

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE PARENTAL
RIGHTS AS TO: R.T., K.G-T., N.H-T., AND
E.H-T.,
MINOR CHILDREN,

No. ~~1921~~ Electronically Filed
Aug 01 2016 11:15 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

JACQUELINE GUERRERO,
Appellant,

vs.

WASHOE COUNTY DEPARTMENT OF
SOCIAL SERVICES,
Respondent.

Appeal from an Order Terminating Parental Rights in FV14-03897
The Second Judicial District Court of the State of Nevada
Honorable William A. Maddox, Senior District Judge, Family Division

APPELLANT'S OPENING BRIEF

JEREMY T. BOSLER
Washoe County Public Defender
Nevada State Bar No. 4925
JOHN REESE PETTY
Chief Deputy Public Defender
Nevada State Bar No. 10
350 South Center Street, 5th Floor
P.O. Box 11130
Reno, Nevada 89520-0027
(775) 337-4827
jpetty@washoecounty.us

Attorneys for Jacqueline Guerrero

TABLE OF CONTENTS

TABLES OF CONTENTS	i.
TABLE OF AUTHORITIES	ii.
STATEMENT OF JURISDICTION	2
ROUTING STATEMENT	2
STATEMENT OF THE LEGAL ISSUE PRESENTED	3
STATEMENT OF THE CASE	3
STATEMENT OF THE FACTS	4
SUMMARY OF ARGUMENT	16
ARGUMENT	18
<u>Standard of Review</u>	18
<u>Discussion</u>	19
CONCLUSION	26
CERTIFICATE OF COMPLIANCE	27
CERTIFICATE OF SERVICE	28

TABLE OF AUTHORITIES

CASES

Five Minor Children, 407 A.2d 198 (Del. 1979), <u>rev'd on other grounds</u> , Patricia A.F. v. James A.F., 451 A.2d 830 (Del. 1982)	23
Horgan v. Felton, 123 Nev. 577, 170 P.3d 982 (2007)	22
In Interest of E.W., ____ S.W.3d ____, (Tex.App. 2015) 2015 WL 3918292	21
In re A.H., 414 S.W.3d 802 (Tex.App. 2013)	21
In re J.V.J., 765 S.E.2d 389 (Ga. Ct. App. 2014)	24
In re G.S.R., 159 Cal.App.4th 1201 (Cal. Ct. App. 2008)	24
In re P.C., 165 Cal.App.4th 98 (Cal. Ct. App. 2008)	25, 26
In re Parental Rights as to A.J.G., 122 Nev. 1418, 148 P.3d 759 (2005)	19
In re Parental Rights as to A.L., 130 Nev. Adv. Op. 91, 337 P.3d 758 (2014)	19
In re Parental Rights as to A.O.M., 131 Nev. Adv. Op. 66, 356 P.3d 499 (2015)	25

In re Parental Rights as to J.L.N., 118 Nev. 621, 55 P.3d 995 (2002)	18
In re Parental Rights as to Q.L.R., 118 Nev. 602, 54 P.3d 56 (2002)	23, 24
In the Matter of the Parental Rights as to N.J., 125 Nev. 835, 221 P.3d 1255 (2009)	30
In the Interest of C.J.V., 746 S.E.2d 783 (Ga. 2013)	24, 25
Matter of Parental Rights as to D.R.H., 120 Nev. 422, 92 P.3d 1230 (2004)	30
Matter of Parental Rights as to N.J., 116 Nev. 790, 8 P.3d 126 (2000)	19
Santosky v. Kramer, 455 U.S. 745	20, 21
Sierra Nevada Stagelines, Inc. v. Rossi, 111 Nev. 360, 892 P.2d 592 (1995)	22
Troxel v. Granville, 530 U.S. 57 (2000)	19

STATUTES

NRS 128.105	22
NRS 128.109	22

NEVADA RULES OF APPELLATE PROCEDURE

NRAP 3A	2
NRAP 4	2
NRAP 30	2

MISCELLANEOUS

Merriam-Webster's Collegiate Dictionary (11th ed. 2012)	23
The American Heritage Dictionary of the English Language (5th ed. 2011)	23

I. STATEMENT OF JURISDICTION

This Court possesses appellate jurisdiction pursuant to Rules 3A(b)(1) and 4(a)(1) of the Nevada Rules of Appellate Procedure.

