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IN THE SUPREME COURT OF THE STATE OF NEVADA

In the Matter of E.R.,
A Minor.

Supreme Court No. 73272
District Court No. J-15-337398-P1

CLARK COUNTY
DEPARTMENT OF FAMILY
SERVICES and CLARK
COUNTY DISTRICT
ATTORNEY'S OFFICE,

Electronically Filed
Jul 18 2017 10:23 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT
COIURT, THE HONORABLE
CYNTHIA N. GIULIANI,
DISTRICT COURT JUDGE,

Respondent,

PHILLIP RIVERA AND REGINA
RIVERA AND STEPHANE
ROZIER AND JOEY ROZIER .

OPPOSITION TO EMERGENCY MOTION FOR STAY
UNDER NRAP 27(e)

COMES NOW, Raymond E. McKay, Esq., Pro Bono CAP attorney for
E.R., a minor, and hereby submits to this Honorable Court her Opposition to
the State of Nevada's Emergency Stay Motion regarding E.R.'s placement, in
anticipation that her request to file an opposition is granted.

This opposition is based upon all of the memorandum of points and

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1 authorities cited and upon any oral arguments made at the time of the hearing
2 for this Motion.

3 DATED this 28th day of June, 2017.

4
5 Respectfully submitted,

6 LAW OFFICES OF ELIZABETH R.
7 MIKESELL

8
9 By 

10 ELIZABETH R. MIKESELL, ESQ.

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16 *Pro Bono CAP Attorney for E.R.*

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18 **RELIEF SOUGHT FROM NEVADA SUPREME COURT**

19 The Clark County Department of Family Services is seeking a stay of
20 the order issued by the Eighth Judicial District Court on June 12, 2017.

21 However, it is not in the best interest of E.R. for a stay to be granted. It is in
22 E.R.'s best interest to begin the bonding process with her familial placement as
23 recommended by the Hearing Master and upheld by the Honorable Judge
24 Cynthia Giuliani. Moreover, it is important for E.R. to be with her sibling
25 OSR, who is already with the familial placement.

26 **LIMITED STATEMENT OF THE FACTS**

27 The Department of Family Services (hereinafter "DFS") removed E.R.
28

1 from the care of her natural mother, Nellie Saez (hereinafter “Saez”), and her
2 alleged father, Pedro, on July 27, 2015. *See Petitioners’ Appendix.* Pedro
3 passed away and a DNA test was performed as to E.R. and her paternal
4 grandparents and it was determined that Pedro was excluded from paternity.
5 As such, Pedro is not the biological father of E.R. and an order to disestablish
6 paternity against Pedro was granted. An order terminating Saez’s parental
7 rights was entered on February 18, 2017. *Id.*

10 E.R. lived with a non-adoptive resource soon after being placed in
11 protective custody until September 9, 2016, when E.R. was placed with Phillip
12 and Regina Rivera (hereinafter “the Riveras”). Soon thereafter, on October 18,
13 2016, Stephanie Rozier, a first cousin of Saez, along with her husband, Joey
14 Rozier (hereinafter “the Roziers”), contacted DFS requesting information to
15 adopt E.R. The Roziers reside in Georgia and contacted DFS within a few
16 hours after learning that E.R. was in foster care. The Roziers immediately
17 began the foster parent/adoptive process. The Roziers also began the process
18 of locating Saez’ other minor children in an attempt to adopt them as well. *Id.*

22 A hearing was held on April 13-14, 2017, regarding placement for E.R.
23 Both the Riveras and Roziers argued that it was in E.R.’s best interest to reside
24 with each of them, respectively. At the hearing, the hearing master was
25 advised that Saez was currently pregnant and that the Roziers would be
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1 seeking adoptive custody of the new born child. The hearing master found
2 that the Roziers provided reasonable excuse for their delay in contacting DFS
3 regarding E.R.. Moreover, the hearing master found that it was in E.R.'s best
4 interest to reside with the Rosiers, her biological family, and with her siblings.
5

