of counsel's recitation of what had been testified to before the Referee, however, Judge Thompson found that: "At the time of the second marriage in June of 1982, Cindy told David that she was pregnant with his child." III ROA 412.

The third party documentation in the file, which was largely unavailable to Judge Thompson when he heard the objection to Referee's Report, shows that Cindy has always maintained that David is not James' father, and that David knew that he was not James' father. In 1983, Cindy sought shelter at a battered women's shelter. The intake notes reflect "Husband is not the baby's biological father." IV ROA 787. In 1984, she sought a Temporary Restraining Order for domestic violence in California; again, the paperwork notes "David Hermanson . . . is James legal Father ONLY - not natural Father, and tells James this all the

time." When seeking a legal protection order in 1985, Cindy executed paperwork stating "David Hermanson, the Defendant is legal Father only of James Hermanson, and has known this before he married me in 6/82." IV ROA 768. She told the Hennessy family that David was not the father, during the pregnancy and after the child's birth. II ROA 349.

On cross-examination, David acknowledged that he knew that Cindy "was telling everyone" that he was not James' father. VII ROA 1243. David acknowledged that it was common knowledge that he was not James' father, and complained that Cindy "told everyone that I wasn't the father, and tried to keep us apart." VII ROA 1225. Cindy alleged that David frequently told the child that David was not his father, and that she also so informed the child. I ROA 23; VII ROA 1231. David denied telling the child that he was not the child's father, but claimed that Cindy frequently told James that David was not his father. I ROA 42; VII ROA 1225. In any event, they appear to agree that the child was consistently informed that David was not his father. The only contrary statement in the record was David's original, vague assertion that "I . . . have also held myself out and been held out as the parent of this child." I ROA 10.

On the basis of counsel's presentations on law and motion as to what had been testified to before the Referee, however, the district court's decision states that David "contends that Cindy has always represented to him and the public that David is the father of James. . . . Immediately following their second marriage, Cindy began a steady stream of affirmations that she was pregnant with David's child. . . . the parties have continuously held themselves to the public as the parents of James." III ROA 415.

Cindy consistently maintained that she had always expressly forbidden David to be named father of the child, and that David filled out the birth certificate without her knowledge

and against her wishes. I ROA 23, 81; II ROA 361-62; VII ROA 1230, 1238. Cindy was under anaesthetic during the birth, which was an emergency caesarean due to the baby's position. II ROA 334. Judge Thompson was informed at argument that only David had anything to do with the form of the birth certificate. II ROA 214.

David bolstered his claim that the child was "always" represented to be his by alleging that: "My name was even put on the birth certificate." I ROA 41. On cross-examination, it was established that David alone filled out the birth certificate, and David admitted that Cindy had never given permission for him to be so named, and that he filled it out alone and without Cindy's consent while she was recovering from surgery. VII ROA 1219, 1224. David's position was that the marriage gave him the "the right as her husband" to name himself father of the child. VII ROA 1224.

The face of the birth certificate shows that all information was provided by David. I ROA 28. There is no evidence in the record stating anything other than that David unilaterally determined the statements on the birth certificate.

Nevertheless, upon argument of counsel, Judge Thompson's recited in his decision that: "The parties listed David as the father of James on the birth certificate and held themselves out to the public as the parents of James." III ROA 412. The decision further recites that "the pattern [of Cindy's affirmations that James was David's child] developed further when Cindy named David as the father of James and placed his name on the birth certificate." III ROA 415.

The parties agree that things did not go well after James' birth. Cindy stated that for the three years following James' birth (1982-1985), she moved in and out of David's residence, seeking temporary housing in battered women's shelters, and staying with various friends and relatives, sometimes establishing her own apartment, and sometimes moving to other cities.

II ROA 362-63. She claimed that David would track her down, and cajole and threaten her with both violence and a court fight, to compel her return. II ROA 363.

David confirmed that the parties' relationship was intermittent, and confirmed that Cindy was gone on multiple occasions for periods of days to months. VII ROA 1226. He protested the suggestion that the parties were never together for more than three months at a time, calling that an exaggeration. VII ROA 1244. The records ultimately filed make it clear that Cindy sought protective orders and direct assistance in battered women's shelters, on multiple occasions between 1982 and 1985. IV ROA 762-779. The parties agree that for six months during this period, David was on remote tour with the Marines, and the parties had no contact. II ROA 363; VII ROA 1226.

From all of these confused relocations, Cindy estimated that the parties actually cohabited for only about 1½ years during both marriages combined, and only about nine months after the birth of James. David testified that he actually cohabited with James for about two years total during the child's lifetime. VII ROA 1226, 1227. Cindy's lawyer added up the time per the parties' testimony and came up with nine months of cohabitation. VII ROA 1226-27. David's lawyer added up the same time and came up with four years. II ROA 272.

Judge Thompson, however, simply stated: "The reconciliation [following the parties' first divorce] blossomed into a second marriage in 1982, where it thrived, more or less, until the parties separated again in 1985." II ROA 412. The decision adds that the parties "continued to live as husband and wife until 1985." IV ROA 413.

In February, 1985, George Hennessy died and Shannon came to live with Cindy. II ROA 347, 350; IV ROA 768. In March, 1985, following an incident of domestic violence, Cindy filed for a protective order, claiming that James was her child only. IV ROA 768-779.

She took the children to live with John Hennessy and his wife, and other members of the Hennessy family. II ROA 350. David responded by filing for divorce in April, 1985, claiming James as a "child of the marriage" and demanding sole physical custody for himself. IV ROA 780-81. Apparently, David gave up on this action and never served Cindy with it, although his threat to pursue custody was sufficient to cause Cindy to return to him. IV ROA 350; IV ROA 634.

In the following couple of months of mid-1985, David left Cindy and the boys, and moved to Las Vegas; Cindy and the children followed a couple of months later. VI ROA 1063. Things were no better in Las Vegas, and again Cindy was in and out of shelters between July and October, 1985. VI ROA 1063. The parties are in agreement that Cindy took Shannon and James in October, 1985, and relocated, first to New Jersey, and then to Des Moines, Iowa. VI ROA 1063; VII ROA 1220-21. They also agree that there was no contact between them from October, 1985, through January, 1988, although David made attempts to track down Cindy and James. VII ROA 1233; I ROA 45, 138-202.

David filed for divorce in Las Vegas in February, 1986, but he served Cindy by publication and did not send a copy to her last known mailing address (her mother's address), to which he sent the personal correspondence that he intended her to receive. VIII ROA 1449-1463; IV ROA 627-28. David's Complaint listed James as a "child of the marriage." VIII ROA 1449. Default was entered, but judgment was never taken. VIII ROA 1458. In 1987, David hired new counsel, brought a motion for custody of James, and obtained an order to that effect. VIII ROA 1464-1475. None of this was ever served on Cindy, and the action was consolidated into this case in 1993. II ROA 374-75; VIII ROA 1481-83.