On March 21, 2016 senior district court judge William A. Maddox filed an order terminating Jacqueline Guerrero's (Jacqueline) parental rights as to her four children: Roberto, Kayleigh, Nathan and Ethan.¹ 1JA 138 (Order Terminating Parental Rights) (Order).² That same day written notice of the entry of the order was filed and served. 1JA 152 (Notice of Entry of Order). On April 18, 2016 the Washoe County Public Defender's Office timely filed a notice of appeal. 1JA 168 (Notice of Appeal).

II. ROUTING STATEMENT

This appeal should be retained by the Nevada Supreme Court under NRAP 17(a)(12) (directing that the Nevada Supreme Court shall hear and decide termination of parental rights cases).

///

///

///

¹ The children will be referred to by first name only in this brief.

² "JA" stands for Joint Appendix. Pagination conforms to NRAP 30(c)(1).

III. STATEMENT OF THE LEGAL ISSUE PRESENTED

A parent's right to the care and custody of her children is among the oldest of the judicially recognized fundamental liberty interests protected by the Due Process Clause of the federal and state constitutions. Termination of the parental relation however, is proper to protect children from serious harm committed by a parent. Did the district court err in terminating Jacqueline's parental rights where, as here, the basis for termination was not serious harm to any of her children, but due to circumstances arising from Jacqueline's poverty?

IV. STATEMENT OF THE CASE

This is an appeal from an order terminating Jacqueline's parental rights as to her four children: Roberto (DOB June 15, 2007), Kayleigh (DOB February 13, 2010), Nathan (DOB June 29, 2011), and Ethan (DOB January 1, 2014).³

Trial took place over a six-day period starting on August 31, 2015 and ending on September 15, 2015 (Joint Appendixes Volumes 2 through 7, respectively). In lieu of closing arguments the district court

³ Prior to trial the children's father—Robert Hunt-Taylor—waived his right to participate in the trial, and agreed to relinquish his parental rights to his children. 1JA 26 (Stipulation and Order).

had the parties submit written briefs, which were filed in October 2015 and which are reproduced in the Joint Appendix.⁴ Almost six months later the district court entered its order terminating Jacqueline's parental rights. The district court found parental fault because Jacqueline "has failed to have a stable income"; has failed to have "a stable and safe place for the children to live"; and "has not addressed her own severe emotional and mental illness." 1JA 148 (Order) (paragraph 3). Notably, the district court did not find abandonment, or abuse or neglect. The district court found that the children's best interests would be served by termination of Jacqueline's parental rights. *Id.*

V. STATEMENT OF THE FACTS

Jacqueline is the mother of four minor children: Roberto, Kayleigh, Nathan, and Ethan. 6JA 1341-42. Roberto was born in Long Beach, California in 2007. 6JA 1341-42, 1357. At that time Jacqueline was seventeen years old and living with Robert Hunt-Taylor and his grandmother. 6JA 1357-58. A month and a half later, Jacqueline and

⁴ Opening briefs: Petitioner's Trial Brief, 1JA 29; [Respondent's] Summation, 1JA 76; and responding briefs: Petitioner's Opposition, 1JA 114; and [Respondent's] Errata and Reply, 1JA 127.

Roberto moved to Jacqueline's mother's house. Almost immediately Jacqueline's mother had her sent to foster care. 6JA 1358. Jacqueline spent four months in foster care and returned to her mother's house where she "had to stay home and take care of my siblings, get a job and kiss school goodbye." 6JA 1359. When Jacqueline turned eighteen, her mother "kicked" her to "the streets." 6JA 1360. She turned to Social Services and with its help, obtained an apartment for her and Roberto, who was then one year old. 6JA 1360-61. Social Services also helped her enroll in Santa Clarita Career College where she studied to become a medical assistant. 6JA 1361. Though she did well in school, anxiety set in and she became "overwhelmed, scared, and walked out of the testing"—and did not get her GED or pass her medical assistant course. 6JA 1361-62.⁵

In August 2009, Jacqueline and Roberto moved to Reno to meet her dad. 6JA 1362-63. They stayed with paternal relatives. 6JA 1364. In February 2010, Kayleigh was born in Reno. (Jacqueline was pregnant with Kayleigh when she and Roberto moved to Reno.) 6JA 1342, 1363. A month after Kayleigh was born, Jacqueline and her children moved to

⁵ The record reflects that Jacqueline has had to deal with anxiety all of her adult life.

