IN THE SUPREME COURT OF THE STATE OF NEVADA

JESUS FAZ, JR, Appellant, vs. WASHOE COUNTY DEPT OF SOCIAL SERVICES, Respondent.	)	Case No. 67063

REPLY TO RESPONDENT'S ARGUMENTS

Appeal from Order Terminating Parental Rights from the
Family Division of the Second Judicial District Court of the State of Nevada
The Honorable Deborah Schumacher

JENNIFER LUNT
Washoe County Alternate Public Defender

CARL WILLIAM HART
Deputy Alternate Public Defender

POST OFFICE BOX 11130
RENO, NV 89520

ATTORNEYS FOR APPELLANT

CHRISTOPHER HICKS, ESQ.
Washoe County District Attorney

JEFFREY MARTIN, ESQ.
Chief Deputy District Attorney

POST OFFICE BOX 11130
RENO, NV 89520

ATTORNEYS FOR RESPONDENT

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REPLY TO RESPONDENT'S ARGUMENTS

I. The State's Answer to the Issue of Whether Appellant has a Constitutional Right to a Trial by Jury is Vague and Misleading.

Respondent made the argument in the Answering Brief that cases involving termination of parental rights should only be heard by a jurist familiar with "the rules of evidence, the legal standards of a termination action pursuant to NRS chapter 128 and the Rules of Civil Procedure." Respondent's Answering Brief, Page 25. This is an argument that holds no water. If the idea were that a jurist who is familiar with the rules of evidence and civil procedure to also be tasked with being the jury, then the idea of a jury trial for any action would be out of the question. The reason for a jury trial is to have an impartial jury of peers that can

look objectively at the evidence produced, weigh the credibility of the witnesses, and make a final determination that can be seen and fair as unbiased. In criminal trials, and most civil trials, the Judge does not simply relinquish their duty to determine and enforce the rules of the court and/or evidence simply because a jury is present. These rules can and will be still enforced regardless of a jury's presence, so this argument makes little sense in this context.

As stated above, the purpose of a jury is for them to be impartial to the trial and issues. As the Respondent pointed out in his brief, this was heard before a judge that knew the intricacies of the case as she had sat before it for almost 5 years. In order to preserve the fundamental right of a parent-child relationship, this Court and this State should ensure that a trial be conducted that is void of any idea of prejudice or bias towards the party that is in jeopardy of losing such a sacred fundamental right. The current system, and specifically this case, put the same judge that granted the plan of termination of parental rights in the corresponding JV case as the judge *and* jury over the trial that determined if those rights were to be terminated. In essence this tasks the same judge to confirm or deny their own previous findings. Although there is no claim that a bias was present in the current action, when auditing a system and its procedures that infringe on such a fundamental liberty interest, it should be clear that bias is absent. This should

extend further to eradicate even the notion of impropriety, one that does not exist absent the option of a jury trial.

Respondent attempts to weave the right to an attorney in termination case to that of a right to a jury trial. In doing so, they cite to *Lassiter v. Department of Social Services of Durham County N.C.,* 452 U.S. 18, 101 S. Ct. 2153 (1981). In contrast, *Lassiter* has been denied by several states, most harshly by the state of Hawai'i in *In the Interest of T.M.* 131 Hawai'i 419. In *T.M.* the Hawai'i Supreme Court rejected *Lassiter* stating specifically that "in light of the constitutionally protected liberty interest at stake in a termination of parental rights proceeding, we hold that indigent parents are guaranteed the right to court-appointed counsel in termination proceedings under the due process clause in article I, section 5 of the Hawai'i Constitution. *In re T.M.*, 131 Haw. 419, 436, 319 P.3d 338, 355 (2014). The Hawai'i Supreme Court in its ruling found that even though the fundamental right of a parent child relationship was a newly founded one, it was no less fundamental simply based on its newness and therefore enjoyed the same protections as other fundamental rights.

Despite the Respondent's attempts to paint termination of parental rights cases in a light that demeans the seriousness of the rights that are being infringed upon, the Supreme Court stated in *Lassiter* that "the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite

class of liberty interests protected by the Fourteenth Amendment." *Id.,* at 455 U.S., at 774, 102 S.Ct., at 1405. And it was also the Court's unanimous view that "[f]ew consequences of judicial action are so grave as the severance of natural family ties." *Id.,* at 787, 102 S.Ct., at 1412.

Respondent argues that *Awada v. Shuffle Master*, 123 Nev. 613 was clear in its opinion that a jury trial only applies to actions and jurisprudence as the framers of the Nevada Constitution understood them at the time of its adoption, but it does not. *Awada* incorrectly separates the civil cases into cases of equity and cases of law not in accordance to the Nevada Rules of Civil Procedure, Rule 2, which specifically states that "there shall be one form of action to be known as "civil action" thereby consolidating all civil actions into one uniform action not defined by "equity" or "law." This is similar to the Federal Rules of Civil Procedure, Rule 2, which states that "reference to actions at law or suits in equity in all statutes should now be treated as referring to the civil action prescribed in these rules" and "this rule follows in substance the usual introductory statements to code practices which provide for a single action and mode of procedure, with abolition of forms of action and procedural distinctions." Again, the Federal Rules abolish this idea that civil actions can be categorized as two separate actions, one being in "equity" and another in "law." For the Respondent, or any court, to bifurcate civil actions

into two separate sub-categories is unlawful and clearly a violation of all applicable Civil Procedure Rules.

