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.	

STEPHANIE AND JOEL "JOEY" 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. There are no corporate interests as described in NRAP 26.1(a) involved in this proceeding. 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

Emily McFarling, Esq.
McFarling Law Group
Pro Bono Co-Counsel for E.R.

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 14th day of August, 2017.

Ford & Friedman

By: _____
John R. Blackmon, Esq.
Nevada Bar Number 013665
Counsel for Stephanie and Joel "Joey" Rozier, Real Parties in Interest

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. Under NRS 128.110, do the familial preference and the sibling presumption survive an order terminating parental rights, when no adoption has taken place?

B. Under *Clark County Dist. Attny. v. Eighth Judicial Dist. Court*, 167 P.3d 922 (Nev. 2007), does the phrase "*a family member with notice*" include constructive or implied notice, based on a family member's general knowledge of a distant relative's history of instability that may or may not lead to children being removed from the distant relative's care by the State?

C. Does 432B.121 impose upon a family member, seeking placement of a child who has been removed from their mother's care, a duty to routinely search for such potentially removed children simply because the family member seeking placement has a general knowledge that their relative has a history of instability which may or may not lead to the children's removal from their care?

D. Under Nevada's statutes and case law on the best interest determinations for child placement in 432B cases, is it arbitrary or capricious for the district court to determine in its discretion, that when both households competing for placement are great, that the familial preference outlined in 432B.550(5) is more important to a final decision than a child's bonding with her current nonrelative placement, especially when this preference is applied with the

specific condition that a carefully crafted therapeutic transition is ordered concurrently with the new placement?

E. Under Nevada's statutes and case law on best interest determinations, is the district court precluded from considering the inevitable placement of a child's sibling, when the district court's best interest determination does not hinge on the inevitability of a sibling's future placement?

IV. STATEMENT OF THE FACTS

A. INTRODUCTION

Real Parties in Interest Stephanie and Joel "Joey" Rozier (hereinafter, the "Roziers") cannot join in E.R.'s stipulation to the facts as presented in either of the consolidated Petitions, in their entireties. As presented by both Philip and Regina Rivera (hereinafter, the "Riveras") and the District Attorney,[1] the facts in the Petitions are a crafty manipulation of the circumstances uncovered in the lower tribunal. Both Petitions omit essential facts in this case, mischaracterize other facts, and then include facts that are not a part of the record below. Therefore, the Roziers are compelled to include their own statement of the facts as they have been documented in the lower court, as they have testified under oath below, and as undersigned counsel so certifies.

---

[1] Because the District Attorney is counsel for the Department of Family Services (hereinafter, "DFS"), the references to either the District Attorney, or the Department of Family Services may be considered synonymous.

However, the Roziers do indeed join in E.R.'s arguments and conclusions regarding the proceedings below, and seek only to provide a different perspective based on Nevada's statutory and case law schemes that have not yet been briefed for this Court. To the extent either of the consolidated Petitions, or the Answer filed by E.R., failed to fully address applicable law, the Roziers seek to clarify and supplement those arguments and representations in order to reach a just and equitable decision in this very important matter.

Additionally, the Consolidated Petitions (hereinafter, the "Petitions" when not specifically noted as respective individual petitions) both misrepresent the law applicable to this matter. Specifically, the District Attorney's Petition seeks to rely on, *Bopp v. Lino*, 110 Nev. 1246, 885 P.2d 559 (1994), to reach the conclusion that a termination of parental rights severs a child's familial relationships. The Rivera's Petition does not even cite to authority establishing that conclusion. The Rivera's Petition repetitively cites to statutory provisions inapplicable to this 432B case. Specifically, the Riveras' Petition seemingly relies on NRS 125C, 127, and 128, despite the fact that the instant matter does not stem from a custody case in district court, an adoption case, or a termination of parental rights case, respectively.

Further, the District Attorney's Petition argues that pursuant to *Clark County Dist. Atty., Juvenile Div. v. Eighth Judicial Dist. Court ex rel. County of Clark*, 123 Nev. 337, 167 P.3d 922 (2007), the Roziers had a concomitant duty to come

forward and seek placement, just as DFS has a duty to locate potential family placement options. The instant matter and *Clark County* are simply not analogous.