Lake Havasu City, Arizona to reunite with Robert Hunt-Taylor. 6JA 1364. In the two years they stayed in Lake Havasu, Jacqueline went back to school, found work, and became a part-time care giver for Mr. Hunt-Taylor's grandmother. 6JA 1364-66, 1368. She also enrolled Roberto (when he was three years old) into a school to address his speech issues. 6JA 1365, 1369. During the time in Lake Havasu, Nathan was born. 6JA 1342, 1370.

In January 2012, the family (Mr. Hunt-Taylor, Jacqueline, and their three children), moved back to Reno to be with Jacqueline's mother—who wanted to meet the children “and be a part of their lives.” 6JA 1370-71. However, one month later Jacqueline's mother “kicked” them out and dropped them off in downtown Reno. 6JA 1371. Jacqueline found a motel room at the Wonder Lodge where they stayed for two months. 6JA 1372. With the help of Washoe County Department of Social Services (WCDSS), the family was placed in the Volunteers of America Family Shelter, where they stayed for approximately five months—one month short of the maximum six-month time limit. 6JA 1372-74. They then relocated to “The Prayer House,” and then to a family shelter—“The Family Promise.” 6JA 1374-77. Between April and

September 2012 Jacqueline was employed as a housekeeper. 6JA 1374-76. When The Family Promise closed in late November, early December of 2012 (due to a lack of funding), 2JA 315; 6JA 1377, Jacqueline and her family (with help from Social Services via LITFH funding,⁶ 2JA 315-16), moved to an apartment on South Virginia Street. 6JA 1378-79. In October Jacqueline found work through a job agency as a housekeeper at Harrah's, 2JA 318; 6JA 1379-81, and was able to pay the \$300 deposit. 6JA 1381. They were also receiving public assistance—food stamps and WIC. 6JA 1382.⁷ The family stayed in the apartment until the middle of March 2013, 6JA 1386, and then (with help from Social Services) moved into a motel. 6JA 1388-89, 1391-92. Andrea Menesini was Jacqueline's assigned worker. 2JA 257; 6JA 1392.⁸

WCDSS had become involved with Jacqueline's family due to three—subsequently unsubstantiated (meaning that the “allegations of the reports were found to be untrue”)—reports, which were received in October, November and December 2012. 2JA 269-70. And because in

⁶ “Low-income Temporary Housing Funds.” 2JA 317.

⁷ Jacqueline was not eligible for food stamps, but Mr. Hunt-Taylor was. Jacqueline will not qualify for food stamps until 2020. 6JA 1382-85.

⁸ Andrea Menesini is an assessment worker. 2JA 244.

each instance the children were assessed as safe, they were not removed. 2JA 270-72, 278, 286-87, 289. In April 2013 however, the Division was concerned about the family's housing and also that Roberto had missed "quite a bit of school." 2JA 297. So on April 19, 2013, after it was determined that the family did not have adequate housing (they were being evicted), the children were removed by the Division's Emergency Response Unit. 2JA 289-90, 291-92.⁹

At this time Jacqueline was not employed but was looking for work through a previous employer. Additionally she was receiving assistance through Nevada State Welfare, including Temporary Assistance to Needy Families (TANF), food stamps, and Medicaid for the children. 2JA 295; 5JA 1135.¹⁰ Nonetheless, the Division's Safety

⁹ According to Ms. Menesini, the family "was being evicted and had exhausted all the resources locally [regarding] housing[.]" 2JA 289.

¹⁰ Cynthia Heldenbrand, a social worker supervisor in the State of Nevada Welfare Office, testified that Jacqueline received TANF in the amount of \$513.00 per month between April 2013 and November 2013, and because her children had been removed that amount was lowered to \$253.00 for December 2013. In January and February 2014 Jacqueline received \$383.00, and in March, April, and May she received \$291.00. In June and July 2014 Jacqueline received \$171.00 because she was working. 5JA 1133-34, 1141-43. Ms. Heldenbrand explained that TANF is a five-year federal program, which in Nevada is broken up into two-year, one-year time frames (after two years of receiving benefits the person has to "sit out" for 12 months before receiving

Plan Determination identified, as an “impending danger,” that the children were unsafe in Jacqueline’s care due to inadequate housing as well as her lack of motivation regarding Roberto’s missed school days. 2JA 298-99.¹¹ Prior to the children’s removal in April, Ms. Menesini observed Jacqueline and the children together approximately ten times. She had no concerns as to the children’s safety—the children’s needs were being met in terms of housing and food; there were no inappropriate interactions; Jacqueline was attached to her children; the children were happy and their clothes were clean. 2JA 325-26. Additionally, Jacqueline had put Kayleigh into a program called “Child Find,” which is a program for children between the ages of two and five that assesses a child’s developmental needs and help provide services related to those needs. 2JA 333-36.

additional benefits). 5JA 1144-45. After the five years, the person is “done for a lifetime.” 5JA 1145. In the Fall of 2014 when Jacqueline was on “sit out” (*i.e.* had no TANF funding), WCDSS did not offer her any services. 5JA 1196-97.

