

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2
3 PHILIP RIVERA and REGINA
4 RIVERA

CASE NO:

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Jun 09 2017 08:34 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

5 Petitioners,

6 EIGHTH JUDICIAL DISTRICT
7 COURT, CLARK COUNTY,
8 NEVADA and THE HONORABLE
9 CYNTHIA GUILIANI, DISTRICT
COURT JUDGE

District Court Case Information:

Case No.: J-15-337398-P1

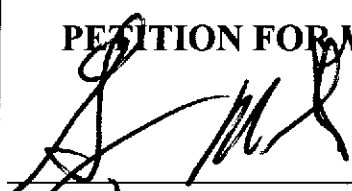
Dept.: Dependency

10 Respondent,

11
12 STEPHANIE ROZIER and JOEY
13 ROZIER

14 Real Parties in Interest.

15
16 **PETITION FOR WRIT OF MANDAMUS AND STAY OF DISTRICT**
17 **COURT PROCEEDINGS**

18
19 
GREGORY S. MILLS, ESQ.

20 Nevada Bar No. 8191

21 DANIEL W. ANDERSON, ESQ.

22 Nevada Bar No. 9955

703 S. 8TH Street

Las Vegas NV 89101

Attorneys for Philip and Regina Rivera

1 **PETITION FOR WRIT OF MANDAMUS AND STAY OF DISTRICT**
2 **COURT PROCEEDINGS**

3 **Relief Sought:**

4 Pursuant to NRAP 21, Petitioners PHILIP and REGINA RIVERA hereby
5 petition this Court for the following:
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- 7 1. An Order staying the District Court's order changing the placement of
8 Esther Rodriguez pending this Court's decision on Petitioner's requests
9 below.
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11 2. An Order directing the District Court to release the transcripts of the
12 hearings on April 13/14, 2017 and May 23, 2017 to allow Petitioners to
13 appropriately cite and supplement this Petition.
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15 3. A Writ of Mandamus directing the Honorable Judge Cynthia Giuliani to:
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17 a. Vacate the order changing placement of the minor child Esther
18 Rodriguez from the Petitioners to the Roziers.
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20 b. Direct DFS to proceed with the permanency plan of adoption of
21 Esther by the Petitioners.
22

23 **Issues Presented:**

- 24 1. Whether this Court should stay the District Court's decision to change
25 Esther's placement pending this Court's decision on the Petitioner's writ
26 request.
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1 2. Whether the District Court abused its discretion upholding the Hearing
2 Masters' recommendation to change Esther's placement, when:

3 a. the placement hearing and recommendation took place after the
4 biological mother's rights were terminated and immediately prior
5 to the Riveras finalizing their adoption of Esther.

6 b. the Hearing Master found that the familial preference controlled the
7 placement decision, notwithstanding the trauma that a change in
8 Placement would cause Esther.

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12 **NRAP 26.1 DISCLOSURE STATEMENT:**

13 The Petitioners herein are individuals and have no interest in any corporation
14 is involved in this case. The attorneys who have appeared on behalf of the Appellant
15 in this case are DANIEL W. ANDERSON, ESQ. and GREGORY S. MILLS, ESQ.

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18 **NRAP 17 ROUTING STATEMENT:**

19 This case involves the placement of a minor child by the District Court under
20 NRS 432B. Pursuant to NRAP 17(a)(12), this case is retained by the Supreme Court
21 for consideration.

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23 **Statement of Necessary Facts:¹**

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¹ Transcripts of the hearings that took place on April 13, April 14, 2017, and May
23, 2017 are not available to the Riveras. The Riveras previously petitioned the
District Court for the transcripts in order to prepare an objection to the Hearing

1 The Petitioners, Philip Rivera and Regina Rivera (hereinafter the Riveras),
2 are foster parents, and were the previous placement of the minor child, Esther
3 Rodriguez (hereinafter "Esther"). Esther was removed from the care of her
4 biological mother on July 27, 2015 when Esther was about 1 ½ months old.² In
5 August 2016, the court changed Esther's permanency plan from reunification with
6 her mother to termination of parental rights and adoption.³

9 The Riveras were located and confirmed to be an adoptive resource, and
10 Esther was placed with them on September 9, 2016.⁴ Esther had been in two
11 different placements, neither which were adoptive resources, prior to being placed
12 with Riveras. At the time DFS placed Esther with the Riveras, she had already been
13 in DFS custody for approximately 14 months.

