IN THE SUPREME COURT OF THE STATE OF NEVADA

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ROBERT MILLER,

Appellant,

vs.

SHERRY WILFONG,

Respondent.

S.C. NO. 43140
D.C. NO: D294128

Appeal From the Eighth Judicial District Court, Clark County
The Honorable Cheryl Moss, District Judge

RESPONDENT'S ANSWERING BRIEF

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

STATE CASES

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STATE STATUTES AND RULES

MISCELLANEOUS

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STATEMENT OF THE ISSUES

I. After about a year of litigation, the Family Court ruled in favor of the mother on all major issues of custody, visitation, and child support in this paternity case. The mother was indigent, while the father was an electrician making about $60,000.00 per year. The Family Court awarded $3,000.00 – about 10% of the billable time actually incurred – in attorney's fees payable to the mother's counsel. Did the court abuse its discretion in making that fee award, solely on the ground that the mother obtained counsel through Clark County Legal Services and therefore would not be billed by her attorney?

II. Did the court abuse its discretion in making that fee award because the underlying action was a paternity case, and not a divorce case?

III. Appellant filed an unusable Appendix and an entirely deficient brief, which failed to cite to the record or to any relevant legal authority. Appellant essentially ignored two orders from the Nevada Supreme Court to correct his filings, violated a variety of procedural and substantive rules of this Court in those filings, and by so doing made the Court's job harder and foisted off onto Respondent the responsibility for correcting his deficiencies. Should sanctions in the form of attorney's fees and costs on appeal be imposed against Appellant and his counsel?

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STATEMENT OF THE CASE[1]

This is an appeal from an *Order* awarding attorney's fees in a paternity case. R. App.[2] 246, 251-52. Eighth Judicial District Court, Family Division, Hon. Cheryl I. Moss presiding.

In the district court, this firm represented Respondent Sherry Wilfong from March, 2003, when we accepted the case from the Clark County Legal Services *Pro Bono* Project, until we withdrew from the case when all final orders were entered at the hearing of January 13, 2004. R. App. 235. The procedural details of the district court filings, usually recited in this section, are in this case intertwined with the factual history and so are recited in the Statement of Facts, below. Since this case deals with the question of fees, however, and fees on appeal are at issue, it is worth reciting here the basic details of the filings in ***this*** Court.

Robert appealed from solely the award of fees contained in the order entered at the January 13, hearing; the *Order* appealed from was filed March 5, 2004. R. App. 246. Even though we had

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[1] NRAP 28(b) provides that Respondent may provide a Statement of the Case if "dissatisfied" with that of the Appellant.

As detailed in this section of the *Answering Brief*, this Court has already provided Robert with two opportunities to file a procedurally and substantively adequate *Opening Brief*, but the second one contains the same 18-line "Statement of the Case" that was in the first. It gives no specific page numbers to ***any*** documents, does not identify the pleadings below containing the arguments ultimately ruled upon, and is not even accurate as to the few matters it does recite (for example, mistakenly stating on line 2 that the order appealed from was entered March 4, 2004, when it was actually filed on March 5).

Robert's "Statement of the Case" is entirely unusable, and the Court is asked to refer to the recital in this *Answering Brief* pursuant to NRAP 28(b).

[2] Although this Court admonished Mr. Kelleher to correct his original, defective documents by filing a proper Appellant's Appendix (*see Notice of Deficient Brief* issued October 4, 2004), the document styled "Supplemental Appendix," received on November 16, 2004, is still woefully insufficient and incomplete. It is missing ***all*** of the exhibits from Sherry's *Opposition* filed April 4, 2003, and does not include many relevant documents from the record, such as the *Answer* to the *Petition*, either party's *Affidavit of Financial Condition*, the *Reply to Counterclaim*, *Reply to Opposition*, or the *Supplement to Motion*.

Further, it lacks a proper Table of Contents, or ***any*** pagination at all – in direct violation of NRAP 30(c)(2) – making it impossible to cite to the "Appendix." Rather that waste any more of the Court's time, Sherry simply files Respondent's Appendix, pursuant to NRAP 30(b)(4), and all references to the record will be to that document, styled "R. App."

We believe that the Court should formally find in this case that the omissions and deficiencies in Appellant's Appendix make it "so inadequate that justice cannot be done without requiring inclusion of documents in the respondent's appendix which should have been in the appellant's appendix," as stated in NRAP 30(g)(2). The Court should "impose monetary sanctions" against Robert and his counsel as specified in that rule, as the appropriate response for their having effectively shucked off onto us (*pro bono* counsel for Respondent Sherry) the burden of providing this Court with the obviously-relevant court orders and other papers needed to resolve this appeal. As detailed in part below, the malfeasance exhibited by Robert's counsel here is a continuation of consistent failures below, for which he has never yet been called to account in any part, to the significant expense of those who respect the rules.

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withdrawn months earlier, Robert served only this office with notice of entry of the March 5 *Order*. R. App. 253-55. He served only Sherry with his *Notice of Appeal* and *Case Appeal Statement*. R. App. 317-321.

After we withdrew, Sherry hired other counsel[3] to represent her in later proceedings in the Family Court. When Robert filed his *Docketing Statement* in this Court, he listed both that other counsel, and this firm, as Sherry's attorneys. *See Docketing Statement* filed April 29, 2004.

Many months passed during which Robert did nothing to prosecute the appeal. On September 17, 2004, this Court filed an *Order to File Opening Brief and Regarding Counsel*, directing Robert to file his *Opening Brief* and *Appendix* within 15 days, and giving Sherry 60 days to find counsel to represent her on appeal. On or about September 29, Robert filed a four-page "brief" containing one case citation and no supporting documents. It was served on this office, although we had withdrawn from the Family Court case nine months earlier, and had never appeared in this appeal.

On October 4, 2004, this Court issued its *Notice of Deficient Brief*, requiring Robert to correct various deficiencies in his filings within 10 days. On or about October 13, Robert filed a second *Opening Brief*, but it was virtually identical to the original filing.[4] It, also, was served on this office, even though we still were not attorneys of record in any court.

By late October, we were contacted by Sherry and, upon request, we agreed to represent her in this appeal on the same *pro bono* basis that we had represented her previously in Family Court. *See* Notice of Appearance filed October 27, 2004. We so informed Clark County Legal Services, which administers *pro bono* services in Southern Nevada.

On November 5, this Court issued a further *Order*, noting that Robert's *Appendix* was still deficient, and requiring him to file one complying with NRAP 30 within ten days. The *Order* also

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[3] Christopher R. Tilman, Esq.

[4] The text is identical to the original filing. For some never-explained reason, the brief is retitled on page four as "*Respondent's Answering Brief*." A "Table of Contents" was inserted as page 2, and the one cited case is repeated on page 3 as a purported "Table of Authorities." It was accompanied by a purported *Appendix*, consisting entirely of another copy of the order appealed from, which had been stapled to the back of the original "*Opening Brief*."

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provided us 60 days to file this *Answering Brief*. As noted above, on or about November 15, Robert filed his unusable "*Supplemental Appendix*." This *Answering Brief* follows.

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STATEMENT OF FACTS[5]

Sherry R. Wilfong and Robert G. Miller met in Las Vegas, Nevada in September, 2000, while attending a class at community college. R. App. 58, 74. The parties never co-habited or married, but in April, 2002, Sherry discovered she was pregnant with Robert's child. Robert urged Sherry to have an abortion at his expense, but that was not an option for her. R. App. 39, 75.

Robert's refusal to accept responsibility for the child or assist with any of the pregnancy costs ended the parties' relationship. R. App. 39. The pregnancy rendered Sherry unable to work; she moved in with her parents, who provided a home and food before and after the birth of the child. R. App. 39-40.

