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,
_____/
JACQUELINE GUERRERO,
Appellant,
vs.
WASHOE COUNTY DEPARTMENT OF SOCIAL SERVICES,
Respondent.
_____/

No. 70210

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

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APPELLANT'S REPLY 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

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ARGUMENT IN REPLY

The gist of the Department's position—repeated throughout its brief—can be gleaned from how it frames the legal issues. See Respondent's Answering Brief (RAB) at 1. First the Department asserts that the family court properly found parental fault under the statute based upon Jacqueline's failure to "obtain and maintain income" or "a safe and stable home," and that she failed to address her "severe mental and emotional illnesses." Second, that the family court properly found termination was in the children's best interest since the children "are flourishing in an adoptive placement where all their needs are met, where they are cared for by a mentally stable individual who is capable of following through with tasks to effectively provide for them, [and] where they are treated and loved like family ... ." Finally, third, that the family court was not required to find "substantial harm," because that finding is not required by the governing statutes.

But, as explained below, these reasons are legally insufficient to support the termination of Jacqueline's parental rights and her children should be returned to her.

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Termination of parental rights is an extreme measure. Contrary to the Department's view, Jacqueline's poverty or emotional or mental difficulties are not sufficient reasons for terminating her parental rights, and the existing adoptive foster care placement does not preclude the return of Jacqueline's children

The termination of parental rights "is a remedy of last resort which can be sustained only when there is clear and convincing evidence that the cause of the deprivation is likely to continue." *In re J.V.J.*, 765 S.E.2d 389, 393 (Ga. App. 2014) (internal quotation marks, footnote and italics omitted). Continuing, the appellate court added,

> [a]s such, "compelling facts" are required to terminate parental rights. And while the juvenile court may consider past parental conduct in deciding whether the cause of deprivation is likely to continue, evidence of past unfitness, standing alone, is "insufficient to terminate the rights of a parent to her natural child." Rather, clear and convincing evidence of "present unfitness is required." Additionally, a parent's poverty alone is an insufficient basis to terminate parental rights. Lastly, we have repeatedly recognized that "[t]he right to raise one's children is a fiercely guarded right in our society and law, and a right that should be infringed upon only under the most compelling circumstances."

Id. (internal footnotes and italics omitted, second alteration in the original).

This Court has expressed a similar position on many occasions. For example in *In re Parental Rights as to A.G.*, 129 Nev. Adv. Op. 13, 295 P.3d 589 (2013), this Court reiterated "that severing the parent-child relationship is *an extreme measure* and an exercise of awesome power." And because the termination of parental rights "implicates fundamental liberty interests of a parent's relationship with his or her child," not only must the proceedings be "fundamentally fair," but more importantly, "substantive due process ... demands that the government have a basis for subjecting the parents to the procedures in the first instance." *Id.* 295 P.3d at 595 (citations omitted, italics added).

Because termination of parental rights is an extreme measure it should be a last resort. "Termination of parental rights is designed for cases in which there is no way in which the child's interests can be reasonably served except by taking the offending parent out of the child's life." *Greeson v. Barnes*, 111 Nev. 1198, 1209, 900 P.2d 943, 950 (1995) (Springer, J., dissenting). Thus, "[t]he kinds of parental rights termination cases we ordinarily see are cases in which it is quite apparent that the child's interest cannot be served by sustaining the parental tie with parents who, for example, are in prison, are hopeless

drug addicts or who have actually demonstrated a 'settled purpose' to give up their parental rights." *Id.*

That is not this case. Nowhere in the Department's answering brief (or in the record of the proceedings below) is there any evidence (or indication) that Jacqueline is a convict or a substance abuser or has demonstrated a settled purpose to give up her parental rights.[1] Nor is there evidence (or indication), that Jacqueline neglected or abandoned her children.[2] Indeed, when the children were in Jacqueline's care—before the Department took them—they were safe, cared for, and loved. No social worker testified to the contrary.

