IN THE SUPREME COURT OF THE STATE OF NEVADA

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AMY MULKERN and VIVIAN MULKERN,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE FRANK P. SULLIVAN, DISTRICT JUDGE,

Respondents,

and

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

Real Parties in Interest,

and

BABY GIRL WHITE, A MINOR,

Real Party in Interest,

and

S.C. No.:

D.C. Case No.: J-17-324384-P3

KENNETH WENDTLAND AND ASHLEY WENDTLAND,

Real Parties in Interest.

PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

Action is required prior to August 17, 2018. Relief was sought in the district court, but denied in an *Order* filed June 20, 2018, necessitating this writ petition; the time since then has been necessary to obtain the record needed for the appendix, since we had no direct access. The facts are essentially undisputed; the legal issue is analogous to that faced in *R. v. Eighth Judicial Dist. Court*[1] in that this Court must determine who is "family" to a neglected child placed in foster care.

Pursuant to NRAP 21 and 27, and NRS 34.160, Petitioners Amy and Vivian Mulkern submit this *Petition for Writ of Mandamus or Prohibition*, requesting issuance of a writ of mandate directing the district court to apply the correct legal standard at the evidentiary hearing scheduled August 17, 2018, for placement of Baby

[1] *R. v. Eighth Judicial Dist. Court*, 134 Nev.__, __ P.3d __ (Adv. Opn. No. 29, May 3, 2018).

Girl White, an infant.

If this writ is not expedited, or if it is granted after the evidentiary hearing, the trial for placement of Baby Girl White will have to be repeated, which would greatly delay permanent placement of Baby Girl White, which is contrary to her best interests and, in accordance with the psychological literature, could well constitute "irreparable harm" to the infant if extended time passes without appropriate permanent bonding.

ROUTING STATEMENT

According to NRAP 17(a)(12), this writ shall be heard and decided by the Nevada Supreme Court because it involves NRS Chapter 432B.

NRAP 26.1 DISCLOSURE

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

1. Amy Mulkern, Petitioner

2. Vivian Mulkern, Petitioner

3. The Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, and the Honorable Frank P. Sullivan, District Judge, Respondent

4. Clark County Department of Family Services; and Clark County District Attorney's Office, Real Parties of Special Interest

5. Baby Girl White, a Minor, Real Party of Special Interest

6. Kenneth Wendtland, Real Party of Special Interest

7. Ashley Wendtland, Real Party of Special Interest

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I. REASON FOR REQUEST FOR EXPEDIENT CONSIDERATION

Even though there are more than 14 days until the hearing, we have made every practicable effort to notify the clerk of this Court and opposing counsel of this filing, and are serving it as quickly as possible.[2]

A motion made pursuant to NRAP 8 may be considered on an expedited basis, and even by a single justice, where time constraints make the usual procedure of having the motion heard by a panel of this court impracticable.[3] We ask for that consideration if a panel is unavailable for review.

This writ decision affects the location and permanency of placement of Baby Girl White, currently nine months old, so it should be expedited to give Baby Girl as soon a possible an opportunity to bond with the appropriate caregiver and gain as much stability and permanency as possible.

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[2] Supervising counsel was just in the hospital, and began review of the draft the day he could return to work.

[3] NRAP 8(a)(2)(D).

POINTS AND AUTHORITIES

II. STATEMENT OF FACTS & PROCEDURE

A. History of Amy Mulkern and Vivian Joan, Who is Baby Girl's Biological Sibling

Amy Mulkern is a Massachusetts resident who is the adoptive mother of Baby Girl White's biological sister, Vivian Joan, born January 25, 2015.[4] Amy has a Bachelor's degree in Psychology and Early Childhood Education, a Master's degree in Early Childhood Education, and a Certificate of Advanced Graduate Study in Reading.[5]

Between 2013 and 2014, Amy completed the application and registration process to adopt, and was registered by several adoption agencies.[6]

Baby Girl White (as she was then known) was born on January 25, 2015, addicted to heroin; hospital staff started a drug withdrawal treatment regime and

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[4] II App 297.

[5] *Id.*

[6] *Id.*

contacted social services. The Department of Child and Family Services ("DFS") told the birth mother that the baby would enter foster care. The birth mother told them she didn't want the baby in foster care, but also felt she couldn't parent. She instead chose to make an adoption plan,[7] and contacted an adoption agency.