¹¹ On cross-examination Ms. Menesini acknowledged that Roberto was then only five-years-old and not required by law to attend school; the requirement starts at the age of six. 2JA 313-14. She also acknowledged that Roberto was not “unsafe” because he was not going to Kindergarten. 2JA 314.

After the children were removed, Jacqueline' case was assigned to a permanency worker (Ms. Rocio Lopez) for ongoing services. 2JA 297, 308, 310; 3JA 592 (noting that the assignment was made on April 30, 2013). When this case was assigned to Ms. Lopez, the children were in the care of WCDSS and placed at Kids Cottage. In May 2013, the children were placed in the home of Sandra Matute, where they continued to reside. 3JA 593.¹² At its inception the permanency plan was for reunification. 3JA 602-03. One year later the plan changed to termination of parental rights. 3JA 603.¹³ During this year a case plan and service agreement was developed for Jacqueline. The case plan required that she get housing, a stable income—either through welfare or employment—and that she be “motivated” to keeping the home clean, getting her children to appointments and school on time, and attending appointments. There was also an emotional well-being component. 3JA 609.

¹² Jacqueline has maintained contact with her four children while they have been in foster care. 5JA 1213-14; 6JA 1342-47, 1352-56; 7JA 1535-37.

¹³ The Adoption Safe Family Act (ASFA) gives a parent 12 months to reunify with a child or children. 3JA 603-04.

Jacqueline and Mr. Hunt-Taylor found an apartment in Reno on Linden Street. (They had actually secured the apartment in March 2013, but could not move in until May 2013 because it was not ready. 6JA 1402-03.) They had managed to save some money and were, as noted, receiving TANF in the amount of \$513.00 per month. Rent for the apartment was \$450.00 monthly; so they budgeted, and got additional money by collecting cans and bottles and selling plasma; and they looked for work. 6JA 1405-06, 1409-12. They also utilized community resources. 6JA 1415-17. Their expenses were covered through July 2013, but in August they came up short; there was \$30.00 missing. 6JA 1418, 1423.¹⁴ Consequently the power (or “light”) bill did not get paid. 6JA 1425. Even after selling a microwave (\$10.00) and a recliner (\$15.00) they were unable to meet their expenses. 6JA 1426. The power was turned off in August. The same was true for October, November and December. 6JA 1427-28, 1430.¹⁵ Ultimately they were

¹⁴ It may be that Mr. Hunt-Taylor was using some money to purchase alcohol for himself. There was no evidence that Jacqueline was misusing the funds. 6JA 1418, 11423, 1436-37.

¹⁵ In October the TANF funds were reduced by half because the children had been removed. 6JA 1428.

evicted at the end of December, just before Jacqueline gave birth to Ethan (on January 1, 2014). 6JA 1430-31.

When Jacqueline and Ethan were discharged from the hospital they went to her father's mobile home on Fourth Street. 6JA 1431-32.¹⁶ They stayed there for three months. 6JA 11437. In February 2014 Jacqueline found work (through LaborMax) at SK Food Group. But the work was not constant and the work hours varied. 6JA 1438-39. Jacqueline had expenses: \$200.00 as rent to her father, and expenses related to the care of her child, Ethan. 6JA 1440-41.

In April 2014 Mr. Hunt-Taylor moved Jacqueline and Ethan into another trailer located in the same trailer park as Jacqueline's father's trailer. 6JA 1442-43. They lived in that trailer until July 2014. 6JA 1444.¹⁷ In the interim, a person named Alberto Vazquez was invited to

¹⁶ Alicia Kraft, an assessment worker, determined that this arrangement provided for Ethan's basic needs. Ms. Kraft also provided a Pack 'n Play for Ethan; Jacqueline had "all the other supplies needed at the time." 2JA 341, 349-50, 358-59. Ms. Kraft did not have any concerns regarding Jacqueline's interaction with Ethan, 2JA 353-54, 361, so Ethan was not removed. 2JA 351-52.

