IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF PARENTAL RIGHTS AS TO S.L., N.R.B., H.R.B., AND W.C.B.
MINORS

DONALD B. and MELISSA L.,

APPELLANTS,

vs.

THE STATE OF NEVADA/ CLARK COUNTY DEPARTMENT OF FAMILY SERVICES

RESPONDENTS.

Supreme Court No. 71873/71889

RESPONDENT'S ANSWERING BRIEF

STEVEN B. WOLFSON
DISTRICT ATTORNEY
Nevada Bar #001565
JANNE HANRAHAN
Nevada Bar #009053
601 North Pecos Road
Las Vegas, Nevada 89101
Ph: (702)-455-6989
Hanrahja@ClarkCountyNV.gov
Counsel for Clark County
Department of Family Services

ROBERT DRASKOVICH, ESQ.
Nevada Bar #006275
Turco & Draskovich, LLP
815 South Casino Center Boulevard
Las Vegas, Nevada 89101
robert@draskovich.com
Ph: (702)-474-4222
Counsel for Donald B.

MICHAEL GOWDEY, ESQ.
Nevada Bar No. 006994
815 South Casino Center Boulevard
Las Vegas, Nevada 89101
Ph: (702)-471-0321
mgowdey@aol.com
Counsel for Melissa L.

AMY HONODEL, ESQ.
Nevada Bar No. 007755
725 East Charleston Boulevard
Las Vegas, Nevada 89104
Ph: (702) 870-1777
ahonodel@lacsn.org
Counsel for S.L.

LAUREN CALVERT, ESQ.
Nevada Bar No. 010534
716 South Jones Boulevard
Las Vegas, Nevada 89107
Ph: (702) 507-0092
lauren@morrisandersonlaw.com
Counsel for N.R.B., H.R.B. and W.C.B.

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certified that the following persons and entities as described in NRAP 26.1(a), must be disclosed. This representation is made in order that the judges of this court may evaluate possible disqualifications or recusal.

STEVEN B. WOLFSON
DISTRICT ATTORNEY
Nevada Bar #001565
JANNE HANRAHAN
Nevada Bar #009053
601 North Pecos Road
Las Vegas, Nevada 89101
Ph: (702)-455-6989
Hanrahja@ClarkCountyNV.gov
Counsel for Clark County
Department of Family Services

ROBERT DRASKOVICH, ESQ.
Nevada Bar #006275
Turco & Draskovich, LLP
815 South Casino Center Boulevard
Las Vegas, Nevada 89101
robert@draskovich.com
Ph: (702)-474-4222
Counsel for Donald B.

MICHAEL GOWDEY, ESQ.
Nevada Bar No. 006994
815 South Casino Center Boulevard
Las Vegas, Nevada 89101
Ph: (702)-471-0321
mgowdey@aol.com
Counsel for Melissa L.

AMY HONODEL, ESQ.
Nevada Bar No. 007755
725 East Charleston Boulevard
Las Vegas, Nevada 89104
Ph: (702) 870-1777
ahonodel@lacsn.org
Counsel for S.L.

LAUREN CALVERT, ESQ.
Nevada Bar No. 010534
716 South Jones Boulevard
Las Vegas, Nevada 89107
Ph: (702) 507-0092
lauren@morrisandersonlaw.com
Counsel for N.R.B., H.R.B. and W.C.B.

ROUTING STATEMENT

Nevada Rules of Appellate Procedure 17(a)(12) state that the Nevada Supreme Court shall hear and decide cases involving termination of parental rights. The underlying District Court action was a termination of parental rights action originating under Chapter 128 of the Nevada Revised Statutes.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

OTHER REFERENCES

ISSUES PRESENTED

I. The District Court Found Substantial Evidence that S.L. Was Physically, Mentally and Emotionally Abused in the Appellants' Home; Therefore, the Court Correctly Found Clear and Convincing Evidence of Parental Fault.

II. The District Court Found Substantial Evidence that Neither Parent Engaged in Therapy to Address Physical Abuse as Required by Their Case Plans; Therefore, the Court Correctly Found Clear and Convincing Evidence of Parental Fault.

III. The District Court Found Substantial Evidence that the Case Had Been Open for 30 Months, that the Parents Had Not Changed Their Behavior, and that the Children Were Integrated into an Adoptive Home; Therefore, the Court Correctly Found Clear and Convincing Evidence that Termination of Parental Rights Was in the Best Interest of the Children.

IV. The Fifth Amendment Privilege Is Not Abrogated Where Parents Are Required to Address Child Abuse in Therapy, and Where They Are Given Immunity From Criminal Prosecution for Doing So.

PRELIMINARY STATEMENT REGARDING REFERENCES TO THE RECORD

The citations in the following answer will be made by referencing matters in the Appellant's Appendix in the form of "AA###" and matters in the Respondent's Appendix in the form of "RA###." The hashtag symbol represents the page number where the material appears. (It should be noted that the transcripts included in the Appellants' Appendix are not arranged in order of the dates of the hearings and are therefore somewhat confusing to reference).

STATEMENT OF FACTS

This case opened in December 2013, when then-fifteen-year-old S.L. told a school friend that she had sustained a black eye because her stepfather, Donald B., hit her. AA, Vol. I, p. 000006, 10-12. Child Protective Services ("CPS") responded to the school, but S.L. told authorities her black eye was a result of hitting her eye on a cabinet. Id. The CPS investigator performed a routine body check and discovered that S.L.'s back was crisscrossed with multiple abrasions, welts and bruises showing linear and looped patterns. Id., 14-17. The investigator photographed the injuries but ultimately allowed S.L. to go home because S.L. insisted those injuries were caused by a fall on a trampoline. Id., p. 000007, 9-12 and RA, pp. 001-005. Donald B. and Melissa L. told CPS that S.L. had a history of lying and stealing and that "the only people being abused is us." AA, Vol. I, p. 000009, 1-16.

A subsequent review of the CPS database indicated numerous prior reports to the CPS Abuse Hotline of similarly suspicious injuries to S.L. Id. at p. 000006, 18-19. The agency's database also included information from California indicating that Donald B. had killed his eight-month-old baby in the 1980s and had served prison time for Voluntary Manslaughter and Child Abuse. Id., 18-20. The photos of S.L.'s injuries were reviewed by a pediatrician specializing in child abuse, who determined the injuries were consistent with abuse and not the result of a fall or

self-injury. Id., p. 000024. Therefore, S.L. was removed from Donald B. and Melissa L., and the other three children were removed a short time after. Id., p. 000052, 4-6. At first, a family member moved into the home with the children and the parents moved out; when that arrangement did not work out, the children were placed in the foster home of Jackie Wolffe in May 2014. RA, p. 008, 23-27.

Within weeks of being placed in the foster home, S.L. began disclosing that the injuries she had suffered over the years were not due to accidents, as she had always told CPS, but to ongoing, repetitive physical abuse by Donald B. AA, Vol. I, p. 000053, 23-26. In late May 2014, S.L. wrote a letter addressed to her father and gave it to her foster mother, with permission to share with her Department of Family Services caseworker. Id. In the letter, S.L. detailed some of the abuse she had suffered, stating that Donald B. regularly beat her with instruments including a "belt, frying pan, spatula, remote, pot, flashlight, shoe, hanger, wood, broomstick, and more." RA, pp. 019-20. She wrote that he shot her hand with a BB gun, threw a knife at her that cut her wrist, broke her front teeth, withheld food, forced her to exercise or stand on her head for lengthy periods without food or water, called her names, pulled her hair, hit her in the face, and instructed her not to tell anyone what was happening to her. Id. The other children also began to disclose that they had witnessed the ongoing abuse of S.L. by Donald B. shortly after placement in

foster care, and they revealed that Melissa L. was aware of the abuse. AA, Vol. I, pp. 000053-54, 26-28, 1-2.

