IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE PARENTAL RIGHTS AS TO S. L.; N. R. B.; H. R. B. AND W. C. B.	NO. 71873
DONALD B., Appellant, vs. STATE OF NEVADA DEPARTMENT OF FAMILY SERVICES; S. L.; N. R. B.; H. R. B.; AND W. C. B., MINORS, Respondents.	
IN THE MATTER OF THE PARENTAL RIGHTS AS TO S. L.; N. R. B.; H. R. B. AND W. C. B.	NO. 71889
MELISSA L., Appellant, vs. STATE OF NEVADA DEPARTMENT OF FAMILY SERVICES; S. L.; N. R. B.; H. R. B.; AND W. C. B., MINORS, Respondents.	

APPELLANTS' JOINT OPENING BRIEF

TURCO & DRASKOVICH, LLP

ROBERT M. DRASKOVICH, ESQ.
Nevada Bar No. 6275
815 S. Casino Center Boulevard
Las Vegas, NV 89101
Telephone: (702) 474-4222
Attorney for Appellant Donald B.

LAW OFFICES OF MICHAEL I. GOWDEY

MICHAEL I. GOWDEY, ESQ.
Nevada Bar No. 6994
815 S. Casino Center Boulevard
Las Vegas, NV 89101
Telephone: (702) 471-0321
Attorney for Appellant Melissa L.

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Jurisdictional Statement

This appeal was filed pursuant to Rule 4(a) of the Nevada Rules of Appellate Procedure and is an appeal of a final judgment terminating parental rights. Written notice of the entry of judgment was filed on December 14, 2016, and the Notice of Appeal was filed November 28, 2016.

Statement of the Issues

1. Whether the District Court erred in finding the evidence substantial to terminate the parental rights of Donald B. and Melissa L?

2. Whether the Fifth Amendment privilege against self-incrimination protects Donald B. and Melissa L. from admitting to the abuse as a requirement to completing their case plan and reunifying with their children?

Statement of the Case

On January 28, 2014, a Petition alleging abuse and neglect was filed against the natural mother and stepfather of S.L. (Appellants' Appendix, hereinafter I "AA" 1.) On July 30, 2014, the parents entered a plea of no contest to the allegations in the Third Amended Petition and the Department of Family Services ("DFS") submitted case plans for both parents. (I AA 22; 36; VI AA 1414).

In January of 2016, DFS changed the recommendation of the permanency goal to termination of parental rights and the matter went to trial for nine days. (I AA 1). Written notice of the entry of judgment terminating Donald B. and Melissa L.'s parental rights was filed on December 14, 2016, and the Notice of Appeal was filed November 28, 2016. (I AA 68).

Statement of Facts

Donald B. and Melissa L. (collectively referred to as "Appellants") are the biological parents of minors, N. R. B., H. R. B. and W. C. B. Melissa L. is the biological mother of S.L. with the biological father of S.L. not being identified. (I AA 1). On December 11, 2013, Child Protective Services ("CPS") made contact with S.L. who was allegedly observed to have a bruise underneath her left eye at school. (I AA 6:10-11). S.L. had purportedly told a friend that Donald B. hit her, but later denied making this statement to CPS. (I AA 6:11; 7:3). S.L. told CPS that the injury had occurred when she was unloading the dishes from the dishwasher and hit the cabinet above the dishwasher with her eye. (I AA 7:3-6). Her other siblings were home when this happened and Donald B. applied ice to her eye to help with the swelling. (I AA 7:3-6). When CPS asked about marks and bruising on S.L.'s back, she recalled that she hit part of the trampoline where the pole and the round part meet after climbing over the wall to get into her backyard. (I AA 7:8-12). S.L. denied physical abuse or being fearful of anyone at her home. (I AA 8:5:5). On this same day, CPS made contact with N.B. who reported a similar rendition of how S.L. obtained the injury from hitting her face on the cabinet door while unloading the dishwasher at home. (I AA 8:21-23). The family had already been under close scrutiny due to prior unsubstantiated allegations of abuse by CPS and Donald B's. prior 1984 conviction out of California for manslaughter of his

infant daughter. (I AA 5:3-5; 5:25-28). Melissa L. did not have any prior relevant criminal history identified. (I AA 4).