16 In October 2016, approximately 15 months after Esther was removed from
17 her mother's care, Stephanie Rozier contacted DFS inquiring about Esther's
18 placement.⁵ Stephanie informed DFS that she was a cousin to Esther's biological
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23 Master's decision resulting from that hearing. The court denied the Riveras
24 request on the basis that they were not parties to the underlying action. Citations to
25 the appendix have been made where documents were available to the Riveras
26 supporting the factual assertion.

26 ² Petitioner's Appendix, page 6.

27 ³ Id., p. 62, ll. 19-22.

28 ⁴ Id., p. 68, ll. 11-12.

⁵ Id., p. 70, ll. 2-7.

1 mother, was living in Georgia with her husband, and was interested in placement of
2 Esther with her. Although Ms. Rozier was unknown to DFS, was not identified by
3 the mother, and was not discovered as a result of DFS' due diligence search prior
4 to Esther's 1 year removal mark, DFS still agreed to process an ICPC application
5 on behalf of the Roziers as a potential family placement for Esther.
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8 A trial for the termination of Esther's biological mother's parental rights was
9 held on January 12, 2017. The mother's rights were terminated, making Esther
10 available for adoption with the Riveras consistent with the court's permanency plan
11 of August 2016. DFS continued to process the adoption with the Riveras and
12 anticipated completing the process by the end of May 2017.
13

14
15 On March 14, 2017, DFS received notice that the Roziers' ICPC was
16 approved. As a matter of courtesy to the Roziers, the state placed the matter on
17 calendar for the court's consideration, and the court in turn set an evidentiary
18 hearing to consider whether Esther's placement should be changed from the Riveras
19 to the Roziers. The evidentiary hearing took place on April 13 and April 14, 2017.
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22 The Hearing Master's Recommendations were filed on May 1, 2017.⁶ In its
23 decision, the court made no findings that were averse to the Riveras in terms of their
24 parenting ability, financial resources, community involvement, their bond with and
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28 ⁶ Id. pp. 76-79.

1 commitment to Esther or their long-term plans for her upbringing. In fact, the Court
2 made positive findings regarding all aspects of the Riveras' care of Esther.⁷ These
3 findings were supported by the Riveras' testimony, every report filed by the
4 caseworkers since the time Esther was placed in the Riveras' care, and the sworn
5 testimony of multiple case workers. The Court concluded that Esther was
6 "incredibly bonded" with the Riveras and that they "have proven" that they have
7 the ability to care for Esther.⁸

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11 Conversely, the findings in support of Ms. Rozier as to placement were
12 supported only by her and her husband's testimony. No collateral witnesses were
13 called in support of placement with the Roziers and no documentary evidence was
14 submitted on their behalf other than an ICPC approval. The Court made findings
15 in favor of the Roziers like those made in favor of the Riveras, excepting the
16 Riveras' bond and proven ability to care for Esther. In fact, the Roziers had never
17 met Esther at the time of the hearing.

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21 It appears that the Court's decision ultimately rested on its belief that 1) the
22 Roziers would likely end up with at least one half-sibling of Esther's and 2) when
23 comparing bonding to biological family connection, family connection is the
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27 ⁷ Id at page 77, ll. 10-24.

28 ⁸ Id.

1 overriding consideration.⁹ The court concluded that Esther should be placed with
2 the Roziers, despite hearing significant testimony that removing Esther again could
3 cause significant and potentially long-term trauma to Esther.
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5 The Hearing Master's recommendations were clearly erroneous for three
6 reasons:
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- 8 A. The Hearing Master applied a familial preference where none exists. At
9 the time of the placement decision, the natural mother's rights had been
10 terminated in February 2017. As such, if Ms. Rozier was in fact a cousin
11 of the natural mother's, Ms. Rozier's legally identifiable familial
12 relationship with Esther ended when the mother's rights were terminated.
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14 B. Even if the familial preference was not terminated in February 2017, Ms.
15 Rozier failed to come forward to seek placement within one year of
16 removal, thereby making the familial preference inapplicable to the case.
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18 C. Even if the familial preference was applicable, the great weight of the
19 evidence presented at hearing proved that Esther's best interests required
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24 ⁹ In addition to incorrectly emphasizing the familial preference regarding Esther
25 and the Roziers, the Hearing Master incorrectly speculated in his decision that the
26 Roziers' might someday end up with at least one of Esther's siblings. At the time
27 of the placement hearing, both Esther and her younger sister were placed with the
28 Riveras, and their older 12-year-old half sibling was in a different foster/adoptive
home in Wisconsin. None of the siblings had ever had any contact with the
Roziers at the time of the hearing and none had ever been placed with the Roziers.