The parties' baby girl, Makaela Wilfong, was born on December 23, 2002, in Henderson, Nevada. R. App. 69. That same day, Robert filed his *Petition to Establish Paternity*, although the document was not immediately served on Sherry. R. App. 1.

On December 30, 2002, Robert signed an Affidavit of Paternity. R. App. 72. Robert nevertheless demanded a DNA Parentage Test, which was performed January 10, 2003, and confirmed that Robert had a 99.997% probability of being Makaela's father. R. App. 63.

Although Robert voluntarily provided Sherry with a little child support, she was forced to rely upon government assistance to provide for Makaela. The welfare office sought to recoup funds from Robert by mid-February. R. App. 106-110. This apparently spurred Robert into serving the *Petition* on Sherry on February 26, 2003, although he had chosen to have no contact with the child up to that time. He filed a *Motion* seeking joint physical custody on March 12. R. App. 6.

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[5] It is respectfully submitted that Robert's recitation of the facts is inadequate to allow this Court to review the case. Robert gives the Court no factual background of the case whatsoever, and nothing on which to review the lower court's decision other than the *Order* appealed from.

We believe that at least ***some*** case history is necessary for the Court to understand the factual context of the case and the positions of the parties. *See* NRAP 30. In violation of that rule, Robert has omitted any factual discussion, various pretrial orders (*see*, *e.g.*, R. App. 18, 139, 229, 232, 235), the Court Minutes, the *Affidavits of Financial Condition* filed by the parties, and some of the documents filed below arguing the law and public policy of awarding attorney's fees in this case – which is the sole matter he has appealed. *See*, *e.g.*, R. App. 73, 288, 324. He has elected to not provide the Court with a transcript of the hearing on that matter.

There are few actually contested questions of fact. Because Robert has contested the lower court's award of attorney's fees, however, the procedural history of who did what, and the reasonableness of the actions of the parties and their counsel, is at issue, and this Court should be provided all relevant references to that procedural history. As Robert has not proffered anything that might reasonably be considered a Statement of Facts, the Court is asked to refer to this recital of the facts, pursuant to NRAP 28(b), to allow a fully-informed review of this case.

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Sherry contacted the *Pro Bono* Project of Clark County Legal Services, which referred her to this law office in early March[6]; we filed the application to allow her to proceed in *forma pauperis*, obtained the corresponding *Order*, formally appeared on Sherry's behalf, and filed an *Answer* to Robert's *Petition* on March 21, 2003. R. App. 15-27.

We then filed an *Opposition* to Robert's *Motion*, asking for physical custody of the infant, and Sherry's *Affidavit of Financial Condition*, showing that she had a negative monthly income. We requested reimbursement of pre- and post-birth expenses relating to the child, child support, and medical coverage. R. App. 28-35, 38-72. Most relevant to this appeal, the *Opposition* set out case law from other jurisdictions indicating why awards of attorney's fees are appropriate in *pro bono* cases, and how attorney's fees are authorized under the Uniform Parentage Act, case law interpreting that Act, and local rules in Clark County authorizing awards of fees in compensation for having to respond to frivolous or improper filings by an opposing party. R. App. 53-55.

Robert responded, R. App. 73-123, and filed an *Affidavit of Financial Condition* claiming that he was an electrician making some $4,600 per month.[7] Robert provided no legal authority, argument, or evidence of any kind indicating that an award of fees in favor of a *pro bono* litigant was improper, prohibited, or otherwise inappropriate on the basis of the authorities we had submitted.

A hearing was held before Judge Moss on April 21, 2003, resulting in orders referring the parties to mediation, granting temporary primary physical custody to Sherry and temporary visitation to Robert, identifying Robert as responsible for Makaela's insurance, and setting temporary child support and arrears owed.[8] R. App. 130-36. Our request for an award of fees was deferred. *Id.* The formal *Order* was filed May 22, 2003. R. App. 134.

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[6] The paperwork by which Sherry applied to the *Pro Bono* Project were not ever put into issue below and are therefore not part of the formal court record, although both parties and the Family Court were aware of her status at all times (as referenced in various filings). Should the Court believe it necessary for any reason, we can supplement the record with the administrative paperwork upon request.

[7] That sum was erroneously low, by way of the frequent error of multiplying an hourly wage by 40 hours per week, and then multiplying by four (weeks in a month). Since there are 52 weeks in a year, however, the math is actually dollars per hour x 40 (hours per week) x 52 (weeks per year) divided by 12 (month per year), indicating that Robert's actual income was $5,044.00 per month.

[8] At this point, Robert was represented by Charles Geisendorf, Esq.

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At the return from mediation on June 19, the question of fees was again deferred. R. App. 137, 139-140. The formal *Order* was not entered until October 3. R. App. 232-34.

Robert filed further documents, but they all addressed his position regarding custodial orders; none addressed the propriety of fees in this case. R. App. 141-215. He filed a new *Affidavit of Financial Condition* on August 18. R. App. 216.

A further hearing was held August 20, 2003, at which Robert's counsel indicated that he still had not researched the issue of attorney's fees in *pro bono* and paternity cases. He requested and received permission to brief the issue for the Court in advance of the next hearing, a status check set for January 13, 2004. R. App. 227-28, 229-231.

Robert never did file any such briefing, however. At some point, Robert substituted Mr. Kelleher for Mr. Geisendorf.

The status check hearing was held on January 13, 2004, resulting in a number of filings. R. App. 244-45. Sherry submitted an updated *Affidavit of Financial Condition*. R. App. 237. This office was granted an order to withdraw, since all pending matters were resolved. R. App. 235. Robert's counsel submitted the substantive final *Order*, filed March 5, 2004 (from which he now appeals), which unfortunately contained many inaccuracies.[9]

Most relevant to this appeal, the district court entertained argument and explicitly reviewed both parties' *Affidavits of Financial Condition*, on the basis of which it found that the parties had a significant disparity of income. The Judge reviewed our detailed historical billing record,[10] and observed that while this law firm was working on a *pro bono* basis, we had expended over $27,000.00 worth of legal work time representing her. Acknowledging that Sherry had cited additional law supporting an award of attorney's fees, the Judge recited *Sargeant v. Sargeant*[11] as

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[9] Most of these are relatively minor and do not affect the substance of this appeal, such as the insertion of the inappropriate "and Decreed" language throughout the document (which was not a decree of any kind), and language indicating that the document was a *Decree of Divorce* between these parties (who were never married). R. App. 250.

[10] Pursuant to *Love v. Love*, 114 Nev. 572, 959 P.2d 523 (1998) (party requesting fees should submit itemized billing statement for the review of opposing counsel and the court); for some reason, the historical billing summary has not, apparently, made it into the formal court record, but it was before the judge and both counsel.

[11] 88 Nev. 223, 495 P.2d 618 (1972).

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sufficient authority for the fee award, in language similar to that in the order drafted by Robert's counsel. *See* R. App. 251.

On the basis of the arguments and findings, the Family Court Judge reduced to judgment about one-tenth of the value of the work done – $3,000.00. *Id*. Robert's counsel inserted additional verbiage into the order as to what Robert was "willing to pay," in language indicating that it was an order. *See* R. App. 251-52. The Judge signed it, and Robert filed a *Notice of Entry* on March 10, 2004. R. App. 253.

After several months went by without any payment of any kind being made on the sums reduced to judgment, despite demands,[12] this office initiated execution. R. App. 307.

Before any sums were actually paid, Robert filed a *Motion for Stay* on April 1, and obtained an *Order Shortening Time* on April 8.[13] R. App. 288, 322. Robert chose not to copy this office with any of those filings, but did apparently send at least some of them directly to Sherry.[14]

Still without any notice of any kind to this office – or apparently anyone else – Robert's counsel went directly to the Family Court Judge (without following ***any*** of the procedural or ethical rules regulating such conduct)[15] and obtained an "*Ex-Parte Order in Reference to Garnishment*" on April 5, which declared the execution on the months-old judgment "null and void." R. App. 315.