From 1985 to 1988, Cindy raised both children alone, while attending nursing school. She applied for welfare benefits for assistance in California, Nevada, New Jersey, and Iowa. In each instance she attempted to name Mr. Pellington as the father, but each of the agencies required Cindy to list David on the application form because his name appeared on the birth certificate. VII ROA 1237, 1231; IV ROA 676-682; II ROA 314, 207, 374. The only State that ever sought collection from David was Nevada, which sought and finally collected $125.50. IV ROA 678, 626; II ROA 345.

Cindy had contacted David in 1988 to determine whether he had ever filed for divorce, and she testified that he falsely claimed to have not filed. VII ROA 1233. Cindy testified that she wanted to divorce him, but that at threat of a custody suit, she permitted David to visit her and the children in Iowa from 1988 through 1990. VII ROA 1233. Still, Cindy put herself on the legal aid waiting list for a divorce in Iowa, and ultimately filed in December, 1989, when his harassment increased. II ROA 339-343; 367. Cindy's divorce Complaint recited that there were no children of the marriage, and although one child was born during the marriage, David was not the father. II ROA 340. David convinced her to drop the divorce suit. II ROA 344, 367; VII ROA 1241.

David claimed that he had supported Cindy and James while they were in Iowa. I ROA 42-43. Cindy testified that David never provided any support, and only assisted with the cost of the phone calls between Nevada and Iowa in 1989 when she threatened to stop making the calls unless he agreed to pay for them. II ROA 366-67. David's cover letters indicate that all the $5.00 and $10.00 sums he sent were intended to cover his phone bills. IV ROA 683-726; VII ROA 1233. The court below found only that "reconciliation was discussed and money changed hands." III ROA 413.

David also came to Iowa to visit. He claimed that he visited seven times from January, 1988, through August, 1990. I ROA 43; VII ROA 1222. Cindy agreed that David visited during those years, but claimed it was only five times. II ROA 366. Those visits did not go smoothly. Cindy testified that during David's visit in July, 1989, he became violent. II ROA 366. Cindy further testified that during his visit in March, 1990, David assaulted her and attempted to smother her in view of the children. David denied that he attacked Cindy, and claimed that he was "only trying to calm her down." VII ROA 1244. The police report, however, noted bruises on her neck, described the incident as attempted choking with hands, and that David had hit Cindy in the eye and tried to smother her, requiring his removal from the premises by the police. II ROA 317.

In May, 1990, Cindy completed nursing school, and she and both children stopped in Las Vegas en route to Cindy's family reunion in California in August, 1990. The parties discussed reconciliation. II ROA 368, 351.

The parties agree that they decided to attempt reconciliation, but they give differing accounts of the details. Cindy returned to Las Vegas in October, 1990; the reconciliation attempt lasted only 30 days. Essentially, David claimed that he paid to have Cindy and the boys return, but Cindy insisted on coming out too early, made him sleep on the couch, and finally made him move out. VII ROA 1222-23. Cindy claimed that David changed his mind after arrangements were made, stuck her with all the bills, demanded that she support him, and again assaulted her a few times, and finally left when she told him she would no longer put up with being hit. II ROA 368-370; VII ROA 1234. Cindy was able to supply documentation of her version of these events. IV ROA 799-811. Judge Thompson's decision recites only that

"the third reconciliation did not work and Cindy filed for divorce in December of 1990." III ROA 413.

In addition to the testimony of Cindy, and of John Hennessy, as to David's beatings of Cindy, there were the women's shelter records referenced above, and police reports from several jurisdictions. II ROA 315-333. The last two physical assaults completely documented in the record were in Iowa in March, 1990, and in Las Vegas in January, 1991. II ROA 315-19. Another incident, in December, 1990, involved David drunkenly attempting entry to Cindy's apartment at 2:00 a.m. It took two officers and the use of cap-stun to subdue David, who attempted to cause a crash of the patrol car en route to booking. II ROA 315-16, 320.

In court, David denied several times that he had ever been violent toward Cindy, insisting that he had merely defended himself from her over the years because she drank too much and started fights with him. I ROA 43; VII ROA 1219, 1242. Referee Marren referred both parties to Temporary Assistance for Domestic Crisis, however, and the TADC Progress Report received by the Referee on June 4, 1991 states:

> Mr. Hermanson reports that he has been violent in the relationship, and has pushed, slapped and restrained Ms. Hermanson over the course of their 15 year relationship.

VII ROA 1294-95; I ROA 106-107. David also admitted to "altercations" with Cindy and his arrest in December, 1990, and January, 1991. VII ROA 1294. Cindy's March 31, 1993, report from TADC revealed even later incidents, with David pounding on her door and requiring intervention of the police, and Cindy's application for a Temporary Protective Order in Las Vegas. IV ROA 790-91. She was continuing in counselling for coping with battered women's syndrome. VII ROA 1358-1360.

The court below made no finding regarding the role of domestic violence in this case, other than the oblique statements in the decision that the parties' story was "tumultuous" and their relationship "dynamic," broken by "a period of marital discord." II ROA 412.

It took over two years from the entry of Judge Thompson's decision for the divorce trial to be completed, and a final judgment from which an appeal could be brought to be entered below. This appeal followed.

ARGUMENT

I. THE STANDARD OF REVIEW IS THAT OF SUBSTANTIAL EVIDENCE AND LEGAL ERROR

This case is an appeal from a Decree of Divorce. That decree incorporates an order entered on objection from a Referee's Report, which is based on application of a statute, and on the alternate ground of estoppel.

This Court has always maintained that the question of whether and how statutes apply is one of law for this Court to address de novo on appeal. See, e.g., Trubenbach v. Amstadter, 109 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 41, Mar. 24, 1993) (construing Nevada statute of limitations and Nevada Uniform Enforcement of Foreign Judgements Act).

Further, this Court has held that whether a party is entitled to prevail by reason of the doctrine of estoppel is a question of law to be determined by this court on its review of the record. See Southern Nev. Mem. Hosp. v. State, 101 Nev. 387, 705 P.2d 139 (1985).

Accordingly, the question on appeal is whether the court below had substantial evidence for its factual findings, and whether the court committed legal error in applying those findings. This is not a case of a discretionary determination of custody, which requires deference to the discretion of the trier of fact. See, e.g., Primm v. Lopes, 109 Nev. 502, 853 P.2d 103 (1993). Here, the court below entering the decision at issue did not conduct an evidentiary hearing, but relied on the written submissions of counsel in determining an objection to a Referee's Report on the court's law and motion calendar.

