IN THE SUPREME COURT OF THE STATE OF NEVADA

PHILIP R.; AND REGINA R., Petitioners, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE CYNTHIA N. GIULIANI, DISTRICT JUDGE; Respondents, And STEPHANIE R.; JOEY R. CLARK COUNTY DEPARTMENT OF FAMILY SERVICES; AND E.R. A MINOR, Real Parties in Interest.	No.: 73198
IN THE MATTER OF: E.R., A MINOR	No. 73272
CLARK COUNTY DEPARTMENT OF FAMILY SERVICES; AND CLARK COUNTY DISTRICT ATTORNEY'S OFFICE, Petitioners, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE CYNTHIA N. GIULIANI, DISTRICT JUDGE; Respondents, and PHILIP R.: REGINA R.; STEPHANIE R.; JOEY R.; AND E.R. A MINOR, Real Parties in Interest.	

MINOR CHILD, E.R.'s ANSWER TO CONSOLIDATED PETITIONS FOR WRIT OF MANDAMUS

NRAP 26.1 DISCLOSURE

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

Tanner L. Sharp, Esq.
Steve B. Wolfson, Esq.
Deputy District Attorney – Juvenile Division
Attorneys for Clark County Department of Family Services and Clark County District Attorney's Office, Petitioners

John Blackmon, Esq.
Ford & Friedman LLC.
Attorney for Stephanie and Joey Rozier, Real Parties in Interest

Gregory Mills, Esq.
Mills, Mills & Anderson
Attorney for Phillip and Regina Rivera, Real Parties in Interest

Raymond E. McKay, Esq.
Law offices of Elizabeth R. Mikesell
Pro Bono CAP Attorney for E.R., Reference Party

The Honorable Judge Cynthia Giuliani
Eighth Judicial District Court of the State of Nevada, County of Clark
Respondents

Dated this 10th day of August, 2017.

MCFARLING LAW GROUP

By: */s/ Emily McFarling*
Emily McFarling, Esq.
Nevada Bar Number 008567
Pro Bono Co-counsel for E.R.

I. ROUTING STATEMENT

This case involves NRS 432B and is retained by the Supreme Court of Nevada under NRAP 17(a)(9).

II. TABLE OF CONTENTS

III. ISSUES PRESENTED

A. Whether the familial preference and sibling presumption survive termination of parental rights under NRS 432B.550(5).

B. Whether the District Court abused its discretion upholding the hearing master's report and recommendations

IV. STATEMENT OF THE FACTS

E.R. stipulates to the facts contained in Petitioner's Petition.

V. ARGUMENT

A. Termination of Parental Rights does not Obliterate the Familial or Sibling Placement Preference under NRS 432B.550

In a dependency action, if the court is going to place a child with a person other than a parent, the following preference must be given:

> (1) With any person related within the fifth degree of consanguinity to the child or a fictive kin, and who is suitable and able to provide proper care and guidance for the child, regardless of whether the relative or fictive kin resides within this State.
> (2) In a foster home that is licensed pursuant to chapter 424 of NRS.[1]

It is also presumed to be in the child's best interests for the court to place the child with a sibling.[2]

[1] NRS 432B.550(5)(b).
[2] NRS 432B.550(5)(a).

Petitioner cites *Bopp v. Lino*[3] to support his case that the familial preference was obliterated by Saez's termination of parental rights. Petitioner specifically states: "the Court found that when an order for adoption is entered, the statute establishes a new legal family for the adopted child and terminates the legal relationship between the child and her natural kindred." But that is not all this Court said in *Bopp*, it went on to state: "Prior to the entry of a decree of adoption, certain relatives continue to have a legal relationship with the child."[4]

Here, the familial preference remains intact because there has been no adoption, only a termination of parental rights. Everything in Petitioner's brief supporting the extinguishment of the familial preference relates to post-adoption; and would make no sense as applied to placement proceedings in dependency actions that occur after a termination of parental rights but before any adoption. The essence of these dependency cases is that a biological parent's rights are being terminated and DFS and the court are trying to place the child in a home with permanency. In *all* cases that end with adoption, there is a termination first. If the termination ended the familial preference, then there would not really be a familial preference because, if the termination occurred quickly—prior to DFS performing their due diligence in locating family, then under Petitioner's argument, in many cases there would be no

[3] 110 Nev. 1246, 1247, 885 P.2d 559, 560 (1994).
[4] *Id.* at 1251.

familial preference. Consider the example of a parent who offers to consent to termination of parental rights concurrent with the child being taken into protective custody, a termination in that situation could not be construed as abrogating the preference for placement with family.

Petitioner states that unless there is a statutory exception, termination extinguishes any familial connection. This is not true. It is adoption that is the trigger, not a termination of parental rights. NRS 432B.550 does not state the familial preference goes away after a termination.