When this office found out about the above conduct, we filed an *Opposition to Plaintiff's Motion for Stay and Countermotion to Determine Issue of Exemption*, on April 15. R. App. 324. The filing set out the correct law, and applicable procedures, to be followed in either seeking a stay, or to prevent execution on judgments, noting that Robert had complied with none of those procedures. R. App. 327-330. We documented the expenditure of an additional $1,590.00 in costs and fees from that misbehavior, and noted that it was part of a continuing pattern of wrongful

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[12] The correspondence between counsel is not included in the formal record, although it is discussed in the filings discussed immediately below; if the Court has any curiosity as to those communications, we would be happy to supply them.

[13] Between these dates, on April 7, Robert filed his *Notice of Appeal*, creating this action.

[14] By regular mail – for the apparent purpose of ensuring that they would be received after the actions sought had occurred.

[15] *See*, *e.g.*, authorities noted at R. App. 326, n. 2.

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behavior throughout the case that had expanded the costs of the litigation greatly beyond what they would have been if incontestable positions had been stipulated to as requested, and unreasonable stances had not been taken. R. App. 333-36. We asked for a further award of fees due to the added expenses that our opponent's derelictions had caused. R. App. 330-31.

At the hearing on April 20, the Court noted that no supersedeas bond had been filed and that no stay of execution was therefore appropriate. We were asked by opposing counsel if we would cease collection procedures if $100.00 per month payments were immediately started and continued, and the back payments made up; in the interest of economy, we agreed. R. App. 337.

This appeal followed.

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ARGUMENT

I. PRELIMINARY STATEMENT; ROBERT HAS WAIVED HIS RIGHT TO ARGUE THAT AN AWARD OF ATTORNEY'S FEES IS IMPROPER

The "statement of issues" in the *Opening Brief* relies strictly on the phrasing of the *Order* issued on March 5, 2004 – which Robert's counsel drafted. He has chosen to provide neither all of the underlying documents, nor a transcript of the proceedings, which are necessary for a review of the trial court's actual words and reasoning. The single citation recited by Robert is *Sargeant v. Sargeant*,[16] ignoring all the other legal authority before the district court authorizing its order. He provides zero supporting law, logic, or public policy grounds in support of his argument.

As a procedural matter, this Court has stated repeatedly that a party on appeal cannot assume an attitude or adopt a theory inconsistent with or different from that taken at the hearing below,[17] and that any argument not presented in the proceedings below is considered waived on appeal and will not be entertained in this Court.[18]

Here, our request – and stated grounds – for attorney's fees were set out in the *Countermotion* filed on April 4, 2003. R. App. 38, 53-55. The *Sargeant* case was not even one of the authorities cited for our request. Robert's *Reply* to that *Countermotion* provided no argument or authority in opposition to our request, nor did he supply any such argument or authority at any time during the following nine months – despite repeated opportunities, specific judicial invitation, and at least one in-court promise to do so made five months prior to the ruling. R. App. 227-28, 229-231.

Thus, this appeal ***could*** be resolved on the basis that Robert never asserted the argument below that *Sargeant* was an inadequate basis for an award of fees,[19] and is therefore estopped from

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[16] 88 Nev. 223, 495 P.2d 618 (1972).

[17] *Tore, Ltd. v. Rothschild Management Corp.*, 106 Nev. 359, 793 P.2d 1316 (1990). This includes the situation where a party has a duty to speak but remained silent, which position may not be reversed during an appeal.

[18] *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996); *Fick v. Fick*, 109 Nev. 458, 851 P.2d 445 (1993); *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 623 P.2d 981 (1981).

[19] It is at least questionable whether the question could be considered adequately "raised below" even if counsel had made some argument relating to *Sargeant* at the hearing of January 13 – after nine months of providing no written authority for his position. In any event, there is no way to tell what, precisely, was stated by whom at the hearing, since Robert elected not to provide a transcript. *See Toigo v. Toigo*, 109 Nev. 350, 849 P.2d 259 (1993) (where appeal fails to include transcript of trial, arguments as to what was said in open court will not be considered on appeal; a lawyer who

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making any such argument here, since the absence of a transcript permits no basis to assess a claim of error at the hearing,[20] and in its absence this Court will presume that the record supports the district court's order.[21] However, there are significant public policy reasons to request the issuance of a written opinion from this Court governing the awarding of attorney's fees, both as to *pro bono* cases generally, and regarding paternity cases specifically.[22]

After briefly turning to the applicable standard of review for attorney's fee cases, this discussion will therefore return to the body of authority permitting a court to make an award such as the one at issue here. The trial court's decision to award fees in this case should be affirmed irrespective of whether a case citation in the *Order* awarding those fees is the right case: "If a decision below is correct, it will not be disturbed on appeal even though the lower court relied upon the wrong reasons."[23]

II. THE APPLICABLE STANDARD OF REVIEW IS ABUSE OF DISCRETION

This Court has several times been called upon to review the propriety of attorney's fees awarded in the context of domestic relations cases, and has consistently maintained that so long as the Court has the opportunity to review detailed billing sheets showing the breakdown of the amount

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files an appeal "without providing the trial transcript or at least a statement permitted by NRAP 10(e) [now NRAP 9(d)] does a disservice to his client").

[20] *Primm v. Lopes*, 109 Nev. 502, 507, 853 P.2d 103 (1993) (without transcripts, appellate court is without evidence to assess claim of error at a hearing).

[21] *M & R Investment Co. v. Mandarino*, 103 Nev. 711, 748 P.2d 488 (1987).

[22] Robert did not provide any authority regarding either kind of case. The various district court judges, however, have expressed a variety of opinions regarding the propriety, grounds, and rationale under which fees may be awarded in paternity cases. There is no controlling Nevada case law as to the permissibility of fees in either *pro bono* or paternity cases, and it is widely believed in the appellate Bar that resolving recurring conflicts among the district court judges is itself a valid ground for seeking a published resolution on appeal.

[23] *Motenko v. MGM Dist., Inc.*, 112 Nev. 1038, 921 P.2d 933 (1996); *Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981).

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of the work, and the award has some identifiable basis, the decision whether to make an award of fees (and its size) are a matter of the district court's discretion.[24]

Accordingly, Robert has the burden of showing that under ***no*** set of circumstances could the Family Court have awarded any fees to Sherry. For the various reasons detailed above and below, this is a burden that Robert cannot, and certainly has not, met.

III. AWARDING ATTORNEY'S FEES TO A PRO BONO LITIGANT IS PROPER

Robert cites no authority whatsoever for his argument that the award of attorney's fees to counsel for a *pro bono* litigant is prohibited by any law, rule, or public policy directive. Instead, his argument is based entirely on the "logic" of his reasoning that: There is no need for a mother in a paternity case to be able to meet her adversary on an equal basis; if *pro bono* counsel thoroughly researches and litigates the case, the monied, paying party is at a disadvantage, because he only gets what he pays for, and not "extensive and expert legal assistance" which provides the *pro bono* litigant with "disparate legal services."[25]

No part of that "logic" makes sense. The "equal basis" case law is addressed in the following section. While Nevada law seems silent on the issue of whether an attorney for a *pro bono* litigant may be awarded fees, other states have explicitly visited the issue and confirmed that attorney's fees may be awarded to a party who is represented by an attorney appearing in a *pro bono* capacity.[26]

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[24] *Kantor v. Kantor*, 116 Nev. 886, 8 P.3d 825 (2000) (where the trial court reviewed billing records, the amount to be awarded was within the court's discretion); *Love v. Love*, *supra*, 114 Nev. 572, 959 P.2d 523 (1998); *Mack v. Ashlock*, 112 Nev.1062, 921 P.2d 1258 (1996) (remanding so trial court could state some basis for making its award of fees); *Sprenger v. Sprenger*, 110 Nev. 855, 878 P.2d 284 (1994).