In *Clark County*, the trial court found that the relatives seeking placement had known about that child's removal for a year, and failed to seek placement during that time. Here, the Roziers sought placement, definitively, without a single day going by after they received notice of E.R.'s removal. The Petitioners argue that the Roziers knew, or should have known that E.R. had been removed, because of the biological mother's (hereinafter, "Saez") history of instability. Additionally, both Petitions attempt to argue imputed notice to the Roziers simply because their relative living in Florida was on notice of E.R.'s removal, even though the facts below establish the Florida relative did not pass on his information once he acquired it. Both Hearing Master Norheim and District Court Judge Giuliani sternly disagreed with the implied notice argument presented by DFS. There was no evidence in the record that could reasonably lead to the notice *assumption* the Petitioners are making with respect to the Roziers. In fact, the Rivera petition even concedes that the Roziers were "ignorant" of E.R.'s removal until October 18, 2016, when the Roziers contacted DFS to request placement. Implied notice and ignorance are mutually exclusive.

Finally, neither of the Petitions properly state the issues to be considered by this Court. Both Petitions presume that the child at issue would suffer trauma as a

result of the placement decision. However, both Petitions intentionally omit the conditions precedent to the lower court's placement decision, which were that the Roziers follow through with a comprehensive therapeutic trauma minimization transition period, and prove their familial relationship.[2] Without the therapeutic transition being in place, the lower court stated there would be no change of placement for E.R. Thus, to categorize the district court's decision as being an abuse of discretion, which was arbitrary or capricious, is either a misunderstanding of what the court ordered, or an intentional misrepresentation meant to mislead this Court. Neither of those mistaken positions of the Petitioners are acceptable. The Roziers respectfully request that this Court not substitute its judgment for that of the lower tribunal, especially in light of the extensive examination of evidence that took place below.

B. CORRECTED FACTS

As stated in the District Attorney's Petition, the facts outlined at 2:13 - 4:4 are accurate to the best of the Roziers' knowledge. However, to shed an accurate light on the proceedings below, the motivations of both DFS and the Riveras are important starting points, possibly even prior to E.R.'s placement with the Riveras.

---

[2] In addition to the testimony elicited at trial, which included Mrs. Rozier's testimony regarding her biological connection to E.R., the Roziers have submitted documentary proof of the same to DFS, yet DFS has failed to supplement the Appendix with the same.

1.) *DFS and Rivera's intent to ensure permanency with Riveras.*

Socially, and legally speaking, there are major differences between foster parents, and adoptive parents. As E.R.'s Answer in this matter makes clear, foster parents are not supposed to anticipate adoption. The first goal of a foster family is to assist the State and the biological family of the child in their care to become reunified, or unified, with those family connections. However, from the Rivera's testimony at the evidentiary hearing on placement before Hearing Master Norheim from April 13 - April 14, 2017 (hereinafter, the "Evidentiary Hearing") the Petitioners' goal to forever place E.R. with the Riveras was likely set from the start, maybe even before said placement. Mrs. Rivera testified that she and her husband had attempted to conceive children naturally, but that a medical issue prevented that from becoming a reality for them. (DA App. 0338:6-11.)[3] Following failed attempts at natural conception, the Rivera's engaged the services of Catholic Charities to be able to adopt a child. (DA App. 0338:12-15). When the Rivera's refused to take multiple children that were offered to them through Catholic Charities, they abandoned the private adoption route. (DA APP. 0338:15-19).

[3] For ease and clarity, the Appendix filed by the District Attorney will be referred to as "DA App.," and the Appendix filed by the Riveras will be referred to as "Riv. App."

The Rivera's refusal to accept the children presented to them by Catholic Charities led them to DFS, to attempt to foster to adopt,[4] because Mrs. Rivera had "known several people who have adopted through the system." (DA App. 0338:20-22). Do the Roziers fault the Riveras for having a strong desire to bring children into their lives? Of course not, the blame here for the Riveras' inappropriate expectations is squarely on the shoulders of DFS. DFS must have known that the Riveras had previously sought adoption, and failed, or at least had not found a child that met their expectations, and it should have been made clear to them that there is no certainty in being able to finalize an adoption with a child placed through the foster program. Hearing Master Norheim even concluded at the end of the Evidentiary Hearing on April 14, 2017 that, "[t]he Riveras were led to believe when they got placement that this is it. This is permanency." (DA App. 0377:24-0378:1). Further, testimony from Mrs. Rivera reveals just how deep her desire to adopt a child had become, after having successive failures or missteps in the child conception/adoption processes; Mrs. Rivera stated, "I've prayed for a child for years. Every day, I've prayed for a child to be in my life. And now I have [E.R.]." (DA App. 033910-11). The Roziers feel bad for the Rivera family, and how this matter was handled by DFS, but the Roziers and E.R. should not be penalized

[4] Fostering to adopt is essentially, a family seeking adoption will foster children, and when those children become available for adoption, seek to be the adoptive resource for those children.

because of the dereliction of duty on the part of DFS, even though said failure will cause the Riveras emotional grief.

