IN THE SUPREME COURT OF THE STATE OF NEVADA

SEBASTIAN MARTINEZ,
Appellant,
vs.
KRISTI RAE FREDIANELLI; ANTHONY FREDIANELLI; AND MIKAELLA RAE FLANNERY, A/K/A MIKAELLA RAE FREDIANELLI, A MINOR, BY NEVADA STATE WELFARE, AS GUARDIAN AD LITEM,
Respondents.

No. 55073

FILED

JAN 18 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is a proper person appeal from a district court order dismissing appellant's paternity action. Eighth Judicial District Court, Family Court Division, Clark County; Bryce C. Duckworth, Judge.

Having considered the parties' arguments and the district court record, we conclude that the district court abused its discretion by dismissing appellant Sebastian Martinez's paternity petition for his alleged failure to timely serve process on respondent Anthony Fredianelli. Scrimer v. Dist. Ct., 116 Nev. 507, 512-13, 998 P.2d 1190, 1193-94 (2000) (reviewing the district court's dismissal of a complaint for failure to serve process for an abuse of discretion). First, the district court improperly determined that the December 2007 service of process on Anthony was invalid, as neither the district court, nor respondent Kristi Rae Fredianelli, could properly challenge the validity of the service of process. See NRCP 12(b) (providing that an affirmative defense is set forth by a party in a pleading, in a 12(b) motion, or at trial); Fritz Hansen A/S v. Dist. Ct., 116 Nev. 650, 656-57, 6 P.3d 982, 986 (2000) (recognizing that a defendant may move for dismissal based on lack of personal jurisdiction, insufficiency of process, or insufficiency of service of process). Also, a

challenge to the sufficiency of service of process is an affirmative defense that must be asserted in the pleadings or by motion or it is deemed waived. See NRCP 12(b) and (h)(1); see also Second Baptist Ch. v. First Nat'l Bank, 89 Nev. 217, 220, 510 P.2d 630, 631-32 (1973) (stating that affirmative defenses not specifically pleaded are waived).[1]

Second, without a proper challenge to the December 2007 service of process, it appears on its face that the December 2007 service meets NRCP 4's service requirements. Additionally, the district court record demonstrates that after the December 2007 service of process was made, appellant's then-counsel used the amended petition's caption on several documents and mailed copies of those documents to Anthony at the same address where service occurred. Third, even if the district court had properly determined that the December 2007 service of process was invalid, its oral decision was of no effect, as no written order quashing such service had ever been entered, until the order challenged on appeal, which was entered on September 21, 2009.[2] See State, Div. Child & Fam. Servs. v. Dist. Ct., 120 Nev. 445, 454, 92 P.3d 1239, 1245 (2004).

Fourth, because the district court abused its discretion in determining that the December 2007 service of process was invalid, it then improperly required Sebastian to re-serve process on Anthony. As the record before us does not clearly establish, however, that the December 2007 service of process was invalid, we conclude that the district court

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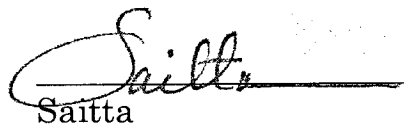
[1]We note that even if Kristi had standing to challenge the service of process on Anthony, no formal motion doing so was ever filed by Kristi. See NRCP 12(b).

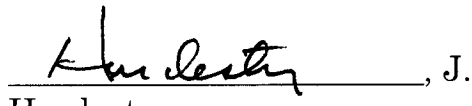
[2]We note that the decision that the December 2007 service of process was invalid was initially made by the Honorable Gloria S. Sanchez.

abused its discretion in determining that Sebastian failed to timely serve process on Anthony under NRCP 4(i).[3] Accordingly, we

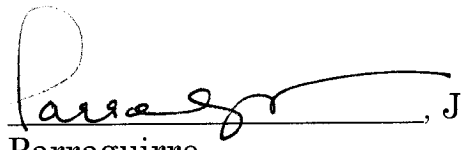
ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[4]



Saitta, J.



Hardesty, J.



Parraguirre, J.

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[3]As respondents' arguments regarding the December 2007 service of process were not properly raised in the district court, we did not consider them in resolving this appeal.

[4]We are concerned by the fact that the original district court judge appointed a guardian ad litem for the minor child in name only, as notice was not required to be served on the appointed guardian ad litem, namely respondent Nevada State Welfare. This court has recognized that a guardian ad litem's purpose is to represent a minor's interest, which may be separate from the minor's parents' interests, and to protect the minor. See Linthicum v. Rudi, 122 Nev. 1452, 1457 n.18, 148 P.3d 746, 750 n.18 (2006); Baker v. Baker, 59 Nev. 163, 87 P.2d 800 (1939), modified on rehearing on other grounds by Baker v. Baker, 59 Nev. 163, 96 P.2d 200 (1939). Moreover, the guardian ad litem is expected to take part in paternity action proceedings on behalf of the minor. See generally NRS 126.141(4); NRS 126.171. Thus, on remand, we are confident that the district court will ensure that a proper appointment of a guardian ad litem is made for the minor child.

We admonish respondent Nevada State Welfare for failing to respond to this court's orders directing a response to appellant's civil proper person appeal statement.

cc: Hon. Bryce C. Duckworth, District Judge, Family Court Division
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Eighth District Court Clerk