IN THE SUPREME COURT OF THE STATE OF NEVADA

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Tracie K. Lindeman
Clerk of Supreme Court

IN THE MATTER OF PRESTON S., A MINOR CHILD,

No. 66410

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PRESTON SANDERSON,
Appellant,
vs.

THE STATE OF NEVADA,
Respondent.

_____/

PETITION FOR EN BANC RECONSIDERATION

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Docket 66410 Document 2016-04055

A.

Appellant Preston Sanderson petitions for en banc reconsideration of the panel's opinion in *In re P.S.*, 131 Nev. Adv. Op. 95, 2015 WL 9465753 (filed on December 24, 2015). The panel denied rehearing on February 1, 2016. En banc reconsideration is appropriate here, as the issue presented involves "a substantial, precedential, ... or public policy issue." NRAP 40(A(a).

B.

This appeal concerns the appropriate construction of a Nevada statute. In that regard, "[t]his court avoid[s] statutory interpretation that renders language meaningless or superfluous, and [i]f the statute's language is clear and unambiguous, [this court will] enforce the statute as written." *Barber v. State*, 131 Nev. Adv. Op. 103, 363 P.3d 459, 462 (2015) (first alteration added) (internal quotation marks and citations omitted). Here's what the statute says:

> After reviewing the recommendations of a master of the juvenile court and any objection to the master's recommendations, the juvenile court *shall*:
>
> (a) Approve the master's recommendations, in whole or in part, and order the recommended disposition;

> (b) Reject the master's recommendations, in whole or in part, and order such relief as may be appropriate; or
> (c) Direct a hearing de novo before the juvenile court if, not later than 5 days after the master provides notice of the master's recommendations, a person who is entitled to such notice files with the juvenile court a request for a hearing de novo before the juvenile court.

NRS 62B.030(4) (italics added).

The panel's error (misinterpretation of the statute) stems from its reading of the statute at too high a level of generality, resulting in its conclusion that the statute's

> use of the word "shall" means that the district court is required to choose one of the three options laid out in NRS 62B.030(4): (a) accept the master's recommendation in whole or in part, (b) reject the master's recommendation in whole or in part, or (c) conduct a hearing de novo if one is timely requested.

131 Nev. Adv. Op. 95 at 3.[1] That is, the panel concluded that even where a timely request for a de novo hearing is made under (4)(c), the district court is not required to hold a de novo hearing—it can ignore the timely request for a hearing de novo and choose to resolve the

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[1] All page references to *In re P.S.* are to the certified hard copy of the panel's opinion that was mailed to counsel.

objection to the master's recommendation under either option (4)(a) or option (4)(b) instead. But that reading of the statute is wrong because it "renders language [of subsection (4)(c)] meaningless or superfluous." *Barber v. State*, 363 P.3d at 462. To appreciate this point better, consider the following three examples:

1. Suppose NRS 62B.030(4) said this:

> After reviewing the recommendations of a master of the juvenile court and any objection to the master's recommendations, the juvenile court shall:
>
> (a) Approve the master's recommendations, in whole or in part, and order the recommended disposition;
> (b) Reject the master's recommendations, in whole or in part, and order such relief as may be appropriate; or
> (c) *Direct a hearing de novo, and order such relief as may be appropriate.*

If this was the statutory language construed in the panel's opinion, the panel's reasoning and result could not be faulted. This proposed statute would clearly grant the district court the *unilateral* opportunity to "choose[] one of these three options[.]" 131 Nev. Adv. Op. at 3. And the parties would be passive actors in the district court's choice; having no *pre*-decision say in the matter, and having only the

option to appeal from the district court *post*-decision. But this is not what the statute says. In contrast, the actual statutory language gives a requesting party an active role in subsection (4)(c). While the parties remain passive actors in subsections (4)(a) and (4)(b), a party becomes an *active* actor in subsection (4)(c) by making a timely request—*pre*-decision—for a hearing de novo. The timely request for a de novo hearing is a necessary condition to an end: *e.g.*, whether a district court must hold a hearing de novo is dependent upon there being a timely request.[2] On this point the statute is clear and not reasonably susceptible to conflicting interpretations. The statute specifically states that the district court "shall ... [d]irect a hearing de novo ... if, not later than 5 days after the master provides notice of the master's recommendations, a person who is entitled to such notice files with the juvenile court a request for a hearing de novo before the juvenile court." NRS 62B.030(4)(c).

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[2] One supposes that a court could hold a de novo hearing even in the absence of a timely request. But that hearing would not be because of NRS 62B.030(4); it would have to take place under some aspect of inherent judicial power.