That agency called Amy on February 6, 2015, telling her about a baby girl in the NICU at Sunrise Hospital in Las Vegas who was available for adoption and was being slowly weaned off methadone at the hospital.[8]

When Amy was contacted she was told that Vivian's natural birth mother Amy White, ("NM") wanted to meet her, and wanted pictures and letters every six months.[9] Amy was excited at the prospect of meeting NM, and was hopeful Vivian would have a chance to know where she came from and her biological family. Unfortunately, NM changed her mind before Amy arrived in Nevada, and

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[7] *Id.*

[8] *Id.*

[9] II App. 299.

they never met.[10]

Amy met Vivian Joan 6 days later, and fell in love instantly.[11] Vivian remained in the NICU for nine more days. Upon discharge and while Amy waited for the ICPC to clear, she and Vivian enjoyed getting to know one another in a hotel in Las Vegas.[12] They took daily walks, and Amy spent lots of time holding and bonding with Vivian.[13] They then left for Massachusetts while Vivian was still on a small dose of daily methadone.[14]

Amy and Vivian arrived in Boston on February 28, 2015, and quickly became a part of Amy's close-knit family.[15] After returning home, Amy got to work finding health care providers for Vivian.[16] She found a pediatrician in

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[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] II App 298.

[16] *Id.*

Boston with experience with babies who had been born addicted, and made an appointment for Vivian to see her right away.[17]

Vivian qualified for Early Intervention at 4 months based on her birth history, and continued receiving services until her third birthday. She met all her developmental milestones, crawling at 7.5 months, and walking around her first birthday. Vivian is now three years old, is currently on track developmentally, and already knows many letters and how to count to 20.[18]

B. History of this Case

On October 5, 2017, another child was born to Amy White ("NM"), (the same mother as Vivian Joan's), at home.[19] NM's roommate cut Baby Girl's umbilical cord with a pair of house scissors.[20] On October 6, at 7:00 a.m., NM and

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[17] *Id.*

[18] *Id.*

[19] I App. 2

[20] *Id.*

Baby Girl were transported to Sunrise Hospital ("the hospital") in an ambulance.[21] The hospital staff labeled the child Baby Girl White ("Baby Girl").

NM reported to the hospital staff that she had used heroin and amphetamines during her pregnancy and last used heroin the day she gave birth.[22] Both NM and Baby Girl tested positive in their urine for opiates and amphetamine/ methamphetamine.[23]

The doctor noted in NM's chart that it was difficult hooking NM up to an IV due to the condition of her veins from IV drug use.[24] Track marks were observed on her arms and legs by medical staff.[25] NM told hospital staff that she was leaving the hospital because she was having withdrawals, and left the hospital against medical advice at 9:00 a.m. on October 6.[26] NM did not identify who the

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[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

father was prior to leaving the hospital.[27]

The same day, DFS received a report of the abuse and neglect of Baby Girl by NM since she abandoned Baby Girl at Sunrise Hospital.[28] On October 8, the Emergency Response Team placed a police hold on Baby Girl. On October 9, the DFS submitted a "diligent search request" to locate placement options for Baby Girl.[29]

A warrant hearing was held on October 11 since Baby Girl was still in the Sunrise Hospital NICU.[30] It was determined that probable cause existed that placement with NM was not safe or appropriate, and it was recommended that the matter be set for a Probable Cause Hearing upon Baby Girl's release from the hospital.[31]

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[27] I App. 5.

[28] I App. 2.

[29] I App. 1.

[30] *Id.*

[31] *Id.*

On October 15, Baby Girl was released from the hospital and placed by DFS with a foster family which was *not* an adoptive resource.[32] Rather, the foster mother is an employee of DFS and is believed to hold a management position (a fact we believe is significant, as detailed below).

On October 16, DFS issued a *Confidential Protective Custody Report* noting that the Probable Cause hearing was scheduled for October 19.[33]

By October 16, DFS noted that they had made no contact with NM, and that unsuccessful efforts were made at her last known address, addresses found through diligent search, and possible relatives.[34] Contact was made with the father of another of NM's children (Robert Hines), but he refused to be considered for placement because he is not the father of Baby Girl and could not afford to care for another child.[35]

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[32] II App. 277.

[33] *Id.*

[34] I App. 2.

[35] I App. 3.

DFS noted that NM had three older children who were not in her care, and that she had extensive CPS history with her older children either being adopted out or placement of the children with their fathers.[36] Important to this action is that the October 16 report confirmed that DFS knew that *they were aware* of NM's other children.[37] DFS found NM's sister, Andrea, but apparently had been unable to reach her as of October 16.[38]

On October 19, the Court referred Baby Girl to the Children's Attorney Project ("CAP") to appoint an attorney.[39]

The *Petition for Abuse/Neglect* against NM was filed by DFS on November 7.[40]

Although the record is not clear as to the exact date, sometime before

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[36] I App. 2.

[37] *Id.*

[38] I App. 3

[39] *Id.*

[40] I App. 7.