The State filed a petition alleging that neither Donald B. nor Melissa L. had given a medically consistent explanation for S.L.'s injuries, and that the injuries were found to be abusive in nature by a physician specializing in child abuse. Id., pp. 000001-2. The petition was amended twice prior to the matter going to trial, to more specifically allege that Donald B. abused S.L. physically, mentally and emotionally and that Melissa L. knew about the abuse and failed to protect S.L. Id., pp. 000016-18. The trial was held in July 2014 before former Justice Nancy Becker. RA, p. 007, 15-17. The State called Donald B. to the stand, and for most of the direct questioning, he asserted his Fifth Amendment privilege, as at that point both parents were facing criminal charges for the abuse of S.L., but at the end of Donald B.'s testimony, the parents' attorney asked for a recess to speak with his clients. RA, pp. 21-22. Subsequently both parents entered no-contest pleas to the Third Amended Petition, which alleged: that Donald B. physically abused S.L.; that Donald B. mentally injured S.L. by causing her to experience extreme fear, anxiety and emotional distress related to the ongoing physical abuse; that Donald B. was convicted of felony Voluntary Manslaughter and Corporal Punishment of a Child in relation to the death of his infant child; that Melissa L. failed to protect S.L. despite her knowledge of the abuse; and that Melissa L.

mentally injured S.L. by failing to obtain counseling or therapy for her to address the emotional distress she suffered as a result of the abuse. AA, Vol. I, pp. 19-21.

Senior Judge Becker canvassed both parents and informed them that the allegations in the petition would be treated as true. RA, p. 022. The State stipulated on the record that neither the no-contest plea nor any statements made by the parents to treatment providers in the juvenile case would be used against them in any criminal matter arising out of the same facts and circumstances. Id.

CPS prepared written case plans for reunification for both parents. AA, Vol. I, pp. 22-49. The case plans were accepted by the court with no objection from parents' counsel. RA, p. 024. The case plans required both parents to address physical abuse in counseling and to be able to demonstrate an understanding of how physical abuse affected their children's well-being. AA, Vol. I, pp. 22-49. The primary goal for both parents was to acknowledge in therapy that S.L. had been physically abused, to engage in therapy to address it, and to demonstrate actual behavioral change as attested to by therapists. Id. Toward that end, both parents were referred to physical abuse classes and assessments at Red Rock Psychological Services. Id. The entire family was also referred to Healthy Minds Mental Health

Clinic for family therapy, to facilitate the familial relationships after reunification.[1] Id., p. 000064, line 14-15.

Meanwhile, a preliminary hearing in the criminal case had occurred and the judge in that case ordered no contact between the parents and children due to prior concerns of coaching by the parents.[2] Id., p. 000055, 24-26. The no-contact order out of the criminal court was in effect at the time of the initial trial in the abuse-neglect case, and except for a couple of months beginning in September 2014, it remained in effect for essentially the entire underlying "J" case.[3]

After the Disposition hearing in the "J" case, DFS requested a finding of aggravated circumstances based on Donald B.'s conviction for Voluntary Manslaughter and the extreme and repetitious nature of the abuse suffered by S.L. while in the care of Donald B. and Melissa L.[4] RA, Vol. I, p. 025. The motion

---

[1] The counseling at Healthy Minds began with each family member being assigned an individual therapist, with the goal that eventually all would come together for family therapy prior to and just after reunification. That group portion of the family therapy never happened because of the no-contact order between parents and children issued by the criminal court; however, the inability to complete that step was not held against the parents at the TPR trial.

[2] The criminal case is still pending trial.

[3] Appellants imply in their brief that the no-contact order was somehow orchestrated by DFS; obviously, however, it was a criminal court judge who made that decision.

[4] While such motions are generally filed very soon after adjudication (because they are based on factors that exist *prior* to the case opening, not on case plan compliance, as Appellants believe), this one was not filed until about three months after adjudication.

hearing was continued by request of defense counsel and eventually ended up on calendar at the same time as the one-year review, in January 2015. Id. at pp. 38-39. The court denied the motion, but changed the permanency goal to termination of parental rights. Id.

At the termination trial, the State presented testimony by the DFS Custodian of Records that the agency had received 14 reports of suspicious injuries to S.L. between March 2008 and December 2013. AA, Vol. II, p. 000409. The first report indicated that S.L. had come to school with bruises under both eyes and had come to school with similar injuries multiple times in the previous months. Id. The second report, from May 2008, indicated S.L. came to school with bruising to her cheek. Id. at 000411, 8-13. The third, from November 7, 2008, indicated S.L. had come to school with a black eye that day, and that she had also come to school in September and October 2008 with facial bruising and a chipped tooth. Id. pp. 000411-000412. Later in that same month, two reports came in from different reporters that S.L. was again seen at school with yet another black eye, this time covered by make-up.[5] Id. at pp 000412-000413, 14-24 and 10-24. In December 2009, a report was made indicating S.L. had a cut on her wrist and that she had told classmates her father threw a knife at her. Id at 000414, 15-19. In February 2010, a

[5] That same report indicated that S.L. would not allow the school nurse to lift her shirt to check for other injuries. AA, Vol II, p 413, 22-23.

report indicated that S.L. came to school with a black eye and stitches in her eyebrow. Id at 000415, 3-7. In December 2010, a report indicated S.L. had once again come to school with a black eye. Id. at p. 000415, 17-22. In January 2011, a report came in that S.L. had bruising over both of her eyes, below the eyebrow. Id. at 000416, 4-11. The next day, another report came in that S.L. had bruising to her ribs. Id. 17-24. In March, 2011, the Hotline received a report that S.L. had come to school with her left eye red, puffy and scratched; the caller, another mandated reporter, expressed concern at the number of times she had seen facial injuries to S.L Id. at p. 000417, 11-19. In December 2011, a report indicated that S.L.'s parents had withdrawn her from school and not enrolled her anywhere else or in home schooling. Id. at 000418, 2-8. On January 27, 2012, the same reporter indicated that S.L. had still not been enrolled in any type of schooling. Id., at 15-19. The last report received by the Hotline was in December, 2013, from two different mandated reporters, expressing concern that S.L. had come to school with bruising to both eyes and had told a friend her father hit her. Id. at 000419, 1-23. The instant case opened with that report. Id. The Custodian of Records testified that all of the reports had come from mandated reporters, and that there were multiple different reporters over the years. Id. at 000421, 1-10.

S.L. herself testified at trial that most of the calls that had come in to the Hot Line did indeed reflect injuries that resulted from abuse inflicted by Donald B.[6] AA, Vol. VI, pp. 001462-001495. She stated that she had always told investigators otherwise because she feared what would happen if she told the truth, and that Donald B. would instruct all the children about what to say to investigators. AA, Vol. VII, p. 001501-001502. She testified about the constant physical, mental and emotional abuse she suffered at the hands of Donald B. and stated that her mother knew of the abuse and did nothing to stop it. AA, Vols. VI and VII, pp. 001462-001555. She testified that she had not previously revealed that her mother knew of the abuse because she didn't want her mother to hate her. AA, Vol. VII, p. 1526-7. There were also times, S.L. testified, when Melissa L. would beat her with a belt as well. Id at 001474-75.

S.L. testified that Donald B. instructed her and the other children regarding what to tell CPS about the injuries, and that he would make them rehearse the stories until they could repeat them without mistakes. Id. at 001502-3. S.L. said she continued to deny the abuse even after CPS got involved in 2013, because she was afraid she would again be returned to the home and further abused. Id at 001501. While CPS was involved, S.L. said, she would be treated like a regular member of

---

[6] S.L. testified that one of the injuries reported to CPS, the black eye in February 2010, actually did result from her sister throwing a remote at her and not from abuse by Donald B.

the family, but once the investigations were over, she would once again be treated as a pariah. Id. at 001514-15. She testified that the angry letter she wrote to her father in May 2014[7] accurately described some of the abuse she had suffered at his hands. Id. at 001510.