Common sense dictates the familial preference remains until adoption. *Bopp* states that adoption establishes a "new legal family for the adopted child and terminates the legal relationship between the child and her natural kindred." The first most obvious thing is the second part of the sentence: "and terminates the legal relationship between the child and her natural kindred." This indicates that the relationship is intact between the child and natural kindred—until adoption. Applying Petitioner's argument that termination severs the child's kindred, then after termination but before adoption, the child has no family? That is an absurd proposition.

It is adoption that severs the familial preference, not termination of parental rights, therefore the district court did not err when it applied the familial preference

and awarded placement to Rozier after termination of parental rights, but prior to any adoption.

B. The District Court Did Not Abuse its Discretion

Once the district court determines the familial preference exists, its analysis should center on the child's best interests.[5] The court must give preference to placing a child related within the [fifth] degree of consanguinity to the child who is suitable and able to provide proper care and guidance for the child, regardless of whether the relative resides within this State.[6]

Preservation of familial relationships is an important consideration in determining what is in the child's best interest for placement purposes.[7] Once the criteria for the statutory preference are established, the statute creates a familial placement preference, not a presumption, and the district court must then consider placing the child with the relatives.[8] The placement decision ultimately rests in the district court's discretion, which must be guided by careful consideration of the child's best interest.[9]

---

[5] Clark County Dist. Atty., Juvenile Div. v. Eighth Judicial Dist...., 123 Nev. 337, 346 (2007).
[6] *Id.* at 342.
[7] *Id.* at 348.
[8] *Id.*
[9] *Id.*

A family member, with knowledge that a child has been placed into protective custody, delays seeking custody of the child for more than one year after the child's initial placement, the family member must demonstrate a reasonable excuse for the delay in order to retain the familial preference's application.[10]

In this case, Rozier contacted DFS about placement on October 18, 2016, less than six weeks after E.R. was placed with the Rivera on September 9, 2016. Rozier soon thereafter started the ICPC process and took clear actions toward obtaining placement. Clearly the delay in contact did not result in E.R. having gotten attached to an adoptive placement for a significant amount of time as she had only just been placed with them and had been moved around by DFS for over a year prior to that.

This Court has upheld the district court's decision in a very similar case as the one presently before it. In that case, Petitioner argued that relatives did not come forward timely and that the child's best interest were not served by placing with the relative.[11] This Court rejected that argument and found: 1) the family member came forward upon notice; 2) took immediate steps to initiate the ICPC process; 3) although the child had bonded with her foster family, she had an extensive family network in Texas and nothing indicated that she would not also bond with her

[10] *Id.* at 347.
[11] *See generally Jones v. Second Judicial Dist. Court of State ex rel. County...*, 124 Nev. 1483 (2008).

paternal relatives; and 4) it is presumed that placing the child with a sibling is in the child's best interest.[12]

1. The district court applied the proper standard

Petitioner argues the hearing master did not apply best interest considerations and placed too much emphasis on family connection. First, if the child has a sibling in the placement home, then it is presumed to be in the child's best interests for the court to place the child in that home. The hearing master relied on this inevitability. Petitioner does not even contradict that this is going to happen. Rather, they state it has not happened yet. It is a timing thing. But there are no facts in the record to show that the Rozier's should not, or will not, be the placement home for E.R.'s younger sibling.

Second, this Court has found that preserving familial relationships is "an important consideration in determining what is in the child's best interest for placement purposes."

The district court was therefore within its discretion to determine it was in the child's best interest to be placed with family, where there is a high likelihood that the child's sibling will also be placed in that home.

///

[12] *Id.*

2. Rozier demonstrated a reasonable excuse for delay

The district court found that Rozier both learned of E.R.'s removal and contacted the department in October 2016. This was 15 months after E.R. was placed into protective custody on July 27, 2015. The court found her delay excusable— because DFS never tried to find her— or anyone really. The records showed that DFS was contacted by E.R.'s adult sibling— but they never asked her about any other relatives. Satisfied with this, DFS appears to have ended their "search". The district court found this as sufficient excusable neglect.

Petitioner argues that Rozier *should* have known the child was removed based on her knowledge that Saez has a history of problems. That is quite a stretch to expect relatives to go looking for children in placement simply because they know a family member to have problems. You cannot fault Rozier for not investigating as this Court has stated that the family member must have knowledge. Rozier states her knowledge came from an Uncle. And once she obtained this knowledge, she promptly came forward. Rozier only has a duty to come forward when she actually knows— she is not expected to place calls randomly to DFS to ask if they have any of Saez's children in their custody. Incidentally, Rozier came forward only weeks after E.R. was placed in her current foster home.