On January 8, 2014, CPS removed S. L. from her home. (I AA 52:5-6). Even though there were no allegations of abuse to the other minor children, CPS subsequently removed N. R. B., H. R. B. and W. C. B., from their home on January 19, 2014. (I AA 52:5-6). The minor children were placed in foster care at St. Jude's after the children's placement with, Alicia B., the sister-in-law to the children and wife of their eldest adult brother, David B., did not work out and no other relatives were deemed appropriate by CPS. (I AA 834:13-23; 877:7-9). On January 29, 2014, a Petition of Abuse/Neglect was filed for all of the minors against Donald B. and Melissa L. requesting that the minors become wards of the District Court. (I AA 1). The Petition was amended on February 27, 2014 alleging Donald B. was an unfit caregiver pursuant to Nev. Rev. Stat. 432B.555 based on his prior conviction. (I AA 13). In March of 2014, Donald B. was charged with 18 felony counts and one gross misdemeanor, and Melissa L was charged with five felony counts stemming from the alleged abuse of S.L. (VI AA 1392:9-24; 1393:1-7). On June 12, 2014, the Petition was amended a second time wherein it was alleged that a physician had identified the marks based on photographs of S.L.'s back as having "occurred without a deliberate but unreasonable or failure to act" and alleged that Donald B. had created the marks on S.L. through physical abuse. (I AA 16). The Second Amended Petition also attributed all prior

unsubstantiated allegations of abuse to Donald B. (I AA 16). The Second Amended Petition further alleged that Melissa L. failed to protect S.L. despite her knowledge of the ongoing physical abuse, lacked the protective capacity, and mentally injured S.L. (I AA 16). A Third Amended Petition was filed that omitted the section attributing all prior unsubstantiated allegations of abuse to Donald B. along with the section alleging that Melissa L. lacked the protective capacity among other things. (I AA 19). A no contact order between the parents and children was entered on July 18, 2014, but was later lifted by the court on Counsel's Motion on September 14, 2014 only to be put back into place two months later by the State's motion. (IV AA 931:8-24).

On July 30, 2014, Melissa L. and Donald B. entered a plea of no contest to the Third Amended Petition. (VI AA 1414:8-9). The case was set for a dispositional hearing on August 13, 2014. (IV AA 831:2-6). At the dispositional hearing, DFS submitted case plan reports for Donald B. and Melissa L. that required them to participate in parenting classes, therapy, among other things, but most importantly an acknowledgement that S.L. was physically abused in order to reunify with the children by February 28, 2015. (IV AA 842:5-7). The District Court accepted DFS's case plan reports for both parents. (I AA 40:7-8). Only three months into the case plan, on November 7, 2014, the State filed a motion for a finding that aggravated circumstances existed under Nevada Revised Statute 432B.393 to waive reasonable efforts to reunify the family based on Donald B.'s

prior conviction, and thus, already setting the stage to seek termination of parental rights before the parents were given an opportunity to fulfill the requirements of their case plans to reunite with their children. (IV AA 924:20-24; 925:10-20). As the District Attorney's Office was actively pursuing the criminal case and DFS was represented by the District Attorney's Office in the juvenile case, Donald B. and Melissa L. would not admit to the abuse of S.L. (I AA 67:3-5). Even though Donald B. and Melissa L. were complying with all of the requirements of the case plan reports with the exception of admitting to the abuse of S.L., DFS changed the recommendation of the permanency goal from reunification to termination of parental rights in January of 2016. (I AA 67:3-5). At the time, Donald B. and Melissa L. had both completed risk assessments and classes at Red Rock Psychological Health, and were attending therapy at Healthy Minds. (IV AA 849:3-17; 850:14-18; 852:8-12). Donald B. had also completed boundaries classes. (IV AA 849:8-9). Donald B. and Melissa L. were continuously making efforts to have contact with their children the entire time, but DFS refused based on the contact order in place requested by the State. (IV AA 937:5-23). On July 22, 2015, DFS submitted another report to the District Court again recommending termination of parental rights because "[e]ven though the parents had completed the objectives or action steps in the case plan, there was still know [sic] acknowledgment of the physical abuse and there was no – there was – the Department was not able to do a safety plan with them. (IV AA 849:8-9). In this

same report, Melissa L. and Donald B. had completed mental health assessments, and Donald B. had completed a domestic violence assessment along with the twenty-eight (28) sessions of therapy at ABC therapy. (IV AA. 862:11-18; 863:6-22). The two-year review hearing was held in January of 2016 where DFS reported no change due to the parents' failure to admit to the abuse. (IV AA 911:6-20). On July 20, 2016, the two and a half year review hearing was held and no change was reported by DFS. (IV AA 883:4-13).