[25] *Opening Brief* at 6-7.

[26] *See Arnold v. Arizona Dept. of Health Services*, 775 P.2d 521 (Ariz. 1989) (upholding trial court determination that attorney's fees could be awarded to a *pro bono* litigant); *Benavides v. Benavides*, 526 A.2d 536 (Conn. 1987) (reviewing and reciting large number of cases and other authorities verifying that fees can be awarded to attorneys for *pro bono* legal services); *Do v. Superior Court of Orange County*, 135 Cal. Rptr. 2d 855, 109 Cal. App. 4th 1210 (Cal. 2003) (upholding an award of fees for discovery misconduct, stating that permissibility of the award did not turn on whether or not a fee was actually "incurred"); *In re Marriage of Ward*, 4 Cal. Rptr. 2d 365, 3 Cal. App. 4th 618, 624 (Ct. App. 1992) (legal services organizations providing *pro bono* representation are entitled to receive statutory attorney fee awards); *Hodge v. Sorba*, 31 P.3d 1273 (Alaska 2001) (attorney's fee award was based on relative economic positions of the parties, and not dependent on whether underlying proceeding is to obtain a divorce).

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In *Arnold*, the Arizona Supreme Court agreed with the trial court's decision to award fees:

> The trial court awarded attorney's fees to the prevailing party pursuant to A.R.S. 12-348.[27]
> . . . .
> Attorney's fees should not be limited by the fact that the plaintiffs are indigent and that their attorneys accepted the case on a pro bono basis. It would be a paradox to hold that litigants who are able to pay will have their attorney's fees reimbursed while attorneys who represent litigants unable to pay will be forced to remain unpaid. Such a result would be contrary to the legislative intent in enacting A.R.S. 12-348.[28]

Benavides involved a woman who successfully obtained custody of the parties' minor children, and back child support, through the services of Connecticut Legal Services, Inc., a nonprofit organization which provided representation without cost for persons unable to afford private counsel. The trial court had found that $2,100.00 would be an entirely reasonable fee for counsel in private practice, but cut the award in half, to $1,050.00, because counsel worked for a federally-funded legal services organization.

Reversing and remanding with instructions to award the entire $2,100.00, the Connecticut Appellate Court reviewed cases from around the country in both family law and non-family law cases, and sided with "the majority of courts [which] have held that the award of counsel fees to the prevailing party is proper even when that party is represented without fee by a nonprofit legal services organization."[29] The court explained its ruling as a matter of public policy:

> We are aware that indigents are represented by legal services attorneys in a large number of family relations matters. It would be unreasonable to allow a losing party in a family relations matter to reap the benefits of free representation to the other party. A party should not be encouraged to litigate under the assumption that no counsel fee will be awarded in favor of the indigent party represented by public legal services; . . . or as in this case, that a reasonable fee will be discounted for the same reason. "Put in another way, the public should be relieved from the financial burden of obtaining an indigent plaintiff's divorce or successfully defending against a husband's complaint, to the extent that the

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[27] The statute provided that any award of fees was to be based on "prevailing market rates for the kind and quality of the services furnished," but had a provision stating that the award should "not exceed the amount which the prevailing party has paid or has agreed to pay the attorney or a maximum amount of seventy-five dollars per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceeding involved, justifies a higher fee."

[28] *Arnold*, *supra*, 775 P.2d at 536.

[29] *Benavides*, *supra*, 526 A.2d at 537.

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> husband is able to pay all or part of her attorney's fees. The taxpayer has an interest in recovering where possible a portion of the costs in these situations." Id.[30]
>
> An award of counsel fees that does not discriminate against nonprofit legal service entities will encourage nonprofit counsel to expend its resources in the representation of those clients who are unable to afford private counsel in disputed child custody and child support enforcement litigation. The purposes of such acts as the Uniform Child Custody Jurisdiction Act in Connecticut . . . are advanced and are made more available to the poor where there is an expectancy that the nonprofit legal services will recoup at least part of its resources through an award of counsel fees to its client. Furthermore, a realization that the opposing party, although poor, has access to an attorney and that an attorney's fee may be awarded deters noncompliance with the law and encourages settlements.[31]

In *Do*, the California appellate court brushed aside the argument that an attorney for a *pro bono* client is analogous to an attorney who is representing himself in a legal proceeding. Instead, the court followed the same reasoning as had the Arizona court in *Arnold*, finding sanctions for the opponent's discovery misconduct[32] payable to the *pro bono* attorney:

> Based on the cited cases, we conclude that fees or monetary sanctions in the form of fees may be ordered where the award does not result in disparate treatment between [classes of] litigants. And this is true whether or not a party actually "incurs" additional fees as a result of the opposing party's conduct as is the case here where the party is represented by a lawyer who does not charge a fee.[33]

The California appellate court in *Ward*, echoing the reasoning of *Benavides*, affirmed the order that attorney's fees be paid to the mother's *pro bono* counsel (a legal services organization)

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[30] *Id*. at 538. The footnote at this location in the opinion is equally applicable in this case, and read: "As one commentator has stated: 'Legal services for the poor is free only to the indigent person. Someone has to pay for it and that someone – the taxpayer – should be compensated, the compensation being the increased effectiveness of the legal services program.' G. McLaughlin, 'The Recovery of Attorney's Fees: A New Method of Financing Legal Services,' 40 Fordham L. Rev. 761, 784 (1972)."

As Respondent, we have asked only for affirmance of the *Order* below. However, it is worth noting that the award in question – about one-tenth of the fees actually expended in successfully vindicating every major point in contention in favor of our client – is far less than would be expected in any "normal" case, which reduction was apparently predicated on our appearance for Sherry as *pro bono* counsel. Following the reasoning of *Benavides*, it would not be unreasonable for this Court, upon remand, to direct the district court to determine whether the award of attorney's fees was reduced by reason of our appearance for a *pro bono* client and, if so, to increase the award to what it would have been but for that fact.

[31] *Id*. (internal quotations deleted).

[32] The fee award in this case was not specifically for discovery sanctions. There is no reason to believe that the precise reason for the imposition of fees or sanctions is relevant, but even if it was, Robert's nine-month-long failure to provide the trial court the requested briefing and argument on the fees issue, coupled with the considerable number and variety of other procedural derelictions (partially recounted above) certainly justified imposition of a fee award under EDCR 7.60 (compensatory fee award when an opponent's motion or opposition is frivolous, unnecessary, or unwarranted).

[33] 135 Cal. Rptr. 2d at 860-61, 109 Cal. App. 4th at 1218.