The court therefore did not abuse its discretion when it concluded that Rozier's delay in coming forward was excusable as she did not know of E.R.'s removal.

3. It is in E.R.'s best interest to be placed with Rozier

Petitioner sets forth six reasons as to why placing E.R with Rozier is not in her best interests.

a. The permanency goal for E.R. is adoption

Petitioner provides that it is in E.R.'s best interests to be adopted, and with her current foster family, this could be done within thirty days; whereas with Rozier, it would take approximately one year.

Everyone agrees that a permanent home and eventual adoption are in E.R.'s best interests. But that doesn't mean that he who can adopt first automatically is the best place for E.R. Especially when the adoption process is only farther along with the foster home because DFS ignored Rozier and proceeded with the foster family while knowing there was a family member ready, willing, and able to take E.R. and adopt.

Petitioner states "there is no guarantee that the Roziers would adopt [E.R.] as they have not even met her." This also goes to the above. DFS denied Rozier's multiple requests for visitation. DFS set the table to exclude the Roziers and then seeks to fault them for circumstances the Department created.

b. The district court, in its discretion, placed E.R. with Rozier; Rozier did not have to meet a burden or prove such placement will improve E.R.'s quality of life

Petitioner provides that even Rozier admitted that both potential placements would be comparable homes; and the only reason the court placed with Rozier, was the biological connection and potential placement of siblings. This is true. But what Petitioner misses, is both these things go to best interests. If all things are equal, it is in the child's best interest to be placed with family. The familial preference in the statute exists for this reason. This Court has held that "preservation of familial relationships is an important consideration in determining what is in the child's best interest for placement purposes." Further, the sibling placement statute specifically creates a presumption that it is in E.R.'s best interests to be placed with Rozier (when this placement occurs).

Lastly, it is the court's decision, after taking evidence, to determine where to place the child, based on the child's best interests. There is no burden for Rozier to meet. Rozier does not need to prove the child's quality life will be improved, as Petitioner asserts. Petitioner cites no legal authority for such a proposition.

///

///

///

c. E.R. is two years old, thus has not bonded with her community

In support of best interest, Petitioner avers that "E.R. has established relationships and bonded with her friend, teachers, faith community, and the Rivera's relatives."

E.R. is two years old. While a two-year-old certainly develops relationships, she has only been with the Rivera's 10 months. And as stated, Rozier contacted DFS weeks after E.R. was placed with Rivera. With no other way to say it, DFS blew Rozier off and were not interested in placing E.R. with Rozier. Again, DFS creates situations it later uses to try and support its position. E.R. would not be so embedded with Rivera if DFS had followed statutory placement priority in the first place (as well as actually conduct a due diligent search for relatives).

While E.R. at two years old has spent the last ten months with Rivera, this does not create a significant enough bond with the community to create a best interest that trumps familial preference and the presumption of best interest with the sibling placement.

///

///

///

///

d. E.R. might be bonded to the Riveras, but this does not outweigh familial preference and the sibling presumption

It is reasonable that E.R. would be bonded with the family he has lived with for the past 10 months. It is also reasonable that in ten months, or two years from now, Rozier will be able to say the same thing. But this does not outweigh the statutory familial preference and this Court's prior holdings that this preference is a factor to consider when determining best interest. Additionally, once E.R.'s sibling is placed with Rozier, there is a presumption it is in her best interest to be placed with Rozier.

e. The Roziers are an excellent placement

Petitioner argues that the court concluded the Riveras would be an excellent placement, and because of this, it is not in his best interest to be removed from the home.

It is understandable that the Riveras feel this way. But this is the nature of being a foster parent. Ideally, every foster home should be a great home to take in children. That's the goal. But there are no guarantees. Sometimes you take a child in and the parent rehabilitates themselves and the child returns to the parent. That happens all the time. In other instances, a child is placed with a foster home, and

later, a family member comes forward and the child is eventually placed there. This also happens all the time.

Stability is obviously in E.R.'s best interest. One more move and E.R. will be permanently placed with relatives and likely with a sibling for the rest of her childhood. This is in E.R.'s best interest.

f. The trauma from removing from the Rivera's would be minimal

Petitioner provides that there was "uncontroverted" evidence that removing E.R. from her current home would result in long term trauma.

The issue with this "uncontroverted evidence" is that it came from a DFS employee, Ms. LaMaison. DFS has an agenda: place E.R. with the Riveras. That is obvious. So, DFS brings in an employee who presents a conclusion that E.R. needs to stay right where she is or there will be significant trauma with a new placement. This is hardly compelling.

The hearing master recommended and the district court judge confirmed, that a condition of E.R.'s placement with Rozier is that Rozier must comply with "the trauma minimization transition as outlined by the department." The court was not blind to trauma from a child being moved from one house to another. They took this into account and developed a plan.