What makes this case unusual is that the factual record is better in this Court than it was below, because the Court now has a written statement of evidence submitted before the Referee, and many exhibits, that were not available at the time of the hearing on the objection.

The only relevant matters on appeal are those in the record. See, e.g., State, Emp. Sec. Dep't v. Weber, 100 Nev. 121, 123-24, 676 P.2d 1318 (1984). Normally, those facts are limited to the ones available to the decision-maker when the appealed matter was heard.

As this Court noted in its Order Dismissing Appeal of September 14, 1992, however, the district court's Amended Decision of February 4, 1992, was an interlocutory order. V ROA 824-826. While further evidence of relevance was developed, the judges hearing the case for the past two and a half years have considered the issues addressed in Judge Thompson's ruling "not at issue" pending this appeal.[3] V ROA 977.

II. THE DISTRICT COURT ERRED IN ELECTING TO APPLY A PROVISION OF THE CALIFORNIA EVIDENCE CODE TO THE ISSUE OF PATERNITY IN THIS NEVADA DIVORCE

Judge Thompson's decision does not reveal why the court below elected to apply the terms of a California statute. David's moving papers prior to that decision, state the argument for application of California law as follows:

> Additionally, because the child was born in California, California Evidence Code Section 621 (d) states "that the notice of motion for blood tests under Subdivision (b) may be raised by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the Court acknowledging paternity of the child."
>
> Because there was no need for the Defendant to file an Affidavit acknowledging paternity of the child as his name was on the birth certificate the Plaintiff virtually had two years from the time of the child's birth in order to request blood tests.

I ROA 116.

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[3] This is one of the class of cases addressed by this Court's recent opinion in Sims v. Sims, 109 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 170, Dec. 22, 1993). The rights of the parties, and the family relations of the minor child at issue, have been in legal limbo since the Referee's Recommendation in June, 1991. Appellant respectfully requests that this Court make a final determination of the issues if at all possible, rather than remanding for further proceedings below, due to the extraordinary time this matter relating to this minor has been in litigation.

The argument was unclear, but appeared to be that some, but not all, provisions of the California paternity statutes should be applied by our court in this divorce because the child was born in California. The judge, without analysis, apparently accepted this position; this was error.

As a preliminary matter, it should be noted that Nevada has a specific statutory provision stating: "All other presumptions are disputable. The following are of that kind: 15. That a child born in lawful wedlock is legitimate." NRS 47.250. It can not be verified that this provision of Nevada law was ever cited to or considered by the district court in reaching its decision.

Cindy and David are both Nevada residents. I ROA 1, 14. This action was brought under Chapter 125 of the Nevada Revised Statutes. When the issue of paternity was raised, and the Referee recommended applying a prior holding of this Court to effect an "equitable adoption," the district court correctly found that the doctrine was inapplicable and that "the Referee was in error in refusing to honor the statutory request for a blood test." II ROA 218. The district court then correctly referred both parties to the Paternity Master for blood tests "pursuant to the appropriate statute." II ROA 218.

The "appropriate statute" referred to by the trial court was not the California Evidence Code; it is NRS 126.091(1), which provides that a parentage action "may be joined" with a divorce. In fact, the Paternity Master's first action was to amend the pleadings to name the child as a party to the complaint per the Nevada paternity statutes. VII ROA 1253, 1280.

Clearly, the trial judge acted under the authority of Nevada law when he ordered the blood tests. The question is why California law re-surfaced after those tests, especially since

the California provision in question has to do with whether blood tests may be ordered in the first place, and Nevada has expressed a policy that the paternity presumption is disputable.

A clue may be found in the appellate briefs filed by prior counsel. They spent a considerable length of time examining whether the law of "the forum" or of the "the foreign jurisdiction" should control in a conflict of laws situation, and whether the California Evidence Code provision in question was "procedural" or "substantive." III ROA 514-515; 548-551.

In this case, however, there is no conflict. Neither party is, or claims to be, a resident of California. The cases cited show, on analysis, why the issue is a false one. In re Estate of Dauenhauer, 535 P.2d 1005 (Mont. 1975) involved the Montana court's attempt to resolve the rights of California claimants as to a decedent who happened to die in Montana. On first blush, the elderly case of Kowalski v. Kowalski, 116 A.2d 6 (N.J. 1955), looks more relevant. III ROA 549-550. The New Jersey court, however, was in the unhappy predicament of a circularity, where the issue was paternity, but the parties' rights to be before the court at all depended on the ultimate issue to be decided, given the existence of a Florida decree of divorce and its implication of paternity. The court resolved the dilemma by recourse to the ancient common law of "domicile of origin."

This court has never indicated that the trial courts of this state should resort to the "domicile of origin" in determining matters of paternity, custody, and visitation in any way, nevertheless in suits between two Nevada residents as to a child who is also a Nevada resident. If this doctrine were to be held applicable in our divorce courts, then rights to a child born to two Nevada residents while they were in Iran would presumably be resolved under the Islamic law in effect there, notwithstanding the residence of all parties in this state.

David's reliance on his claim of where the parties were residents when they married is also of no significance. III ROA 550. It is worth noting in passing that if a paternity action had been filed in California, it would have apparently been dismissed with direction to re-file in Nevada; California Civil Practice Code § 395 states that an action to determine parental relation and support should be brought in the county where the child resides.

Parties to divorces in this state frequently come from two different states. It makes no sense to say that we should look to the law of the state in which the parents were residents on the date of marriage in determining the rights to children in a Nevada divorce. For that matter, the parties in this case were twice married in Nevada, were residents here at the first marriage, and David was a Nevada resident who was located elsewhere only by reason of military assignment after he joined the Marines. See Op. Att'y Gen. No. 78 (Apr. 27, 1972) (absence from Nevada by virtue of military service does not interfere with residency here).

This Court has had little to say in this area, presumably because the answer has seemed clear. In Clark v. Clark, 80 Nev. 52, 389 P.2d 69 (1964), a Defendant wife tried to use her Florida decree of separate maintenance as a bar to the Plaintiff husband's divorce complaint. The Court found that this state would accord full faith and credit to the decrees of sister states, but that no choice of law problem was presented, since:

> we are not to be governed by the Florida law of res judicata or estoppel, or by the effect of those doctrines upon the husband's ability to procure a divorce in that state, had he litigated his case there. It seems to us that we are at liberty to follow Nevada law as to the scope of the doctrines of res judicata and estoppel, particularly in cases dealing with status where important state interests and public policies are involved.