Additionally, following the rules of when juries were to be provided from 18th century England does not correlate with the idea and long held belief that the United States and corresponding state constitutions are living breathing documents meant to conform and adapt to modern times and issues. As mentioned in the opening brief, the fundamental right of a parent-child relationship is a relatively newly founded one, but no less fundamental than the right to life, liberty and other freedoms identified at earlier periods of history. Just recently, the United States Supreme Court in *Obergefell v. Hodges,*. 135 S. Ct. 2584 stated that "the generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the rights of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed." The liberties and protections of the Constitution cannot and should not be looked in a bubble of time when it was drafted, but as a living document that bends itself to protecting the definition of freedom that evolves through time with every new fundamental right that is and will be identified.

Currently five states allow jury trials for termination of parental rights, Texas, Oklahoma, Wisconsin, Wyoming, and Virginia. Texas specifically reads that their Constitution (which reads similar to Nevada's) states that "the right of trial by jury shall remain inviolate" is extended to those cases that deal with the termination of parental rights. Tex. Const. art. I, § 15. The idea of a jury trial for termination of parental rights cases is not a new one, nor a novel one, yet it should be further extended to the families in the state of Nevada as put forth in this case.

II. **The Respondent Failed to Address Whether Mr. Faz had Proven by a Preponderance of the Evidence that He Had Rebutted the Presumptions**

The Respondent in its answering brief simply went over the presumptions again and cited the District Court's Order in its support for the presumptions applied. While it is true the case had gone on for several months, the trial proved that Mr. Faz was willing and more importantly, able to parent his three children absent of governmental interference. The testimony showed that Mr. Faz had stable housing, stable income and the desire and drive to have his children placed home with him. Mr. Faz testified that he understood the special needs of his children and would follow through on all suggestions as it pertained to therapy and proper supervision. Again, Mr. Faz simply had to show that he rebutted these presumptions by a preponderance of the evidence. *In re J.D.N.*, 128 Nev. ___,___, 283 P.3d 842, 849 (2012).

Mr. Faz did prove by a preponderance of the evidence that he rebutted the presumptions used against him by the District Court.

III. The Respondent Failed to Support that Termination of Mr. Faz's Parental Rights were in the Best Interest of the Children

Throughout the Respondent's answering brief, Washoe County Department of Social Services highlights and details all the emotional and psychological problems that all three children are currently experiencing. In doing so, the Respondent wishes to paint a bleak picture on the Appellant and his corresponding ability to handle these complex and time intensive issues. In stark contrast, when the subject of the adoptability of the children come into focus, these issues that were insurmountable for the Appellant, are suddenly discounted or not even mentioned when discussing the likelihood of all three children being adopted within a foreseeable amount of time.

The Respondent noted that hundreds of families were interested but omitted that none had been approved and very few got past the initial interest portion as pointed out in the opening brief. In fact, as stated in the opening brief, the adoption "specialist" wasn't even fully aware of the all of the diagnoses given to the children at the time of the termination trial. All of these complex issues and special needs that the children have are significant barriers for the adoption of these children, yet were all completely discounted or ignored by the state in its

case. Mr. Faz, and only Mr. Faz, was willing and able to take these three children into his home and provide for them in a sufficient and loving manner in a reasonable time period. The idea that "permanency" was achieved simply because Mr. Faz's parental rights were terminated is a false one. These children are no closer to permanency today than there were at the time of the termination trial. The Respondent emphasizes that Mr. Faz's parental rights being intact was a barrier to adopting these children into a permanent placement, yet almost a year later it is believed that none of the children have yet been put in a permanent placement, much less adopted, so how much of a barrier was it in reality?

The Court should not allow terminating parental rights just for the sake of it. Mr. Faz losing his parental rights cannot be seen in the best interest of the children as these children all have severe special needs and the District Court essentially made the legal orphans with no immediate or even realistic time period for "permanency" that did not include their father. When looking at this case as a whole, the best interests of the children should be paramount, and this was not the case in the corresponding termination trial.

CONCLUSION

The District Court failed on three levels during the termination trial. First, it failed to properly provide Mr. Faz with his constitutional right to a trial by jury, incorrectly applying the law and standard that simply didn't apply. Second, it failed to properly weigh the evidence in the proper context, therefore incorrectly relying on presumptions that no longer applied. Lastly, the District Court failed to properly apply and determine what would be in the best interest of the children when terminating Mr. Faz's parental rights. The Respondent failed to show by clear and convincing evidence that it was in the best interest of these children to have Mr. Faz's parental rights terminated.

For these reasons, Mr. Faz requests this Court reverse and remand this case back to the district court level where it can be tried in a fair and impartial setting.

DATED this 5th day of August, 2015.

JENNIFER J. LUNT
Washoe County Alternate Public Defender

BY: /s/ Bill Hart
BILL HART, BAR # 11986
Deputy Alternate Public Defender
Washoe County Alternate Public Defender
PO Box 11130
Reno, Nevada 89520
(775)328-3955

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read This Appellate 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 the Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(3), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I hereby certify this this brief also complies with NRAP 32(4)–(6), that the typeface is Times New Roman in 14 point font and that it complies with the page volume limitation. 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 5th day of August, 2015.

JENNIFER J. LUNT
Washoe County Alternate Public Defender

BY: /s/ Bill Hart
BILL HART, BAR # 11986
Deputy Alternate Public Defender
Washoe County Alternate Public Defender
PO Box 11130
Reno, Nevada 89520
(775)328-3955

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Washoe County Alternate Public Defender's Office and that on this date I served a copy of the APPELLANTS REPLY BRIEF to the following:

JESUS FAZ, JR
1084 Rock Blvd.
Sparks, NV 89431
Via U.S. Mail

WASHOE COUNTY DISTRICT ATTORNEY
Jeff Martin
Via Inner Office Mail

ADAM LAXALT
ATTORNEY GENERAL STATE OF NEVADA
100 N. CARSON STREET
CARSON CITY, NEVADA 89701
Via U.S. Mail

DATED this 5th day of August, 2015.

/s/Shannon Hambright
SHANNON HAMBRIGHT