In addition to the abuse detailed in the letter, S.L. also testified that Donald B. would sometimes make her lie on the floor and that he would then stand on her chest wearing his work boots, sometimes bouncing up and down. Id. at 001516-001521. On at least one of those occasions, she testified, she had passed out because she was unable to breathe. Id.

Both of the twin siblings, N.R.B. and H.R.B., also testified that they saw and heard S.L. being abused in the home by Donald B. Id. at 000280-95 and 000313. H.R.B. testified about one night during dinner, when Donald B. told S.L. to go to the garage and get something for him to hit her with and that S.L. returned with a pipe. Id., p. 000315. S.L. was "screaming and crying" when Donald B. proceeded to hit her with the pipe, H.R.B testified. Id. H.R.B. also testified that Melissa tried to hit S.L. with a chair, and cut a chunk out of S.L.'s hair when she was angry with her. Id. at 000317. Both twins testified that S.L. was treated differently by not being allowed to go on family vacations and being given different or less food. Id. at 000294 and 000323.

---

[7] Referenced on p. 002 of the Statement of Facts, and at RA, Vol. I, pp. 19-20.

The children's therapists testified that all the children suffered from PTSD due to the things they had experienced and witnessed in their home prior to removal, although all the therapists acknowledged that being in foster care could have also contributed to the PTSD. Id. at pp. 000666-000809. All the therapists testified that the children had spoken of the abuse in therapy. Id.

The children's foster/adoptive mother, Jackie Wolffe, also testified that all the children had spoken to her about the abuse of S.L. She testified that S.L. was a "normal teenager," who suffered bouts of panic when she first came to the home, but who had gained self-confidence and emotional strength during the two years she had lived in the foster home. Id. at 000603 and 000618-20. Ms. Wolffe testified that S.L. did not like talking about the abuse, but that H.R.B. was very forthcoming about it and would challenge S.L. when she tried to minimize the abuse or their mother's role in it. AA, Vol. III, pp. 000604-06.

All parties stipulated at trial to the admission of Dr. Sandra Cetl's testimony at the criminal preliminary hearing, in which she testified that the injuries to S.L.'s back portrayed in the photos taken by CPS in December 2013 were a result of abuse and could not have been self-inflicted or happened as a result of a fall. RA, Vol. I, p. 046, 19-23; p. 047, 1-6 and pp. 49-50. Dr. Cetl's testimony indicated the looped and linear patterns that appeared on S.L.'s back were likely from a cord or

belt, and that they were of differing ages, indicating more than one event. Id. p. 048, 1-25.

Both parents went to Red Rock Psychological Health for physical abuse risk assessments and physical abuse classes.[8] RA, Vol. I, pp. 67-79 and 81-96. The assessments indicated both parents were at high risk to re-offend, and recommended that both engage in individual counseling to address the physical abuse, to identify their triggers for abuse, to strengthen their protective capacity and to create coping skills. Id., pp. 79-80 and 95. Both parents eventually signed up for and attended 10 sessions of individual counseling at ABC Therapy; however, nothing in the completion reports or assessments provided by ABC Therapy indicated that either parent ever addressed physical abuse. Id. 97-98. Rather, the documentation from ABC seemed to indicate they discussed their feelings regarding removal of the children. Id, 97-98.

The parents were called to testify and each invoked their Fifth Amendment Privilege for any questions that could impact the pending criminal case. AA, Vols. II, III and V at 440-578 and 001001-1180. For each of those questions, the District Attorney requested the negative inference, as permitted in civil cases. Id. at 000461. The Court indicated it would consider whether to grant the negative

---

[8] The parents took the classes prior to having the assessments, which are normally performed first. Thus, the assessments reflect their state of mind *after* taking classes about physical abuse.

inference only after hearing all the evidence, in order to determine whether there was sufficient independent evidence to allow for a negative inference.[9] Id.

During each parent's testimony, recordings of their jail calls were played and they were questioned about those calls.[10] AA, Vols. II, III at 440-578 and Vol. V. at 1001-1180. The calls, primarily conversations between Melissa L. and Donald B., indicated that both parents had an extremely negative, disparaging attitude toward S.L., even in the calls that took place prior to her disclosing the abuse. AA, Vol. VI, 001426. In the calls, Melissa L. said, among other things, that S.L. had "the brain of a fucking peanut" and that she felt "sorry for the poor sap that ends up with her." Id. When she became aware of the letter that S.L. wrote detailing the abuse, Melissa L. said S.L. was "lucky she wasn't in front of my fucking face" when she read the letter. Id. Donald B. called S.L. a liar and a thief. Id.

Melissa L. admitted in her testimony that the physical abuse risk assessment from Red Rock required her to engage in therapy with a trauma therapist to

---

[9] Ultimately, it appears the Court made no negative inference from the parents' invocation, as it is not mentioned in the Decision; however, the Court specifically noted that it found sufficient *independent* evidence of parental fault and best interest. AA, Vol. VI, p. 1431, 10-13.

[10] For unknown reasons, the content of the jail calls was not transcribed – as each was played, there is merely a notation in the transcripts that "audio plays in courtroom." However, the Court refers specifically to the content of the calls in its decision and the questioning before and after each call is played references the content, with no objection from defense counsel as to factual misrepresentation.

identify triggers, form coping skills and a relapse prevention plan. AA, Vol. I, p. 244, 1-21.She acknowledged that she had done none of that. Id.

Donald B. and Melissa L. presented only two witnesses, psychologist David Gennis, formerly known as David Sanchez ("Sanchez/Gennis"),[11] and Donald B.'s adult son from a previous relationship. Sanchez/Gennis testified that he was a former employee of Healthy Minds and that he had provided family therapy for Donald B. during the course of the case as well as a short period of family therapy for Melissa L.[12] AA, Vol. V, p. 00203. Sanchez/Gennis testified that he believed the children should be returned to the home of Donald B. and Melissa L., and that he believed that S.L. had never been abused. Id. 001244-45. He admitted that he had not spoken with the children about their experiences in the home or viewed the photos of S.L.'s injuries, nor had he been privy to information about how Donald B.'s infant daughter had been killed. Id. at 001210-001250. He acknowledged that information would have been relevant, but stated even if he had had it, he still would recommend that Donald B. be reunified with his children. AA, Vols. V and VI, 1230-1303. Sanchez/Gennis testified that in therapy, Donald B. denied abusing S.L., and Sanchez/Gennis testified that he simply accepted that Donald B. had

---

[11] In their Opening Brief, Appellants erroneously identify Sanchez/Gennis as "Dennis Sanchez" and "Dennis Gennis."

[12] Melissa L. had a different Healthy Minds therapist for most of the case, but that therapist was not called to testify.

never abused S.L. Id. at 1283. Further, Sanchez/Gennis testified that he had produced a "safety plan" that involved the parents hiring a nanny and installing video cameras in the home. AA, Vol. VI, 00126-62. The purpose of the cameras, he testified, was to protect the parents from further allegations by S.L. Id. This "safety plan" would only be in effect until the case closed. Id.