Id., 80 Nev. at 57. See also Aldabe v. Aldabe, 84 Nev. 392, 441 P.2d 691 (1968) (where Nevada has a legitimate interest in the adjudication of the marital status of parties, Nevada

domestic law is to be applied); Portnoy v. Portnoy, 81 Nev. 235, 401 P.2d 249 (1965) (Nevada court, with jurisdiction over both parties, will use the law of their domicile to establish their rights); Choate v. Ransom, 74 Nev. 100, 323 P.2d 700 (1958) (law of the parties' domicile determined the incidents of their rights as husband and wife).

This case clearly involves a question of status, implicating public policy and important state interests in its citizens and residents. Nevada has an extensive statutory scheme for determining the rights of parties to divorce, and in determining the paternity of children. There is simply no valid reason to determine how the case might come out if a single provision of the California Evidence Code was engrafted upon the Nevada law of paternity.[4]

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[4] It also should be noted that, procedurally, the order at issue was on objection from a Referee's Recommendation, and California law was neither pled nor argued before the Referee. Until their recent amendment, Rule 5.84(c) of the Eighth Judicial Court Rules stated that "Argument on the objection must be confined to the matters presented to the referee and the referee's findings and recommendations related thereto . . . ." EDCR 5.84 also permitted the district court to remand a matter for further findings or other purpose.

The California Evidence Code argument only arose in David's Opposition to Cindy's Objection to Referee's Report. I ROA 116. While the parties skirted its applicability thereafter, the issue of using foreign law to determine presumptions was not squarely addressed, and as noted above, all subsequent judges in the case simply deferred to Judge Thompson's ruling as final until this appeal could be heard.

It thus appears that the entire issue of the application of California law was outside the scope of the objection and should not have been considered by the district court on objection.

Further, since the district court rejected the Referee's legal theory but made a ruling that limited Cindy's parental rights, she was entitled to an evidentiary hearing before the district court to disprove the evidence being considered. See Moser v. Moser, 108 Nev. 572, 836 P.2d 63 (1992).

A. Under Nevada Law, the District Court's Ruling Was Error

In Libro v. Walls, 103 Nev. 540, 746 P.2d 632 (1987), this Court addressed a former husband's post-divorce request to be relieved of a support obligation for a child born during his marriage to his former wife. An arrearage in child support had existed because the husband did not obtain blood tests establishing his non-paternity until four years after the child's birth, and a year after the divorce.

The Court held that the question of the husband's liability to pay child support (by virtue of paternity of the child) was not litigated because he did not suspect the child was not his, and that the wife committed extrinsic fraud in not telling the husband that he might not be the father of the child. In closing, the Court noted that the wife's omission "prevented Joseph from having a fair opportunity to litigate paternity in the divorce proceedings." Id., 103 Nev. at 543. It is also clear that if paternity is ever put in issue at the time of divorce, even impliedly, the matter becomes res judicata preventing any later challenge as between the parties. See Harris v. Harris, 95 Nev. 214, 591 P.2d 1147 (1979); accord, DeVaux v. DeVaux, ___ N.W.2d ___, 245 Neb. 611 (Neb., Apr. 15, 1994) (where mother knew she was having affair at conception, her use of reasonable diligence would have led her to litigate paternity upon divorce; suit to determine paternity of third party years after the divorce barred); Michelle W. v. Ronald W., 703 P.2d 88 (Cal. 1985) (post-divorce attack on former husband's paternity disallowed).

It has thus been established that under Nevada law, paternity is an appropriate issue at the time of divorce. That is the reason for NRS 126.091(1), permitting joinder. The statutory scheme specifically permits the natural mother of a child to litigate the question of paternity. NRS 126.071(1). The statutes further provide that: "An action to declare the . . .

nonexistence of the father and child relationship is not barred until 3 years after the child reaches the age of majority."[5]

The Nevada statutes do give a presumption of paternity in several fact situations. Applicable here is the presumption that attaches for a child that is born during the parties' marriage. NRS 126.051(1)(a). The same statute states that the presumption "may be rebutted in an appropriate action only by clear and convincing evidence." NRS 126.051(3). Here, conclusive DNA testing and the stipulation of the parties proved the non-existence of a father and child relationship. VII ROA 1298.

It is respectfully submitted that constitutional equal protection requires that the natural mother, no less than the presumed father, has the right to litigate the question of paternity. Otherwise, whenever the natural mother is involved in any relationship that gives rise to a presumption of paternity under NRS 126.051, she (but not he) would give up the right to seek a factual determination of paternity. Such a reading would give unilateral choice to the presumed father to determine whether or not a father and child relationship exists, in contravention to our entire statutory scheme.

The Nevada statutory framework makes perfectly logical sense. Even if the parties had been happily married since 1982, there would have been no reason for Cindy to bring a paternity action. There are many step-parents in this state willingly providing for the children of their spouses. It would be against public policy to disrupt such families by requiring them

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[5] Under Nevada law, if the natural father wished to bring a paternity action today, he could do so. NRS 126.071(1). It would certainly be against this Court's declared public policy to effectively terminate any of his potential rights without notice. See Price v. Dunn, 106 Nev. 100, 787 P.2d 785 (1990) (setting out notice requirement for termination of parental rights).

to litigate matters of paternity at the beginning of the marriage, at pain of the natural parent's loss of the right to determine the fact of paternity.

In this Nevada divorce between Nevada residents, in which both parties have requested relief from the Nevada courts as to the status of a minor living in Nevada, it is respectfully submitted that the statutes of Nevada dealing with paternity should be found to apply. Under the provisions of those statutes, on the basis of the evidence in the record, this Court should declare the nonexistence of a father and child relationship between David and James.

B. Presuming, Arguendo, that the California Evidence Code Provisions for Determining Paternity Were Applicable, Those Provisions did not Compel the Result Reached by the District Court

It is submitted that the district court erred even if, for any reason, this Court sees fit to refer to Section 621 of the California Evidence Code in resolving this appeal, since the criteria of that statute were not satisfied.[6] Section 621, as it existed in 1991, stated:

> (a) Except as provided in subdivision (b), the issue of a wife cohabitating with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.
>
> (b) Notwithstanding subdivision (a), if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests performed pursuant to Chapter 2 (commencing with Section 890) of Division 7, are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.
>
> (c) The notice of motion for blood tests under subdivision (b) may be filed not later than two years from the child's date of birth by the husband, or for

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[6] Some consideration should be given to which version applies, as the provision has been repeatedly amended over the years. In the decision relied upon by the district court, Michelle W. v. Ronald W., 703 P.2d 88 (Cal. 1985) the California Supreme Court noted that the statute had been amended between the start of that case and its appellate resolution, but stated that since both parties were addressing the current version, the court would do so on appeal as well. Id., 703 P.2d 89, n.1. The statute has now been repealed, with many of its provisions incorporated into Section 7000 of the California Civil Code.