///

4. DFS could have located Rozier sooner— if they'd tried

Petitioner argues that they could not have located Rozier sooner because DFS had no knowledge of her. This is true. The problem though is DFS only put in token efforts to search for any relatives. DFS spoke to E.R.'s adult sibling (Tellez). Petitioner states that Tellez did not disclose any information about Rozier "as Rozier is distantly related to Saez." But the district court found that it appeared based on notes that DFS never even asked if Tellez knew of any relatives.

DFS had its family, the Riveras. Talking to Tellez was only to check off a box that it "tried" to locate family members. DFS did not really want any information from her. In fact, it was *Tellez* who called DFS. There is no record of DFS investigating and contacting anyone on its own.

If Petitioner alleges Rozier should have affirmatively done more in coming forward, and "should have known" that E.R. was taken based on her knowledge of Saez's past; then DFS should have also done more besides talking to one relative. In fact, DFS has a statutory duty to investigate for family members whereas Rozier does not have a duty to come forward unless she has actual knowledge. DFS failed in its duty. The district court's finding that DFS did not search for relatives sufficiently was not clearly erroneous.

///

///

5. The Quinlan and LaMaison testimony was inconsistent with the facts

Petitioner argues that court's finding that Quinlan and LaMaison's testimony was not credible was clearly erroneous. Petitioner states "both the testimony of Ms. Quinlan and Ms. LaMaison and the DFS records make it clear that both DFS employees informed Rozier the plan was for the Riveras to adopt E.R. Rozier was to be second option should adoption not occur." The district court did not believe this.

After contacting DFS, only weeks after E.R. was placed with the Riveras, Rozier immediately got the ICPC processing rolling and started taking adoption classes. Again, this was after E.R. was only with the Riveras a very short period of time. It would be odd for DFS to have told Rozier, at this point, that she was back-up to a non-relative who only had E.R. a few weeks. Rozier's actions also were not consistent with someone who thought she was, at best, second choice for placement. For this and other reasons, the district court, after hearing everyone's testimony, found Rozier credible—and the DFS employees not credible. The court's findings were not clearly erroneous.

///

///

///

VI. CONCLUSION

The district court's application of the familial preference was not error as no adoption had taken place. The district court's application of the presumption of best interest for placement with a sibling was also not error as the district court found there is a high likelihood that E.R.'s sibling will be placed with Rozier— something Petitioner does not even dispute.

The other findings challenged by Petitioner as clearly erroneous were not. The district court judge is in the best position to weigh the credibility of witnesses and the evidence. The district court found DFS was not credible, had not sufficiently looked for relatives; and that Rozier's delay in coming forward was excusable as she had no knowledge that E.R. was removed from Saez.

The Court should therefore deny this Petition.

Dated this 10th day of August, 2017.

MCFARLING LAW GROUP

By: */s/ Emily McFarling*
Emily McFarling, Esq.
Nevada Bar Number 008567
6230 W. Desert Inn Rd.
Las Vegas, NV 89146
(702) 565-4335
Pro Bono Co-counsel for E.R.

VIII. CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point font, Times New Roman style.

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), proportionately spaced, has a typeface of 14 points or more and does not exceed 30 pages.

Finally, I hereby certify that I have read this Answer to Petitions for Writ of Mandamus, and to be the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. I further certify that this brief complied with all applicable Nevada Rules of Appellant Procedures, in particular, NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by appropriate reference to the record on appeal.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 10th day of August, 2017.

MCFARLING LAW GROUP

By: */s/ Emily McFarling*
Emily McFarling, Esq.
Nevada Bar Number 008567
6230 W. Desert Inn Rd.
Las Vegas, NV 89146
(702) 565-4335
Pro Bono Co-counsel for E.R.

IX. CERTIFICATE OF SERVICE

I, an employee of McFarling Law Group, hereby certify that on the 10th day of August, 2017, I served a true and correct copy of MINOR CHILD, E.R.'s ANSWER TO CONSOLIDATED PETITIONS FOR WRIT OF MANDAMUS, as follows:

X by United States mail in Las Vegas, Nevada, with First-Class postage prepaid and addressed as follows:

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

///

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

Gregory Mills, Esq.
703 S. 8th Street
Las Vegas, NV 89101
Attorney for Phillip and Regina Rivera

Raymond E. McKay, Esq.
7251 West Lake Mead Blvd.,
Ste. 250
Las Vegas, NV 89128
Pro Bono CAP Attorney for E.R.

__X__ via hand delivery to the following:

The Honorable Judge Cynthia Giuliani
Eighth Judicial District Court
601 N. Pecos Rd.
Las Vegas, NV 89101

By: ___*/s/ Maria Rios Landin*_____
Maria Rios Landin