¹⁷ This location was checked out by an assessment worker—Erika Meszaros—who found the baby's playpen "to be clean, free of clutter, [and] appeared to have clean linen in it." 2JA 368-69, 377. Some things in the trailer needed to be rectified, but Ethan was not removed. 2JA 378. And 2JA 392-93, 396-97 (Denise Tyre) (same conclusion in July

stay at the trailer by Jacqueline for a short while. His presence created strife and ultimately Jacqueline and Ethan moved out after Mr. Hunt-Taylor was arrested for domestic violence. 6JA 11445-49.¹⁸ They moved to another trailer in the park (for about a week and a half), and then stayed at the home of Ms. Maribel Stalker until September 2014. 6JA 1448-51, 1453-59.¹⁹ Before moving from Ms. Stalker's home however, WCDSS arrived and removed Ethan from Jacqueline on the basis of "environmental neglect." 6JA 1461-64. See 2JA 420, 424-32, 445-46 (Denise Tyre) (explaining Ethan's removal from Ms. Stalker's home on September 11, 2014, and placing him in Ms. Matute's home—but *pace Id.* 447-48 (no environmental risk at Stalker's residence)).²⁰ Once Ethan was removed, Jacqueline's case (regarding Ethan) was assigned to Malia Seronio, a permanency worker. 2JA 434; 5JA 1173-75. Meanwhile, Ethan was placed in Ms. Matute's foster home with his siblings. 5JA 1177. Here WCDSS's plan was a concurrent plan of

2014).

¹⁸ Ms. Tyre concluded that Ethan had not been placed at risk because of this act of domestic violence. 2JA 437.

¹⁹ See 5JA 1149-59 (Maribel Stalker) (noting that Jacqueline and Ethan were living in her home when Social Services took Ethan).

²⁰ Ms. Tyre did not believe Jacqueline and Ethan were residing at Ms. Stalker's house. She thought they lived at a different location.

reunification as well as termination of parental rights. Ms. Seronio: “A concurrent plan indicates that I would continue working reasonable efforts with Ms. Guerrero, *but* I would also begin working towards termination of parental rights and steps required to do that.” 5JA 1179 (*italics added*). Followed by adoption. *Id.*

Jacqueline was asked to complete a psychological evaluation and then engage in therapy. 5JA 1198. She saw Dr. Rogina in December 2014.²¹ Then she completed a neuropsychological evaluation with Dr. Aberasturi in January 2015. 5JA 1199. Based on Dr. Aberasturi’s recommendations, Jacqueline was referred to individual therapy (with Ms. Dori Orlich—who found her to be “always cooperative” and “very, very pleasant.” 5JA 971, 973-76²²) until a dialectical behavioral

²¹ Dr. Rogina testified that he completed a psychological evaluation of Jacqueline in December 2015, but did not do testing because Jacqueline never returned. 4JA 902, 910-13. In the one meeting they had, Jacqueline was personable and friendly. 4JA 914. He concluded however that Jacqueline suffered from depression; he found a pervasive and persistent depressive disorder, and he diagnosed an anxiety disorder. 4JA 921-22.

²² Ms. Orlich testified that Jacqueline was “overwhelmed, distressed ... frustrated, [and] that she loved and was bonded to [Ethan][.]” 5JA 982. Jacqueline stopped seeing Ms. Orlich and started seeing Ms. Buttacavoli at Ms. Seronio’s direction. 7JA 1523-24, 1580.

therapist was available. 5JA 1210-02. That therapist—Amanda Buttacavoli—became available in March 2015. 5JA 1201-02.²³

As noted, Dr. Suzanne Aberasturi conducted the neuropsychological evaluation. 3JA 465-66, 471. She met with Jacqueline four times. 3JA 473. Dr. Aberasturi found Jacqueline to be “very pleasant” and “very forthcoming.” 3JA 475-76, 534. After extensive testing, Dr. Aberasturi concluded that Jacqueline had three different diagnoses falling under real anxiety: generalized anxiety with history of panic attacks; obsessive-compulsive disorder; and post-traumatic stress disorder based on past traumatic experience. 3JA 506-07, 516. Dr. Aberasturi also found attention deficit hyperactivity disorder, and a dependent personality disorder. 3JA 507-10. Dr. Aberasturi recommended dialectical behavioral therapy for Jacqueline as well as a psychiatry evaluation to see if medication as treatment was warranted. 3JA 511-