As E.R.'s Answer states, DFS should have told the Rivera's about the potential for family placement with the Roziers in a way that would have properly tempered their expectations, because children are very often placed with relatives after foster placement. Additionally, E.R.'s CAP attorney below stated on the record, as an officer of the court, that he, "wouldn't have signed the termination rights because that might have affected the family process had [he] known active family members were - - were participating at that time." (*sic*) (DA App. 0373:2-5). By not informing the CAP attorney about the efforts the Roziers were making in order to obtain placement, he was unable to represent E.R. with all the facts then known to DFS. *Id.* It is DFS's failure to properly update Mr. McKay regarding the Roziers interest in placement, coupled with Mrs. Rivera's clear and unwavering intent to adopt *and not foster*, that signals there was something of a coordinated effort between DFS and the Riveras to ensure E.R. remained with them at all costs. DFS testified that it had reached out to Mr. McKay multiple times, but there was no documentary evidence supporting that contention, and Mr. McKay disputed DFS's claims of its attempted contact. (DA App. 0371:5-20).

///

///

2.) *The Roziers Did Not Have Notice of E.R.'s Removal.*

The Petitions seek to establish that a relative's general knowledge of another family member's history of instability automatically establishes constructive notice of a child's removal, no matter what. As a policy issue, it is an unfortunate reality that nearly all parents involved in 432B cases, and also have had their children removed from their care by the state, are unstable, or unable to provide safe or adequate care. Thus, the Petitioners argue that any relative who knows that there is a parent involved in the 432B case is on notice of all hypothetical removals, when that parent has a history of known instability, homelessness, or drug addiction to an extent their children may be removed. The Petitioners' arguments that relatives with such general knowledge are automatically on notice is preposterous, because the same would impose an impossible duty, to search for potentially removed children, on distant relatives in a way that is categorically inconsistent with Nevada law.[5] Additionally, such a position would be detrimental to children, who would be deprived the chance of living with their blood relatives, just because placing

[5] *See generally* NRS 432B.390, which commands DFS to place children in its custody with suitable relatives within the fifth degree of consanguinity. Disturbingly, DFS testified in this case that its due diligent search for family members pursuant to this statute only endeavors to locate family members within the first degree of consanguinity. (DA App. 0311:8-15). DFS misrepresented the table of consanguinity in this testimony, but still stated its obligation is to actively pursue people like the Roziers, but that it is hard to do.

children in foster care is easier on DFS. Nonetheless, the facts established below show what was known by the Roziers, and what was not.

Mrs. Rozier testified that she was engaged in casual conversation with a relative living in Florida ("Tony"), and the conversation somehow led to a discussion about E.R.'s removal from Saez's care. (DA App. 0168:10-13). The Petitioners both seek to impute Tony's notice to the Roziers, despite the evidence that the only fact established below on the issue is that the Roziers found out about E.R.'s removal from Tony, and that Tony told her of E.R.'s removal on October 18, 2016. October 18, 2016 was the day the Roziers contacted DFS, because Clark County was the last place they knew Saez to be living. (DA App. 0180:4-8).