1 that she remain in the Riveras care in her adoptive home. The Hearing
2 Master failed to state in the decision how moving Esther from her current
3 adoptive placement to a putative relative, who she has never met, is in her
4 best interest.
5

6 Based on the clear error committed by the Hearing Master, the District
7 Attorney and the Riveras filed objections to the recommendation. District Court
8 Judge Cynthia Giuliani held a hearing on those objections on May 23, 2017. No
9 formal order has been issued from that hearing, however, Judge Giuliani stated at
10 the hearing that she did not find that the Hearing Master's decision was clearly
11 erroneous and that she was affirming it.¹⁰ Judge Giuliani's decision to uphold the
12 clearly erroneous recommendations of the Hearing Master was an arbitrary and
13 capricious decision that is indefensible under the facts and law applicable to this
14 case. Based on the foregoing facts and argument set forth below, the Riveras
15 respectfully request that this Court reverse Judge Giuliani's decision upholding the
16 clearly erroneous recommendations and order that Esther's adoption with the
17 Riveras can go forward.
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28 ¹⁰ Id. p. 80.

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II

ARGUMENT

A. This Case is Appropriate for Extraordinary Relief under NRAP 21.

This Court is empowered to consider petitions for extraordinary relief under NRS 34.170, which states as follows:

NRS 34.170 Writ to issue when no plain, speedy and adequate remedy in law. This writ shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It shall be issued upon affidavit, on the application of the party beneficially interested.

This Court has previously held that placement decisions made under NRS 432B are not appealable, and are therefore appropriate for consideration on a petition for writ of mandamus. *Clark County Dist. Atty. v. Dist. Ct.*, 167 P.3d 922, 925 (Nev. 2007).

In this case, the Hearing Master recommended, and the District Court affirmed, an order changing Esther's placement from her adoptive parents to former relatives of the biological mother. As that placement decision was not subject to appeal, it is appropriate for this Court to consider the Riveras' petition.

Additionally, although not technically parties to the underlying action, the Riveras were weeks, if not days, from completing their adoption of Esther. As such, they should be considered persons "beneficially interested" within the meaning of

1 NRS 34.170. Based on the foregoing, the Riveras submit that this case is appropriate
2 for review by this Court pursuant to NRS 34.170 and NRAP 21.

3 **B. This Court Should Stay the District Court's Order Changing Placement**
4 **Pending its Review of this Case.**

5
6 This Court has the authority to stay the District Court's placement order
7 pursuant to NRAP 8, which states in pertinent part as follows:

8
9 (a) Motion for Stay.

10 (1) Initial Motion in the District Court. A party must ordinarily
11 move first in the District Court for the following relief:

12 (A) a stay of the judgment or order of, or proceedings in, a
13 District Court pending appeal or resolution of a petition to the Supreme
14 Court or Court of Appeals for an extraordinary writ;

15 (B) approval of a supersedeas bond; or

16 (C) an order suspending, modifying, restoring or granting an
17 injunction while an appeal or original writ petition is pending.

18 (2) Motion in the Court; Conditions on Relief. A motion for the
19 relief mentioned in Rule 8(a)(1) may be made to the Supreme Court or
20 the Court of Appeals or to one of its justices or judges.

21 (A) The motion shall:

22 (i) show that moving first in the District Court would be
23 impracticable; or

24 (ii) state that, a motion having been made, the District Court
25 denied the motion or failed to afford the relief requested and state any
26 reasons given by the District Court for its action.

27 (B) The motion shall also include:

28 (i) the reasons for granting the relief requested and the facts
relied on;

(ii) originals or copies of affidavits or other sworn statements
supporting facts subject to dispute; and

(iii) relevant parts of the record.

(C) The moving party must give reasonable notice of the
motion to all parties.

1 (D) In an exceptional case in which time constraints make
2 consideration by a panel impracticable, the motion may be considered
3 by a single justice or judge.

4 (E) The court may condition relief on a party's filing a bond or
5 other appropriate security in the District Court.

6 ...

7 (d) Stays in Civil Cases Involving Child Custody. In deciding
8 whether to issue a stay in matters involving child custody, the Supreme
9 Court or Court of Appeals will consider the following factors: (1)
10 whether the child(ren) will suffer hardship or harm if the stay is either
11 granted or denied; (2) whether the nonmoving party will suffer hardship
12 or harm if the stay is granted; (3) whether movant is likely to prevail on
13 the merits in the appeal; and (4) whether a determination of other
14 existing equitable considerations, if any, is warranted.