> purposes of establishing paternity by the presumed father or the child through or by the child's guardian ad litem.
>
> (d) The notice of motion for blood tests under subdivision (b) may be filed by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child.
>
> ....

Throughout the proceedings below, this statute was treated as providing an "irrebuttable" presumption. In Michelle W., however, the California Supreme Court denied that the presumption was irrebuttable and therefore subject to constitutional attack. See 703 P.2d at 94; Vlandis v. Kline, 412 U.S. 441 (1973) (conclusive presumptions are constitutionally suspect where the presumed facts are not universally true, reasonable alternative means exist to determine actual facts, and the presumption affects an important right or a right which is constitutionally protected).

The factors required for application of the statutory presumption under Section 621 were not satisfied in this case. The district court correctly recited the central holding of Michelle W., but made certain incorrect assumptions. For example, the first two factors are that "the child's mother must be married" and that "the mother must be cohabiting with her husband." III ROA 414.

The district court presumed that these tests were to be applied at the time of birth, but the California cases have held that they apply at the time of conception as well. See, e.g., Leslie v. Superior Court (Madsen), 279 Cal. Rptr. 46 (1991) (conclusive presumption inapplicable where mother was not cohabiting with presumptive father at time of conception); Michael M. v. Giovanna F., 7 Cal. Rptr. 2d 460 (Ct. App. 1992); Keaton v. Keaton, 86 Cal. Rptr. 562 (Ct. App. 1970) (cohabiting means "living together as husband and wife"); Kusior v. Silver, 354 P.2d 657 (Cal. 1960); Michael H. v. Gerald D., 236 Cal. Rptr. 810 (Ct. App. 1987) (noting

cohabitation at both points in time); Whitney v. Whitney, 337 P.2d 219 (Ct. App. 1959); Estate of McNamara, 183 P. 552 (1919).

In this case, the parties agree that they married when Cindy was already six months pregnant, and Cindy made it quite clear that the parties were neither cohabiting nor married when James was conceived. VII ROA 1229; I ROA 1, 14. Several courts have held that the absence of cohabitation at the time of conception makes even otherwise conclusive presumptions merely starting places from which credible evidence could be admitted for or against paternity. See, e.g., Leslie v. Superior Court (Madsen), supra; Kusior v. Silver, supra; V.L.P. v. J.S.S., 407 A.2d 244 (Del. Fam. Ct. 1978); Warren and Joeckel, 656 P.2d 329 (Or. App. 1982); Curry v. Felix, 149 N.W.2d 92 (Minn. 1967); Anonymous v. Anonymous, 252 N.Y.S.2d 797 (N.Y. Fam. Ct. 1964); People ex rel. Gonzales v. Monroe, 192 N.E.2d 691 (Ill. App. 1963); Burke v. Burke, 340 P.2d 948 (Or. 1959).

The reason there is a long history of cohabitation or "access" cases that weakened or eliminated presumptions of paternity when husband and wife did not live together as such at the time of conception. What many later cases fail to note, in examining this ancient test, is that it arose for the purpose of increasing the factual reliability of exercising the presumption. In the days before reliable blood testing, there was no good test of paternity except "exclusive access."[7] See Sylvia v. Ben, 334 N.Y.S.2d 229 (N.Y. Fam. Ct. 1972) ("access in the days of

[7] For a particularly strained example, see Jackson v. Jackson, 430 P.2d 289 (Cal. 1967). The court had before it blood tests conclusively establishing that the husband was not the father. Before it would consider that evidence, however, it had to find that the husband could account for the activities of his wife during the three and a half days they cohabited, to show that they were not "cohabiting" during conception. Only then did it allow admission of the evidence that was greatly superior to any inferences from testimony as to the spouses' activities. Such reasoning is unnecessarily convoluted given the function that the presumption was intended to fulfill.

Judge Cardozo, blood tests today, and who knows what tomorrow may bring. . . . The presumption of legitimacy was never intended to suppress the truth and perpetrate a falsehood . . . .")

While this entire line of cases favors Cindy's position in this appeal, it is submitted that the Court should go beyond reciting that this case fits within an exception to the conclusive presumption. This Court should note that a superior means of establishing truth now exists, and find that both any conclusive presumption, and a lack-of-cohabitation exception thereto, are anachronisms in the modern world.[8]

In any event, the district court was incorrect in finding that the first two elements of the California Evidence Code test were satisfied. The district court also should not have found the third and fourth factors of the California Evidence Code to have been met. Those two factors are that "the husband must be neither impotent nor sterile" and that the two year statutory period must have elapsed. III ROA 414.

The only evidence before the court below was Cindy's testimony that she never used birth control when with David, that he had claimed to be sterile, that he had refused to go to a fertility doctor with her, and that he had scars indicating a vasectomy. II ROA 369; III ROA 468, IV ROA 617, 624, 633; VII ROA 1236. None of this was rebutted by David.

The district court, however, incorrectly found that "there is no evidence on record that David is either impotent or sterile." III ROA 414. It is true that only some of the California case put the burden of going forward with proof on the husband, while others place the burden

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[8] This Court has expressed a willingness to acknowledge the changing social order of society in determining that blind adherence to aged legal conventions is improper and can be harmful to those the conventions evolved to protect. See, e.g., Magiera v. Luera, 106 Nev. 775, 802 P.2d 6 (1990) (best interest of child did not require putting name of father on birth certificate).

on the party asserting sterility. Keaton v. Keaton, supra (burden on party with "peculiar means of such knowledge"); Vincent B. v. Joan B., 179 Cal. Rptr. 9 (Ct. App. 1981) (in "particular circumstances of this case," burden on party asserting sterility). Where there is some evidence in the record to support a finding of sterility, it was error for the district court not to at least require David to supply some evidence to the contrary.

Finally, the district court misperceived which version of the statute was being applied. In David's prior brief, he coyly made all statutory references in this section of his argument to the statute as it read when the child was born. III ROA 550-53. The district court thought, however, that it was applying the current version, as he presumably should have been doing under Michelle W., supra. That version of the statute required the mother to file notice of motion for blood tests not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child [emphasis added].