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on the basis that such awards are necessary to permit the class of poor persons with family law disputes to obtain adequate representation as a matter of serving the public policy of ensuring that children are adequately supported:

> [T]he federal and state governments have made the establishment and collection of child support orders a priority, recognizing the failure of absent parents to support children constitutes one of the major causes of poverty in America. The primary representation SDVLP provides for indigent parents in family law proceedings involves issues of child custody, visitation and support. By representing these parents in these matters, SDVLP confers not only a benefit on the particular family unit represented, but also society in general by promoting the protection and support of minor children. Presumably, obtaining and enforcing appropriate child support awards may well provide the financial differential to enable a custodial parent and child to cast aside reliance on public assistance.
>
> In summary, statutory fee awards to entities like SDVLP promote the underlying public policy of increasing the availability of legal services to parties who might not otherwise be able to obtain counsel. . . . Moreover, awarding attorney fees to legal services organizations avoids a potential windfall for those parties in family law matters against whom fees would be ordered if the other party had private counsel . . . . There appears to be no rational reason for advancing differential treatment, because such treatment would only benefit the more affluent parent and impose greater hardship upon the indigent.[34]

The Court opined that denying an award of fees just because the applicant had *pro bono* representation would encourage unnecessary litigation by the financially stronger party, since that party would not fear consequences from irresponsible litigation.[35]

Perhaps the most precisely on-point of these cases, addressing both the issue of *pro bono* representation, and the fact that the parties to the litigation were not married when the legal work was done, is the frank discussion of options contained in the Alaska Supreme Court's disposition in *Hodge*, *supra*. There, the wife hired a private law firm to first end her marriage and then, in bifurcated and much lengthier proceedings, seek child custody, child support, and resolve certain property and financial disputes.[36] The retainer agreement stated that she would owe the attorney's nothing more than the sum, if any, that she was awarded for fees from the other side.[37]

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[34] 3 Cal. App. 4th at 626; 4 Cal. Rptr. 2d at 370.

[35] *Id*.

[36] It took the attorneys 5.9 hours of work before the divorce decree was entered. Thereafter, resolving the actual disputes between the parties required 152.4 hours. 31 P.3d at 1274.

[37] 31 P.3d 1274.

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The relevant Alaska statutes and ethical codes permit the award of attorney's fees "during the pendency of a divorce case," or to a prevailing party in litigation, based on the relative economic positions of the parties. The former husband attacked the award made to the former wife, stating that it was a prohibited "contingent" fee and because most of the litigation occurred after the divorce itself was concluded. The agreement at issue there is virtually identical to the Clark County Legal Services *Pro Bono* Project form contract that is signed by persons such as Sherry seeking assignment of attorneys such as this office.[38]

The trial court had rejected all attacks by the former husband, finding that the firm's retainer agreement was not a "contingent fee" agreement, but a form of *pro bono* recognizing the economic reality of taking such a poor person as a client whether it is expressly stated in the agreement or not. The Alaska Supreme Court approved all those findings:

> Georganna's arrangement with her attorneys was not "contingent" under those rules or the policies underlying those rules. The superior court concluded that "this is not a contingency fee, as that term is defined . . . as payment was not contingent on securing a divorce or on the amount of alimony, support or a property settlement." The superior court reasoned that the fee agreement is a form of a pro bono arrangement, by which counsel agreed to represent plaintiff in the hope that the court would award attorneys fees at the end of the case. . . . Evidently recognizing that plaintiff could not pay much in the way of fees, and that he was unlikely to obtain more than what the court awarded, counsel for plaintiff instead made an agreement that both reflected the reality that he perceived and provided a pro bono service to a client. To deny fees because the arrangement provided up front for what evidently would have happened anyway would be effectively to penalize counsel for plaintiff for taking the realistic and pro bono approach that he did.
>
> We agree with the superior court's characterization of the fee arrangement. Georganna's payment of fees for services the firm rendered was not contingent on successful prosecution of any given issue. Rather, it turned on the financial resources of the parties. It therefore did not violate the prohibitions of the bar rules or rules of professional conduct.
> . . . .
> [A]n attorney's fee award in domestic proceedings will not turn on whether the underlying proceeding is formally a proceeding to obtain a divorce. . . . [T]he ex-wife could recover attorney's fees incurred during the post-divorce proceedings under the rule that "an award

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[38] The Contract, titled "Client Retainer," signed by Sherry and this office on March 4, 2003, was the standard form contract from CCLS. On page one of the standard form, the would-be client initials two lines stating "I will not be charged attorney's fees for the services provided to me under this agreement" and "If, because of the nature of the legal matter that is the subject of this agreement, my attorney is able to collect attorney's fees from the adverse party, my attorney is hereby authorized to keep such fees." Page two contains the boilerplate: "ATTORNEY FEES: If you are accepted for attorney representation, your assigned attorney will represent you without charge unless awarded attorney's fees from the opposing party. In that case, he/she is authorized to keep such fees."

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> of attorney's fees in a 'case between unmarried individuals . . . limited to issues of child custody and support' is 'based on [their] relative economic situations and earning powers.'[39]

Precisely the same public policy and recognition of reality is applicable here. The standard form retainer agreement signed by applicants to the *Pro Bono* Project recognizes the reality that persons of severely limited means will never be able pay the attorneys that are asked by the Project to represent them. The only sums such attorneys will ever receive is an award from the opposing party in such a case, who (as in this case) may have substantially greater resources.[40] As in several of the cases discussed above, it took the intervention of counsel to obtain a custody ruling and a child support award in accordance with the statutory guidelines – all over Robert's fervent opposition.

There is good reason to encourage attorneys to take *pro bono* cases, in the interest of society generally and the taxpayers specifically. There is ***no*** reason to encourage wealthier parties to litigate under the assumption that no counsel fee will be awarded to their opponents, or to provide an economic windfall to those wealthier parties, or to take obstructive and unreasonable positions on the basis that the court will not be able to do anything about it irrespective of the outrageousness of their actions or the disparity of the parties' incomes.

In short, every public policy consideration indicates that attorney's fees can and should be awarded to an attorney representing a *pro bono* client if otherwise appropriate. It was well within the discretionary power of the Family Court to make such an award in this case.

IV. AWARDING ATTORNEY'S FEES IN A PATERNITY CASE IS PROPER

Robert's entire argument on this point is that the *Sargeant* case involved a couple who were divorcing, the two parties in this case were not married, and that therefore fees are not appropriate in a paternity case.[41] The logical fallacy of this "reasoning" is fairly obvious.[42]

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[39] 31 P.3d at 1275-76 (internal citations and quotations omitted).

[40] Robert was an electrician making over $60,000.00 per year during this case.

[41] *See Opening Brief* at 5-7.

[42] It's like saying that fees were affirmed in the breach of contract case of *Barozzi v. Benna*, 112 Nev. 635, 918 P.2d 301 (1996), but the parties to this case did not litigate breach of contract, and that therefore fees are not appropriate in this case. The "rationale" is a total nonsequitur.

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Apparently intentionally, Robert's brief describes the parties as "never married" rather than "unmarried."[43] He never explains how or why there is any distinction in Nevada attorney's fees law between parties that once were married, had a child together, and divorced, and those that were never married and had a child together, as to litigation occurring when they are not married. In either event, the litigation between the parties is between unmarried individuals with a child together, and this Court has had no trouble at all finding that fees should be assessed in appropriate cases between such parties, as detailed below.

Since Robert provides no authority, cogent argument, or public policy that could support his claim of error, it could be argued that he has confessed the frivolousness of his appeal on that basis alone, having violated the ***obligation*** of an appellant to cite legal authority in support of such an argument.[44] The question of the appropriateness of sanctions under NRAP 28 and *Barry v. Lindner*[45] is addressed in the next section.

Here, however, we are constrained to repeat that there are valid reasons of public policy to request the full consideration of the merits of the law governing the awarding of attorney's fees in such cases, hopefully leading to the issuance of a written opinion from this Court on the subject of fees in paternity cases. This requires a review of the applicable law, irrespective of the deficiency of the *Opening Brief* to frame or provide any cogent analysis of the issues.

The general rule in Nevada is that attorney's fees cannot be awarded in the absence of a statute, rule, or contract authorizing such an award. *Schouweiler v. Yancey Co.*, 101 Nev. 827, 712 P.2d 786 (1985). There is no contract here, leaving the matter one of direct statutory authority, or general statutory or rule-based authority under the case law. These are examined in turn below.

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[43] *See Opening Brief* at 7.