When it came time for trial on this matter, all subject minors had been out of the home and in foster care for approximately two years. The State called S.L., the foster parent Jacqueline Wolf, Melissa L., Donald B., S.L. N.B., H.B. S.L.'s therapist Janet Nordine, N.B.'s therapist Laura Brown, H.B.'s therapist Lynetta Cooley, the Custodian of Records for DFS Mari Paralade, The defense called Donald B.'s therapist, Dr. Dennis Gennis also known as Dr. Dennis Sanchez, from Health Minds and David B., the children's adult sibling.[1] At the time of trial, S.L. was a month away from turning eighteen and aging out of the foster system. (VI AA 1459:15-18). While in foster care, S.L. was injured at least three times with one of those injuries resulting in a trip to the emergency room. (VI AA 1459:15-18). During her testimony at trial, S.L. testified she had lied at the preliminary hearing on July 18, 2014 when she stated under oath that she obtained the bruise

[1] For the sake of brevity, Appellants do not cite to all testimony adduced at trial. However, Appellants reserve their right to provide further trial testimony in Reply, if necessary.

and markings on her back in December of 2013 from the cabinet and trampoline because she was afraid and was told to create stories of how the abuse occurred by her parents. (VI AA 1459:15-18). S.L. further testified that Donald B. had given her the bruise on her eye and her back with a belt. (VI AA 1459:15-18). This, of course, contradicted S.L.'s prior statement to her friend that she had obtained the bruise from Donald B. when he hit her in the face. (I AA 6:11; 7:3). S.L. also testified that she had lied at the preliminary hearing about Melissa L. not beating her for she testified at trial under oath Melissa L. beat her sometimes and Donald B. would step in to stop the beating. (VI AA 1459:15-18). S.L. conceded that there were times that she had injuries not due to abuse that CPS investigated despite being an accident. (VI AA 1459). S.L. further recounted that she was allegedly abused everyday by Donald B. and sometimes by Melissa L., but she had never disclosed this to CPS or authorities before despite the many times CPS had interviewed her and conducted body checks. (VI AA 1459). Two letters were admitted at trial. The first letter was written prior to the July 14, 2014 preliminary hearing. (III AA 692:1-8). In the first letter, S.L. claimed Donald B. had repeatedly abused her since the age of three. (III AA 692). The second letter was written during the time the parents were permitted contact with S.L. In the second letter, she wrote to Donald B. that he was incarcerated for a “stupid reason” and should not be incarcerated. (III AA 692). S.L. declared in this second letter that she loved Donald B. and could not wait until he came home. (III AA 692).

During the trial testimony of Maryte Tallent, DFS case manager, she testified that even after she had visited the children every 30 days post-removal from their home and placement into foster care, not once did S.L. or Nikki ever discuss the alleged abuse. (IV AA 913:22-24; 914:1). Ms. Tallent conceded that unless Donald B. and Melissa L. admitted Donald B. physically abused S.L., the case plan would go nowhere. (IV AA 952:20-23). It did not matter that Donald B. did domestic violence counseling or that they both did mental health evaluations and counseling, or completed everything, all the counseling Red Rock required, Healthy Minds required, ABC Therapy required, it would all mean nothing unless they admitted that Donald B. abused S.L. (IV AA 953:5-12). Even though Donald B. and Melissa L. had completed all classes and assessments in their case plan reports, DFS determined that the parents had not completed or substantially completed their case plans because "[t]hey haven't been able to acknowledge that there was physical abuse in their home, there was emotional abuse in their home, and that impact the children." (IV AA 911:12-18; 921:20-22). While the State stipulated that any statements made by the parents to treatment providers while addressing the abuse would not be used against them in the pending criminal. (VI AA 1439:17-18). The State's stipulation was not reduced to writing and not applicable to DFS as testified by Ms. Tallent at trial. (VI AA 1392:9-24; 1393:1-7; IV AA 977:20-24; 978:1-2). Donald B.'s R. B., H. R. B., and W. C. B.'s wanted to go home with their parents and the parents were requesting visitation with the

children, which was denied by DFS even though the parents and children's therapists requested that there be therapy with the parents to facilitate the reunification goal. (III AA 694:20-24; 695:1-13; 743:3-23; VI AA 1202:22-24; 1204:1-18; I AA 17:16-22; IV AA 919:3-4).