15 This case meets all the requirements for this Court to issue a stay of the District
16 Court's order. Both the district attorney and counsel for the Riveras orally moved
17 for a stay of the order at the hearing when Judge Giuliani affirmed the Hearing
18 Master's recommendations. Judge Giuliani summarily denied those requests. As
19 such, the Riveras have no choice but to seek a stay order from this Court. As shown
20 below, this case also is substantively appropriate for stay given the undisputed facts
21 of the case.

22 1) Esther will suffer significant hardship if the District Court's order is
23 not stayed. It is undisputed, and the Hearing Master found, that Esther "is
24 incredibly bonded with the Riveras and that the Riveras have proven that they have
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1 the ability to care for Esther.” The Hearing Master also stated that Esther would
2 experience “significant trauma” if removed from the Riveras.

3 2) The Roziers will suffer no harm of any kind if the stay is granted. It is
4 undisputed that until October 2016, the Roziers made no contact with DFS
5 regarding Esther. It is also undisputed that the Roziers, despite knowing of Esther’s
6 existence from the time of her birth, had never contacted her or visited her in person
7 at any time from her birth through the May 23, 2017 hearing, a span of nearly two
8 years. The Roziers have no relationship with Esther and Esther is not bonded to
9 them. Even now, the Roziers are still complete strangers to Esther.
10

11 3) The Riveras are very likely to be successful on this Petition. The
12 Hearing Master’s recommendation and the District Court’s decision upholding that
13 recommendation are indefensible. This Court’s decision in *Clark County Dist.*
14 *Atty., v. Dist. Ct., 167 P.3d 922* (Nev. 2007) was decided in favor of the adoptive
15 foster parents on nearly identical facts, when the District Court improperly asserted
16 that the familial preference would control unless it was shown that placing the child
17 with the family member would be detrimental to the child.
18

19 This Court reversed that decision and laid out the exact procedure that the
20 District Court should follow when dealing with familial preference. In summary,
21 the District Court should first determine whether a familial preference exists and, if
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1 so, determine whether placing the child with that family would be in the child's best
2 interest over the current placement. Id. at 928.

3 In this case, not only did the Hearing Master ignore this methodology, he
4 specifically found that changing placement would cause the child trauma. The
5 Hearing Master essentially made the same mistake, albeit more severe, as the
6 District Court in the case cited above by making the familial preference the
7 determinative factor over the child's best interest. There is no explanation for the
8 decision other than clear error. As such, the Riveras submit that this Court is likely
9 to grant their petition.
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13 In terms of equity, it is clear granting a stay in this case will be the most
14 equitable decision for all involved. As stated above, the Riveras were within weeks
15 of finalizing their adoption of Esther when the Hearing Master ordered a change of
16 placement. It would be incredibly inequitable for the Court to allow enforcement of
17 that order when the underlying facts and applicable law so clearly demonstrate the
18 order's error. Allowing a change of placement when the order is likely to be
19 reversed will only cause harm to all involved. This includes the Roziers, who are
20 now operating under the false understanding that the Hearing Master's decision was
21 correct and that Esther will soon be placed with them.
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26 Based on the foregoing, the Riveras respectfully request that this Court order
27 a stay of enforcement of the District Court's order until it is able to thoroughly
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1 consider both the Riveras' and the District Attorney's petitions for extraordinary
2 relief.

3 **C. The District Court's Decision Upholding the Hearing Master's Clear**
4 **Error was Arbitrary and Capricious and should Be Reversed.**

5 **1) No Familial Preference Exists in this Case.**

6
7 The Hearing Master's recommendation in this case and Judge Giuliani's
8 decision affirming that recommendation are both clearly erroneous for multiple
9 reasons. While the District Court has the authority to make and modify placement
10 of a child under its care and to amend the permanency plan pursuant to NRS
11 432B.550, the Hearing Master's use of the familial preference in this case was clear
12 error. The relevant statute states in pertinent part as follows:
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15 NRS 432B.550 Determination of custody and placement of child by
16 court; retention of certain rights by parent when child placed other than
17 with parent; determination of whether agency which provides child
18 welfare services has made reasonable efforts required.