²³ An attempt to secure services at the Northern Nevada Adult Mental Health Services (NNAMHS) was unsuccessful because NNAMHS would not accept Jacqueline’s insurance (Amerigroup Medicaid). 5JA 1201-02; 7JA 1607. Jacqueline was also referred to Alliance Family Services. 5JA 1202. Mohave Mental Health would not see her because of her insurance, and would not accept WCDSS’s voucher. 5JA 1204. But Jacqueline got on a waiting list for Northern Nevada Hopes. 5JA 1203; 7JA 1576-78.

12. (Jacqueline attempted to get medication at NNAMHS and at Family Alliances. 7JA 1524-25.)

Amanda Buttacavoli, a licensed clinical social worker, obtained her certification to provide dialectical behavioral therapy online. 3JA 544-47. She was Jacqueline's therapist; they met three times. 3JA 549-53. Ms. Buttacavoli characterized Jacqueline as "very engaged during individual sessions," "punctual," and demonstrated "complete engagement and [a] willingness to participate fully." 3JA 559. But Jacqueline missed two sessions and pursuant to a policy allowing only one missed appointment, therapy was discontinued. 3JA 558-62; 7JA 1523, 1582-83, 1608-09.

Recognizing that she would need some help, Jacqueline expressed her desire for the return of her children and to "be a mom again." 7JA 1537, 1600-04, 1613-14. There was no evidence of abandonment, neglect or abuse.

VI. SUMMARY OF ARGUMENT

The United State Supreme Court has held that a parent's right to the care and custody of her children is among the oldest of the judicially recognized fundamental liberty interests protected by the Due Process

Clauses of the federal and state constitutions. The State has the authority to protect children from serious harm committed by parents and to terminate a child's relationship with his or her parent forever if that harm is proven. Termination of parental rights is an exercise of awesome power. It is tantamount to imposition of a civil death penalty. In termination of parental rights cases this Court closely scrutinizes whether the district court properly terminated the parental rights at issue. At trial the petitioning party—here WCDSS—must prove by clear and convincing evidence that termination is in the children's best interest, and that parental fault exists. This Court reviews the family court's findings of facts for substantial evidence. It reviews questions of law de novo.

Here the district court did not find "serious harm"; it found "parental fault" under the token efforts provision of NRS 128.105(2)(f); finding that Jacqueline had failed to have a stable income or provide a stable and safe place for the children to live. The court also incorrectly found that Jacqueline had a "severe mental illness" that she had failed to address. The district court's stable income/place to live findings cannot be the basis for termination because of Jacqueline's poverty.

Parental unfitness cannot be based on poverty. The district court announced that poverty was not the issue here, but that finding is belied by the record. “Poverty” is being poor. “Poverty” covers a range of from extreme want of necessities to an absence of material comforts. Because a parent’s poverty alone is an insufficient basis to terminate parental rights, a State has no right to irrevocably sever the natural parent-child relationship simply because a parent is incapable of providing her children with an idyllic middle-class lifestyle.

VII. ARGUMENT

The district court erred in terminating Jacqueline’s parental rights where, as here the basis for termination was not serious harm to any of her children, but solely due to circumstances arising from Jacqueline’s poverty.

Standard of Review

The parent-child relationship “is a fundamental liberty interest and the Due Process Clause of the Fourteenth Amendment protects parents’ fundamental right to care for and control their children.” *In re Parental Rights as to J.L.N.*, 118 Nev. 621, 625, 55 P.3d 955, 958 (2002) (internal quotation marks and footnotes omitted). Termination of

parental rights “is an exercise of awesome power that is tantamount to imposition of a civil death penalty.” *In re Parental Rights as to A.J.G.*, 122 Nev. 1418, 1423, 148 P.3d 759, 763 (2005) (internal quotation marks omitted) (quoting *Matter of Parental Rights as to N.J.*, 116 Nev. 790, 795, 8 P.3d 126, 129 (2000)). Thus, this Court “closely scrutinize[s] whether the district court properly ... terminated the parental rights at issue.” *Id.* The petitioning party must prove by clear and convincing evidence that (1) termination is in the [children’s] best interest, and (2) parental fault exists. *In re Parental Rights as to A.L.*, 130 Nev. Adv. Op. 91, 337 P.3d 758, 761 (2014). This Court reviews findings of fact for substantial evidence and questions of law de novo. *Id.*

Discussion

The United State Supreme Court has held that a parent’s right to the care and custody of her children is among the oldest of the judicially recognized fundamental liberty interests protected by the Due Process Clauses of the federal and state constitutions. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). That right is not absolute and a State has the authority to protect children from serious harm committed by parents and to terminate a child’s relationship with his or her parent forever if

that harm is proven by clear and convincing evidence. *Santosky v. Kramer*, 455 U.S. 745 (1982).