During the trial testimony of Dr. Gennis, Donald B.'s therapist at Healthy Minds who was referred by DFS, he testified that Donald B. had completed all of his required therapy, specifically 80 plus sessions. (V AA 1207:7-22; 1213:18-20). Dr. Gennis opined that based on his training, education, and experience, Donald B. was a fit parent, Donald B. had the ability to provide an abuse free home, and it would be in the children's best interest to be in his home. (V AA 1208:17-24; 1209:1-19). Over the past fifteen (15) years of him working in clinical services to the foster care families, Dr. Gennis has never worked with parents who were as invested in terms of reunifying with their children and following through with what has been asked of them and more. (V AA 1209:1-19). Despite not knowing the specifics of Donald B.'s conviction in California from 34 years ago, Dr. Gennis believed that Donald B. had changed and was not the same person he was 30 years ago. (V AA 1228:15-17). Dr. Gennis believed that if Donald B. reunited with his three minor children, they would not be at risk of physically being harmed. (V AA 1240:12-15). Most importantly, Dr. Gennis testified that even though Donald B. denied the allegations of abuse to S.L., he still placed his risk level as minimal and addressed the physical abuse in his

therapy. (V AA 1244:22-24; I AA 56:1-2). In the two years that he had treated Donald B., Dr. Gernnis did not believe that Donald B. had committed the acts of abuse. (V AA 1244). Dr. Gennis further created two safety plans for Donald B. that he provided to DFS, which provided for a full-time nanny approved by DFS and the installation of video cameras in the home to increase safety for the family. (VI AA 1260:17-22; 1261:11-22). In Dr. Gennis' opinion, DFS had been moving forward to terminate rights from the beginning. (VI AA 1271:7-13). When asked about the importance of an admission to abuse for therapy to be effective, Dr. Gennis testified that a patient does not need to make an admission of having done something wrong in order for them to experience growth and it was clear to him that DFS and Healthy Minds had failed this family. (VI AA 1304:7-24). Accordingly, it was abundantly clear based on the evidence presented at trial, DFS had no real intention of ever reunifying the minor children with their parents and in fact, made every effort that it could to prevent reunification. Despite admitted evidence to the contrary and R. B., H. R. B., and W. C. B.'s desire to return to their parents, the district court terminated the parental rights of Donald B. and Melissa L. because they refused to admit to a crime.

Summary of Argument

In January of 2014, S. L., N. R. B., H. R. B., and W. C. B. were removed from their home due to allegations that S.L.'s bruise on her eye was caused by her step-father, Donald B., and her mother, Melissa L., was aware of the alleged

abuse. (I AA 1). After Donald B. and Melissa L. entered a plea of no contest to the Third Amended Petition, the children became wards of the District Court. (VI AA 1414:8-9). The case plan reports submitted by DFS required both Donald B. and Melissa L. to complete parenting classes, counseling, and therapy, but also specifically admit that Donald B. abused S.L. (IV AA 842:5-7). Two years after the children were removed from their home, the District Court granted the State's petition and terminated Donald B. and Melissa L.'s parental rights. (V AA 1443). After a nine day trial, the District Court reviewed the evidence and made findings of fact relating to that evidence. (V AA 1443).