19 1. If the court finds that a child is in need of protection, it may, by
20 its order, after receipt and review of the report from the agency which
21 provides child welfare services:

22 (a) Permit the child to remain in the temporary or permanent
23 custody of the parents of the child or a guardian with or without
24 supervision by the court or a person or agency designated by the court,
25 and with or without retaining jurisdiction of the case, upon such
26 conditions as the court may prescribe;

27 (b) Place the child in the temporary or permanent custody of a
28 relative, a fictive kin or other person the court finds suitable to receive
and care for the child with or without supervision, and with or without
retaining jurisdiction of the case, upon such conditions as the court may
prescribe; or

1 ...

2 5. In determining the placement of a child pursuant to this section,
3 if the child is not permitted to remain in the custody of the parents of
4 the child or guardian:

5 (a) It must be presumed to be in the best interests of the child to be
6 placed together with the siblings of the child.

7 (b) Preference must be given to placing the child in the following
8 order:

9 (1) With any person related within the fifth degree of
10 consanguinity to the child or a fictive kin, and who is suitable and able
11 to provide proper care and guidance for the child, regardless of whether
12 the relative or fictive kin resides within this State.

13 (2) In a foster home that is licensed pursuant to chapter 424 of
14 NRS.

15 6. Any search for a relative with whom to place a child pursuant
16 to this section must be completed within 1 year after the initial
17 placement of the child outside of the home of the child. If a child is
18 placed with any person who resides outside of this State, the placement
19 must be in accordance with NRS 127.330.

20 ...

21 The foregoing statute sets an order of preference for placement if the child
22 cannot be returned to the parent or parents. In this case, the Hearing Master used
23 this preference as the determining factor for removing Esther from her adoptive
24 home and ordering placement with Ms. Rozier. This application was erroneous
25 because the familial preference does not exist where the parent's rights have already
26 been terminated at the time the placement decision is made. This conclusion is
27 inescapable when the Court considers the familial preference in conjunction with
28 NRS 127.171 and NRS 125C.050.

1 NRS 127.171 allows for certain relatives to petition the Court for post-
2 adoption visitation of a child “only if a similar right had been granted previously
3 pursuant to NRS 125C.050.” Essentially, the statute is designed to preserve a
4 familial preference for contact between relatives and the adoptive child if that right
5 to contact was preserved by the relatives taking some affirmative action under NRS
6 125C.050.
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9 NRS 125C.050 allows relatives to petition the Court for visitation with a
10 child whose parents’ rights have been terminated under the following conditions:
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12 7. If the parental rights of either or both natural parents of
13 a child are relinquished or terminated, and the child is placed in
14 the custody of a public agency or a private agency licensed to
15 place children in homes, the District Court in the county in which
16 the child resides may grant to the great-grandparents and
17 grandparents of the child and to other children of either parent of
18 the child a reasonable right to visit the child during the child’s
19 minority *if a petition therefor is filed with the court before the
20 date on which the parental rights are relinquished or
21 terminated.*

22 NRS 125C.050(7)(emphasis added) The foregoing statute requires
23 petitioners under NRS 125C.050 to file a petition for visitation with the child prior
24 to entry of the order terminating parental rights. If the petitioners fail to do so, the
25 familial preference upon which the visitation is based is eliminated at the time the
26 child’s parents’ rights are terminated. Furthermore, even if such a petition is filed
27 and visitation granted, the Court is still required to terminate those visitation rights
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1 at the time parental rights are terminated unless “the court finds, by a preponderance
2 of the evidence, that visits by those persons would be in the best interests of the
3 child.” NRS 125C.050(9).
4

5 The foregoing statutes make it clear that the right to petition the court for
6 visitation under NRS 125C. 050 is based on the existence of a familial preference.
7
8 The same concept of familial preference is the basis for the placement preference
9 under NRS 432B.550(5), upon which the Hearing Master relied when he
10 recommended removal of Esther from the Riveras. However, it is also clear under
11 NRS 125C.050 that the relative’s right to petition for visitation based on the familial
12 preference ends the moment parental rights are terminated. This is because the
13 termination of the parents’ rights to the child, by extension, also terminates the
14 relationships of the child to the parents’ other family members. While this
15 conclusion is not explicitly set forth in NRS 432B.550, any other interpretation
16 would be inconsistent with NRS 125C.050’s operation.
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20 Furthermore, NRS 127.171, the statute that permits post-adoptive contact
21 with biological family members, explicitly relies on the mechanism in NRS
22 125C.050 as the method for preserving the familial preference to justify post-
23 adoptive contact. Since both NRS 125C.050 and NRS 127.171 require a formal
24 petition be filed prior to termination of parental rights to preserve the familial
25 preference, it would be illogical and inconsistent to conclude that the familial
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1 preference extends beyond the date of termination when considered in the context
2 of NRS 432B.550.

