IN THE SUPREME COURT OF THE STATE OF NEVADA

MANUELA HERNANDEZ

vs.

EIGHTH JUDICIAL DISTRICT COURT JUDGE; THE HONORABLE ROBERT W. TEUTON, DISTRICT COURT JUDGE,

Respondents,

and

THE STATE OF NEVADA

Real Party in Interest.

Case No. 67127

(Dist. Ct. # J-14-332774-U1)

ANSWER TO PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, WRIT OF PROHIBITION

COMES NOW, the Real Party In Interest, the Clark County Department of Family Services (State of Nevada), (hereinafter "Department"), by and through its attorney, STEVEN B. WOLFSON, District Attorney, by and through his deputy FELICIA QUINLAN, and hereby responds to the Petition for Writ of Mandamus Or, In the Alternative, Writ of Prohibition based on the following memorandum of points and authorities in the above-referenced matter in compliance with the Court's Order.

MEMORANDUM OF POINTS AND AUTHORITIES

I. ISSUES PRESENTED

1. **The District Court did not abuse its discretion when it adopted a case plan designed to facilitate reunification between the subject minor and natural mother.**

2. **The District Court did not abuse its discretion in ruling that a parent under its jurisdiction is required to submit to a drug test if she appears to be under the influence because drug testing based on individualized suspicion and not for the purposes of criminal prosecution does not violate the Fourth or Fourteenth Amendments of the Constitution.**

II. STATEMENT OF THE FACTS

On or about February 4, 2014, minors Analia Hernandez (hereinafter "Analia") and Kelssy Hernandez (hereinafter "Kelssy") because Kelssy presented at the Sunrise Children's Hospital exhibiting bruising to the cheeks, swelling to the left cheek, diffuse bruising to the entire forehead, bruising to the inside of the pinna, inner lip contusion, and bruising to the dorsal foot. (Appellant's Appendix, hereinafter "AA," pages 4-5) Dr. Cetl noted that Kelssy's bruising to the face, forehead, and ears were too numerous and diffused to count. (AA, p. 5) Kelssy was only two years old at the time the injuries were discovered. (AA, p. 4)

Kelssy came to the attention of the Department because her babysitter sought medical attention for the two year old child, (AA, p. 2) Manuela Hernandez (hereinafter "Ms. Hernandez") did not seek medical care for Kelssy because she claimed she was working. (AA, p. 2) Ms. Hernandez then claimed that the bruising

was the result of an accident. Id. On or about February 19, 2014, an abuse and neglect petition was filed against Ms. Hernandez and her boyfriend, Jonathan Balderas (hereinafter "Mr. Balderas"). (AA, p. 4-6)

Ms. Hernandez admitted to the Amended Petition on or about March 13, 2014 which was filed on March 26, 2014. (AA, p. 8-10). In doing so, Ms. Hernandez admitted that she left the minors in the care of Mr. Balderas even though she saw and/or knew that he slapped Kelssy twice in the face on or about January 3, 2014. (AA, p. 9) After a trial, Mr. Balderas was found to have abused Kelssy and was given a case plan, which was adopted by the Court on or about March 31, 2014. (AA, p. 47 and 16-19)

Also at the March 31 hearing, the Department proposed a case plan for Ms. Hernandez that required her to undergo a physical abuse risk assessment and follow the recommendations, undergo a domestic violence assessment and follow the recommendations, address her legal issues, cooperate with the Department, and take parenting classes. (AA, p. 40-44) Part of the requirement of cooperating with the Department was that Ms. Hernandez had to submit to random drug tests, based on her diminished protective capacity and being around people who are using drugs. (AA, p. 42-43, and 27-28) Ms. Hernandez's counsel opposed the random drug testing because Ms. Hernandez tested clean. (AA, p. 27) The district court modified the case plan and deleted the random testing, but permitted the

Department to test Ms. Hernandez if there was reasonable belief that Ms. Hernandez was under the influence of non-prescribed drugs. (AA, p. 28-30) The court further provided guidance of reasonable belief to include slurred speech or otherwise exhibiting that she is under the influence. (AA, p. 29) The court found that requiring a warrant for a drug test was unnecessary and that reasonable belief and court order would suffice. (AA, p. 28 and 29)

> The Court: First of all, he's not gonna be able to call her up and say you've got twenty-four hours to submit to a test. That's pretty intrusive given the facts here. If he's meeting with her and she's got slurred speech or she's otherwise exhibiting that she's under the influence of some controlled substance, I'm not gonna require him to go get a warrant. That's good enough for me to say, submit to a drug test. (AA, 00029, lines 15-22).