The District Court found that Donald B. and Melissa L.'s parental rights should be terminated on grounds of token efforts, failure of parental adjustment, unfitness, risk of serious physical, mental or emotional injury and that it was in the best interests of the children that their parental rights should be terminated. (V AA 1443). This determination was based entirely on Donald B. and Melissa L.'s refusal to admit the abuse. (V AA 1443). At trial, Donald B.'s therapist, Dr. Gennis testified that the reunification could have occurred despite Donald B.'s refusal to admit to the abuse and Donald B. had a minimal risk to re-offend. (VI AA 1304:7-24; V AA 1244:22-24). Dr. Gennis maintained this opinion despite having not ever met the children or the specifics of Donald B.'s prior conviction. As this admission violated Donald B. and Melissa L.'s Fifth Amendment privilege

against self-incrimination, DFS and the District Court should not have required such an admission.

The District Court also found that the parents engaged in multiple services, but did not engage in services to address physical abuse and result in behavioral changes necessary to protect the children because the parents would not acknowledge the abuse. (V AA 1443:4-11). This finding not only ignored the DFS' case worker Ms. Tallent's admission that the parents had completed all counseling and assessments required by the case plans with exception of the admission of guilt, but also Dr. Gennis' testimony that Donald B.'s therapy addressed the physical abuse without the admission of guilt by Donald B. (I AA 56:1-2).

Regardless of the favorable trial testimony from Donald B.'s therapist Dr. Gennis, the children's desire to reunify, and DFS's admissions as to Donald B. and Melissa L.'s case plan compliance, the District Court ignored this evidence and terminated the parental rights of Donald B. and Melissa L. for failing to incriminate themselves by admitting to the abuse of S.L.

I. Standard of Review

Since the termination of parental rights "is 'an exercise of awesome power' that is 'tantamount to imposition of a civil death penalty,'" the District Court's order terminating parental rights is subject to close scrutiny. *In the Matter of the Parental Rights as to A.L. and C.B.,* 130 Nev. Adv. Op. 91, 337 P.3d 758, 761

(2014) (quoting *In re Parental Rights as to A.J.G.*, 122 Nev. 1418, 1423, 148 P.3d 759, 763 (2006)). The termination of parental rights must be based on clear and convincing evidence. *Id.* (citing, *In re Termination of Parental Rights as to N.J.*, 116 Nev. 790, 795, 8 P.3d 126, 129 (2000)). To that end, this Court reviews questions of law de novo and the district court's factual findings for substantial evidence. *In re A.L.*, 130 Nev. Adv. Op. 91, 337 P.3d at 761 (citing *Awada v. Shuffle Master, Inc.*, 123 Nev. 613, 618, 173 P.3d 707, 771 (2007)). Since the District Court's decision to terminate the parental of Donald B. and Melissa L. was not supported by substantial evidence and in violation of their Fifth Amendment privilege against self-incrimination, Donald B. and Melissa L. request that this Court overturn the District Court's decision.

II. LEGAL ARGUMENT

A. THE DISTRICT COURT ERRED IN FINDING PARENTAL FAULT ON THE BASIS THAT DONALD B. AND MELISSA L. WOULD NOT ADMIT TO A CRIME.

The District Court erred in finding token efforts, failure of parental adjustment, unfitness, and risk of serious physical, mental or emotional injury on the basis that Donald B. and Melissa L. refused to admit to the abuse, a crime, in violation of their Fifth Amendment privilege against self-incrimination. Prior to terminating a parent's rights, the District Court's order must consider the evidence and make specific findings as to the factors set forth in Nevada Revised Statute 128.105. Nev. Rev. Stat. 128.105. "NRS 128.105 provides that a district court

may terminate parental rights if it finds that '[t]he best interests of the child would be served by the termination of parental rights' and the parent is unfit, failed to adjust, or only made token efforts to 'support or communicate with the child,' 'prevent neglect of the child,' 'avoid being an unfit parent,' or 'eliminate the risk of serious physical, mental or emotional injury to the child.'" *In the Matter of Parental Rights as to A.L. and C.B.*, 337 P.3d at 761 (citing Nev. Rev. Stat. 128.105). However, the Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.; Nev. Const. art. 1, § 8. The Fifth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 6 (1964). While this issue has not been decided by this Court, it has been addressed by courts of other jurisdictions that have consistently held that the State and the district court cannot compel a parent to admit to the abuse because the threat of terminating the parents' rights acts as a compulsion to which Fifth Amendment protections apply. *See, In the Matter of Parental Rights as to A.L. and C.B.*, 130 Nev. Adv. Op. 91, 337 P.3d 758, 761 fn. 1 (2014)("[Appellant] also argues that the district court's sole basis for terminating her parental rights was her refusal to admit intentionally harming her child and that this requirement violated her Fifth Amendment right against self-incrimination. We do not reach this issue because it is not necessary to dispose of this matter."); *In the Matter of the Welfare of J.W.*, 415 N.W.2d 879, 883 (Minn. 1987) (holding that threat of