3 Based on the foregoing, the Riveras submit that the Hearing Masters'
4 application of the familial preference as the determinative factor was clear error.
5 There was no familial preference in play at the time of the placement hearing
6 because the natural mother's parental rights were already terminated. As such, this
7 Court should order that Esther remain in her current placement so her adoption by
8 the Riveras can go forward.

12 **2) The Hearing Master Should Not Have Applied the Familial**
13 **Preference Because Ms. Rozier Failed to Seek Placement within One**
14 **year of Esther's removal.**

15 Assuming *arguendo* that the termination of Esther's parents' rights did not
16 eliminate the familial preference, the Hearing Master still should have found that
17 Ms. Rozier lost the preference when she failed to come forward within one year of
18 the date of Esther's removal. The Hearing Master's failure to do so was clear error.
19 The case of *Clark County Dist. Atty. V. Dist. Ct.*, 167 P.3d 922 (Nev., 2007)
20 provides explicit instructions regarding the impact of a family member's failure to
21 timely come forward seeking placement:
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25 A family member's failure to timely and definitively request
26 custody of a child who has been placed in protective custody,
27 when that family member knows of the protective custody
28 placement, may ultimately either render the statutory familial
preference inapplicable or influence the District Court's

1 determination of the child's best interest. If a family member,
2 with knowledge that a child has been placed into protective
3 custody, delays seeking custody of the child for more than one
4 year after the child's initial placement, the family member must
5 demonstrate a reasonable excuse for the delay in order to retain
6 the familial preference's application. And even when a family
7 member seeks custody within one year of the child's initial
8 removal, the District Court may consider any delay by the family
9 member in determining the child's best interest.

10 The foregoing excerpt states that a family member's failure to come forward
11 within one year, "may ultimately render the statutory familial inapplicable or
12 influence the District Court's determination of the child's best interest."
13 Furthermore, a family member seeking placement after one year must demonstrate
14 "a reasonable excuse for the delay in order to retain the familial preference." Both
15 requirements assume that the family member is aware of the proceedings for
16 placement of the child.

17 In this case, the Hearing Master determined DFS should have located Ms.
18 Rozier earlier, because DFS had contact with a relative who had contact with Ms.
19 Rozier. However, the diligent search for relatives of Esther did not return Ms.
20 Rozier's name, nor did the family member who had contact with Ms. Rozier
21 disclose her name. As such, it is not clear why the Hearing Master found that DFS
22 should have located Ms. Rozier earlier and notified her sooner of a need for Esther's
23 placement.

1 Furthermore, the Hearing Master's finding in this regard completely ignores
2 the fact that Ms. Rozier waited approximately 15 full months after removal to come
3 forward. The *Clark County* case above specifically held that family members on
4 notice of the child's removal "had a concomitant duty to step forward and request
5 custody if they wished to have the child placed with them."
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7
8 While Ms. Rozier claimed that she was unaware of Esther's removal from
9 her biological mother for approximately 15 months, ignorance of Esther's plight
10 should not be a reasonable excuse for Ms. Rozier's delay in requesting placement.
11 If the purpose of the familial preference is to express the legislature's "preference
12 to keep children together if there were family members ready, willing and able to
13 do this,"¹¹ then whether Ms. Rozier was aware of Esther's situation is irrelevant.
14 This is especially true in this case, since the Riveras recently took placement of
15 Esther's infant sister.
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19 Furthermore, Ms. Rozier's failure to come forward for over one year, even in
20 ignorance, begs the question of why her familial relationship to Esther should be
21 accorded any weight at all. Ms. Rozier's actual relationship with Esther's mother
22 was so tenuous, that she was completely unaware her cousin had been in state
23 custody for 14 months as was her other "cousin" (Esther's older 12-year-old half-
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28 ¹¹ *Clark County* at 927, quoting the legislative record of NRS 432B.550(5).