2. Suppose the statute used the word "may" in the place of the word "shall," such that it said:

> After reviewing the recommendations of a master of the juvenile court and any objection to the master's recommendations, the juvenile court *may*:
>
> (a) Approve the master's recommendations, in whole or in part, and order the recommended disposition;
> (b) Reject the master's recommendations, in whole or in part, and order such relief as may be appropriate; or
> (c) Direct a hearing de novo before the juvenile court if, not later than 5 days after the master provides notice of the master's recommendations, a person who is entitled to such notice files with the juvenile court a request for a hearing de novo before the juvenile court.

"It is a well-settled principle of statutory construction that statutes using the word 'may' are generally directory and permissive in nature, while those that employ the term 'shall' are presumptively mandatory." *Nev. Pub. Emps. Ret. Bd. v. Smith*, 129 Nev. Adv. Op. 65, 310 P.3d 560, 566 (2013) (citation and some internal quotation marks omitted). Thus, if the statute used the word "may" instead of "shall" then the panel's reasoning and result could not be faulted; the statute's language would, by the use of the word "may," allow the district court

"to choose one of the three options laid out [in the statute]." 131 Nev. Adv. Op. 95 at 3. And the use of the word "may" would give the district court discretion to hold (or not hold) a hearing de novo even after receipt of a timely request for a hearing de novo. But the statute uses the word "shall"—as in "shall ... [d]irect a hearing de novo"—which is mandatory, and which "does not denote judicial discretion." *Johanson v. Eighth Judicial Dist. Court*, 124 Nev. 245, 250, 182 P.3d 94, 97 (2008); *Goudge v. State*, 128 Nev. Adv. Op. 52, 287 P.3d 301, 304 (2012) (same); *Barral v. State*, 131 Nev. Adv. Op. 52, 353 P.3d 1197, 1198 (2015) ("[s]hall imposes a duty to act" (quoting NRS 0.025(1)) (some internal quotation marks omitted). Thus, the panel's "reading contravenes the presumption that every word, phrase, and provision—here, the word ["shall"]—in a statute has meaning." *Nev. Pub. Emps. Ret. Bd. v. Smith*, 310 P.3d at 566 (citations omitted). Under the panel's reading, a district court can render subsection (4)(c) nugatory by always choosing to exercise its discretion to handle a master's recommendation under subsections (4)(a) or (4)(b), and never under subsection (4)(c).

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3. Suppose the statute used the word "shall" but subsection (4)(c) said:

> *Consider directing a hearing de novo* before the juvenile court if, not later than 5 days after the master provides notice of the master's recommendations, a person who is entitled to such notice files with the juvenile court a request for a hearing de novo before the juvenile court.

In this version the district court would only be required to *consider* directing a hearing de novo after a timely request for a de novo hearing has been made. The district court would not be mandated to hold a de novo hearing. Again, if this language was the language of the statute then the panel's reasoning and result could not be faulted. Notably, this example is essentially how the panel interpreted NRS 62B.030(4). But that is not what the statute says.

As these three examples illustrate, there are ways to write the statute that would support the panel's reading. But none of these examples were enacted by the legislature. This Court's task is to construe the language of NRS 62B.030(4) as written. *Barber v. State*, 363 P.3d at 462. Here the statute is clear. This Court must conclude that under NRS 62B.030(4), in the absence of a timely request for a de

novo hearing, a district court may choose between (4)(a) or (4)(b) to the exclusion of (4)(c) in resolving an objection to a master's recommendation. On the other hand, where a proper and timely request for a de novo hearing is made, the district court must choose (4)(c) to the exclusion of either (4)(a) or (4)(b) in resolving an objection to a master's recommendation. That is what the statute says.

C.

This Court should grant the petition for en banc reconsideration, withdraw the panel's opinion, and issue a new opinion that properly reads NRS 62B.030(4). And this Court should reverse the district court's order and remand for a hearing de novo in that court.

DATED this 8th day of February 2016.

JEREMY T. BOSLER
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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This brief has been prepared in a proportionally spaced typeface using Century in 14-point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points and contains a total of 1,859 words and does not exceed ten pages. NRAP 40A(d).

3. Finally, I hereby certify that I have read this petition, 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 petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 40A. I understand that I may be subject to sanctions in the event that the accompanying petition is not in conformity with the

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requirements of the Nevada Rules of Appellate Procedure.

DATED this 8th day of February 2016.

/s/ John Reese Petty
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Chief Deputy, Nevada State Bar No.10

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 8th day of February 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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