The district court's order does not find the requisite *serious* harm (let alone any harm) to any of Jacqueline's children. Nor can it. The evidence presented at trial showed that Jacqueline properly cared for her children and that they were taken from her for reasons other than serious harm:

- WCDSS became involved in this family in October 2012 based on three reports—each subsequently deemed unsubstantiated; the children—Roberto, Kayleigh, and Nathan—were not removed;
- The assigned social worker, Ms. Menesini, had no concerns over Jacqueline's parenting skills or her care or interaction with her children—the children were happy and their clothes were clean;
- Later, and only because the family faced eviction, were the children removed from their home; not because of serious physical, mental, or emotional harm;
- Jacqueline moved to a new apartment and maintained contact with her children;

- After Ethan was born the social worker did not remove him while he and Jacqueline stayed with her father or even after they moved to their own trailer;
- Later Ethan was removed for “environmental” risk based on another social worker’s belief that he and Jacqueline were living at one location when the evidence showed they lived at another (that itself did not present “environmental” risk).

Nowhere in six days of trial testimony was there any evidence that Jacqueline was not bonded to her children (and they to her) or that she was not attentive to their needs. True she had to utilize community services, relied upon social welfare, sell items, and rely on other strategies; but she still provided. “Even if a parent’s behavior may reasonably suggest that a child would be better off with a new family, the best interest standard does not permit termination merely because a child might be better off living elsewhere.” *In Interest of E. W.*, ____ S.W. 3d ____, ____ (Tex. App. 2015) (2015 WL 3918292 *10) (internal quotation marks omitted) (citing *In re A.H.*, 414 S.W. 3d 802, 807 (Tex. App. 2013)); and *cf. Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (noting that “[t]he fundamental liberty interest of natural parents in

the care, custody, and management of their children does not evaporate simply because they have not been model parents or have lost temporary custody of their children to the State.”).

Here the “parental fault” finding was one of “token efforts” under NRS 128.105(2)(f). The “best interest” finding was based on the statutory presumptions contained in NRS 128.109. 1JA 148 (Order). The district court’s order found that Jacqueline failed to “have a stable income,” or “have a stable place”²⁴ for the children to live, and that she had not “addressed her own severe emotional and mental illnesses.” *Id.* On the later point, the evidence presented established that Jacqueline suffered from anxiety and panic attacks (and situational depression) which could be treated without medication—though it was suggested that medications might help. Jacqueline was not diagnosed with a “severe mental illness.”²⁵ This Court may set aside a district court’s findings of fact when they are either “clearly erroneous” or where “no evidence supports the findings.” *Sierra Nevada Stagelines, Inc. v. Rossi*, 111 Nev. 360, 363, 892 P.2d 592, 594 (1995); and *Horgan v. Felton*, 123

²⁴ The district court’s order adds “safe” in conjunction with “stable” place but there was no evidence that the children were ever “unsafe.”

²⁵ Additionally, evidence presented at trial demonstrated that her inability to get medications was tied to her insurance coverage.

Nev. 577, 581, 170 P.3d 982, 985 (2007) (findings of fact must be supported by “substantial evidence”). It should do so here.

Turning the first point, “[parental] unfitness cannot be based on poverty and lifestyle which do not reflect a lack of concern for and ability to care for the children or an unwillingness to receive the child as part of a family.” *Five Minor Children*, 407 A.2d 198, 200 (Del. 1979), rev’d on other grounds, *Patricia A.F. v. James R.F.*, 451 A.2d 830 (Del. 1982). Given the evidence presented at trial, the district court surprisingly concluded that this case was not about poverty.²⁶ Yet the district court also found that Jacqueline “ha[d] not consistently remained unemployed enough to support the children financially.” 1JA 148. The juxtaposition of these two ideas is confounding because the latter idea is the definition of “poverty.” See Merriam-Webster’s Collegiate Dictionary 973 (11th ed. 2012) (“poverty may cover a range from extreme want of necessities to an absence of material comforts”); The American Heritage Dictionary of the English Language 1381 (5th ed. 2011) (“The state of being poor; lack of the means of providing material needs or comfort”). And “a parent’s poverty alone is an an