In approving drug testing if there is reasonable belief that Ms. Hernandez is under the influence, the court noted that Ms. Hernandez already lacked protective capacity that she would otherwise possess. (AA, p. 29)

Ms. Hernandez moved the court to amend the case plan to remove any drug testing. (AA, p. 48-54) The district court denied the motion, finding that NRS 432B.540 and NRS 432B.560 give the court discretion to tailor case plans to meet the needs of the individual case, that Ms. Hernandez is on notice that the Department will drug test her if she appears to be under the influence, and that the best interest of the child is served by preventing subsequent removal of the children should Ms. Hernandez in fact be under the influence. (AA, p. 82-84) In making this decision, the district court specifically acknowledged that in every

proceeding in which a child is removed from the care of his or her parents, there is an intrusion on the parties' rights. (AA, p. 82 and 87) The district court also found that these intrusions are minimized by tailoring the case plan to the facts of the case. (AA, P.82-83 and 87-88)

III. LEGAL ARGUMENT

1. The District Court did not abuse its discretion when it adopted a case plan designed to facilitate reunification between the subject minor and natural mother.

"[T]he state has a compelling interest in assuring that abused and neglected children achieve safe, stable and permanent home environments within which to be reared." In re Parental Rights as to D.R.H., 120 Nev. 422, 427, 92 P.3d 1230, 1233 (2004). While *terminating* the relationship between parent and child requires the Court to weigh the interests of the child with the interest of the parent,[1] as cited by Ms. Hernandez, the parent's due process rights are protected when an abuse and neglect petition is substantiated against that parent.[2]

At the point that the Court has jurisdiction over a parent because of a substantiated abuse and neglect petition, the Court has the authority to require that parent to comply with a case plan for reunification pursuant to NRS 432B. 432B.540(2). Matter of Parental Rights as to A.G., 129 Nev. Adv. Op. 13, 16, 295

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[1] Matter of Parental Rights as to N.J., 116 Nev. 790, 801-802, 8 P.3d 126, 133-134 (2000)

[2] Matter of Parental Rights as to A.G., 129 Nev. Adv. Op. 13, 16-17, 295 P.3d 589, 596 (2013)

P.3d 589, 596 (2013). Accordingly, the District Court has the broad discretion to order Ms. Hernandez to complete services designed to eliminate safety risks to achieve permanent reunification with her children.

NRS 432B.540 reads, in pertinent part:

> 2. If the agency believes that it is necessary to remove the child from the physical custody of the child's parents, it must submit with the report a plan designed to achieve a placement of the child in a safe setting as near to the residence of the parent as is consistent with the best interests and special needs of the child. The plan must include, ***without limitation***:
> (a) A description of the type, safety and appropriateness of the home or institution in which the child could be placed, including, without limitation, a statement that the home or institution would comply with the provisions of NRS 432B.3905, and a plan for ensuring that the child would receive safe and proper care and a description of the needs of the child;
> (b) **A description of the services to be provided to the child and to a parent to facilitate the return of the child to the custody of the parent or to ensure the permanent placement of the child;**
> (c) The appropriateness of the services to be provided under the plan; and
> (d) A description of how the order of the court will be carried out.
> NRS 432B.540(2) (emphasis added).

There is no mention in this statue that the plan proposed by the agency be "rationally related" to a petition, as Ms. Hernandez claims. Instead, Ms. Hernandez cites NRS 128.0155 for her contention that the services the Court may require a parent to comply with "relate directly with the allegations in the Petition." (Petition, p.12) However, this is a gross miscitation to the law. Besides the fact that NRS 128.0155 is a termination of parental rights statute and not a 432B protection of children from abuse and neglect statute, which governs the proceedings in the instant case, that statute does not even mention a petition for abuse or neglect.