6 *Id.*

7
8 Based upon DFS filing an objection to the hearing master's
9 recommendation, a hearing was held on May 23, 2017, before the Honorable
10 Judge Cynthia Giuliani. The core of DFS's argument was that the Roziers,
11 because they knew Saez was a homeless drug addict, and that E.R. existed,
12 should have known that E.R. would, at some point in the hypothetical future,
13 be taken into protective custody by one of the fifty states. The facts of this case
14 actually tend to show a coordinated effort by DFS to prevent the Roziers from
15 being able to properly come forward as a placement option. After reviewing
16 the pleadings and hearing argument, Judge Giuliani found that the familial
17 preference applied and that it was in E.R.'s best interest for her to be placed
18 with family, and upheld the hearing master's recommendation. DFS made an
19 oral motion for a stay but it was denied. *Id.*
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24 Saez gave birth to E.R.'s sister, O.S.R., approximately two months ago.
25 O.S.R. was taken into custody by DFS almost immediately thereafter. O.S.R.
26 was temporarily placed with the Riveras so E.R. could bond with her sister.
27
28

1 Recently, a placement hearing was held regarding O.S.R. and she was placed
2 with the Roziers.

3 E.R. has met with a therapist one time at the time of the writing of this
4
5 opposition, with numerous anticipated meetings over the next several weeks to
6 determine a trauma minimization transition plan for E.R. and the Roziers, per
7 the hearing master's recommendation and court order.
8

9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 **I. LEGAL AUTHORITY FOR STAY**

11
12 In deciding whether to grant a stay the Court should consider the same
13 factors as are considered regarding a preliminary injunction. *Dangberg*
14 *Holdings Nev., LLC v. Douglas County*, 115 Nev. 129, 142, 978 P.2d 311, 319
15 (1999).
16

17 The Nevada Rules of Appellate Procedure 8(d), state in relevant part as
18 follows: "[s]tays in [matters involving child custody... [,] [i]n deciding whether
19 to issue a stay, this court will consider the following factors: (1) whether the
20 child(ren) will suffer hardship or harm if the stay is either granted denied; (2)
21 whether the nonmoving party will suffer hardship or harm if the stay is
22 granted; (3) whether movant is likely to prevail on the merits in the appeal;
23 and (4) whether a determination of other existing equitable considerations, if
24 any, is warranted. NRAP 8(d).
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1 Based upon the authority cited above, E.R. requests that this Court deny
2 DFS's request for a stay which would prevent E.R. from beginning the
3 transition to the care and custody of the Roziers.
4

5 **II. APPLICATION OF LEGAL AUTHORITY TO PRESENT** 6 **MATTER**

7 **1. Whether the child will suffer hardship or harm if the stay is** 8 **either granted or denied**

9 E.R. is currently residing with the Riveras. Even though the initial
10 placement was recommended more than two months ago, E.R. has never met
11 the Roziers. Moreover, it is estimated that it will take several weeks before a
12 therapist will formulate a trauma minimization transition plan for E.R. and the
13 Roziers. It is in E.R.'s best interest to being the transition plan as soon as
14 possible. DFS's delay in formulating a transition plan has not been in E.R.'s
15 best interest, and further delay with a stay will not benefit E.R. A bonding
16 process needs to start as soon as possible between E.R. and the Roziers.
17 Further delay will only strengthen the bond between the Riveras and E.R.,
18 which is not in E.R.'s best interest as it will cause further complications in
19 implementing a transition plan with the Roziers.

20 The implementation of a transition plan between E.R. and the Roziers is
21 several weeks way from being drafted and finalized. More importantly, the
22 transition plan is anticipated to take six weeks or more to be completed once it
23 is implemented. As such, we are several months away from the Roziers taking
24 custody of E.R., which is plenty of time for the court to consider DFS's
25 pending writ. Therefore, a stay is unnecessary.

26 More importantly, E.R. and her sister O.S.R. had an opportunity to bond
27 together for the past six weeks while both were residing with the Riveras.
28

1 However, O.S.R. is now living with the Roziers in Georgia and any
2 unnecessary delay would adversely affect E.R.'s bonding relationship with her
3 sister. Consequently, E.R. would suffer from harm if the stay is granted.
4 Accordingly, DFS's request for stay should be denied.

5 **2. Whether the nonmoving party will suffer hardship or harm if**
6 **the stay is granted**

7 While the Roziers have not yet been given an opportunity to meet with
8 E.R., they are likely to suffer some hardship if the stay is granted. The Roziers
9 will never be able regain the lost time with E.R. which would result if a stay is
10 granted.