1 sibling) who is placed in a foster/adoptive resource in Wisconsin. Additionally, Ms.
2 Rozier has had zero contact with Esther since birth. Under these circumstances,
3 what possible benefit could Esther realize if the Court treats Ms. Rozier different
4 from any other stranger on the street seeking to adopt a child. The answer is that
5 Esther will not benefit at all.
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7
8 Ms. Rozier should have come forward to seek placement sooner than 15
9 months after Esther was removed. Her failure to do so should have resulted in the
10 Hearing Master finding the familial preference inapplicable. Absent the familial
11 preference in Ms. Rozier's favor, there is no evidence to support that changing
12 Esther's placement from the Riveras, whom the Court found to be exceptional
13 parents, to Ms. Rozier, who had no bond or relationship of any kind with Esther,
14 would be in Esther's best interest. As such, the Hearing Master's recommendation
15 to change Esther's placement was clear error.
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19 **3) The Hearing Master's Use of the Familial Preference as the**
20 **Determinative Factor for Esther's Placement was Clear Error.**

21
22 The Hearing Master's recommendation to place Esther with Ms. Rozier
23 accorded the familial preference far too much weight in this case. The *Clark County*
24 *Dist. Atty. v. Dist. Ct.*, 167 P.3d 922 (Nev., 2007) decision states the following:

25 When the District Court is determining a child's initial placement under
26 the statute and relatives interested in having the child placed with them
27 are before the court, the court should first resolve whether a familial
28 preference exists. With respect to this issue, the court must first
consider whether the relative is sufficiently related—within the third

1 degree of consanguinity—and whether the relative is "suitable and able
2 to provide proper care and guidance for the child." If so, then the court
3 should consider placing the child with this relative before
4 contemplating nonrelative placement, but the placement decision lies
5 in the District Court's discretion.

6 If, however, an initial non-family placement is made before interested
7 relatives are before the court, and interested relatives then timely seek
8 custody, the court should again determine whether the familial
9 preference exists and, if so, consider placing the child with the relatives,
10 **if this placement serves the child's best interest.**

11 While NRS 432B.550(5) does not expressly provide for consideration
12 of the child's best interest, the statute concerns the placement of a child
13 with someone other than the child's parent, and since neither the
14 relatives nor nonrelatives who seek custody of the child occupy the
15 status of parent in the proceedings, **the child's best interest necessarily
16 is the main consideration for the District Court when exercising its
17 discretion concerning placement. Accordingly, after concluding
18 that a familial preference exists, the District Court's analysis
19 should center on the child's best interest.**

20 In the instant case, a non-familial placement was made as the initial placement
21 determination. According to the foregoing case, when the Roziers came forward,
22 the Hearing Master should have 1) determined whether a familial preference exists
23 and, if so, 2) considered whether placement with the Roziers would serve Esther's
24 best interest. Additionally, Esther's best interest should have necessarily been the
25 main consideration for the Hearing Master and the analysis should have centered
26 on Esther, not on her relationship with the Roziers.
27
28

1 First, that the Roziers failed to provide definitive proof at the hearing that
2 they were actually related to Esther's mother should have ended the analysis. Rather
3 than follow the order of steps laid out in the foregoing case, the Hearing Master
4 conditionally approved placement with the Roziers "if" they could provide proof
5 that they were cousins of Esther's mother. This was clearly an incorrect application
6 of the law under the *Clark County* case above. It also demonstrates that the Hearing
7 Master placed an inordinate amount of importance on the alleged relationship over
8 Esther's best interest.
9

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11
12 Second, it is impossible to say that the Hearing Master's recommendation in
13 this case was centered on Esther's best interest. The Hearing Master found that the
14 Riveras were exceptional parents to whom Esther was extremely bonded. The
15 Hearing Master also noted that Esther would be traumatized by the removal.
16 Notwithstanding these findings and the Roziers' failure to prove their relationship
17 to Esther, the Hearing Master stated that biological connection was the overriding
18 consideration and, as such, Esther should be placed with the Roziers. The Hearing
19 Master did not find that removing Esther from the Riveras would be in Esther's best
20 interest, to the contrary, the Hearing Master found that doing so would traumatize
21 Esther. The Hearing Master did not even mention the words "best interest of the
22 child" in his decision
23
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1 Based on the Hearing Master's failure to center the placement decision on
2 Esther's best interest and his decision to place Esther with the Roziers in spite of
3 the trauma it would cause Esther, the Riveras submit that the Hearing Master's
4 decision was clear error. The District Court's decision to affirm the Hearing
5 Master's recommendation is inexplicable and indefensible. There is no explanation
6 other than the decision was arbitrary and capricious. Esther should remain in the
7 Riveras' care because it is in her best interest. The Riveras are an adoptive resource
8 for Esther and they are dedicated to providing her with a safe and stable family that
9 will be in Esther's best interest now and for the rest of her life.
10
11
12

13 III

14 CONCLUSION

15 WHEREFORE, based on the above and foregoing, the Petitioners
16 respectfully requests the following:
17
18

- 19 1. An Order staying the District Court's order changing the placement of
20 Esther Rodriguez pending this Court's decision on Petitioner's requests
21 below.
22
- 23 2. An Order directing the District Court to release the transcripts of the
24 hearings on April 13/14, 2017 and May 23, 2017 to allow Petitioners to
25 appropriately cite and supplement this Petition.
26
- 27 3. A Writ of Mandamus directing the Honorable Judge Cynthia Giuliani to:
28

1 a. Vacate the order changing placement of the minor child Esther
2 Rodriguez from the Petitioners to the Roziers.