NRS 128.0155 reads, in its entirety:

> **NRS 128.0155 "Plan" defined.** "Plan" means:
> 1. A written agreement between the parents of a child who is subject to the jurisdiction of the juvenile court or family court pursuant to title 5 of NRS or chapter 432B of NRS and the agency having custody of the child; or
> 2. Written conditions and obligations imposed upon the parents directly by the juvenile or family court,
>
> which have a primary objective of reuniting the family or, if the parents neglect or refuse to comply with the terms and conditions of the case plan, freeing the child for adoption.
> (Added to NRS by 1981, 1750; A 1985, 1397; 1991, 2180; 2003, 1116)

It is long held that statues should be afforded their plain meaning unless this violates the spirit of the law. McKay v. Bd. of Supervisors, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986). As such, instead of creating meaning that is not within the clear language of a statute, the purpose of the statutory scheme is paramount when interpreting them. Here, chapter 432B is dedicated to protection of children and every statute contained therein must be construed ***liberally*** to be afforded its purpose and meaning. Edgington v. Edgington, 119 Nev. 577, 582-83, 80 P.3d 1282, 1286-87 (2003) (emphasis added).

The plain language of NRS 432B.540 mandates that if the child is removed from the home, a plan without limitation must provide services to the parent and the child to ensure permanent placement. NRS 432B.560(1) also grants the court the ability to order the parent into any treatment that is in the best interest of the child. The case plan comports with the law and the District Court did not abuse its

discretion in ordering Ms. Hernandez to submit to drug testing if she is exhibiting signs that she is under the influence of drugs.

Moreover, Ms. Hernandez's constitutional rights are protected by the due process afforded her in this case. It has been long held that the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). Here, Ms. Hernandez was provided the case plan before the hearing and her counsel strenuously argued against the requirement that she be tested. In fact, counsel was heard on the matter and persuaded the District Court to limit the Department's ability to test Ms. Hernandez. (AA, p. 27-30) As she had a meaningful opportunity to be heard in a meaningful manner. The drug testing based on reasonable suspicion was not and is not a surprise to Ms. Hernandez. As such, there was no violation of her due process rights.

In making its decision, the District Court specifically referenced the risk of reunification in the home of Ms. Hernandez not being permanent. Ms. Hernandez argues this is a misapplication of law. However, this argument is based on the assumption that the District Court would instantly remove the children if Ms. Hernandez tested positive for drugs. Instead of making an assumption, this Court need only consider the circumstances that would lead to a removal after reunification with Ms. Hernandez. First, in no uncertain words, the District Court

put Ms. Hernandez squarely on notice that the Department may drug test her if she appears to be under the influence. Second, to be tested, Ms. Hernandez has to be noticeably under the influence during an interaction with the Department. This could be a meeting at the case worker's office or a visit at Ms. Hernandez's home. Ms. Hernandez would have to be unable to control her impulses to the degree that she is unable to resist using drugs just before a planned meeting with the Department or when she is at home caring for her children. This means that Ms. Hernandez knew all the risks and used drugs or alcohol to the point of intoxication. This indicates a significantly diminished protective capacity towards the children in her care. That is far different than a parent who uses before having any involvement with the Department or juvenile court. As such, the District Court did not err in considering that Ms. Hernandez's drug use could lead to a subsequent removal of her children from her care. In fact, the District Court, per NRS 432B.540, is supposed to plan for the *permanent* placement of children.

The District Court did not abuse its broad discretion in requiring Ms. Hernandez to submit to a drug test if she appears to be under the influence during interactions with the Department. If the District Court had ordered Ms. Hernandez to submit to random drug testing, as the Department proposed, that order would have come under scrutiny by this Court. The California Court of Appeals, while only persuasive in this case, ruled that a Court cannot order a parent to submit to

random drug testing if there is no indication or investigation into a parent's supposed drug use. In re Sergio C., 70 Cal. App. 4th 957, 960, 83 Cal. Rptr. 2d 51, 53 (1999). Here, the District Court's ruling is in accordance to this holding. First, the Court in Sergio C. allowed *random* drug testing that the appellate court found to be invasive. The District Court in this case specifically declined to make such an order. (AA, p. 88) Second, the investigation called for in Sergio C. is present in this case; in that, Ms. Hernandez is known to associate with people who have tested positive at high levels for drugs and the Department has to personally observe Ms. Hernandez behaving as if she is under the influence of a controlled substance before any test may be performed. (AA, p. 27-29). The District Court, unlike the Court in Sergio C., specifically ruled that: "he's not gonna be able to call her up and say you've got twenty-four hours to submit to a test." (AA, p. 29, lines 15-17) Instead, the District Court acknowledged that would be too intrusive to Ms. Hernandez and required reasonable suspicion, such as slurred speech or some other indicator that she is under the influence of controlled substances. (AA, p. 29) As such, *if* Ms. Hernandez has to submit to drug testing, there will be sufficient evidence to support the test.