[44] *See* NRAP 28(a)(4); *State, Emp. Sec. Dep't v. Weber*, 100 Nev. 121, 123-24, 676 P.2d 1318 (1984) (advising counsel of sanctions for failure to refer to relevant authority); *Smith v. Timm*, 96 Nev. 197, 606 P.2d 530 (1980) (inadequate "discharge of the appellant's obligation to cite legal authority"); *Carson v. Sheriff*, 87 Nev. 357, 487 P.2d 334 (1971) (contentions not supported by relevant authority need not be considered).

[45] 119 Nev. ___, 75 P.3d 388 (Adv. Opn. No. 45, Dec. 31, 2003).

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A. Direct Statutory Authority

This appeal concerns a paternity action. The bulk of the Uniform Parentage Act ("UPA") was adopted into law by the 1979 Nevada Legislature. The portion applicable here is NRS 126.171, which is based substantially on Section 11 of the UPA:

> Costs. ***The court may order reasonable fees of counsel***, experts and the child's guardian ad litem, and other costs of the action and pretrial proceedings, including blood tests or tests for genetic identification, ***to be paid by the parties in proportions and at times determined by the court***. The court may order the proportion of any indigent party to be paid by the county. In no event may the State be assessed any costs when it is a party to an action to determine parentage.

(Emphasis added.) This statute has never been interpreted by this Court, but it seems pretty clear. Also, other jurisdictions have awarded attorney's fees based on similar state statutes that adopted in whole or part section 11 of the UPA.[46]

In short, NRS 126.171 provides discretion to the Court to order a fee award in a paternity action. The statute was cited by us in our *Opposition and Countermotion* filed on April 4, 2003, R. App. 54, but never cited, discussed, distinguished, or commented upon by Robert during the following nine months of litigation. He ignores the statute entirely in his appeal.

B. General Authority for Awarding Attorney's Fees

This Court's position regarding the awarding of attorney's fees has evolved over time. At first, this Court refused to compel an award of fees to a weaker party "merely" because the other party had grossly disproportionate wealth.[47] Early case law required a party requesting temporary

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[46] *See*, *e.g.*, *State of Wyoming v. DDM*, 877 P.2d 259 (Wyo. 1994); *City & County of San Francisco v. Ragland*, 182 Cal. App. 3d 153, 227 Cal. Rptr. 44 (Ct. App. 1986); *Tedford v. Gregory*, 959 P.2d 540 (N.M. 1998); *Sisneroz v. Polanco*, 975 P.2d 392 (N.M. 1998).

[47] *See Allis v. Allis*, 81 Nev. 653, 408 P.2d 916 (1965) (wife had $25,000.00 to $40,000.00 in liquid assets, while the husband was worth approximately three-quarters of a million dollars).

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support and fees to be in "necessitous circumstances," if not entirely destitute, before an award could be granted,[48] and held that such an award could only be made prospectively.[49]

NRS 125.150 was amended in 1961 to permit the deferral of claims for fees until the end of proceedings. This changed the question posed by a fee request, from whether it was necessary in order to get an attorney to the courtroom, to whether the party requesting fees should be compensated for having incurred those fees.[50]

The seminal case of *Leeming v. Leeming*[51] involved unmarried parties to a child custody matter brought several years after the divorce. The Court discussed the "inherent injustice" that would result if suit money was not separately compensable even as to amounts previously expended, since it was seen as important to provide such suit money to pay counsel "without diminishing care for children."[52] The Court reviewed the legislative history of NRS 125.150 and its purposes, and held that the former wife was entitled to suit money so she might pay her counsel without invading funds intended for the support of her children.[53]

The following year, in *Sargeant v. Sargeant*,[54] this Court determined that it had previously been "out of step" with the national majority, which did ***not*** require necessitous circumstances for an award of alimony. The Court overruled *Allis*, *supra*, in language providing the basis for its citation ever since of the proposition that a wife "should be able to meet her adversary in the

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[48] *See Engebretson v. Engebretson*, 75 Nev. 237, 338 P.2d 75 (1959).

[49] This was presumably because, conceptually, any pendente lite award must be based on need. *Metcalfe v. Second Judicial District Court*, 51 Nev. 253, 274 P. 5 (1929). The result was that a party could not obtain temporary support or attorney's fees for expenses that were incurred in the past because the requesting party obviously had been able to obtain those services without the temporary award. *See Levinson v. Levinson*, 74 Nev. 160, 325 P.2d 771 (1958).

[50] *See Levy v. Levy*, 96 Nev. 902, 620 P.2d 860 (1980); *Cranmer v. Cranmer*, 79 Nev. 128, 379 P.2d 474 (1963).

[51] 87 Nev. 530, 490 P.2d 342 (1971).

[52] 87 Nev. at 532.

[53] *Id.* at 532.

[54] 88 Nev. 223, 495 P.2d 618 (1972).

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courtroom on an equal basis."[55] Disproportionate wealth between parties became an independent basis for an award of fees; *Sargeant* overruled the earlier line of cases stating that the requesting party must make a "suitable showing of need."[56]

More recently, in *Love v. Love*,[57] this Court reaffirmed *Leeming* and its holding that attorney's fees could be awarded between unmarried parties in a post-divorce matter. The Court provided alternate bases for such an award, stating that it could be made pursuant to NRS 125.150(3), which incorporates NRS 125.040 (authority to enter orders to enable the other party to carry on or defend such suit or "accomplish the purposes of section 125") ***or*** pursuant to NRS 18.010(2)(b) (fees to prevailing party).[58]

In *Halbrook v. Halbrook*,[59] the Court again affirmed that *Leeming* remained good law and was controlling, and that "the power of the court to award attorney's fees in divorce actions remains part of the continuing jurisdiction of the court in appropriate post-judgment motions relating to support and child custody." In other cases since *Sargeant*, the Court has reviewed various fee awards involving parties not then married to one another, and has made no distinction between parties who were married, and those who were not, in determining entitlement to an award of fees.[60]

That brings us back to the scant analysis in Robert's *Opening Brief*, in which he states that where parties marry, they have chosen to create community property, from which fees are paid, and that somehow it is more "fair" to allow fees between parents fighting over custody, visitation, and support if they had once been married than if they had never been married.

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[55] 88 Nev. at 227. No distinction was made between the appropriateness of an award of fees to a "wife" and an unmarried ***former*** wife.

[56] Those cases had held that it is not sufficient to merely allege the conclusion that the party is in need, but that the requesting party must plead sufficient facts to demonstrate that need. *See Green v. Green*, 75 Nev. 317, 340 P.2d 586 (1959).

[57] 114 Nev. 572, 959 P.2d 523 (1998).

[58] *Love*, *supra*, 114 Nev. at 581.

[59] 114 Nev. 1455, 1461, 971 P.2d 1262 (1998).

[60] *See Korbel v. Korbel*, 101 Nev. 140, 696 P.2d 993 (1985); *Fletcher v. Fletcher*, 89 Nev. 540, 516 P.2d 103 (1973).

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In addition to being incorrect on its face,[61] Robert's proposition fails to address the thirty years of case authority applying the same test to divorcing parties and to parties who had been divorced for many years (and who would therefore, definitionally, have to use separate property income to pay any fee awards). Robert does not suggest any public policy rationale to support the notion that where parents disagree about what is best for their children, there is or could be any rational distinction between those who were once married, and those who were not, as to the propriety of a fee award when their means are unequal.

Persuasive case law from elsewhere supports the legitimacy of awarding fees to non-married (or "never married") litigants; a pair of Alaska cases, from 1998 and 2003, neatly illustrates the point.