Additional facts established below show that the Roziers had a reasonable belief that Saez was stable following E.R.'s birth. (DA App. 0174:2-3). The reason that the Roziers assumed Saez was stable at the time of E.R.'s birth was that on Saez's Facebook page, she indicated she was married, possibly living in a home with E.R.'s father, and that the photos of Saez presented her as being healthy. (DA App. 0181:3-21).[6] Even though DFS disagreed, the court stated, "[these facts] based on the sworn testimony today, is a reasonable delay. That is, [the Roziers] did not know, the Department did not reach out to them, the family did not reach

[6] Even if the Roziers can be said to have had implied notice of E.R.'s removal, their reasonable belief that Saez had obtained some level of stability at the time of E.R.'s birth is a defense to the Petitioners' argument of implied notice.

out to them. This again is the only evidence that I have. They might have *guessed* there was a problem and maybe should have started checking on it earlier. But that's a stretch." (DA App. 0198:10-16) (emphasis added). Based on the evidence, the lower court determined that the delay in the Roziers coming forward to seek placement was reasonable, and excusable, because the Roziers did not have notice, and when they did, they came forward immediately. On top of the lack of notice the Roziers had of E.R.'s removal, after they contacted DFS, they were specifically told they could not attend any of the hearings related to E.R.'s case. (DA App. 0234:14-20). The District Attorney attempted to lead the DFS worker in the same line of questioning if the Roziers had been told that same thing between October 20, 2016 and January 12, 2017, but the worker stated she could not recall. (DA App. 0234:24-0235:3).

3.) *Best Interest Findings Were Extensive.*

Throughout most of the rest of the evidentiary hearing before Hearing Master Norheim, evidence was presented as to the suitability of both placement options before the Court. Those findings were memorialized in the Hearing Masters Findings of Fact, Conclusions of Law, and Recommendations filed May 1, 2017. (Riv. App. 076-078). Finally, Hearing Master Norheim specifically asked Mr. McKay and the District Attorney if the court's findings were sufficient, and indicated to all present at the Evidentiary Hearing that the court would provide the

District Attorney as much time as was needed to determine the sufficiency of the findings, and the District Attorney stated that the findings were "good." (DA App. 0383:20 – 0384:14). In the District Attorney's Petition at 20:16 – 21:22, DFS claims Hearing Master Norheim's findings were insufficient. However, the record shows something different. Therefore, the lower court was left with the decision of how to determine a child's best interest when all best interest factors are equal, save and except for the biological connection between the Roziers and E.R.

V. ARGUMENT

A. NRS 128.110 SPECIFICALLY INDICATES THAT FAMILY TIES ARE NOT SEVERED BETWEEN THE TERMINATION OF PARENTAL RIGHTS AND A PROSPECTIVE ADOPTION.

> 1. Whenever the procedure described in this chapter has been followed, and upon finding grounds for the termination of parental rights pursuant to NRS 128.105 at a hearing upon the petition, the court shall make a written order, signed by the judge presiding in the court, judicially depriving the parent or parents of the custody and control of, and terminating the parental rights of the parent or parents with respect to the child, and declaring the child to be free from such custody or control, and placing the custody and control of the child in some person or agency qualified by the laws of this State to provide services and care to children, or to receive any children for placement. **The termination of parental rights pursuant to this section does not terminate the right of the child to inherit from his or her parent or parents, except that the right to inherit terminates if the child is adopted as provided in NRS 127.160.**

NRSA § 128.110(1) (West) (*Emphasis added*).

The above quoted statute explicitly establishes that the termination of parental rights does not sever familial ties. If the termination of parental rights severed the familial ties, as Petitioners suggest, then the children at issue in these proceedings would not be able to inherit from the parents, whose parental rights had been terminated. This statute does not limit such inheritance to any testamentary instrument, and thereby suggest, even if a parent whose rights had been previously terminated pursuant to this statute, the child/ren at issue, prior to being adopted will still inherit from their parents through the laws of intestacy. For these reasons, coupled with those argued in E.R.'s Answer, it is adoption that severs the familial ties, and not a termination of parental rights.

The public policy ramifications of DFS's position are quite well presented in E.R.'s Answer, therefore, the Roziers simply emphasize that the public policy of keeping families together when possible would not be served by abrogating NRS 128.110, and interpreting *Bopp v. Lino,* 110 Nev. 1246, 1253, 885 P.2d 559, 563 (1994),[7] as severing familial relationships during the time between the termination of a parent's rights and their child's adoption, especially since *Bopp* did not stem from a 432B case.

i.) <u>The Familial preference is preserved post termination of parental rights pursuant to NRS 128.110(2)</u>

[7] *See* NRAP 38 & 39.

NRS 128.110(2), states in pertinent part:

> 2. If the child is placed in the custody and control of a person or agency qualified by the laws of this State to receive children for placement, the person or agency, in seeking to place the child:
> (a) May give preference to the placement of the child with any person related within the fifth degree of consanguinity to the child whom the person or agency finds suitable and able to provide proper care and guidance for the child, regardless of whether the relative resides within this State.
> (b) Shall, if practicable, give preference to the placement of the child together with his or her siblings.