The District Court did not err as Ms. Hernandez had notice and opportunity to be heard before any drug testing will occur and it was within the District Court's

discretion to order drug tests based on a reasonable belief standard. As such, this Court should uphold the District Court's ruling.

2. The District Court did not abuse its discretion in ruling that a parent under its jurisdiction is required to submit to a drug test if she appears to be under the influence because drug testing based on individualized suspicion and not for the purposes of criminal prosecution does not violate the Fourth or Fourteenth Amendments of the Constitution.

The Fourth Amendment protects against only unreasonable searches and seizures. United States v. Sharpe, 470 U.S. 675, 682, 105 S.Ct. 1568, 1573 (1985). What is reasonable, of course, "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." United States v. Montoya de Hernandez, 473 U.S. 531, 537, 105 S.Ct. 3304, 3308, 87 L.Ed.2d 381 (1985). Thus, the permissibility of a particular practice "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." Delaware v. Prouse, 440 U.S. 648, 654, 99 S.Ct. 1391, 1396; United States v. Martinez–Fuerte, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976). Chandler v. Miller, 520 U.S. 305, 308, 117 S. Ct. 1295, 1298, 137 L. Ed. 2d 513, 519 (1997) (The pivotal question is whether the searches are reasonable; to be reasonable under the Fourth Amendment, a search ***ordinarily must be based on individualized suspicion of wrongdoing***) (emphasis added.)

In most criminal matters, the balance may favor the need for warrants. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619, 109 S. Ct. 1402, 1414,

103 L. Ed. 2d 639 (1989). However, there are times that special needs make a warrant and probable cause requirements impractical. Id. "[D]ispensing of the warrant requirement is at its strongest when 'the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." Id. at 623.

In Skinner, the United States Supreme Court found toxicological tests for railroad employees for the purpose of public safety and not for the purpose of prosecution, justified privacy intrusion ***without a warrant or individualized suspicion***. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. at 620-621 (emphasis added). The Supreme Court validated regulating railroad employees' conduct and likened it to that of supervising probationers for the purpose of public safety and that the drug tests fell within the special needs exception. Id. at 620. Specifically, "supervision of probationers or regulated industries, or its operation of a government office, school, or prison, "likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." Id. The Supreme Court noted that alcohol and drugs are eliminated from the bloodstream at a constant rate and blood and breath samples are necessary to measure the presence of substances at the time of the incident. Id. The Supreme Court further found that railroad supervisors were not in the business of investigating criminal violations or enforcing administrative codes and imposing warrant procedures were unreasonable. Id. at 623-624.

Ms. Hernandez cites a series of criminal cases, which directly implicate the protections of the Fourth Amendment of persons not convicted of a crime or are otherwise under investigation for a crime by law enforcement. However, none of those cases apply to the instant case. Specifically, in U.S. v. Scott, the Ninth Circuit distinguished pretrial detainees, who are presumed innocent, from parolees, who have a lowered expectation of privacy. United States v. Scott, 450 F.3d 863, 872 (9th Cir. Nev. 2006). Here, like a parolee, Ms. Hernandez has a lowered expectation of privacy because she is under the jurisdiction of the juvenile court due to her abuse and neglect of her children. Like a probationer or a person regulated due to a safety impact on the public, Ms. Hernandez is subject to supervision of the Department and the Court while working her case plan towards reunification. Specifically, Ms. Hernandez's case plan allows the Department to conduct random home visits and re quires her to sign releases to monitor her domestic violence counseling and physical abuse/non-offending classes. (AA, p. 42-43)

Here, the circumstances surrounding the need for testing and the nature of the test constitute a reasonable search. Mr. Balderas physically abused Kelssy and Ms. Hernandez saw the abuse and failed to do anything to protect her daughter. Ms. Hernandez acknowledged she knew her boyfriend was abusing her child when she admitted to the Amended Petition. (AA, p. 8-10 and 46-47) Mr. Balderas

would have continued to abuse Kelssy if the babysitter had not intervened because, when confronted, Ms. Hernandez claimed Kelssy's injuries were the result of an accident. (AA, p. 2) Ms. Hernandez's protective capacity was significantly diminished at the time her children were removed from her care and the reasons for that are unknown. A plan for the safe and permanent reunification of this family must evolve as the problems in the family that led to removal become known.