The earlier, and more restrictive version was not in effect under the test the district court thought it was applying. Thus, the court's conclusion that Cindy's request for blood tests was outside "the two-year time frame provided by the statute" was incorrect. III ROA 414. No affidavit causing the statutory time to begin to run was ever filed. To the degree that the rephrased statute is ambiguous, it should not be construed to limit the rights to seek redress of an uneducated party. See Perez v. Singh, 97 Cal. Rptr. 920 (Ct. App. 1971) (finding limitations on action for paternity tolled during child's minority); Copeland v. Desert Inn Hotel, 99 Nev. 823, 673 P.2d 490 (1983) (procedural technicalities barring court access to uninformed parties will be looked upon with disfavor).

All of these errors are of the sort that are inherent in attempting to apply an isolated provision of another state's laws, and are part of the reasons why such statutory grafting should be avoided by the courts of this state in resolving legal disputes between Nevada residents. In any event, it is clear that the district court erred in finding that any of the factors of the California Evidence Code were satisfied. The court's finding that "it becomes clear that the presumption set forth in Section 621 has not been rebutted" was legal error meriting reversal.

The United States Supreme Court's decision in Michael H. v. Gerald D., 491 U.S. 110 (1989), aff'g 236 Cal. Rptr. 810 (Ct. App. 1987), in which the California statute survived constitutional attack, was based on the specific facts presented in the case. The facts considered most critical by the Court were that the natural mother and her husband were married and cohabiting both at the time of conception and at the time of birth, and that they were together in opposition to the desire of the natural father to disrupt that family unit. The Court left open the possibility that the presumption of legitimacy might well be disregarded under other circumstances. 491 U.S. at 126-130. It is clear that the plurality holding was limited to defensive use of the presumption by an intact family unit.

Since issuance of that opinion, California courts have held that constitutional application of the conclusive presumption is limited to such defensive use by an intact family unit, and is unconstitutional in other applications. See, e.g., In re Melissa G., 261 Cal. Rptr. 894 (Ct. App. 1989); Szwed v. Headrick (In re Guardianship of Szwed), 271 Cal. Rptr. 121 (Ct. App. 1990); County of Orange v. Leslie B., 17 Cal. Rptr. 2d 797 (Ct. App. 1993) (where family unit not intact, presumption given no weight and rebutted by blood tests even if mother was married to and cohabiting with husband at conception). In each of these instances the courts found that a conclusive presumption "would not serve the interests it was intended to protect."

The Leslie B. court stated that the presumption was designed to "preserve the integrity of the family unit, protect children from the legal and social stigma of illegitimacy, and promote individual rather than state responsibility for child support." 17 Cal. Rptr. 2d at 799. The court further noted that passage of the Uniform Parentage Act abolished the incidents of illegitimacy and voided further consideration of any "stigma" of illegitimacy. Id. at n.4. That left the integrity of the family unit and the risk of public support for children as the court's concerns.

Commentators have noted that "despite the `conclusiveness' of this presumption, California courts have found ways to avoid its application." Mindy Halpern, Father Knows Best -- But Which Father? California's Presumption of Legitimacy Loses Its Conclusiveness: Michael H. v. Gerald D. and its Aftermath, 25 Loy. L.A.L. Rev. 275 (Nov. 1991). As demonstrated by the various citations argued in the court below, and those set out above in this section, there are many cases that apply the "conclusive presumption," and many cases that do not. In reviewing the multitude of cases, some patterns begin to emerge. For a collection of articles criticizing the constitutionality and fairness of the California statute, see id. at 276, n.8; see also Annotation, Nonfather's Parental Rights, 84 A.L.R. 4th 655 (1990 & Supp. 1992).

The key to application of the California Evidence Code appears to be the peculiar facts of the case, and thus whether the reviewing court views it as being in the best interest of the child to find that the presumption applies. There are many competing values and interests at stake, of the mother, the husband, the child, and the state. See Halpern, Father Knows Best, supra, at 279-80, 288-312. Where there is no intact family to protect, courts have disregarded the presumption and focused more on the interests and relationships of the mother, child, and putative father. Id. at 319. Some courts have gone so far as to identify and weigh

each of these competing interests. See, e.g., McDaniels v. Carlson, 738 P.2d 254, 261 (Wash. 1987).

The dissent in Michelle W. argued that it seemed strange to try to serve a public policy goal of protecting a "family unit" that no longer existed. See 703 P.2d at 100 (C.J. Bird, dissenting). The commentators have agreed, noting that there may be no "family integrity" in a case, that nearly one out of two marriages end in divorce, that there is little need to uphold the sanctity and integrity of the traditional nuclear family when the marriage is defunct, and that the "stigma of illegitimacy" is decreasing in a society composed of many non-traditional households. See Halpern, Father Knows Best, supra, at 312; see also Bartlett, Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family has Failed, 70 Va. L. Rev. 879 (1984).

By reason of the factual matters set out in the Statement of Facts above, and touched on in the estoppel discussion below, it is submitted that this is one of those cases in which application of a conclusive statutory presumption "would not serve the interests it was intended to protect."

There is no "intact family unit" to protect, and the record clearly shows that there never was one. Cindy has (with no assistance from David) improved her station in life so as to support her children without need of public assistance. When it was needed, David proved useless as a resource; he repaid public assistance agencies only $125.50 for all assistance rendered during James' first ten years of life. IV ROA 678, 626; II ROA 345. Thus, under the cases indicating that the court should perform a weighing of factors in determining whether to apply the California Evidence Code presumption, the facts of this case indicate that the presumption should not be applied. Courts that have considered truth of paramount

importance have simply declared that adequate scientific evidence should always overcome a presumption. Hanson v. Hanson, 249 N.W.2d 452 (Minn. 1977).

In a larger sense, it is respectfully submitted that the semantic gamesmanship of attempting to determine what result is desired before seeing if the applicable test reaches it would not be an appropriate addition to the decisional law of this state. If this Court finds the California law applicable and finds that in these facts it presents only a rebuttable presumption, then it is submitted that the clear DNA test results should be found to have overcome that presumption. If the Court finds that the statute does create an irrebuttable presumption, the Court should find that the provision flunks the constitutional test of Vlandis, supra, and cannot be made the basis for a legitimate order. In either case, the district court order relating to application of Section 621 of the California Evidence Code should be reversed.

III. THE DISTRICT COURT ERRED IN DETERMINING THAT THE FACTS OF THE CASE COULD SUPPORT ESTOPPEL AGAINST CINDY

It is true that a decision of the district court will be upheld even if entered for the wrong reasons. See Kraemer v. Kraemer, 79 Nev. 287, 382 P.2d 394 (1963). It is also true that where the record discloses insufficient evidence to sustain factual findings of the district court, the decision below will be reversed. McKinzie v. Nev. Livestock Prod. Credit, 107 Nev. 936, 822 P.2d 1113 (1991). Thus, to obtain reversal, Cindy must also establish that the district court's alternate ground for finding David to be the father of James (estoppel) was invalid.