termination of parental rights is sufficient to trigger Fifth Amendment protections and the trial court's order requiring the parents to incriminate themselves unenforceable, but noting that the State may compel therapy that may be ineffective absent disclosures outside of Fifth Amendment protections); *In re M.C.P., Juvenile,* 153 Vt. 275, 301, 571 A.2d 627, 641 (Vt. 1989) (finding that the trial court may not require an admission to a crime to reunify parents, but may do so if therapy not effective); *In the Matter of the Welfare of M.D.O.,* 462 N.W.2d 370, 378 (Minn. 1990) (where the State declares no rehabilitation without the parents' admission, then the burden shifts to the State to prove the assertion); *In the Interest of E.H.* 578 N.W.2d 243, 250-51 (Iowa, 1998) (requiring only therapy and no admission of crime did not violate the parent's privilege against self-incrimination); *In the Interest of C.H.,* 652 N.W.2d 144. 150 (Iowa 2002) (finding it improper for the trial court to require an admission of guilt prior to reunification); *Minh T. V. Arizona Department of Economic Security,* 202 Ariz. 76, 80, 41 P.3d 614, 618 (Az. App. 2001) (finding the trial court cannot compel therapy that requires an admission); *State v. Brown,* 286 Kan. 170, 181, 182 P.3d 1205, 1214 (Kan. 2008) (finding the trial court cannot require a parent to admit a crime in order to reunite); *In re A. W.,* 231 Ill.2d 92, 108, 896 N.E.2d 316, 326 (Ill. 2008) (finding that the trial court cannot compel admission of a crime).

Here, the District Court found that S.L.'s injury to her eye and back was due to Donald B. physically abusing S.L. with Melissa L. having knowledge of

the abuse. DFS submitted case plans for both Donald B. and Melissa L. requiring both of them to admit to the abuse despite the multiple felony charges filed by the State against them for the abuse. As demonstrated in both the District Court's findings and DFS' testimony, the only reason DFS sought termination was because Donald B. and Melissa L. would not admit to the abuse of S.L. However, if Donald B. and Melissa L. would have admitted to the abuse, then they would not only have admitted to a crime in violation of their Fifth Amendment privilege against self-incrimination, but also defeated the entire goal of reunification. Accordingly, DFS's requirement and the District Court's termination were compulsion enough to trigger Donald B. and Melissa L.'s Fifth Amendment privilege against self-incrimination. Therefore, DFS's case plans requiring said admission and the District Court's subsequent termination of Donald B. and Melissa L.'s parental rights on this basis, violated Donald B. and Melissa L.'s Fifth Amendment privilege against self-incrimination.

As the evidence presented at trial showed that Donald B. and Melissa L. had completed all therapy and assessments with Donald B. being assessed as a minimal risk to re-offend by his therapist Dr. Gennis, the District Court's focus should have been whether the therapy was effective to reunify the children with their parents without admitting to the crime. Dr. Gennis also testified that he believed Donald B. was telling the truth about not abusing S.L. and despite no admission of guilt, Dr. Gennis believed that Donald B. could provide a safe and

abuse free home for his children if given the chance. Dr. Gennis had created two safety plans that could have implemented to ensure the safety of the children. Dr. Gennis was the therapist that DFS referred to Donald B. The State presented no competent evidence to the contrary other than Ms. Tallent's testimony that she believed without the admission of guilt, the parents had not successfully completed the case plans even though she admitted that the parents had completed everything except for admitting to the abuse of S.L. As previously stated by this Court, a parent "cannot be judged unsuitable by reason of failure to comply with requirements and plans that are…impossible...to abide by." *Champagne v. Welfare Division*, 100 Nev. 640, 652, 691 P.2d 849, 857 (1984) *overruled on other grounds by Matter of N.J.*, 116 Nev. 790, 8 P.3d 126 (2000). Considering the parents had already entered a plea of no contest to the Third Amended Petition, this requirement was not even necessary for purposes of reunification, but rather to compel the parents to incriminate themselves, which violated Donald B. and Melissa L.'s privilege against self-incrimination. Thus, the evidence presented was not substantial to show parental fault, but rather the parent's therapy was effective even without the admission of guilt and the District Court erred in finding parental fault to terminate their parental rights on this basis.