Following NRS 121.110(1), NRS 128.110(2) goes on to state that DFS still has the familial preference to think about when determining placement post termination of parental rights. When DFS placed the Roziers' request for placement on Judge Norheim's calendar, DFS abrogated any placement decision to the court. Further, DFS placing the Roziers' request for placement on calendar was an acknowledgement that a familial preference still existed. DFS's actions contradict its argument that a termination of parental rights severs all familial ties that existed through a child's natural parents.

B. PURSUANT TO NRS 432B.121, WHETHER A FAMILY MEMBER SEEKING PLACEMENT OF A CHILD IN A 432B CASE HAD NOTICE OF THE CHILD'S REMOVAL IS A DISCRETIONARY DECISION MADE BY THE DISTRICT COURT.

When a family member seeking custody or placement of a child in a 432B case, knows about the removal, and then delays seeking placement for an

unreasonable amount of time, the delay may be considered by the district court in a best interest analysis regarding the child at issue's prospective placement options. *Clark County Dist. Atty., Juvenile Div. v. Eighth Judicial Dist. Court ex rel. County of Clark*, 123 Nev. 337, 347, 167 P.3d 922, 928–29 (2007). Further, "If . . . an initial non-family placement is made before interested relatives are before the court, and interested relatives then timely seek custody, the court should again determine whether the familial preference exists and, if so, consider placing the child with the relatives, if this placement serves the child's best interest. *Clark County*, at Nev. 346.

"The district court's findings of fact will not be set aside unless those findings are clearly erroneous. Accordingly, if the district court's findings are supported by substantial evidence, they will be upheld. Substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion." *Bopp v. Lino*, 110 Nev. 1246, 1249, 885 P.2d 559, 561 (1994), (internal citations omitted). Whether or not a person has notice is a question of fact.

Importantly, in *Clark County*, the trial court found that the relatives seeking placement knew about the child's removal and came forward more than a year after the child's birth. However, the trial court found that the family placement option had actual knowledge of the removal a few weeks after the child's birth.

Therefore in *Clark County*, the relatives seeking placement waited approximately a year to come forward.[8] Conversely, and here, the district court found that the Roziers did not have notice of E.R.'s removal until October 18, 2016 (which was also the day the Roziers came forward). The factual determination regarding whether or not the Roziers had notice of E.R.'s removal was based on lengthy testimony elicited at the evidentiary hearing. The facts included Mrs. Rozier's testimony that she did not know, that DFS did not ask the relatives, with whom it had contact, if there were any other relatives (DFS simply states that the relative did not disclose any other relatives, which implies that DFS did not even ask), and, but not limited to, the testimony detailing the substantial efforts the Roziers made to achieve placement, while their ICPC was being processed. Unfortunately, this Court has had to decide a lot of similar cases where the record establishes a failure within DFS. The reason it is clear DFS failed to meet its burden is clear based on the language of NRS 432B.390, which commands DFS to place children with family falling within the fifth degree of consanguinity. Nowhere in Nevada law does it state that a family member within the fifth degree of consanguinity has the

[8] Interestingly, in *Clark County*, DFS decided not to contact a known potential familial placement option, simply because one relative the department spoke with indicated that the relative (namely Teresa) would probably not be interest. Similar missteps by DFS are present in the instant matter.

burden or obligation to locate and find their relative children in a sister state's custody.

Finally, "A family member's failure to timely and definitively request custody of a child who has been placed in protective custody, **when that family member knows of the protective custody placement, may** ultimately either render the statutory familial preference inapplicable or influence the district court's determination of the child's best interest. *Clark County Dist. Atty., Juvenile Div. v. Eighth Judicial Dist. Court ex rel. County of Clark*, 123 Nev. 337, 347, 167 P.3d 922, 929 (2007). (Emphasis added). *Clark County*, still establishes that the application of the familial preference is within the discretion of the trial court, even after the relative seeking placement fails to timely and definitively request the same. Further, *Clark County* establishes that the courts must make credibility findings in addition to a best interest determination. *Id.* at Nev. 348.