In a 20-page written decision issued on November 14, 2016, the Court found clear and convincing evidence of parental fault, based upon all three children's testimony about the abuse, the numerous reports of abusive-type injuries to S.L. from mandated reporters, the photographs of the injuries, the jail calls, the testimony of Dr. Cetl, and the reports from Red Rock and ABC. AA, Vol. VI, pp. 001413-001432. The Court found clear and convincing evidence that S.L. had been abused by Donald B, and that Melissa L. knew of the abuse and failed to protect S.L. from it. Id., p. 001421, 17-18. The Court also found clear and convincing evidence that neither parent had engaged in any treatment or counseling to address the abuse and mitigate the damage done to the children: "The Court finds that despite engagement in their services, neither parent has the insight or behavioral change to protect these children from abuse." Id., p.1427, 7-8. The Court also found clear and convincing evidence that termination was in the best interest of the children, as neither parent had made any changes to indicate that the children could safely be returned to their care. Id., pp. 001429-30. The Court noted that, although

N.R.B. and H.R.B. indicated they wanted to go back to their parents, they also wanted to live in a home free of violence.[13] Id., p. 001431, 22-23. The Court, however, found "[t]here was no showing that the issues that brought the children into care 33 months ago are any different now." Id. The Court also noted that the children were bonded with and integrated into the foster family and thriving in their care. Id., p. 1430. Based on all of the above, the Court found clear and convincing of parental fault and best interest. Id., p. 001432, 3-5.

SUMMARY OF ARGUMENT

The District Court's 20-page written decision and the Findings of Fact/Order very specifically outline the substantial evidence of parental fault and best interest presented by the State at trial. The Court properly based its final decision on both the quantity and quality of that evidence. The Court specifically found "... an abundance of evidence regarding the abuse to [S.L.] and the trauma to [the siblings]." Id. at 001421, 14-15. The Court analyzed the evidence to determine whether the abuse had in fact occurred, whether the parents had successfully addressed the abuse in therapy such that the children could be safely returned, and whether the presumptions of parental fault and best interest were rebutted. The Court found that "physical abuse occurred in the household and physical abuse

[13] Asked how she would want things to be different, N.R.B. answered "no hitting." AA, Vol. II, p. 000290. H.R.B. said "to not... hit people." Id. at 00329.

counseling was necessary in order for reunification to occur... There is no evidence in the record that either parent has addressed the physical abuse problem." Id., p. 001421, 14-21.

In the Findings of Fact and Order, the Court listed each fault ground that applied to the parents' detriment - Unfitness, Failure of Adjustment, Risk of Serious Injury, Token Efforts, the Presumptions of NRS 128.109 - and the substantial evidence that it had considered in applying each. The Court performed a similar analysis of Best Interest and found that the children could not, after 30 months in foster care, be safely returned to the parents. Id., pp. 1438-1444. With the level of detailed analysis in both the Decision and the Findings of Fact, it is clear that the Court properly considered and quantified all of the evidence presented over 10 days of trial.

The "abundant" evidence considered by the Court included: the testimony of S.L. herself regarding the abuse and her mother's knowledge of it; the testimony of S.L.'s younger sisters as to the abuse they witnessed; the testimony of the Custodian of Records for DFS that during a five-year period there were 14 reports to the CPS Hot Line of suspicious injuries to S.L., including multiple black eyes, bruises and cuts, and that the calls came from multiple different mandated reporters; the testimony of the children's therapists; and the testimony of the foster mother and the case worker as to the disclosures of abuse made to each of them by

the children. Additionally, the Court considered the actual photographs of S.L.'s injuries, along with the testimony of a pediatrician specializing in child abuse that those injuries were abusive in nature. The Court also noted in its decision the negative, disparaging attitude toward S.L. displayed by both parents in the recorded jail calls that were played during trial. Id., p. 1426. The Court properly found that all of the above constituted substantial - and indeed "abundant" - evidence that Donald B. and Melissa L. physically and mentally abused S.L. throughout her childhood.

The Court then painstakingly analyzed the key factor in termination trials: whether the parents had addressed the abuse in such a way that the children could be safely returned to their care. Again the court found substantial evidence that they had not. That evidence included: 1) assessments from Red Rock Psychological indicating that both parents were at high risk to re-offend unless they successfully completed individual counseling that began with acknowledgment of the abuse; 2) certificates of completion from ABC Therapy that indicated neither parent had addressed physical abuse of a child in the therapy; 3) the testimony of former Healthy Minds therapist Sanchez/Gennis, that he believed Donald B. had never abused S.L. and that his therapy was predicated on that belief. The Court also considered the testimony of the caseworker, who indicated the parents simply denied that S.L. had ever been abused and claimed

that she was psychologically disturbed, a liar and a thief. Based on all of that evidence, the Court found the parents had not changed their behavior or the circumstances that brought the children into custody. Because the children could not safely be returned to the home after 30 months, the Court properly found parental fault, both factually and presumptively.

Although recognizing that N.R.B. and H.R.B. said they wanted to go home with their parents, the Court noted that both children also wanted things to be different in the home if they did go back. Because "there was no showing that the issues that brought the children into care 33 months ago are any different now," the Court found that termination of parental rights was in the children's best interest. In looking at best interest, the Court also properly considered the factors of NRS 128.105(1), 128.107 and 128.108, and found the children were integrated into a foster family and doing "remarkably well" in a "stable loving home free from physical and emotional abuse." Id., p. 001431. The Court found termination to be in the children's best interest, both factually and presumptively, because after 30 months, permanency with the parents was still not an option, while the children were flourishing in the home of the foster family. The presumptions of fault and best interest were not rebutted by evidence that the parents participated to some extent in some services, the Court found, because the parents never made the behavioral change those services were designed to elicit. The written decision

indicates the Court painstakingly analyzed the substantial evidence presented over ten days of trial, and properly made a decision based on that analysis.

Appellants argue they could not engage fully in their case plans because to do so would have required them to suspend their Fifth Amendment privilege against self-incrimination. That argument cannot prevail where, as here, each parent was given immunity from criminal prosecution for statements made to treatment providers. Appellants seem to argue (although the argument appears in their Statement of "Facts") that the immunity agreement should have been in writing; however, both parents accepted it when it was offered and neither parent ever raised the issue of its sufficiency in any motion, objection or pleading to the court in the underlying "J" case. Likewise, throughout the 30 months the case was open, the parents never argued that the case plan should be changed or modified. Instead, they steadfastly maintained that no abuse occurred, thus indicating they never had any intention or desire to address it in therapy.

The goal in a Child Welfare case is not to get an admission of guilt for purposes of punishment, but to remedy a problem within a family that threatens the safety of the children. The juvenile court and DFS have a duty to require parents to engage in therapy that results in changed behavior prior to sending children home. If parents insist there is no behavior that needs to change (despite pleading no-contest to a petition that indicates there is, and despite substantial evidence to the

contrary) the Court cannot in conscience send children back to the same toxic environment from which they were removed.

The State presented substantial evidence that the abuse occurred, and substantial evidence that it was never addressed in therapy by either parent. The case was open for 30 months with no reunification pending at the time of trial. The parents' Fifth Amendment privileges were protected by an immunity agreement. The District Court made a well-reasoned, detailed analysis of the evidence in reaching its conclusion. Therefore, the Court's findings of parental fault and best interest were correct and should be upheld.

ARGUMENT

I. The District Court Found Substantial Evidence that S.L. Was Physically, Mentally and Emotionally Abused in the Appellants' Home; therefore, the Court Correctly Found Clear and Convincing Evidence of Parental Fault.

This Court has previously found that if "substantial evidence in the record supports the district court's determination that clear and convincing evidence warrants termination, we will uphold the termination order." *In the Matter of Parental Rights as to DRH,* 92 P.3d 1230 (2004). Substantial evidence is "that quantity and quality of evidence which a reasonable man could accept as adequate to support a conclusion." *State, Emp Security v. Hilton Hotels*, 102 Nev. 606, 606 (Nev. 1986). Clear and convincing evidence must be "satisfactory" proof that is "so

strong and cogent as to satisfy the mind and conscience of a common man, and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest. It need not be irresistible, but there must be evidence of tangible facts from which a legitimate inference ... may be drawn." *Gruber v. Baker*, 20 Nev. 453, 477, 23 P. 858, 865 (1890).