Alaska law classifies post-divorce litigants no different from those who never married. The landmark case is apparently *Coleman v. Coleman*,[62] in which a Michigan court actually granted the parties a divorce, but all matters relating to child custody, visitation, and support were resolved in Alaska. The reviewing court noted guiding principles identical to those of this State: an award of attorney's fees is only to be reversed for an abuse of discretion, and such an award may be made under two separate theories – either the "prevailing party" line of authority, or based on the parties' relative economic situations and earning power.[63]

The party ordered to pay fees asserted – as Robert does in this case with his cite to *Sargeant* – that since the general authority for awarding fees is classified in the "marriage and dissolution" section of the Alaska statutes, no fees could be awarded where the action was neither for divorce, nor modification of custody after divorce.[64]

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[61] When a divorce is granted, each party is awarded some portion of the ***former*** community estate as his or her separate property, which is then used as the resource for any future award of fees. The principle Robert seems to be trying to enunciate would apply only to *pendente lite* orders for fees.

[62] 968 P.2d 570, 572-73 (Alaska 1998).

[63] 968 P.2d at 572-73.

[64] *Id*. at 573.

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The Alaska Supreme Court labeled the argument as "opportunistic" and non-persuasive, and found that the case therefore fit under the court's policy of analyzing fee questions between such unmarried persons the same way it would between married persons "if the case is 'closely analogous to custody disputes in divorce cases,' as this one obviously was."[65]

The matter was clarified in *Koller v. Reft*,[66] which nearly mirrors the facts of this case. The parties had a brief relationship, during which they neither married nor cohabited, but which produced a child. Shortly thereafter, the father initiated litigation, which soon encompassed issues of custody, support, certain incidental property issues, and the matter of fees.

The trial court awarded the mother attorney's fees and costs based on Alaska's "divorce exception" to the general rule of only awarding attorney's fees to a prevailing party in litigation; under the exception, courts may award fees in cases which resemble a divorce action, either involving the types of issues seen in a divorce, such as determinations of child custody and child support, or where litigation concerning property, custody, and support issues closely follows the breakup of the parties' relationship.[67] The court further noted that where the "divorce exception" is the basis for fees, "it is of paramount importance that the parties be able to litigate on a fairly equal plane"[68] – a concept indistinguishable from this Court's "equal basis" rationale in *Sargeant*.

In short, even if the specific statutory authority for fees in paternity cases cited above did not exist, this Court's general rules for allowance of fees in post-decree motion practice provides ample authority for an award of fees in the legally-indistinguishable context of parties to a paternity case contesting matters of child custody and child support.

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[65] *Id*. (footnotes omitted).

[66] 71 P.3d 800 (Alaska 2003).

[67] *Id*. at 802 & 808-809.

[68] *Id*. at 809.

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C. Alternative Bases for Awarding Attorney's Fees in This Case

Early in this litigation, we identified Robert's tactics as outrageous and abusive,[69] and on that basis suggested that an alternative ground for an award of attorney's fees was EDCR 7.60.[70] Further, by the time fees were eventually awarded nine months later, Sherry had prevailed on the issues of primary custody, prospective child support, arrears in child support, recovery of costs of pregnancy and confinement, and name change. The overwhelming bulk of the record before this Court consists of Robert's submissions fighting those eventual findings.

Robert's tactics throughout the case, from his first submission to his attorney's completely improper and unethical *ex parte* acquisition of a "stay" order without notice, were deplorable.[71]

On this history, the court ***could have*** made a fee award on the basis of NRS 18.010 (prevailing party) ***or*** EDCR 7.60 ***or*** NRCP 11 (signing of pleadings without adequate investigation and good faith belief in their propriety). Since, as noted above, a district court's order will be approved if it is supportable on a basis other than the stated ground on which it was entered, the record supports the very modest fees awarded in this case in any event.

V. SANCTIONS FOR IMPROPER FILINGS IN THE SUPREME COURT

The Statement of the Case and Statement of Facts above document the significant number and variety of derelictions in Robert's brief and appendix filings in this Court, including the five

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[69] Including having no contact with the child for months by choice, then demanding joint physical custody when the D.A.'s office sought to recover support; refusing to pay any of the expenses of the pregnancy and birth; signing an affidavit of paternity and then demanding DNA paternity testing; refusing to provide income information to the court (with which it could make a child support determination); making a demand for attorney's fees from Sherry, whom he knew to be impecunious; ignoring his history of abuse and belittlement of Sherry; and making a wide variety of claims that he knew to be false or exaggerated. *See* R. App. 38-59 & nn. 1, 5, & 6.

[70] (b) The court may, after notice and an opportunity to be heard, impose upon an attorney or a party any and all sanctions which may, under the facts of the case, be reasonable, including the imposition of fines, costs or attorney's fees when an attorney or a party without just cause:
(1) Presents to the court a motion or opposition to a motion which is obviously frivolous, unnecessary or unwarranted.

[71] *See* descriptions at R. App. 55, 324-331, noting the complete lack of factual or legal investigation, over-litigation of matters easily resolved by stipulation, outright false statements, threats to continue litigation on appeal just for the sake of causing undersigned counsel to incur expenses, and repeated, voluntary, and careless violation of orders, statutes, rules and procedures.

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months that passed before a brief was filed, and the repeated, extreme, and continuing violations of NRAP 28 and NRAP 30. The defects and improprieties, large and small, are even greater than is immediately apparent.

For example, in addition to putting the wrong title on page four of his brief, our opponent indiscriminately intermixes the prior and current addresses for his own office – using his old address on the blue cover of the *Opening Brief* and his Certificate of Compliance, but his current address on the white cover below it (the one claiming he is the Respondent) and the signature blocks on pages four and seven.[72] For unknown reasons, his brief is printed on the stationary of a firm that has not existed for several years.[73]

Of much greater concern is our opponent's hiring of a former staff member of this office – who he ***knew*** worked on this case during the entire time she was here – and specifically employing her to work on the other side of this case[74] in direct, knowing, and deliberate violation of this Court's minimum ethical standards as set out in *Ciaffone*[75] and *Leibowitz*.[76]

Having Ms. Carlevale involved, even superficially, on anything to do with this appeal was a violation of SCR 160(2), which prohibits attorneys from representing a client if they have

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[72] He repeatedly and variously mis-states the name of undersigned counsel's law firm, as well. Whether intentional or negligent, such inattention to basic proofing and courtesy is emblematic of the enormous lack of respect for this Court and its processes so amply demonstrated by every aspect of the defective filings he has made in this Court.

[73] Mr. Kelleher was, apparently, briefly a partner in DIXON TRUMAN about four years ago. Such blatant violation of SCR 199(4) in a filing in this Court is, in the least, remarkable.

[74] Ms. Tenille Carlevale's signature appears on the Certificates of Service for Robert's *Docketing Statement* and *Certificate that No Transcripts are Requested*, revealing that she was involved in the preparation of those documents. Robert's counsel was very aware of Ms. Carlevale's involvement in Sherry's case, both because Ms. Carlevale attended the hearings with me and he saw her there directly, and because his office had direct communications with her concerning Sherry's case throughout her tenure here.

As our opponent knew perfectly well, Ms. Carlevale was the law clerk assigned to Sherry's case until March, 2004, when we withdrew. Ms. Carlevale was conversant with every aspect of Sherry's case, and was delegated all functions performed by non-attorney staff relating to that file, including drafting and revisions of motions, oppositions, and replies (which involved extensive confidential communications with Sherry both in person and over the phone), receipt of confidential client communications (including sensitive materials and documents sent by facsimile, mail, and hand-delivery), discovery management, and meeting with Sherry on numerous occasions to review drafts of various pleadings and associated exhibits in preparation for substantial revisions and case strategy planning with attorney staff.

[75] *Ciaffone v. District Court*, 113 Nev. 1165, 945 P.2d 950 (1997).