Here, the facts established below show there was less than one day between the moment the Roziers learned of E.R.'s removal and the time they contacted DFS to definitively request placement. Therefore, even if the, less than one day, it took for the Roziers' to place their October 18, 2016 phone call to DFS, could be considered an unreasonable delay, that delay is still subject to the trial court's discretion. Finally, Hearing Master Norheim made specific findings that DFS's testimony regarding its contact with the Roziers was not credible. This leaves the

Rozier testimony regarding their notice as the only evidence regarding the alleged delay. On its face, contacting DFS the same day a potential family placement option has notice of a proceeding cannot be deemed a delay.

The Roziers submit this argument in addition to the arguments presented in E.R.'s Answer, in that E.R.'s Answer detailed the fact finder's conclusion that DFS should have located the Roziers, instead of the Roziers having to locate E.R. Fortunately, 432B.121 provides direction on how to determine when a familial placement option is aware of a child's removal.

NRS 432B.121: Definition of when person has "reasonable cause to believe" and when person acts "as soon as reasonably practicable." For the purposes of this chapter, a person:

> 1. Has "reasonable cause to believe" if, in light of all the surrounding facts and circumstances which are known or which reasonably should be known to the person at the time, a reasonable person would believe, under those facts and circumstances, that an act, transaction, event, situation or condition exists, is occurring or has occurred.
> 2. Acts "as soon as reasonably practicable" if, in light of all the surrounding facts and circumstances which are known or which reasonably should be known to the person at the time, a reasonable person would act within approximately the same period under those facts and circumstances.

NRS 432B.121 sets out the standard for when a party has reasonable cause to believe a child has been taken into protective custody, and that standard suggests that a party has *reasonable* cause to believe that an actual act, transaction, event, or

situation exists. Therefore, the party would have reasonable cause to believe that a condition exists if under the facts and circumstances then known to the individual, another reasonable person under the same set of facts and circumstances would have cause to believe the condition exists. This is a question for the trier of fact, and the court's conclusion was categorically clear; based on the testimony, the Roziers did not have notice until October 18, 2017.

Here, the Roziers had no idea that E.R. had been removed from her mother's care by the State. The Roziers knew that Nellie had issues, and that she was unstable, and even that Nellie had E.R., but there was never any indication that E.R. had been taken into custody by the State. In fact, the Roziers testified that based on what they had seen online regarding Saez, she was making representations that she had achieved a new level of stability. Ultimately Saez did not tell them, another relative in Florida told the Roziers that Saez had had E.R. taken from her by the State. So, as soon as the Roziers learned of that removal, they immediately endeavored to contact DFS to inquire about the Child. Ultimately, when the district court is considering whether a possible familial placement delayed coming forward, what the Court is really considering is the delay between notice and the date the relative comes forward. Here, the fact that the Roziers came forward seeking placement the same day they were provided

notice that E.R. was in the state's custody is easily identified as acting within a reasonable timeframe pursuant to NRS 432B.121, if not better.

C. WHEN COMPARING TWO COMPETING FAMILIES FOR PLACEMENT OF A CHILD PURSUANT TO 432B, AND ALL BEST INTEREST FACTORS ARE EQUAL, THE FAMILIAL PREFERENCE TRUMPS THE CHILD'S BOND WITH CURRENT PLACEMENT, SO LONG AS THERE IS AN APPROPRIATE TRANSITION PLAN IN PLACE TO PROTECT THE CHILD FROM POTENTIAL TRAUMA ASSOCIATED WITH REMOVAL.

"A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion." *International Game Tech. v. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (footnote omitted); NRS 34.160. A writ is available only where the District Court manifestly abused its discretion. *Round Hill General Imp. Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536; see NRS 34.160. Thus, "[a] writ of mandamus will issue to control a court's arbitrary or capricious exercise of discretion." *Marshall v. District Court*, 836 P.2d 47, 52 (Nev. 1992) (citing *Round Hill*, P.2d 534 (Nev. 1981)).

However, mandamus will not lie to review discretionary acts of a trial court. *Wilmurth v. First Judicial Dist. Ct.*, 393 P.2d 302, 303 (Nev. 1964). It is the settled law of this state that mandamus will not lie to control judicial discretion or to review the propriety of judicial action. *State ex rel. Phillips v. Second Judicial*

District Court, 207 P. 80 (Nev. 1922); *State ex rel. Weber v. McFadden*, 205 P. 594, 595 (Nev. 1922). *State v. Ninth Judicial District Court*, 161 P. 510 (Nev. 1916); *Pinana v. Second Judicial District Court In and For Washoe County*, 334 P.2d 843 (Nev. 1959) (overruled on other grounds); *Gragson v. Toco*, 520 P.2d 616 (Nev. 1974).