11 **3. Whether movant is likely to prevail on the merits in the**
12 **appeal**

13 The Nevada Legislature and the Nevada Supreme Court have long
14 recognized that the overarching consideration in the placement of children is
15 that their best interests be achieved.¹ The Nevada Supreme Court explained
16 that the "preservation of the familial relationship is an important consideration
17 in determining what is in the child's best interest for placement purposes."²
18 Accordingly, in furtherance of the best interest of the child, the Legislature
19 enacted NRS 432B.550(5)(a), which creates a presumption that it is in a
20 child's best interest to be placed with siblings. In particular, NRS 432B.550
21 states:

22 In determining the placement of a child pursuant to this section, if the
23 child is not permitted to remain in the custody of the parents of the child
24 or guardian; (a) It must be presumed to be in the best interest of the
child to be placed together with the siblings of the child.

25 ¹ *Clark county Dist. Atty., Juvenile Div. v. Eighth Judicial Dist. Court ex rel. County of Clark*, 167 P.3d 922,
26 928 (Nev. 2007). *See also*, NRS 125.480(1) (determine custody in divorce), 128.105 (terminate parental rights,
and 432B.480(1)(b)(2) (determine custody in abuse/neglect), all noting that in such child welfare proceedings,
the best interests of the child should be the primary or even sole consideration.

27 ² *Clark county Dist. Atty., Juvenile Div. v. Eighth Judicial Dist. Court ex rel. County of Clark*, 167 P.3d 922,
28 929 (Nev. 2007).

1 Thus, it is statutorily required that this Court presume it is in E.R's best
2 interest to be placed with her sister, and the Roziers.

3
4 Additionally, the Legislature's interest in preserving familial unity is
5 further represented by NRS 127.2825 which provides that "a child placing
6 agency shall, to the extent practicable, give preference to the placement of a
7 child for adoption . . . together with his siblings." DFS have presented no
8 arguments as to why such a placement is not in her best interest.

9
10 Several months of care and love by the Riveras, an unrelated alternative
11 adoptive resource, does not rebut the very clear presumption and strong
12 mandate of the law. In examining the best interests of a child, the question
13 does not turn on whether one home is better than another, but instead whether
14 the "proposed placement plan satisfies the legislative goals and objectives of
15 the statute by providing a stable, safe, and healthy environment for the child
16 considering all circumstances surrounding placement."

17
18 In 2005, when the Nevada Assembly Committee discussed amending
19 NRS 432B.550 to include the best interest presumption, the Department of
20 Social Services for Washoe County recognized that, "splitting siblings in
21 foster care interrupts the sole connection a child may have to his or her family
22 of origin. The loss can negatively impact the child throughout his or her
23 lifetime." Furthermore NRSB.3905 states in relevant part that DFS shall make
24 all reasonable efforts to place siblings in the same location in the placement of
25 a child who is under 6 years of age.

26
27 NRS 432B.390 states in pertinent part:
28

1 6. A child placed in protective custody pending an investigation and a
2 hearing held pursuant to NRS 432B.470 must be placed, except as
3 otherwise provided in NRS 432B.3905, in the following order of
4 priority:

5 (a) In a hospital, if the child needs hospitalization.

6 **(b) With a person who is related within the fifth degree of**
7 **consanguinity or a fictive kin, and who is suitable and able to**
8 **provide proper care and guidance for the child, regardless of**
9 **whether the relative or fictive kin resides within this State.**

10 (c) In a foster home that is licensed pursuant to chapter 424 of NRS.

11 (d) In any other licensed shelter that provides care to such children.

12 (Emphasis Added).