The district court correctly stated that courts in other states have found a parent may be equitably estopped from denying the parentage of the other spouse in certain circumstances where, "in essence, the spouses have consistently held themselves out as the parents of the

child." III ROA 414. The court listed the factors as "the husband's name on the birth certificate, representations to the husband and the public that the husband is the father of the child, and persistent and repetitious affirmations of parentage over a period of years." III ROA 415.

Unfortunately, the district court misperceived the first of these factors, and had no evidence from which he could find the latter two. Accordingly, the court's conclusion that "Each of those factors is present in the case at bar" was error.

First, it is not the presence of the husband's name on the birth certificate, but the action of the wife in placing the husband's name on the birth certificate, that is an element of estoppel against the wife. See Hodge v. Hodge, 733 P.2d 458 (Or. App. 1987) (husband, who had been child's primary caretaker of child, could not be displaced on facts of case). The same facts were present in the other two cases relied upon by the district court. See Boyles v. Boyles, 466 N.Y.S.2d 762 (N.Y. App. Div. 1983); In re Marriage of D.L.J. and R.R.J., 469 N.W.2d 877 (Wis. App. 1991). Those courts also focused on the loving care and nurturing provided over the long term by the non-biological putative parent.[9]

In this case, Cindy asserted, and David admitted, that he acted alone and without her permission in putting his name on the birth certificate and giving James his surname. Cindy testified without opposition that she had done everything in her power to prevent that from happening, but that David acted while she was still in surgical recovery, and told her about it afterwards. I ROA 23, 81; II ROA 361-62; VII ROA 1224, 1230, 1238.

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[9] The motives of the courts deciding the Section 621 cases in California were similar. See, e.g., Michelle W., supra., noting fact that husband "raised, loved, and nurtured the child" from birth for years and "accepted daily parental responsibility for her." 703 P.2d 89, 95.

It is respectfully submitted that Cindy cannot be estopped by David's unauthorized , unilateral act taken against her express wishes. The district court erred in reading the fact of David's name on the birth certificate as having any evidentiary weight.

As to David's role in raising James, the parties agree that they have been separated far more than they have been together; out of the child's twelve years of life, they lived together either nine months or about two years, depending upon which party is found more credible.

The second factor recited by the district court and relied upon in the cases finding estoppel against a natural parent is representations to the husband and the public that the husband is the father of the child. As set out at length in the Statement of Facts, David was inconsistent as to whether Cindy ever told him that he was, or might have been the child's father. Cindy denied ever so stating except when David beat her until she said whatever he wanted to hear, always subsequently recanting. The parties were in agreement that Cindy had always told all third parties that David was not the father of James. Accordingly, there was no evidence in the record to support this finding.

The same applies to the third factor, of "persistent and repetitious affirmations of parentage over a period of years." In terms of oral communications, all evidence was that Cindy denied David's paternity. The only writings that could be interpreted otherwise were the welfare applications on which Cindy was required to list the party appearing as "the father" on the child's birth certificate. As she explained, and as the welfare officials confirmed, this was a legal requirement stemming from David's unilateral placement of his name on the birth certificate, and she denied David's paternity even as she was required to list him. VII ROA 1237, 1231; IV ROA 676-682; II ROA 314, 207, 374.

As set forth in detail above, the district court's statement that "Cindy applied for and received welfare benefits for dependent children by naming David as the father" is somewhat inaccurate. David had no financial responsibility, and only re-paid authorities a total of $125.50 over ten years. David's name being on the birth certificate was solely because of his actions.

With the exception of the welfare applications, there is no evidence of any kind in the record that Cindy ever made any representations to anyone that could be construed as naming David as James' father. In his prior appellate brief, David summarized his submissions to the district court as claiming that "During all relevant periods of time, both Cindy and David held David out to be James' father." III ROA 542. A careful review of the record shows no foundation whatsoever for this claim. David's own prior affidavit does not claim that Cindy ever claimed him to be James' father, and on cross-examination, he denied that Cindy ever so stated. I ROA 41-46; VII ROA 1225. The only statement to that effect was by David's counsel.

Cindy asserts that David always knew the facts regarding James' paternity. David's own version of events states that he was aware of this fact "shortly after James' birth," and that prior to that time, Cindy "sometimes" told him he was the father, and other times that he was not. Whether or not she ever said so, and whether or not this was while he was beating her until she would so state, it is clear on the basis of David's statements alone that he was at least told the child might not be his before marriage. That fact has been held to preclude application of estoppel. See Warren and Joeckel, 656 P.2d 329 (Or. Ct. App. 1982).

It is worth noting in passing that some courts consider the child's ignorance of the truth as to his paternity to be a prerequisite of finding estoppel against the parents. While the parties

disagree as to who "constantly" told James that David was not his father, they are in agreement that James has been told so from a very young age. VII ROA 1225; I ROA 42.

The district court's conclusion that there was a "specific and repetitious pattern which Cindy has maintained to all concerned that David is the father of James" cannot be supported on the basis of the record. It is hard to picture how she could have possibly done any more to disavow David's paternity, as she has done orally and in writing for over ten years. Thus, the district court's comment that "It is now at this late juncture that she wants to disavow her persistent position of paternity to deny David his right of custody to James" is simply wrong. III ROA 415.

In addition to the court misperceiving the facts of the case, the court failed to apply the correct legal test. In Nevada, equitable estoppel has four elements:

1. The party to be estopped must be appraised of the true facts;
2. He must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended;
3. The party asserting the estoppel must be ignorant of the true state of facts;
4. The party asserting estoppel must have relied to his detriment on the conduct of the party to be estopped.

Southern Nev. Mem. Hosp. v. State, 101 Nev. 387, 705 P.2d 139 (1985); 25 Corporation vs. Eisenman Chemical, 101 Nev. 664; 709 P.2d 164 (1985).

Applying the test to the facts of this case, it is clear that Cindy knew the true facts. There is only David's unsupported statement that Cindy intended her conduct to be acted upon (presumably by marrying David). There is no possibility that David can assert the necessary

element of ignorance of the true state of facts, since he has admitted being told he was not the child's father before James was born (and at other times has alleged knowing that just after James was born). No detrimental reliance has been shown. Even if David had assisted in any meaningful way with James, as David asserted and Cindy denied, the mere acceptance of a child into a step-parent's home does not give rise to estoppel, since that behavior is the minimum to be expected of any step-parent upon marriage to the natural parent. Clevenger v. Clevenger, 11 Cal. Rptr. 707 (Ct. App. 1961).