November 7, 2017, Andrea (White) Cornis, the maternal aunt, called DFS about taking placement of Baby Girl.[41] Ms. Cornis lived in the State of Arizona, so DFS made an oral request at the November 7 hearing to go forward with an Interstate Compact on the Placement of Children ("ICPC") proceeding.[42] The Court granted the oral motion.[43]

On November 21, the Court substantiated the abuse/neglect allegations against NM by a preponderance of the evidence and set a disposition hearing for December 12.[44] At the hearing, the District Attorney ("DA") made an oral motion for an order to establish maternity and for an order to create a birth certificate for Baby Girl listing NM.[45] The DA filed a *Disposition Report* on December 6 on the substantiation of abuse and neglect.[46]

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[41] I App. 14.

[42] I App. 9.

[43] *Id.*

[44] I App. 10.

[45] I App. 22.

[46] I App. 11.

Between November 7 and December 4, the NIA Specialist from DFS, Gwendolyn White, contacted Ms. Cornis to give her information to start the ICPC process and left phone messages on November 7 and December 4, but did not get a call back.[47]

On December 6, the Court issued *Findings of Fact, Recommendation, and Order of Approval* substantiating the allegations of abuse and neglect,[48] and on December 8, the Court issued an *Order to Establish Maternity and Order for Birth Certificate* for Baby Girl.[49]

On December 12, a disposition hearing was held; Adrian Rosehill, Esq., from the Legal Aid Center of Southern Nevada ("LACSN") appeared and accepted the appointment of attorney for Baby Girl.[50]

On December 18, Baby Girl was removed from the first foster family and

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[47] I App. 14.

[48] I App. 19.

[49] I App. 22-23.

[50] I App. 28.

placed in another foster home that is a licensed adoptive resource, Kenneth and Ashley Wendtland.[51]

On December 28, the *Preliminary Protective Findings and Order* from the October 19 hearing was filed, stating in relevant part that "inquires have been made about relatives and fictive kin to the child pursuant to NRS 432B.480(2) and no one has come forward to request placement of the child at this time."[52]

On December 29, 2017, an *Out-of-Home Placement Order* was filed stating that DFS made "reasonable efforts" to make it possible to return Baby Girl to NM's house, but that the permanency plan for Baby Girl was adoption.[53]

On January 26, 2018, DCFS worker LuQuisha McCray first contacted Amy and asked her to be a placement for Baby Girl and to do an ICPC.[54] LuQuisha stated that Amy was considered the preference for Baby Girl's placement because

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[51] II App. 277 (this document states their names as Jason and Amy Whiteley, but that was a typo).

[52] I App. 31.

[53] I. App. 34-37.

[54] II App. 300.

Vivian was Baby Girl's biological sibling.[55] Baby Girl was already 3.5 months old, and Amy wondered why no one from DCFS had reached out to her before then; Amy immediately started the ICPC process with DCFS,[56] and on January 30, a referral was submitted to the Nevada ICPC to pursue placement of Baby Girl with Amy in Massachusetts.[57]

On February 6, Amy was informed by Ms. McCray that the court approved doing an ICPC and a home study on her for Baby Girl to be placed with her out-of-state, and that the paperwork was in Massachusetts but had not yet been assigned to a caseworker.[58]

On February 14, Amy was contacted by Ashley Pepoli, Director of Adoption, Massachusetts Society for the Prevention of Cruelty to Children to

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[55] *Id.*

[56] *Id.*

[57] I App. 57.

[58] II App. 301.

begin the home study.[59] Ms. Pepoli sent Amy the application, which she filled out, scanned, and returned on the same day; she mailed back the original.[60]

On February 22, Amy's background check came back approved.[61] Her fingerprints were done February 26.[62] On February 28, Amy had her first home study visit. She provided all the paperwork she could– copies of birth certificates, forms from primary care doctors, etc. All necessary paperwork was returned before the second home study visit,[63] on March 9.[64] On March 29, fingerprints came back and the home study was submitted to DCFS.[65]

The same day, Amy called Ms. McCray to tell her the home study was

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[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] II App. 301.

complete and the ICPC was approved.[66] Also the same day, DFS filed the *Report for Permanency and Placement Review* stating that Baby Girl had two older siblings: Marques White, and the first Baby Girl White (i.e. Vivian Mulkern).[67] The Report also stated that Baby Girl's foster home was meeting Baby Girl's needs, and that Baby Girl had maintained overall good health during the review period.[68]

Under the Report section titled "SIBLING CONTACT," DFS stated that CPS reached out to the natural father of Marquez for interest in placement, but he declined.[69] It also noted that DFS reached out to Vivian Mulkern's private adoption agency to see if the adoptive parent (Amy Mulkern) was interested in placement[70]; as detailed above, Amy had been working for a month to pursue

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[66] II App. 358-374.

[67] I App. 50.

[68] I App. 54.