²⁶ Jacqueline argued that it was. 1JA 76 (Summation) (“This case is about poverty.”).

insufficient basis to terminate parental rights.” *In re J.V.J.*, 765 S.E.2d 389, 393 (Ga. Ct. App. 2014), and *Id.* n. 13 (“*See In the Interest of C.J.V.*, [746 S.E.2d 783, 786-87 (Ga. 2013)] (explaining that evidence that a mother is unemployed, without prospects for future employment, and without any stable living arrangements is an *insufficient basis* to terminate her parental rights”) [internal quotation marks omitted, italics added]; [and *Id.* at 746 S.E.2d 783, 789] (Dillard, J., concurring specially and fully) (“The State has no right to irrevocably sever the natural parent-child relationship simply because a parent is incapable of providing her children with an idyllic middle-class lifestyle.”²⁷). Yet that is what occurred here.

²⁷ The full quote: “What the government is *not* entitled to do, regardless of any *apparent* statutory authority for doing so, is to *force* some generalized, bureaucratic, Orwellian notion of parenting onto citizens who have temporarily lost custody of their children as a precondition to regaining custody of those children. Indeed, I find it deeply troubling that both the trial court and dissent justify the termination of the mother's parental rights, in part, because she has moved from place to place, lived with different people, depended on others for financial support, and failed to provide toys for her children. The State has no right to irrevocably sever the natural parent-child relationship simply because a parent is incapable of providing her children with an idyllic middle-class lifestyle. And while it is certainly heartening to know that the children are thriving in their foster home, the State has no business facilitating the adoption of children entrusted to its care until and unless a parent has, by her actions or inaction, forfeited her

Because “poverty alone, even abject poverty resulting in homelessness is not a valid basis for assertion of [family] court jurisdiction.” *In re P.C.*, 165 Cal.App.4th 98, 106 (Cal. Ct. App. 2008) (quoting *In re G.S.R.*, 159 Cal.App.4th 1202, 1210 (Cal. Ct. App. 2008), this Court should vacate the parental termination order entered below. This result is required even though the children have been placed in a prospective adoptive home. The district court noted that the children are “thriving in their potential adoptive home,” and that if returned to their mother’s care they might risk “re-removal over an inability to provide for their basic needs.” 1JA 149 (Order). But as stated in *In re P.C.*, 165 Cal.App.4th at 601-02, even though a reviewing court may be “loathe to upset the rare instance of stability in [the children’s] lives ... it cannot permit a mother’s parental rights to be terminated [based on mother’s poverty and lack of stable, suitable housing].” In such case a reviewing court should remand so that “the necessary steps to return the children to mother’s custody [can be taken].” *Id.* at 108. And if “renewed efforts fail, the ... court can proceed to terminate mother’s

constitutional right to familial relations. The State's primary goal must be to maintain and preserve the natural parent-child relationship, not to act as a clandestine adoption agency.” 746 S.E.2d at 789-90 (*italics in the original*).

parental rights”—“[i]f grounds *independent* of mother’s poverty and lack of stable, suitable housing currently exist such that it would be detrimental to place the children in mother’s care[.]” *Id.* (italics added).

VIII. CONCLUSION

Jacqueline did not deserve to lose her children through the family court’s order terminating her parental rights. Accordingly, this Court should reverse the family court’s order and remand with instructions to vacate that order and proceed as outlined above.

DATED this 22nd day of July 2016.

JEREMY T. BOSLER
WASHOE COUNTY PUBLIC DEFENDER

By: JOHN REESE PETTY
Chief Deputy, Nevada Bar No. 10
jpetty@washoecounty.us

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, even including the parts of the brief though exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains a total of 4,525 words. NRAP 32(a) (7) (A) (i), (ii).

3. Finally, 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 this brief 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 of the transcript or appendix where the matter relied upon is to be found. 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 22nd day of July 2016.

/s/ John Reese Petty
JOHN REESE PETTY
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 22nd day of July 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Tyler Elcano, Deputy District Attorney
Washoe County District Attorney's Office

I further certify that I served a copy of this document by providing a copy to:

Jacqueline Guerrero.

John Reese Petty
Washoe County Public Defender's Office