13 DFS is tasked by statute, to follow a priority order of placement options.
14 The statute is not discretionary, and is in fact a command by the Legislature,
15 unless the child needs serious medical attention, to place children with family
16 members within the fifth degree of consanguinity. The statutory command
17 specifically contemplates the importance of family relationships. The
18 applicability of the statute does not expire, and therefore is an ongoing
19 obligation for DFS to place children with their biological families over all
20 other placement options. Saez and Mrs. Rozier are cousins and are related
21 within the fifth degree on consanguinity.
22

23
24 DFS argues that there is a strong bond between E.R. and the Riveras and
25 that the removal of E.R. from the Rivera home would cause E.R. unnecessary
26 trauma. Even if those statements were accepted as fact, the presumption that it
27 is in E.R.'s best interest to be placed with her sister and family is not rebutted.
28

1 Such a strong presumption simply cannot be rebutted by the fact that there are
2 other potential adoptive parents who have provided care to a child and want to
3 keep that child, regardless of how good the care or how strong the love. If it
4 could, the statutory presumption would be essentially obliterated by the ICPC
5 process. Children would never be able to be placed with their siblings who
6 happened to reside out of state. Approvals for placement take a significant
7 amount of time. Under DFS's rationale, apparently any care-givers who
8 provided excellent care to a child during the time it takes for an out-of-state
9 placement, should take priority over the statutorily-preferred care-giver who
10 just happened to live in another state. The Court should not allow such a
11 gutting of this crucial presumption.
12

13 It is also significant to note that E.R. has only been in the care of the
14 Riveras for approximately nine months. E.R. lived with her non-adoptive
15 resource for nearly a year when she transitioned to the Rivera household.
16 That transition was basically without incident and E.R. quickly bonded with
17 the Riveras. She was happy, well-cared for and made progress
18 developmentally during the approximately one year she lived with the first
19 foster family. Yet when she had to be moved from their care, she transitioned
20 to the Riveras without incident and quickly bonded with them. Accordingly,
21 this does not appear to be a child with attachment issues, as alleged by DFS,
22 and there is no reason to suggest she will not transition just as easily and bond
23 just as quickly with her sister and the Roziers.
24

25 Because no meritorious arguments have been put forth by DFS to rebut
26 the statutory presumptions regarding best interest, this Court must continue to
27
28

1 presume it is in E.R.'s best interest to be placed with her sister and the Roziers.
2 Therefore, DFS is unlikely to prevail on the merits of the appeal and their
3 emergency motion for a stay should be denied.

4 **4. Whether a determination of other existing equitable**
5 **considerations, if any, is warranted**

6 DFS argues the trauma that might occur should E.R. be placed with the
7 Roziers. However, the hearing master and district court have taken important
8 steps to eliminate, or at least minimize, any trauma to E.R. that would occur
9 when E.R. is placed with the Roziers. Specifically, it has been ordered that
10 E.R. meet with a therapist who would observe and interview the minor child to
11 determine a transition plan which would be in E.R.'s best interest and would
12 keep any potential trauma to a minimum. The placement order was contingent
13 on such a plan and the Roziers stipulated to such a recommendation.
14 Therefore, DFS's argument amount traumatizing E.R. is without merit and
15 their request for a stay must be denied.
16
17

18 **CONCLUSION**

19 The Rivera's are a wonderful couple and they have taken great care of
20 E.R., however, the hearing master and the district court applied the appropriate
21 standard in awarding placement to the Roziers, because they came forward as
22 soon as they possibly could. The familial preference exists in Nevada until a
23 Decree of Adoption is finalized, as an adoption is the only legal mechanism
24 for severing legal familial ties. There was no delay between the Roziers
25 learning of E.R. being taken into protective custody and their efforts to come
26 forward as an option for placement. The hearing master and the district court
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1 properly ordered that E.R. be placed in a home with her family members, the
2 Roziers, and more particularly with at least one sibling, O.S.R., who is
3 currently with the Roziers. DFS has an ongoing obligation to place children
4 with family when family within the fifth degree of consanguinity comes
5 forward in a timely manner.

6 Based on the foregoing and the papers and pleadings on file herein, this
7 Court should deny DFS's request for an emergency stay.
8

9 DATED this 28th day of June, 2017.

10 Respectfully submitted,

11 LAW OFFICES OF ELIZABETH R.
12 MIKESELL

13 By 

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RAYMOND E. McKAY, ESQ., being first duly sworn, deposes and says:

DATED this 28th day of June 2017.

LAW OFFICES OF ELIZABETH R.
MIKESELL

Pro Bono CAP Attorney for E.R.

CERTIFICATE OF MAILING

I hereby certify that service of the OPPOSITION TO EMERGENCY
MOTION FOR STAY UNDER NRAP 27(e) was made this 28th day of June,
2017 by e-mail, addressed to the following:

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