Clearly, a mother's loving bond is relevant to the children's best interests. See *In re Parental Rights of J.L.N.*, 118 Nev. 621, 626, 55 P.3d 955, 958 (2002). In fact, "[t]he best interests of the child standard

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[1] That is, no evidence of abandonment under NRS 128.012. *Cf. Greeson v. Barnes*, 111 Nev. 1198, 1204, 900 P.2d 943, 947 (1995) (stating that "the mere fact the parent contests the termination may indicate that the parent does not have a 'settled purpose ... to forego all parental custody and relinquish all claims to the child.'") (ellipsis in the original).
[2] Neglect is defined in NRS 128.014. Though the family moved around the children did not lack "proper parental care;" did have subsistence, education and medical care; were not found in "a disreputable place, [or] associate[ing] with vagrants or vicious or immoral persons;" or placed "in a situation dangerous to life or limb, or injurious to heath and morals[.]"

embraces a strong presumption that the child's best interests are served by maintaining parental rights." *In re Yve S.*, 819 A.2d 1030, 1042 (Md. Ct. App. 2003) (citations omitted).[3] "If it were otherwise," the court continued,

> the most disadvantages of our adult citizens always would be at greater risk of losing custody of their children than those more fortunate. Those of our citizens coping with emotional or mental difficulties could be faced with such discrimination. [T]he emotional or mental difficulties experienced by a parent *are not sufficient reason for removing a child except in more extreme cases."*

Id. (citations omitted, italics added). As if speaking to the facts of this case, the appellate court (quoting from an earlier decision) said, "[t]he fact that appellant has a mental or emotional problem and is less than a perfect parent or that the children may be happier with the foster parents is not a legitimate reason to remove them from a natural parent competent to care for them in favor of a stranger." *Id.* (citation omitted). More forcibly, the appellate court in *In re J.V.J.*, noted that even where a child has been in "the commendable care [of] the foster parents" (and

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[3] The Maryland Court of Appeals locates this presumption in *Parham v. J.R.*, 442 U.S. 584 (1979). 819 A.2d at 1042 ("The Supreme Court placed its imprimatur on the presumption that parents act in the best interests of their children in [*Parham*].").

with the child's siblings), a court "has no authority to sever the natural parent-child relationship simply because it believes the child would be better off with the foster family." 765 S.E.2d at 396. "Indeed," the court explained, "a court is not allowed to terminate a parent's natural right to familial relations with his or her child simply because it has determined that 'the child might have better financial, educational, and even moral advantages elsewhere.'" *Id.* But that is what the family court did here. See 1JA 163-65 (Order Terminating Parental Rights) (finding parental fault essentially on Jacqueline's poverty and mental health, and finding best interests due to the placement of the children in an adoptive foster home). Naturally, the Department echoes the court's sentiments. See RAB at 18-20 (discussing the children's current placement).[4]

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[4] The family court judge claims, as does the Department—repeatedly, that this case is not about poverty. But it is. "A bad argument does not improve with repetition." *Carr v. United States*, 560 U.S. 438, 462 (2010) (Alito, J., dissenting). The Department double downs by asserting that Jacqueline "chose to be willfully unemployed, to be willfully homeless, and to fail to meet her severe mental and emotional illness." RAB at 33-34. This is an astonishing claim where, according to "the Census Bureau, the percentage of Americans living in poverty is higher today than it was in the late 1960s." Christopher Jencks, Why the Very Poor have Become Poorer, THE NEW YORK REVIEW OF BOOKS 15 (June 9, 2016) (review of Kathryn J. Edin's book, "$2.00 a

CONCLUSION

Jacqueline's poverty and mental and emotional difficulties were insufficient to terminate her parental rights. Nor was termination of her parental rights appropriate because the children were in an adoptive foster home. This later fact was "wholly without consequence, when the court lacked clear and convincing evidence to terminate [Jacqueline's] parental rights." *In re J.V.J.*, 765 S.E.2d at 396.

Jacqueline has a loving bond to her children, has never abused them, is not a substance abuser, and no serious risk of injury the children exists if they are returned to her care. This Court should reverse.

DATED this 5th day of October 2016.

JEREMY T. BOSLER
WASHOE COUNTY PUBLIC DEFENDER

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

Day: Living on Almost Nothing in America"). Additionally, the family court (and the Department) resting termination on a finding of "token efforts" is error. "Justice requires more than a mechanical application of the presumptions as to the children's best interests and 'token efforts' as related to the care of the children." *In re Parental Rights as to A.P.M.*, 131 Nev. Adv. Op. 66, 356 P.3d 499, 506 (2015) (Douglas, J. dissenting).

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 1,639 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 5th day of October 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 5th day of October 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