Even the California courts, that have had to struggle with their "irrebuttable" presumption, have cautioned that equitable estoppel has never been and should not be invoked in California against a natural parent for the purpose of awarding custody and visitation to a non-parent. Nancy S. v. Michelle G., 279 Cal. Rptr. 212 (Ct. App. 1991), citing Szwed v. Headrick (In re Guardianship of Szwed), 271 Cal. Rptr. 121 (Ct. App. 1990).

As a general proposition, it has been held that equitable estoppel is a shield, not a sword, and that the doctrine should never be used to create rights to custody or visitation. In re Interest of Z.J.H., 471 N.W.2d 202 (Wis. 1991). It should also be noted that Nevada jurisprudence is not burdened with the "equitable parent" statute that has proven so troublesome for the Wisconsin courts.

The district court's decision contained many statements that simply have no basis whatsoever in the record, either by omission or mis-statement, such as that the parties lived together, that there was no evidence of David's sterility, and that Cindy placed David's name on the birth certificate. These flaws in the factual underpinnings of the district court's estoppel analysis are of such magnitude that they should be held fatal to the holding below.

It should also be noted that those cases that do find a natural parent estopped to deny the parenthood of the other have done so as the prerequisite to reaching the question of the child's best interests. See, e.g., Dept. of Health & Rehab. Serv. v. Privette, 617 So. 2d 305 (Fla. 1993). In this case, the district court (incorrectly) found certain facts to be true, and simply concluded that David would be named James father on that basis. It is submitted that, if Cindy was estopped to deny David's paternity, that estoppel would at most give rise to the need for a hearing to determine whether David's paternity would be in James' best interest.

It is respectfully submitted that on the basis of this record of extreme repeated violence, extended separation, lack of history of care, support, or significant involvement, and severe hostility between mother and husband, the best interest of the child would not be well served by judicially creating an artificial relationship of father and child. The district court's alternate ground of estoppel for making David into James' father should be reversed.

IV. NEVADA HAS NO LAW OF "EQUITABLE ADOPTION" OR OTHER SUCH THEORY THAT CAN BE USED TO THWART THE WISHES OF A NATURAL PARENT

It should be noted that the doctrine of "equitable adoption," with which the Referee started the rulings ultimately leading to this appeal, has no application here. That doctrine has to do with court enforcement of promises to adopt, especially when there has been reliance upon such a promise. See Frye v. Frye, 103 Nev. 301, 738 P.2d 505 (1987); Sargeant v. Sargeant, 88 Nev. 223, 495 P.2d 618 (1972) (in the absence of even an unfulfilled promise to adopt, the doctrine of equitable adoption cannot apply).

If the Court was inclined to give rise to a new variety of legal claims to children, this would not be an appropriate case in which to do so. The other catch-phrases and doctrines

bandied about in the court below were listed in David's submission to the district court as "de facto parent, in loco parentis, or psychological parent, equitable adoption, equitable parent, or estoppel, laches, or waiver of parental rights." II ROA 388.

Even where step-parents have good motives and a history of loving care to children in their households (which here is disputed), their standing as to those children is that of interested third parties, not parents, and there is no reasonable force of law to so elevate them. Petition of Ash, 507 N.W.2d 400 (Iowa 1993). In a sensitive and well-thought opinion, the Iowa Supreme Court reviewed Atkinson v. Atkinson, 408 N.W.2d 516 (Mich. App. 1987) and other "equitable parent" cases. The court found public policy militated against any such judicial legislation and quoted at length from a California decision:

> expanding the definition of a "parent" in the manner advocated by appellant could expose other natural parents to litigation brought by child-care providers of long standing, relatives, successive sets of step-parents or other close friends of the family. No matter how narrowly we might attempt to draft the definition, the fact remains that the status of individuals claiming to be parents would have to be litigated and resolution of these claims would turn on elusive factual determinations of the intent of the natural mother, the perceptions of the children, and the course of conduct of the party claiming parental status. By deferring to the legislature in matters involving complex social and policy ramifications far beyond the facts of the particular case, we are not telling the parties that the issues they raise are unworthy of legal recognition. To the contrary, we intend only to illustrate the limitations of the courts in fashioning a comprehensive solution to such a complex and socially significant issue.

Nancy S. v. Michele G., 228 Cal. App. 3d 831, 840, 279 Cal. Rptr. 212, 219 (1991). See also In re Marriage of Goetz & Lewis, 203 Cal. App. 3d 514, 519-20, 250 Cal. Rptr. 30, 33 (1988) (legislature better equipped to expand law to recognize "equitable parent" doctrine); In re Marriage of O'Brien, 13 Kan. App. 2d 402, 407-10, 772 P.2d 278, 283-84 (1989) (rejecting equitable parent claim by mother's former husband in paternity proceeding); Zuziak v. Zuziak, 169 Mich. App. 741, 751, 426 N.W.2d 761, 766 (1988) (declining to extend holding of Atkinson to child custody dispute between mother and

> stepmother; stepmother, however, granted custody on other grounds); In re Z.J.H., 162 Wis. 2d 1002, 1018-1020, 471 N.W.2d 202, 209 (1991) (rejecting custody claim, apparently under in loco parentis doctrine, by adoptive parent's former partner for lack of statutory basis) [remaining citations omitted]. . . . No matter how noble some of the claims might be, they remain, at least for now, untenable in our jurisprudence.

507 N.W.2d at 404-405.

As in Iowa, all of the mumbo-jumbo by which David seeks to transform himself from a non-parent into a parent is "at least for now, untenable in our jurisprudence." It is submitted that on the facts of this case, it should remain so.

V. CONCLUSION

David is not related to the child, James, and has always known so. The district court, without an evidentiary hearing, made factual findings that cannot be supported by the record, and used those findings, in conjunction with California law, to turn David from an occasional step-parent into James' father. This was error. The district court's mistaken facts also do not and cannot support a finding of estoppel against Cindy. The procedures by which this determination were made have left the ruling in place for two years and require as speedy a resolution as possible.

It is not and should not be the policy of this state assign or engraft "parents" to children against the express wishes of their natural parents with whom they live. This is particularly true when the putative parent is an abusive former step-parent who has had little contact with the family to which he seeks to be attached.

This Court should reverse the determination of Judge Thompson, as set out in the Amended Decision filed February 4, 1992, and embodied in the Decree of Divorce filed August

25, 1993, and should remand for the sole purpose of entry of an order declaring the non-existence of a parent and child relationship between David and James, and correction of the child's birth certificate to reflect the facts as established by the DNA tests.

Respectfully submitted,
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