[76] *Leibowitz v. Dist. Ct.*, 119 Nev. ___, 78 P.3d 515 (Adv. Opn. No. 57, Nov. 3, 2003).

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"previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 156 and 159(2) that is material to the matter," and SCR 187, which requires lawyers to hold their nonlawyer employees to the same professional standards.

As to the "merits" of the appeal Robert submitted, we have identified above the utter lack of authority for his claim of reversible error, in violation of the rules of this Court and the multiple published opinions warning counsel of the ramifications of disregard for the obligation to cite legal authority (and the record) and otherwise adequately discharge appellant's duties.[77] This Court has previously stated that it is more likely to find sanctions appropriate under NRAP 38 where, as here, the record reveals an abuse of court processes below, since it gives rise to the inference of abuse of the appellate process as well.[78]

Indeed, it appears that Robert's entire "appeal" consists of nothing more than the expenditure of the minimum possible effort required to carry through with his counsel's personal and childish threat in the court below to appeal this case for years for the specific ***purpose*** of causing this firm to expend time and money to defend it.[79]

Robert's failures have delayed the disposition of this appeal by many months, and caused this Court to have to issue two orders to bring his filings into minimal compliance with this Court's rules and procedures – without success. Simultaneously, they have caused this law firm, still acting in a *pro bono* capacity for an indigent client, to assume the entire financial burden of obtaining and producing the record that Robert failed to provide, explaining the issues he failed to discuss in any meaningful way, and essentially brief both sides of the issues so that this Court could meaningfully review the case.

On these facts, there seems little doubt that Robert's counsel should be sanctioned – personally – for his wholly deficient brief and appendix (and multiple other specified and unspecified

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[77] *See* citations set out at n.44, *supra*.

[78] *Young v. Johnny Ribiero Building*, 106 Nev. 88, 787 P.2d 777 (1990).

[79] *See* R. App. 331. This explains in part why the appellate paperwork was served on this firm many months after we were withdrawn from the case below, and long before we appeared as counsel on appeal.

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failings, misdeeds, and ethical lapses).[80] In *Barry v. Lindner*,[81] this Court sanctioned Appellant's counsel $500.00 for similar (but far less severe) failures to cite to the record, provide relevant authority, and comply with the procedural and substantive rules governing appellate litigation. The Court expressed its intent to enforce its nearly 20-year-old expectation that "all appeals . . . be pursued with high standards of diligence, professionalism, and competence."

Respectfully, a $500.00 fine payable to the Nevada Supreme Court law library will do nothing to curtail the sort of misfeasance and malfeasance demonstrated by Robert's counsel in this case, which was openly ***intended*** to cause far more than that amount of economic damage on counsel for a *pro bono* litigant.[82] If this Court actually wishes to "end the lackadaisical practices of the past" and "impress upon the practitioners appearing before this court that we will not permit flagrant violations of the Nevada Rules of Appellate Procedure,"[83] then it should issue sanctions with the purpose and effect of making whole the parties injured by the violations.

In this case, Robert's failure to comply with his obligations to prepare and present an appendix in compliance with NRAP 30 cost this firm approximately $1,100.00 in additional staff time, approximately $400.00 in additional attorney time, and some $600.00 in direct out-of-pocket expenses to obtain, produce, copy, and submit the documents in this sealed case that are required for this Court's appellate review. His entirely defective "brief" has caused an additional expenditure of staff and attorney time, over and above what would have been expended to file an *Answering Brief* in any event, that we have estimated at an additional $6,000.00.

Further, we think that our opponent's obvious efforts to cause exactly those costs by filing a frivolous appeal justifies the imposition of attorney's fees under NRAP 38 "as costs on appeal . . .

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[80] *See Pittman v. Lower Court Counseling*, 110 Nev. 359, 871 P.2d 953 (1994) (appellant sanctioned for failure to cite to the record); *Varnum v. Grady*, 90 Nev. 374, 528 P.2d 1027 (1974) (appellant sanctioned for failure to comply with multiple procedural rules); *In re Candidacy of Hansen*, 118 Nev. 570, 574 n.9, 52 P.3d 938, 940 n.9 (2002) (sanctions may be imposed for defective appendix).

[81] 119 Nev. ___, 75 P.3d 388 (Adv. Opn. No. 45, Dec. 31, 2003).

[82] In the perverse world of "tit-for-tat" being played by Robert and his counsel, imposition of a $500.00 sanction will be taken as a "win" because their misbehavior has caused the expenditure of much more than that by this firm to deal with the effects of their actions and inactions, as detailed below.

[83] *Barry v. Lindner*, *supra*, quoting from *Smith v. Emery*, 109 Nev. 737, 743, 856 P.2d 1386, 1390 (1993).

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to discourage like conduct in the future," because this appeal has most certainly "been processed in a frivolous manner," and "the appellate processes of this court have otherwise been misused."[84] We submit that the sum of attorney's fees "appropriate to discourage like conduct in the future" is the ***entire*** sum of fees caused to have been incurred by this firm in defending its *pro bono* client against this frivolous appeal.[85]

VI. CONCLUSION

As to the merits, all of the known legal authority states that attorney's fees may appropriately be awarded in favor of a *pro bono* litigant in a child custody, visitation, or support case. Similarly, direct statutory authority, and any reasoned analysis of this Court's holdings for the past 30 years, indicate that attorney's fees may appropriately be awarded in a paternity case.

Appellant's *Appendix* is entirely unusable. The *Opening Brief* contains no citations to the record, a single citation to the law, is virtually devoid of legal reasoning, and what is presented is indecipherable gibberish of ill-thought-through, unresearched, unsubstantiated opinion.[86]

The deficiencies in Appellant's appendix and brief have significantly increased the work of this Court (which has twice implored Robert's counsel to comply with the rules) as well as this firm, which has had to provide this Court with a reasonable record and explain the issues in a manner sufficient to allow their orderly disposition. Sanctions against Appellant, and his counsel, including an award of costs and all fees incurred in correcting his deficient submissions and filing this *Answering Brief*, are warranted.

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[84] *See Works v. Kuhn*, 103 Nev. 65, 732 P.2d 1373 (1987); *Flangas v. Herrmann*, 100 Nev. 1, 677 P.2d 594 (1984); *Holiday Inn v. Barnett*, 103 Nev. 60, 732 P.2d 1376 (1987).

[85] As of the time of the completion of this *Answering Brief*, the billable value of the time incurred in producing the required Appendix and this Brief is approximately $21,000.00. Imposition of sanctions in that sum – against Robert, his counsel, or both – is authorized under NRAP 16(f). *See Burke v. State*, 110 Nev. 1366, 887 P.2d 264 (1997) (court may sanction attorney whose performance falls below required standards of diligence, professionalism, and competence); *Hansen v. Universal Health Serv. of Nev., Inc.*, 112 Nev. 1245, 924 P.2d 1345 (1996).

[86] It would strain credulity to believe that any more time or effort was put into the analysis beyond ten minutes of saying words into a dictaphone.

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It is respectfully submitted that this Court should affirm the Family Court orders relating to the award of attorney's fees to Sherry, in the amount of $3,000.00, consider a remand for the purpose of having the district court increase that award to the sum it would have been if the case had not been taken on a *pro bono* basis, and further sanction Robert and his counsel for the deficient filings and unethical behavior in this Court, as specified above.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this answering brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e) which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this ____ day of _____, 2005.

_____
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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing was made on the _____ day of _____, 2005, by U.S. Mail addressed as follows:

John T. Kelleher, Esq.
KELLEHER & KELLEHER, LLC
807 South Seventh Street
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Attorney for Appellant

That there is regular communication between the place of mailing and the place so addressed.

_____
An Employee of the WILLICK LAW GROUP

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