Further, mandamus will not serve to control the proper exercise of discretion or to substitute the judgment of this court for that of the lower tribunal, *Kochendorfer v. Board of Co. Comm'rs*, 566 P.2d 1131, 1133 (Nev. 1977), except when petitioner is able to show that the lower tribunal has acted arbitrarily or capriciously. *Gragson*, 520 P.2d 616; *Collier v. Legakes*, 646 P.2d 1219 (Nev. 1982). Arbitrary and capricious has been defined as the absence of a rational connection between the facts found and the choice made. *Natural Resources v. U.S.*, 966 F.2d 1292, 1297 (9th Cir. 1992). The burden of proof to show capriciousness is on the applicant. *Gragson*, 520 P.2d 616.

The Hearing Master's Findings of Fact, Conclusions of Law, and Recommendations (hereinafter, the "Recommendation"), filed May 1, 2017, goes through a comparative list of qualities attributable to each potential placement option. (Riv. App. 076-78). In the Recommendation, the court found both placement options to be equal in all respects except two. The first was the bond and time E.R. was able to spend with the Riveras during the pendency of this

matter, and the second was the biological connection the Roziers have to E.R. (Riv. App. 077:23-27). If trauma were certain to occur with E.R. as a result of the removal, then such a change in placements would not have been ordered. Specifically, Hearing Master Norheim stated that both families are basically the best of the best, and that he deals with families in these types of matters every day, and that these two families were "rock star parents." (DA App. 0374:9-22)

The trial court below had to weigh those two competing factors. On the one hand the Riveras have bonding, and on the other, the Roziers have a biological connection.[9] One of those two factors could be mitigated, and one of them could not. Obviously, because E.R. had successfully completed prior placement transitions, and because any bonding with the current placement could be undone, and mitigated, it made sense to place E.R. with her relatives, because the biological factor will never go away. Additionally, Hearing Master Norheim stated that "[he didn't] understand why DFS wasn't as concerned about moves two and three, which were completely within their control and suddenly four is the deal breaker." (*sic*) (DA App. 0378:21-23).

Most disturbingly, it is represented explicitly and implicitly throughout both Writ Petitions that the court below did not consider E.R.'s best interests or the

[9] The Answer filed by E.R. correctly concludes that the bonding between E.R. and the foster family was only a reality because of the failings of DFS. Thus, to weigh the bonding factor against the Roziers is inequitable.

potential trauma of a fourth removal, and the way the two Petitions read is that the trial court's order is *the child needs to go with family, and the court does not care about the potential trauma.* No suggestion could be further from the truth, and the Recommendation clearly makes a condition precedent to the Roziers' receipt of E.R. that they participate in a full trauma minimization plan, so that the bonding that had taken place between the Riveras and E.R. not be severed so quickly as to cause emotional trauma to E.R. (Riv. App. 078:6-9). The Recommendation concluded that the placement would not take place should the conditions precedent not be met. *Id.*

Whether or not E.R. would suffer trauma as a result of a fourth removal was not conclusive. DFS testified that it was simply possible, and that E.R. had successfully transitioned to new homes in the past without issue. (DA App. 0243:3-14). Also, the Recommendation does not connect the trauma minimization to the sibling presumption. The Court stated, in essence, without complying with the trauma minimization plan, then the Roziers would not receive placement of E.R. This was a condition, despite the inevitability that E.R.'s sibling would be placed with the Roziers. (DA App. 0379:9-0380:6).

Therefore, there are no facts that support this Court holding that the lower tribunal's exercise of discretion was arbitrary or capricious. The placement decision was clearly based on the child's best interest, because the familial

placement is preferred over non-relatives, if that familial placement serves the child's best interest. Here, the evidence suggested that placing E.R. with her relatives would serve her best interest, and that decision was made after a thorough gathering of facts from everyone involved in the case below.

D. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN CONSIDERING THE POTENTIAL EVENTUALITY THAT ONE OF E.R.'S ANTICIPATED SIBLINGS WOULD BE PLACED WITH THE ROZIERS, BECAUSE THAT FACTOR WAS NOT DISPOSITIVE IN THE ULTIMATE PLACEMENT DECISION.[10]

Pursuant to Section C of this Answer, as well as the law cited therein, the district court did not rely on the inevitability of the sibling placement with the Roziers to justify the placement of E.R. The possibility of the sibling placements, to which the Roziers testified at the evidentiary hearing, was simply additional support for a best interest determination that a child's family is a preferable placement over nonrelative placement when all other factors are equal, so long as a trauma minimization plan was in place. Because the district court did not rely on the inevitability of the applicability of the sibling presumption in support of the placement decision, the court did not abuse its discretion in considering additional

---

[10] In E.R.'s juvenile case below, J-15-3373398-P1, it has recently been documented that E.R.'s sibling has been placed with the Roziers in Georgia, however, at this time, the District Attorney has not supplemented its appendix to include that fact.

factors, even if the factor was hypothetical at the time. Nonetheless, since the infant sibling of E.R. is now placed with the Roziers, the issue should be moot.

VI. CONCLUSION

DFS made substantial mistakes in this case. It did not locate family when it should have, it led the Riveras to believe that they were going to adopt E.R. despite the Roziers coming forward to seek placement the day they received notice of E.R.'s removal from Saez's care, and then were told they could not come to court to speak with Hearing Master Norheim. DFS stacked the deck against E.R.'s biological family so it could ensure its promise that the Riveras would be able to adopt E.R. was kept. Following this series of events, DFS sought to blame the Roziers for not doing enough, while hiding the Roziers' efforts to seek placement of E.R. from E.R.'s CAP attorney. The policy implications of this Court allowing such conduct to be irreversible would strip away the familial preference from thousands of potential family placement options for children in the state's care, because often times, parents involved in 432B proceedings consent to the relinquishment or termination of their parental rights early in these cases. Nonetheless, the Petitioners' arguments regarding when a child's familial ties are severed are simply wrong, and not supported by the law.

The district court's application of the familial preference was not erroneous, because no adoption had taken place. The district court's consideration of the

presumption of a child's best interests for placement with a sibling was also not erroneous, as the district court's best interest determination did not hinge on the inevitability of the sibling's arrival. Additionally, whatever this Court decides about the inevitable sibling placement decision, E.R.'s sibling has been placed with the Roziers now, rendering such speculation moot.

The other findings challenged by Petitioner as clearly erroneous were not. The district court is in best position to weigh credibility of witnesses and the evidence. The district court found DFS was not credible, and had not sufficiently looked for relatives. Additionally, the district court found that the Roziers' delay in coming forward was excusable as the Roziers had no knowledge that E.R. was removed from Saez's care, until October 18, 2016, which was the same day the Roziers came forward seeking placement.

The Court should therefore deny both the Riveras' and the District Attorney's Petitions for a Writ of Mandamus.

Dated this 14th day of August, 2017.

FORD & FRIEDMAN

By: _____

John R. Blackmon, Esq.
Nevada Bar Number 013665
2200 Paseo Verde Parkway, Ste. 350
Henderson, NV 89052
(702) 476-2400
Counsel for Stephanie and Joey Rozier

VIII. CERTIFICATE OF COMPLIANCE

I hereby certify that this Answer complies with the formatting requirements of NRAP 32(a)(1), because it has been reproduced with sufficient clarity, the binding requirements of NRAP 32(a)(3), the paper size, line spacing, margin and page numbers pursuant to 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 Stephanie and Joey R's Answer to Consolidated Petitions for Writ of Mandamus, and to 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 Appellate Procedure, 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 14th day of August, 2017.

FORD & FRIEDMAN

By: _____

John R. Blackmon, Esq.
Nevada Bar Number 013665
2200 Paseo Verde Parkway, Ste. 350
Henderson, NV 89052
(702) 476-2400
Counsel for Stephanie and Joel "Joey" Rozier

IX. CERTIFICATE OF SERVICE

I, an employee of Ford & Friedman, hereby certify that on the 14th day of August, 2017, served a true and correct copy of Stephanie and Joel "Joey" 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, as well as pursuant to NRAP 25(2)(vi) consistent with NEFCR 8:

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

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.

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: Michelle Bruno
Michelle Bruno