

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PHILLIP DAVIS,
Appellant,
vs.
PHILLIP DAVIS, JR.; AND CECILIA
SHIELDS,
Respondents.

No. 70761

FILED

AUG 17 2017

ENZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Phillip Davis appeals from a final order dismissing a petition for grandparent visitation. Eighth Judicial District Court, Family Court Division, Clark County; Denise L. Gentile, Judge.

Appellant¹ filed a petition for grandparent visitation in November of 2013, naming his grandson's parents, respondents Phillip Davis, Jr. and Cecilia Shields, as adverse parties. Appellant provided respondents with copies of his petition and obtained signed receipts of copy from respondents, but no summons was issued or served.

The district court granted appellant's petition for grandparent visitation in December of 2014. On May 1, 2015, appellant filed a motion for an order to show cause and for an order expanding his visitation as he claimed respondents refused to comply with the December 2014 visitation order. Appellant served respondents with this motion via process server on May 28, 2015, as well as by first class mail. At the hearing on this motion

¹Because of the similarity in the names of appellant Phillip Davis and respondent Phillip Davis, Jr., we use the term appellant to refer to Phillip Davis and refer to respondents Phillip Davis, Jr. and Cecilia Shields collectively as respondents to avoid confusion.

17-901700

on July 28, 2015, respondents appeared for the first time in the petition proceedings. They claimed that they believed all visitation issues were concluded in a related case and asserted they had not received any paperwork related to this case until they were served with the show cause motion. Nonetheless, respondents did not request that the district court dismiss the case on service grounds and instead expressed a willingness to mediate the visitation dispute at the district court's suggestion.

At a return hearing following the parties' unsuccessful mediation with all parties present, the district court ordered modified visitation for eight weeks. However, at a November 2015 status check, the district court found that the visitation was still not taking place and thus it set a new, temporary visitation schedule. Thereafter, appellant moved alternatively for reconsideration or clarification of the order setting the temporary visitation schedule.

Rather than address this motion, on February 24, 2016, the district court sua sponte dismissed the entire petition, declaring all prior orders entered null and void. The court based its dismissal decision on a purported procedural defect as the original petition was not served with a court-issued summons within 120 days of filing pursuant to NRCP 4(i). Appellant moved the district court to reconsider its dismissal, and while this request went unopposed by respondents, the district court upheld its dismissal order. This appeal followed.

This court generally reviews findings of sufficiency of process for an abuse of discretion. *Abreu v. Gilmer*, 115 Nev. 308, 312-13, 985 P.2d 746, 749 (1999). NRCP 4(i) requires that the summons and complaint in a civil action be served on defendants within 120 days of the filing of a complaint. The district court shall dismiss a complaint without prejudice if

no such service is accomplished and there is no showing of good cause for the failure to serve. NRCP 4(i).

On appeal, appellant argues, among other things, that NRCP 4(i)'s requirements do not apply to a petition for grandparent visitation and that respondents waived any arguments as to the sufficiency of process by appearing in the underlying matter without ever asserting that the petition should be dismissed on service grounds. Respondents have not filed an answering brief in this case despite being directed to do so.

Here, even if we were to assume that the district court properly determined that NRCP 4(i) governs the service of petitions for grandparent visitation,² reversal of the district court's dismissal order would still be required because respondents waived any challenge to the sufficiency of service of process. NRCP 12(h)(1) states that defenses relating to sufficiency of service of process are generally waived if not raised by motion or included in a responsive pleading. And here, respondents failed to timely raise any defenses in this matter as they never filed a responsive pleading or a motion for relief on any grounds. Indeed, respondents appeared in court at multiple hearings without requesting that appellant's petition be dismissed on service grounds. Instead, the record demonstrates that they were amenable to mediating the underlying dispute.


We conclude that respondents' participation in the petition proceedings without raising this issue in a timely manner is an effective waiver of the defense of insufficiency of process. *Hansen v. Eighth Judicial*

²Under the circumstances presented here, we decline to reach the issue of whether NRCP 4(i)'s service requirements apply to petitions for non-parent visitation brought under NRS 125C.050 and thus, we do not address the merits of appellant's arguments on this point.

Dist. Court, 116 Nev. 650, 656, 6 P.3d 982, 986 (2000) (holding that objections to personal jurisdiction, process, or service of process are waived if not made in a timely motion or not included in a responsive pleading). And because respondents waived any challenge to the sufficiency of service of process for appellant's petition for grandparent visitation, the district court abused its discretion in dismissing this matter on service grounds and vacating all related orders in this matter. *Abreu*, 115 Nev. at 312-13, 985 P.2d at 749. Accordingly, we

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


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Denise L. Gentile, District Judge, Family Court Division
Mills, Mills & Anderson
Cecilia Shields
Phillip Davis, Jr.
Eighth District Court Clerk