Moreover, Ms. Hernandez is not subject to random drug testing. The District Court specifically limited the Department's ability to test Ms. Hernandez:

> "THE COURT FURTHER FINDS that this Court has the authority to tailor case plans to the facts of [the] individual case. Accordingly, if Ms. Hernandez has tested positive for drugs, that would have been sufficient indicia for the Court to order random drug testing and there not need be any cause to force her [to] submit to a drug test. However, she did not test positive and this Court did not order random testing." (AA, p.88, lines 3-8)

The District Court ordered Ms. Hernandez to undergo drug testing if the Department has reason to believe Ms. Hernandez is under the influence so that her parenting can be addressed with a sober and sound mind. (AA, p. 87-89) Ms. Hernandez must give cause to believe that she is under the influence of a controlled substance such as slurred speech or other manifestation during interactions with the Department before she is subject to drug testing. The drug tests are for the purpose of creating a plan to safely and permanently reunify with the subject minors and not for the purpose of criminal prosecution; therefore the tests fall under the special needs exception to the warrant requirement. The drug

test is in the form of urine and/or hair and the nature of the tests is not overtly invasive. A warrant requirement is onerous in the instant case because as held in Skinner, the purpose of the test is frustrated due to the elimination of drugs in the system at a constant rate. As such, the instant matter falls soundly within the special needs exception because, as in Skinner, the primary concern is safety and the goal is safe return of Ms. Hernandez's children.

In balancing intrusion against the legitimate government purpose, the safety of the subject minors, Ms. Hernandez's privacy intrusion is justified. The focus here is safe and permanent reunification and not for the purpose of criminal prosecution. Ms. Hernandez is subject to case plan requirements and the court within its discretion ordered her to submit to drug testing without a warrant as long as the Department has reasonable belief that she is under the influence. The circumstances that led to a case plan formation and drug testing based on reasonable belief standard does not violate the Fourth Amendment.

Accordingly, the District Court did not err and the requirement that Ms. Hernandez submit to a drug test based on individual suspicion while working her case plan towards reunification does not violate the Fourth or Fourteenth Amendment and this Court must uphold the District Court's ruling.

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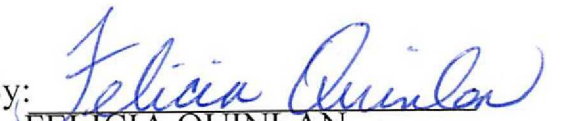
IV. CONCLUSION

Based upon the foregoing arguments, the Real Party in Interest, Clark County Department of Family Services respectfully requests that the Nevada Supreme Court deny the petition for writ of mandamus as the requested relief is without merit.

Respectfully submitted,

STEVEN B. WOLFSON
District Attorney

By: 
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CERTIFICATE OF COMPLIANCE

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

FELICIA QUINLAN, being first duly sworn, deposes and says:

I am the Deputy District Attorney acting for STEVEN B. WOLFSON, District Attorney and one of the Respondents in the above captioned petition.

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 style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a type face of 14 points or more and has an one inch margin on all sides. Finally, I hereby certify that I have read this answer to writ of mandamus, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose.

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I further certify that this reply complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying reply is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Felicia Quinlan
FELICIA QUINLAN

SUBSCRIBED AND SWORN to
before me this 20th day of February 2015.

HEATHER S. AJOLO
Notary Public State of Nevada
No. 06-104308-1
My appt. exp. Dec. 15, 2018

Notary Public in and for said
State and County

HEATHER S. ALOLO
Notary Public State of Nevada
No. 06-104208-1
My appt. exp. Dec. 15, 2018

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify and affirm that I electronically mailed a copy of the foregoing ANSWER TO PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, WRIT OF PROHIBITION to the attorneys of record listed below on 20th day of February 2015.

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