In the underlying "J" case, both parents pled no-contest to a petition alleging physical abuse, mental abuse and failure to protect. Each was canvassed by Senior Judge Becker and informed that the allegations would be treated as true. Thus the fact of abuse and failure to protect was established at the beginning of the case. In spite of that, at the TPR trial the District Court again looked at the issue of whether the abuse had occurred, weighed that evidence under a clear and convincing standard, and determined that the evidence was substantial enough that it even met that higher standard. Further, the Court found that the parents presented no evidence "whatsoever" that the injuries to S.L. had been caused by S.L. herself, and no evidence to rebut the presumptions of 128.109.

A. The State Presented Substantial Evidence of Ongoing Abuse in the Home.

In a detailed, 20-page written decision, the District Court specifically found that the State presented "clear and convincing evidence that [S.L.] was physically

and mentally abused by her parents... throughout her childhood..." AA, Vol. VI, p. 001425, 23-26. The Court detailed the evidence that supported that finding. The testimony of S.L. herself was found credible and compelling: the Court cited to S.L.'s testimony about the multiple injuries she suffered at the hands of Donald B., including broken teeth, multiple black eyes, being shot in the hand with a BB gun, cut by a knife thrown by Donald B., being beaten with a belt and other objects, and being forced to stand on her head or perform exercises for lengthy periods of time. Id. pp. 001416-18. The Court also noted S.L.'s testimony that Melissa L. knew of the abuse and that in fact there were times when Melissa L. had applied make-up to S.L.'s face to cover the bruises. Id. The Court also found credible S.L.'s testimony that she had previously denied the abuse because she was afraid she would be further abused if she did not tell the stories she was instructed by Donald B. to tell regarding the cause of her multiple injuries. Id.

The Court specifically made a finding that the two siblings were credible in their testimony that they had seen and heard S.L. being abused by Donald B. AA, Vol. IV, p. 001423, 5-11. The Decision noted particularly H.R.B.'s testimony about Donald B. sending S.L. out to the garage to get him something to hit her with, as well as her testimony about seeing Donald B. hit S.L. with a belt and a spatula. Id.

The Court noted that it considered the testimony of the DFS Custodian of Records, who testified that CPS had been called to the home 14 times in a five-year period for suspected physical abuse of S.L. In its decision, the Court listed each report that came in to the Hot Line over a period of five years, noting all but two involved suspicious injuries to S.L.[14] Id., p. 1424, 8-9. The Court also cited the opinion of Dr. Sandra Cetl, a physician specializing in child abuse, whose transcribed testimony from the criminal preliminary hearing was admitted at trial by stipulation of all parties. Id., p. 1416, 5-13. Dr. Cetl testified that the injuries depicted in the photographs were consistent with abuse, did not occur from a fall or self-inflicted injury and appeared to be of differing ages, indicating more than one event of recent abuse. Id. The Court also took into consideration the photos of the recent injuries to S.L.'s back, which showed a crisscross pattern of looped and linear marks, lacerations and abrasions to S.L.'s back. AA, Vol. VI, p. 1423, 11-12 and RA at pp. 001-003.

Also dispositive was the testimony of the children's therapists, who testified to the emotional damage the ongoing abuse of S.L. had done to all of the children. Id., p. 1419-22. All three therapists testified that their clients suffered from PTSD

[14] The other two involved reports that S.L. had been removed from school and not re-enrolled for a period of time in 2011 and 2012. AA, Vol. II, p. 00418.

as a direct result of what they experienced and witnessed in the home.[15] Id. Finally, the Court considered the extremely derogatory statements made about S.L. in the jail calls that were played during the trial, in which Donald B. accuses S.L. of lying and stealing, and Melissa L. says S.L. is a danger to society, a "killer kid" who "has the brain of a fucking peanut," and that she (Melissa L.) feels "sorry for the poor sap that ends up with her." Id., p. 001426, 1-13. This quantity and quality of evidence certainly meets the definition of "substantial," as it clearly contains "tangible facts" that are "adequate to support a conclusion" by a reasonable person that Donald B. abused S.L. over a period of years and that Melissa L. failed to protect S.L.

B. The Court considered, and rejected, the parents' theory that S.L. caused the injuries to herself.

The Court specifically found *not* credible the parents' theory that S.L. had mental health issues and caused the injuries to herself. "There has been no showing by the defense whatsoever that [S.L.] caused any of her own injuries," the Court wrote in its decision. AA, Vol. VI, 001422. In making this finding, the Court again cited to Dr. Cetl's testimony that the injuries in the photos were not self-inflicted, as well as the testimony of the twins that they witnessed the abuse, and the foster

---

[15] HRB's therapist also testified that HRB had been traumatized by violence between the parents themselves and that HRB once feared that her mother had killed her father.

mother's testimony that S.L. was a normal teenager, not violent, who was protective of her siblings and had never tried to harm herself. Id., p. 1423, 13-18 and AA, Vol. III, p. 000608-10. At trial and again their Opening Brief, Appellants brought up instances in which S.L. had been injured in foster care, presumably to imply that she was injuring herself. Opening Brief, p. 6, 18-21. However, the Court noted the testimony of the foster mother, the case worker, and S.L. herself, that those injuries were witnessed by multiple other people, documented by the school and/or foster home, and were typical sports-related injuries from soccer and a bike accident.

Taken together, the testimony of S.L., her two sisters, a physician, the Custodian of Records for DFS, the three therapists, the caseworker, and the parents' own words, along with photos of the most recent injuries to S.L., all constitutes "substantial" evidence, whether analyzed by quantity or quality. Thus, the Court properly found the State met a clear and convincing standard of proof that S.L. had been physically and mentally abused by Donald B. throughout her childhood and that Melissa L. knew about it and allowed it to continue. The Court also found that the other children had been emotionally damaged by witnessing the abuse. With those findings, the Court established that both parents were properly required to participate in case plans to mitigate the safety threat their behavior presented to the children.

II. The District Court Found Substantial Evidence that Neither Parent Engaged in Therapy to Address Physical Abuse as Required by Their Case Plans; Therefore, the Court Correctly Found Clear and Convincing Evidence of Parental Fault.

This Court has found that mere compliance with a case plan is not enough; that a parent must show the behavioral change that the case plan is intended to bring about. *In re K.D.L.*, 118 Nev. 737, 742 (2002). Further, this Court has found that even when a parent complies with a case plan, the District Court is not precluded from finding that parental rights should be terminated. *In re Parental Rights as to A.P.M.*, 131 Nev. Adv. Op. 66, 356 P3d 499 (2015).

Here, having found clear and convincing evidence that S.L. was physically, mentally and emotionally abused in the home, the District Court next turned its attention to the analysis most germane to termination of parental rights: whether the parents had made sufficient behavior changes as to indicate the children could safely return to the home. The Court properly found substantial evidence indicated that they had not.

Appellants argue that they completed their case plans because they attended an assessment and classes at Red Rock, family therapy at Healthy Minds, and individual therapy at ABC Therapy. However, both parents' case plans specifically required them to acknowledge in therapy that S.L. was physically abused, address the causes of the abuse in therapy, and ultimately articulate their understanding of

the effects of that abuse on all the children. AA, Vol. I, pp. 22-35 and 36-49. Additionally, they were required to create a plan to keep the abuse from happening again. Id. The District Court found that, while each parent engaged in parts of their case plans, "the main issues of physical abuse have not been addressed." AA, Vol. VI, p. 001429. Donald B. and Melissa L. did not "complete" their case plans, they simply sat through a number of classes and therapy sessions while continuing to deny that there was any problem in their home that needed to be addressed in therapy. Even if merely sitting through therapy sessions on unrelated topics could be construed as "completing" their case plans, the Nevada Supreme Court has recognized that a completed case plan "does not prohibit the district court from terminating parental rights if termination is otherwise warranted under NRS Chapter 128." *In re the Parental Rights as to A.P.M.*, 131 Nev. Adv. Opp. 66, 356 P3d 499 (2015). Termination is certainly "otherwise warranted" where a home that was deemed unsafe for children remains so after 30 months, due to the parents' refusal to honestly address the underlying issues.