3 b. Direct DFS to proceed with the permanency plan of adoption of
4 Esther by the Petitioners.
5

6 DATED this 8 day of June, 2017.

7
8 MILLS, MILLS & ANDERSON

9
10 
GREGORY S. MILLS, ESQ.

11 Nevada Bar No. 8191

DANIEL W. ANDERSON, ESQ.

12 Nevada Bar No. 9955

13 703 S. 8th Street

14 Las Vegas NV 89101

15 Attorney for Movants

16 **VERIFICATION:**

17 **AFFIDAVIT OF PHILIP RIVERA IN SUPPORT OF PETITION**

18 STATE OF NEVADA

19
20 COUNTY OF CLARK

21 PHILIP RIVERA being duly sworn, states the following:

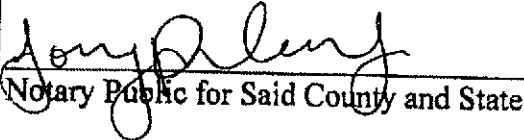
- 22
- 23 1. I am a Petitioner in this action. I have read the foregoing petition and verify
24 that the contents are true and correct to the best of my knowledge.
 - 25 2. I hereby request the that foregoing Petition be granted.
- 26

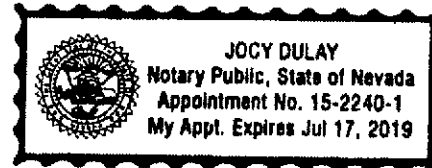
27 Further affiant sayeth naught.
28



PHILIP RIVERA

Subscribed and sworn before me this
7 day of June, 2017.


Notary Public for Said County and State



AFFIDAVIT OF REGINA RIVERA IN SUPPORT OF PETITION
STATE OF NEVADA
COUNTY OF CLARK

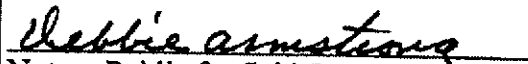
REGINA RIVERA being duly sworn, states the following:

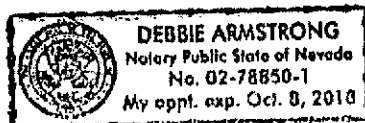
1. I am a Petitioner in this action. I have read the foregoing petition and verify
that the contents are true and correct to the best of my knowledge.
2. I hereby request the that foregoing Petition be granted.

Further affiant sayeth naught.


REGINA RIVERA

Subscribed and sworn before me this
7 day of June, 2017.


Notary Public for Said County and State



CERTIFICATE OF MAILING

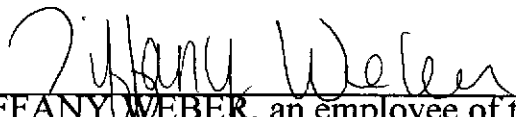
I hereby certify that I am an employee of the MILLS, MILLS & ANDERSON
and that on the 9th day of June, 2017, I duly deposited for mailing in the U.S.
Mail at Las Vegas, Nevada, postage prepaid thereon, or had hand-delivered, a true
and correct copy of the above and foregoing **PETITION FOR WRIT OF
MANDAMUS AND STAY OF DISTRICT COURT PROCEEDINGS**
addressed to the following at their last known address:

Tanner L. Sharp, Esq.
Deputy District Attorney – Juvenile Division
601 N. Pecos Road
Las Vegas, Nevada 89101
Attorney for Clark County Department of Family Services

John Blackmon, Esq.
2200 Paseo Verde Parkway #350
Henderson, Nevada 89052
Attorneys for Stephanie and Joey Rozier

Amy Honodel, Esq.
Legal Aid Center
725 E. Charleston Blvd.
Las Vegas, Nevada 89104
Children's Attorney Project
Attorney for Esther Rodriguez

The Honorable Judge Cynthia Giuliani
Clark County District Court Dept. K
601 N. Pecos Rd.
Las Vegas, Nevada 89101


TIFFANY WEBER, an employee of the
MILLS, MILLS & ANDERSON