B. DONALD B. AND MELISSA L. REBUTTED THE PRESUMPTIONS APPLIED UNDER NRS 128.109.

The District Court applied the presumptions relating to token efforts,

parental adjustment, and termination being presumed in the best interests of the children pursuant to Nevada Revised Statute 128.109.

NRS 128.109 provides as follows:

> 1. If a child has been placed outside of his or her home pursuant to chapter 432B of NRS, the following provisions must be applied to determine the conduct of the parent:
> (a) If the child has resided outside of his or her home pursuant to that placement for 14 months of any 20 consecutive months, it must be presumed that the parent or parents have demonstrated only token efforts to care for the child as set forth in paragraph (f) of subsection 2 of NRS 128.105.
> (b) If the parent or parents fail to comply substantially with the terms and conditions of a plan to reunite the family within 6 months after the date on which the child was placed or the plan was commenced, whichever occurs later, that failure to comply is evidence of failure of parental adjustment as set forth in paragraph (d) of subsection 2 of 128.105.
> 2. If a child has been placed outside of his or her home pursuant to chapter 432B of NRS and has resided outside of his or her home pursuant to that placement for 14 months of any 20 consecutive months, the best interests of the child must be presumed to be served by the termination of parental rights.
> 3. The presumptions specified in subsections 1 and 2 must not be overcome or otherwise affected by evidence of failure of the State to provide services to the family.
>
> Nev. Rev. Stat. 128.109.

"These are…rebuttable presumptions." *In the Matter of Parental Rights as to J.L.N.*, 118 Nev. 621, 625, 55 P.3d 955, 958 (2002). [emphasis added].

However, the only reason these presumptions were applied to this case was because DFS refused to reunify the family based on Donald B. and Melissa L.'s refusal to admit to the abuse and despite Donald B. and Melissa L. complying

with all other requirements in the case plan reports. Donald B.'s therapist, Dr. Gennis testified at trial that in his opinion DFS's goal was not to reunify this family and both DFS and Healthy Minds had failed this family. A motion to waive reasonable efforts was filed a mere three months after the parents had already actively engaged in the requirements of their case plans. The children's therapists' had requested therapy with the children and parents, but the State made sure to block any efforts of reunification of this family by requesting that the no contact order be put back in place in the criminal proceeding, and DFS was able to use the no contact order as a reason to deny therapy with the children and the parents. The State and DFS actions alienated this family to have the presumptions apply in the termination proceedings since Donald B. and Melissa L. refused to admit to the abuse. It did not matter how many assessments or therapy Donald B. and Melissa L. completed, it was never going to be to the satisfaction of the State or DFS who would never allow them to reunify with their children without admitting to the abuse. Donald B.'s therapist, Dr. Gennis testified that Donald B. could provide a safe and abuse free home for the minor children. Based on the Dr. Gennis' testimony and the fact that Donald B. and Melissa L. had completed all assessments and counseling in the case plans as admitted by Ms. Tallent, the District Court should have found these presumptions rebutted by the evidence.