The District Court found that neither parent has "the insight or behavioral change to protect these children from abuse." AA, Vol. IV, p. 001430, 11-15. In making that finding, the Court engaged in a detailed analysis of the various therapy sessions and classes the parents attended. The Court looked at the physical abuse risk assessments from Red Rock Psychological for each parent, and noted that both

were found to be at high risk to re-offend Id., p. 001427, and RA, p. 080 and 095. Both were recommended to engage in individual therapy that specifically addressed their denial of the abuse, identified triggers for abuse, and created coping skills and a plan to prevent its recurrence. RA, p. 080 and 095. Additionally, Donald B. was recommended to address his history of criminal behavior and Melissa L. was to work on developing protective capacity. Id.

The Court noted that each parent engaged in therapy at Healthy Minds throughout the case, but noted the purpose of the Healthy Minds therapy was not to address physical abuse, but to facilitate family relationships once reunification could occur. Id., p. 001428, 18. The Court took notice of letters from the Healthy Minds therapist, Sanchez/Gennis, which indicated that Donald B. and Melissa L. had addressed "feelings of loss, grief and anxiety related to separation from their children." Id. p. 001428, 11-19. The Court found that the Healthy Minds therapy engaged in by the parents was not the individual physical abuse counseling that was recommended by Red Rock, and noted that both Donald B. and Sanchez/Gennis had specifically been informed of that fact by the caseworker. Id. lines 19-21 and AA, Vol. I, p. 000055, 5-8. Appellants now argue that the family therapy was sufficient for compliance with the Red Rock recommendation that they address their denial of the abuse; this despite Sanchez/Gennis' testimony that Donald B. continued to deny the abuse and that Sanchez/Gennis accepted that there

was no abuse.

At trial, Sanchez/Gennis opined that the children could safely be returned to Donald B., but he admitted that he believed Donald B. had never abused S.L. Id. Vol. VI, p. 001283. He also admitted he never saw pictures of S.L.'s injuries, had not spoken to the other children about whether they witnessed the abuse and was not aware of the details surrounding the death of Donald B.'s infant daughter, for which Donald B. was convicted of Voluntary Manslaughter and Corporal Punishment of a Child. Id. pp. 1210-50. Sanchez/Gennis' testimony makes it clear that Donald B. did not simply refuse to talk about the physical abuse because he was worried about his criminal charges: he very specifically *denied* that any abuse ever occurred and Sanchez/Gennis believed him. Obviously, any therapy conducted by Sanchez/Gennis with either parent began with the premise that S.L. had not been abused. It stands to reason, then, that the specific individual causes and triggers for the abuse of S.L. were not addressed. Therefore, no effective plan to prevent it in the future could have been formed.

Appellants make much of the fact that Sanchez/Gennis came up with a "safety plan" that involved having the children cared for by a nanny and placing cameras in the home. Id., pp. 1226-62. To begin with, there is no mention in this "safety plan" of whether the nanny would be present at all times to monitor the children's safety. Placing children in a stranger's care 24/7 to protect them from

parental abuse is not a "safety plan," it is simply another form of foster care – and anything less than 24/7 monitoring would have been inadequate to protect the children.

On the stand, Sanchez/Gennis admitted that the plan to place cameras in the home was not devised to protect the children from abuse (which he did not believe happened) but "to protect Mr. [B.] and Mrs. [L] from further allegations... to avoid any of these allegations from occurring again in the future." Id., p. 001262, 1-7. By his own admission, it was a plan to keep the parents safe from the children's allegations, rather than to keep the children safe from the parents' abuse. Further, Sanchez/Gennis testified that the plan would remain in place only until the children were returned to the home and the DFS case closed. This "safety plan" as described by Sanchez/Gennis was premised on the idea, promulgated by the parents, that S.L. was making up the allegations, and it was nothing more than a ruse to get the children back in the home and the case closed. The recommendation from Red Rock was that the parents fully and freely discuss the abuse, identify its causes, and come up with a plan to prevent it in the future. That is a far cry from a plan aimed at simply silencing the children.

In weighing the evidence of the parents' case plan compliance, the District Court also took into account the fact that the parents had participated in 10 sessions of individual therapy at ABC Therapy. Id., pp. 1428-29, 21-28 and 1-9. The Court

wrote that it reviewed the ABC completion reports submitted at trial, and noted that nothing in the completion reports indicated that they had addressed triggers, abuse of a child, protective capacity or coping skills in relation to physical abuse as recommended by the Red Rock assessment. Id. p. 001429, 3-7. Donald B.'s report stated that he had learned to replace "biased fearful self-talk with positive, realistic and empowering self-talk." RA, Vol. I, p. 098. While it is a bit unclear what that means, it seems to indicate that in his 10 sessions, he gained some self-confidence. The report said nothing about what caused him to kill his infant daughter 30 years ago or physically abuse S.L. on a regular basis over a period of years, or how such violence would be prevented in the future. The ABC Therapy report for Melissa L. was even less clear about what was addressed: Melissa L. apparently learned "to undergo gradually to a repeated imaginal exposure to the feared consequences predicted by worries of her children's well-being and develop alternative reality-based predictions." Id., p. 097. Even Melissa L. was unable to state what that meant at trial, but it clearly had nothing to do with addressing the physical abuse of her daughter by Donald B. or increasing her ability to align with her own daughter's safety. Where a problem is not even identified, acknowledged or discussed in therapy, it cannot be corrected.

Appellants argue on the one hand that the abuse never occurred and on the other that they should not be required to acknowledge the abuse. And at some

point, they appear to argue that because they pled no-contest to a petition that alleged abuse, they actually *did* admit the abuse, and therefore complied with the case plan. Opening Brief, p. 17, 4-9. This indicates a complete lack of understanding as to the purpose of the requirement that they acknowledge the abuse. It is not simply an "admission" that is required, with nothing more. It is an acknowledgment of the circumstances that made their children unsafe and an expressed willingness to change those circumstances. If Appellants now wish to characterize their no-contest pleas as the acknowledgement of abuse that is required by the case plans, they should also recognize that their no-contest pleas were never used against them in the criminal matter, just as stipulated by the State. If they "admitted" the abuse by pleading no-contest to the petition, why then balk at attempting to fix it in therapy? The answer is that neither parent ever had any intention of acknowledging or treating the cause of the abuse; both maintained an attitude of anger, denial and hostility throughout the case.

After closely analyzing the evidence of the services the parents participated in at Red Rock, Healthy Minds and ABC Therapy, the Court found that there were "still grave safety concerns of physical abuse that have not been addressed," and stated that "[i]t comes down to the credibility of the... parents and the witnesses." AA, Vol. VI, p. 001429, 11-12. While recognizing that the parents were in a difficult position having to testify at trial due to the pending criminal case, the

Court specifically found that there was substantial evidence, independent of their testimony, that the abuse occurred and that it was not addressed in therapy. Neither the District Court nor DFS required "admission of a crime" in order for this family to reunify; the requirement was that the parents be able to provide a home that was safe and free of violence. As clearly stated in the decision: "[t]his Court's job is to make sure children are safe." Id., p. 001430, 11-12. The Court correctly found substantial evidence that the children could not be safe in the home of Donald B. and Melissa L., when they had not acknowledged or addressed the issues that led to removal.

Because of the parents' failure to address the primary underlying safety issue, the Court found that the parental fault grounds of Token Efforts, Unfitness, Failure to Adjust and Risk of Harm applied to the detriment of Donald B. and Melissa L. The Court concluded that "[m]ore than ample opportunity has been given to both parents to correct the behavior that brought this family into care," but that the parents had simply failed to do so. The Court also properly applied the unfitness factors in NRS 128.106(f) and (g), and found they applied to Donald B.'s detriment based on his conviction for Felony Manslaughter and Corporal Punishment of a Child in relation to the death of his infant daughter. AA, Vol. VI, pp. 001421-22.