C. REUNIFICATION WAS IN THE BEST INTERESTS OF THE CHILDREN.

The District Court erred in finding that termination was in the best interests of the children. Nev. Rev. Stat. 128.005(2)(c) provides, in pertinent part, that "[t]he continuing needs of a child for proper physical, mental and emotional growth and development are the decisive considerations in proceedings for termination of parental rights." Nev. Rev. Stat. 128.005; *see also, Matter of Parental Rights as to N.J.*, 116 Nev. 790, 800, 8 P.3d 126, 133 (Nev. 2000). The best interest of the child must be shown by clear and convincing evidence. *Id.* (citing *In Matter of Parental Rights of Montgomery*, 112 Nev. 719, 726, 917 P.2d 949, 955 (1996). In this case, the evidence presented rebutted any presumption or finding that termination was in the best interests of the children. At trial Ms. Tallent conceded that the parents had been seeking contact with their children and continued to ask for visitation with them. Both H.B. and N.B.'s therapists requested therapy with the children and parents to facilitate the reunification process to no avail. Ms. Tallent also testified that the other three minors would like to return home with Donald B. and Melissa L. and requested to stay in their foster home if they could not reunite with their parents. Additionally, both Donald B. and Melissa L. had completed all required assessments and counseling as required by DFS. As testified by Donald B.'s therapist, Dr. Gennis, he had proposed two safety plans for the family to ensure the safety and well-being of the children and parents. Donald B.'s assessment by Dr. Gennis was a minimal risk to re-offend and Dr. Gennis believed it was in the best interests of the minor children

to reunify them with Donald B. and Melissa L. Therefore, the District Court erred in finding that the best interests of the children were served by terminating the parental rights and should be overturned.

III. Conclusion

For each of the reasons set forth herein, it is respectfully prayed that this Honorable Court overturn the District Court's decision terminating Appellants' parental rights.

Disclosure Statement

The undersigned counsel of record certifies that the following are person and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Routing Statement

Appellants reaffirm that this appeal is presumptively retained by the Nevada Supreme Court because it case involving the termination of parental rights pursuant to NRAP 17(a)(12).

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 Microsoft Word in 14 point font of the Times New Roman.

2. **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 either proportionately spaced, has a typeface of 14 points of more and contains 6,349 words or does not exceed 30 pages.

3. **Finally, I hereby certify** that I have read this appellant's 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 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 brief is not in conformity with the requirements of Nevada Rules of Appellate Procedure.

DATED this **30th** day of **May**, **2017**.

/s/ Robert M. Draskovich

By_____

ROBERT M. DRASKOVICH, ESQ.
Nevada Bar No. 6275
TURCO & DRASKOVICH, LLP
MICHAEL I. GOWDEY, ESQ.
Nevada Bar No. 6994
815 S. Casino Center Boulevard
Las Vegas, NV 89101
Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on the **30th** day of **May 2017**. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

STEVEN WOLFSON
District Attorney

RYAN J. MACDONALD
Deputy District Attorney

/s/ Erika W. Magana

On behalf of TURCO & DRASKOVICH, LLP

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE PARENTAL RIGHTS AS TO S. L.; N. R. B.; H. R. B. AND W. C. B.	NO. 71873
DONALD B., Appellant, vs. STATE OF NEVADA DEPARTMENT OF FAMILY SERVICES; S. L.; N. R. B.; H. R. B.; AND W. C. B., MINORS, Respondents.	
IN THE MATTER OF THE PARENTAL RIGHTS AS TO S. L.; N. R. B.; H. R. B. AND W. C. B.	NO. 71889
MELISSA L., Appellant, vs. STATE OF NEVADA DEPARTMENT OF FAMILY SERVICES; S. L.; N. R. B.; H. R. B.; AND W. C. B., MINORS, Respondents.	

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Elizabeth A. Brown
Clerk of Supreme Court

ERRATA TO APPELLANTS' JOINT OPENING BRIEF

COMES NOW the Appellants DONALD BROWN and MELISSA LAWERENCE by and through their counsels, ROBERT M. DRASKOVICH, ESQ. of TURCO & DRASKOVICH, LLP, and MICHAEL GOWDEY, ESQ, of

Docket 71873 Document 2017-19100

the LAW OFFICES OF MICHAEL GOWDEY and submits this Motion for an Errata to Appellants' Joint Opening Brief.

Appellants' move this Court for Errata of the Opening Brief so that corrections of the citations of the appendices may include the volume numbers that have been added. See attached Appellants' Joint Opening Brief.

DATED this 9th day of June, 2017.

By: /s/ Robert M. Draskovich

Robert M. Draskovich, Esq. (6275)
TURCO & DRASKOVICH, LLP
Michael I. Gowdey, Esq. (6994)
815 S. Casino Center Boulevard
Las Vegas, Nevada 89101
Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on the 9th day of June, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

STEVEN OWENS
Clark County Chief Deputy District Attorney

/s/ Erika W. Magana

Erika W. Magana, An Employee of
TURCO & DRASKOVICH, LLP