The Court found clear and convincing evidence of best interest because "there was no showing that the issues that brought the children into care 33 months ago are any different now." Id., p. 001431, 23-24. While the Court recognized that N.R.B. and H.R.B. said they wanted to go home with their parents, it also noted that both children testified that they wanted things to be different in the home if they did go back. Id. lines 22-23. Additionally, considering the factors of NRS 128.105(1), 128.107 and 128.108, the Court found the children were integrated into a foster family and doing "remarkably well" in a "stable loving home free from physical and emotional abuse." AA, Vol. IV, p. 1431, 21-26.

Because the children could not be safe if returned to the home of Donald B. and Melissa L., and because they had been integrated into a safe, stable adoptive home free of violence, the Court properly found it to be in the children's best interest that termination of parental rights be granted. The very specific findings outlined in writing by the Court indicate this was a carefully weighed decision that took all the evidence into account; therefore, the decision should be upheld.

III. The District Court Found Substantial Evidence that the Case Had Been Open for 30 Months, that the Parents Had Not Changed Their Behavior, and that the Children Were Integrated into an Adoptive Home; therefore, the Court Correctly Found Clear and Convincing Evidence that Termination of Parental Rights Was in the Best Interest of the Children.

NRS 128.109(2) provides a rebuttable presumption that it is in the best

interests of a child for parental rights to be terminated when that child has resided outside the home pursuant to an NRS 432B placement for 14 of any 20 consecutive months. Upon establishment of the presumption, the burden shifts to the parent to rebut the presumption by a preponderance of the evidence. *In re J.D.N.*, 128 Nev. 462, 473 (2012). The presumption can be rebutted by presenting substantial evidence that compelling reasons exist as to why termination would not be in the best interests of the child. *In re J.L.N.*, 118 Nev. 621, 626 (2002).

Here, there is no dispute that the case had been open for 30 months – more than twice the presumptive time frame – when the trial began. Appellants argue that the parents rebutted the presumption of token efforts by presenting evidence that they participated in some counseling at Healthy Minds and ABC Therapy. This hardly provides "compelling reasons" to indicate reunification is in the children's best interest; in fact, their efforts in this regard are the very definition of "token." The Merriam Webster Dictionary defines the adjective "token" as a word that is "used to describe something that is done with very little effort and only to give the appearance that an effort is being made." Token, adj., 2017, in Merriam-Webster.com, retrieved June 29, 2017 from https://www.merriam-webster.com/dictionary/token. Here, both parents participated in therapy that had little or nothing to do with the underlying issue that led to removal of their children, simply to give the appearance of compliance with their case plans. The

reports from the therapists indicate that nothing regarding physical abuse, the actual issue in this case, was ever addressed in the 30 months the case was open.

Nor did Appellants rebut the presumption of Best Interest by pointing out that H.R.B. and N.R.B. said they would prefer to go home with their parents. As the Court noted, both girls also testified that if they did go home with their parents, they wanted things to be different. "No hitting," as N.R.B. so simply put it. AA, Vol. II, p. 000290. And both girls testified that if they could not go back to their parents, they wanted to remain with their foster family.

Neither parent produced any evidence at trial that anything would be different in the home, because they had still never acknowledged that anything *needed* to be different. Even though S.L. was the main target for the abuse, and she would not have returned to the home in any case,[16] the parents could not show that physical and emotional violence would not be directed at one or all of the younger children in her absence. It is true that the younger children, unlike S.L., were Donald B.'s biological children, but as indicated by the death of his baby daughter, that biological relationship clearly offers no protection from his physical violence. Further, both parents subjected all the children to witnessing violence in the home, and forced them to lie to authorities about it for years, indicating they have no

[16] S.L. reached the age of 18 after her testimony at trial, and had indicated throughout the case that she never wished to return to the home.

understanding or care for the emotional and mental health of any of the children. The burden was on the parents to show the children's best interest lay in being with them, and they failed to produce any evidence that such was the case.

IV. The Fifth Amendment Privilege Is Not Abrogated Where Parents Are Required to Address Child Abuse in Therapy, and Where They Are Given Immunity From Criminal Prosecution for Doing So.

Appellants argue that their Fifth Amendment rights were violated because their case plans required them to acknowledge and address the physical abuse in therapy, but they make no mention of the competing rights of the children to live in a home free from violence and abuse. Both federal and state law require that the best interest of the child be the overriding concern in child welfare cases. Here, the parents' right against self-incrimination was protected by a stipulation from the State that neither their plea to the abuse petition nor any statements made to treatment providers would be used against them in the corresponding criminal matter. They were free to address the safety concerns for the children without worry about criminal consequences; they simply chose not to do so. Because this was a civil matter, they were required to take the stand at trial, but they were properly allowed to invoke their Fifth Amendment privilege at each question that could lead to self-incrimination. Although the State asked for the negative inference to be taken with each of those invocations, there is no evidence that the Court actually made any adverse inference in reaching its decision. The Court

reserved judgment on that issue during the trial, and only notes in the decision that it found sufficient independent evidence of the abuse and of the parents' failure to correct it.[17] Appellants' Fifth Amendment rights were fully protected, thus allowing the Court to properly focus on the children's right to a safe home.

While this Court has not specifically addressed the issue of invoking the Fifth Amendment Privilege in Child Welfare proceedings, multiple other courts have noted the competing constitutional rights in child welfare cases where parents are also facing criminal charges. The Supreme Court of Vermont long ago recognized this dichotomy of interest: "The juvenile court has a strong interest in in protecting the best interest of the child under its jurisdiction. It would be irresponsible for the court to return an abused child to the custody of abusive parents unless and until it can be assured that there will be no repetition of the abusive actions..." *In re MCP*, 153 Vt. 275, (Vt 1989). But neither could parents "be compelled to incriminate themselves in order to regain custody of the child." Id. The Vermont court found that in this situation, the parents were required to find a way to demonstrate that it would be in the children's best interest to be returned to them and that the parents had the burden to respond to findings of severe abuse.

Likewise, the Minnesota Supreme Court found that parents cannot escape

---

[17] Although the issue of the adverse inference was raised in the docketing statement as an issue on appeal, Appellants did not address it in their Opening Brief; therefore, it will not be further addressed in Respondent's Answering Brief.

the consequences of abusing their children by invoking their Fifth Amendment privilege. The court found invalid a court order requiring parents to incriminate themselves to avoid termination of parental rights, but added that was as far as the privilege extended protection in these cases. "While the state may not compel therapy... that would require appellants to incriminate themselves, it may require parents to otherwise undergo treatment. *Therapy, however, which does not include incriminating disclosures, may be ineffective; and ineffective therapy may hurt the parents chances of regaining their children. These consequences lie outside the protective ambit of the Fifth Amendment.*" In the Matter of the Welfare of J.W., 391 N.W.2d 791, 883 (1986), emphasis added. The Minnesota court concluded that terminating parental rights in such situations is not a penalty for exercising the Fifth Amendment right, but that it expresses "the reality that it is unsafe for children to be with parents who are abusive and violent." Id.

In a follow-up case, the Minnesota court found that the "privilege does not protect the parent from the consequences of any failure to succeed in a court-ordered treatment plan." *In re J.G.W.*, 433 N.W.2d 885, 885 (Minn. 1989).

The New Jersey Supreme Court recognized that the goal of Child Welfare cases is properly "rehabilitation and reunification," but added: "[t]he abused child's interest is paramount; only when the child can be protected within the family will the parents' interest in the care and custody of their child also be realized." *State v.*

P.Z., 152 N.J. 86 (1997).

The New York Supreme Court found that a mother's "failure or refusal to participate meaningfully in the counseling programs offered under [her case plan] provide ample basis for the conclusion that she had failed to meaningfully plan for her children's future." *In the Matter of Jesus II*, 177 A.D.2d 575, 576 N.Y.2d 165 (2002).

The U.S. Supreme Court held that the State cannot compel an individual to testify against himself or herself ***without a grant of immunity*** in any subsequent criminal prosecution. *Kastigar v. United States*, 406 U.S. 441 (1972), emphasis added. Here, the parents were not compelled to testify against themselves; they were merely required to address the issue of physical abuse with a therapist in order to make it safe to reunify the children with them, and they were granted immunity from criminal consequences for doing so.

Appellants argue that the District Court erred in finding parental fault on the basis that Donald B. and Melissa L. refused to "admit to... a crime in violation of their Fifth Amendment Privilege against self-incrimination." Opening Brief, p. 13, 11-13. Again, they misunderstand the purpose of Child Welfare proceedings. Neither the District Court nor DFS had any interest in compelling the parents to "admit to a crime;" rather, the Court and DFS wanted the parents to engage in therapy that would be effective in preventing further physical and emotional abuse

of their children so that the children could be safely returned to them. Safe reunification of families is the ultimate goal in child welfare cases. Recognizing that free and open participation in therapy is a crucial element of that process, the District Attorney's office offered immunity from criminal prosecution for their plea in the juvenile matter and for any statements they made to treatment providers in the juvenile case. This is a standard stipulation made in Child Welfare cases in Clark County where parents are facing criminal charges arising from the same facts as the child welfare case, in furtherance of the goal of reunification.

On the date of trial on the initial abuse/neglect petition, Donald B. and Melissa L. accepted the offer of immunity, *entered a no-contest plea* to a petition that alleged physical abuse, mental abuse and failure to protect, and were provided with a case plan that was predicated on their full immersion in therapy to address the abuse. The Court approved the case plan. No objection was raised. Throughout the 30 months the case was open, not one motion, objection, or other pleading was filed to clarify the offer of immunity or to modify the case plan. Now, at this late stage and after remaining silent on the issue throughout the case, the parents suddenly wish to challenge the sufficiency of the immunity agreement as well as the case plan requirement that they acknowledge the abuse and address it in therapy.

Appellants complain (albeit in their "Statement of Facts") that the offer of

immunity was not made in writing, presumably intending to imply that it was therefore not adequate. Again, in the 30 months this case was pending, appellants never once challenged the sufficiency of the agreement for immunity. Neither DFS nor the District Attorney was ever approached by either parent to discuss how the immunity would work or how the parents could participate fully in therapy without incurring consequences in the criminal case. Instead, the parents merely continued to deny that any abuse occurred and continued to blame S.L. for causing the injuries to herself.

Appellants argue that the protection offered by the immunity agreement would have been nullified if the parents also had to tell the DFS caseworker what they had discussed in therapy. In their brief, they cite to the case worker's response on cross-examination that she would have to know whether the parents acknowledged the abuse in therapy. Opening Brief, p. 8, lines 18-20.[18] However, the caseworker also explained that she understood the immunity agreement to mean that the parents could tell her what they learned in therapy without fear of criminal repercussions. AA, Vol IV, p. 971, 8-20. And indeed that has been the case in the past where parents wished to engage in treatment. Again, it would have been useful for the parents or their attorneys to simply inquire as to the parameters

[18] The citation in the brief to support this statement actually refers to Mr. Gowdey's closing argument, which is clearly not dispositive of any fact.

of the agreement. But the position Donald B. and Melissa L. took from day one of this case was that the abuse never happened, that they would never admit to it, and that S.L. was a psychologically disturbed child who caused the injuries to herself.

Had the parents or their attorneys engaged in any discussion about how the immunity agreements work - as they have successfully in other cases - one or both might have avoided termination of parental rights. The case plan was not designed to elicit an admission of guilt, but to facilitate honest and open dialogue in therapy about the circumstances in the household that led to the abuse, so the children could be safe going forward. It should be obvious to any reasonable person that a therapist cannot successfully address a problem the client refuses to acknowledge even exists.

Appellants argue that the State "presented no competent evidence" that the parents *needed* to acknowledge the abuse prior to being safely reunified with the children. Again, any challenge to the requirements of the case plan should have been raised at some point during the 30 months the case regularly appeared on calendar to address case plan compliance. But more to the point, this argument fails because the State *did* in fact present "competent evidence" in the form of the assessment from Red Rock Psychological Services. This was an assessment specifically designed to determine what level of risk the parents presented for future abuse, and what action they needed to take to remediate the safety concerns.

The assessment was prepared by a licensed therapist and was based on interviews with the parents, their participation in physical abuse classes, and reports from CPS, DFS and the police. The assessing therapist concluded that both parents needed to acknowledge the abuse and address it in individual therapy so that they could learn to identify what caused it and to develop protective capacity and coping skills that would prevent further abuse.

The case plan specifically required an acknowledgement that abuse occurred and recognition of how it affected all the children. Neither parent challenged or objected to the case plan in the 30 months the case was open. A licensed therapist determined that acknowledgment of the abuse was necessary in order to prevent it recurring in the future. The parents received immunity from criminal prosecution for any admissions made to treatment providers and were allowed to invoke the Fifth Amendment Privilege at trial. Based on the above, there was no violation of their Fifth Amendment Privilege and the decision of the District Court finding parental fault and best interest should be upheld.

CONCLUSION

Based upon the above, substantial evidence supported the District Court's findings of parental fault and best interest. The District Court properly applied the law to the facts as specifically detailed in the written Decision and the Findings of Fact, Conclusions of Law and Order. DFS respectfully requests this Court uphold the District Court findings and dismiss the appeal.

Dated this 5th day of July, 2017.

Jamie Hanrahan
Nevada Bar #009053
Clark County District Attorney's Office
601 North Pecos Road
Las Vegas, NV 89101
(702) 455-6989

CERTIFICATE OF COMPLIANCE

JANNE HANRAHAN, being first duly sworn, deposes and says:

I am the Chief Deputy District Attorney acting for STEVEN B. WOLFSON, District Attorney and the Respondent 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 typeface of 14 points or more and contains 12,229 words.

Finally, I hereby certify that I have read this answering 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 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.

Dated this 5th day of July, 2017.

Jamie Hanrahan
Nevada Bar #009053
Clark County District Attorney's Office
601 North Pecos Road
Las Vegas, NV 89101
(702) 455-3927

SUBSCRIBED AND SWORN to
before me this 5th day of July, 2017.

ROBERTINA C. RAMOS
Notary Public, State of Nevada
No. 16-3719-1
My Appt. Exp. Sept. 8, 2020

Notary Public in and for said
State and County

CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing RESPONDENT'S ANSWERING BRIEF to the attorneys of record listed below, by depositing the same for mailing the United States mail and/or sent via electronic mail to the addresses listed below on the 5th day of July, 2017.

LAUREN CALVERT, ESQ.
Nevada Bar No. 010534
716 South Jones Boulevard
Las Vegas, Nevada 89107
Ph: (702) 507-0092
lauren@morrisandersonlaw.com
Counsel for N.R.B., H.R.B. and W.C.B.

ROBERT DRASKOVICH, ESQ.
Nevada Bar No. 6275
815 South Casino Center Boulevard
Las Vegas, NV 89101
Ph: (702) 474-4222
robert@draskovich.com
Counsel for Donald B.

MICHAEL GOWDEY, ESQ.
Nevada Bar No. 006994
815 South Casino Center Boulevard
Las Vegas, Nevada 89101
Ph: (702)-471-0321
mgowdey@aol.com
Counsel for Melissa L.

AMY HONODEL, ESQ.
Nevada Bar No. 007755
725 East Charleston Boulevard
Las Vegas, Nevada 89104
Ph: (702) 870-1777
ahonodel@lacsn.org
Counsel for S.L.

An Employee of the District Attorney's Office