[69] I App. 55.

[70] *Id.*

placement of Baby Girl with the intent to raise her with her older sibling.[71] DFS noted that placement of Baby Girl with Amy appeared to be "favorable."[72]

On April 2, Amy had a phone call with Mr. Rosehill, who told her the agency supported placement with a sibling over a foster family – that biological connections do and should come first.[73]

On April 3, the six-month review occurred for this case. [74] Amy was told the Court would call her for the hearing, and Ms. McCray told Amy she could appear by phone, but the Court never called Amy for the hearing as expected.[75] Yet, that same day, Amy was approved as a foster or pre-adoptive family and issued a license pursuant to the ICPC process.[76]

On April 4, Amy received the Home Study conducted by the Massachusetts

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[71] *Id.*

[72] I App. 57.

[73] II App. 302.

[74] *Id.*

[75] *Id.*

[76] I App. 140.

ICPC office.[77] The Home Study was very warm and favorable to Amy, and reiterated that DFS worker Ms. McCray "reports that the team supports this placement as placing Baby Girl White with a biological sibling is a preference."[78]

After the hearing, Amy learned that DCFS's "upper management" decided to supersede Ms. McCray's recommendation to place pursuant to Amy's approved ICPC, and decided to recommend the *foster family* as Baby Girl's placement, thereby denying Baby Girl placement with her sibling Vivian.[79] Baby Girl was five months old at the time.[80]

We believe that this sudden change in position of DFS may have been by influence of the first foster mother, who is an employee of DFS and who we believe works in upper management. We are also informed and believe that the Assistant County Manager, responsible for DFS, Kevin Schiller, was contacted by

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[77] II App. 358-374.

[78] *Id.*

[79] II App. 254.

[80] *Id.*

the Wendtlands in an attempt to influence DFS' recommendations for the April 3 hearing.[81]

Amy then received the following email from Taryn LaMaison, the Central Permanency F Supervisor at DCFS after the hearing:[82]

> Hi Amy,
>
> Thank you for allowing me to attempt to answer your questions today. Today's hearing was a Permanency Review Hearing (6-month review) for the case. It is at this hearing that the Department recommends the primary and concurrent permanency goals to the court, updates the court on the parent progress with reunification efforts, as well as how the child's well-being needs are being met. At this time it was represented in court that the Department is recommending that the child remain with her current foster parent for

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[81] Mr. Schiller communicated this directly to Mr. Rosehill, Esq.

[82] II App. 302-303.

the purpose of adoption. (This was not said in open court, but the reason for this decision is to support the bond/attachment that the child has already made with the current foster parent and decrease the negative impact on the child if the child was moved again). The child's attorney (CAP) stated in the hearing that they were in agreement with this recommendation for their client (the child) as they had stated at the hearing on 3/20/2018. The Department did update the judge that the Department had just received information that your ICPC was approved but since the Department and the CAP attorney were in agreement it was decided by the judge that it was not necessary to have an evidentiary hearing regarding placement that was previously discussed in court on 3/20/2018. The judge did say though, that you could file a motion for placement of your child's sibling that he would consider. Then the next review date was set for

10-16-2018 at 1:30pm in Courtroom 14.[83]

Based upon that email, and because she could not attend the hearing to get more information, Amy retained counsel.[84]

On April 9, an *Out-of-Home Placement Order-Licenced Foster Home* for placement of Baby Girl in the foster home was filed.[85]

On April 12, the Willick Law Group filed a *Notice of Appearance* on behalf of Amy Mulkern. On April 13, following the directive in the email, we filed the *Motion for Child Placement with her Biological Sibling and Immediate Visitation between Siblings and the Proposed Placement*[86] with an *Ex Parte Application for Order Shortening Time*[87] to request placement of Baby Girl in Amy's home with

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[83] I App. 136.

[84] II App. 303.

[85] II App. 79-83.

[86] I App. 86-141.

[87] I App. 142-145.

Vivian, and immediate visitation with her in the interim.[88]

Amy's *Order Shortening Time* was granted and set for April 24.[89] At the hearing, Todd Moody, Esq., appeared on behalf of the foster family, and noted his appearance on the record.[90] The Court set an evidentiary hearing on permanent placement of Baby Girl two more months out, for June 29.[91]

At the hearing, the Court ordered visitation between Vivian and her sister, Baby Girl, for two hours per day every day that week.[92] Amy and the foster family met outside the courtroom to discuss the visit. Ashley Wendtland, the foster mother, suggested visits at her house, but the first foster mother (the DFS employee) interrupted and advised the foster mother against having Amy over at her house, instead suggesting a "public place."[93] The parties ultimately agreed to

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[88] II App. 303.

[89] I App. 146-147.

[90] I App. 153.

[91] *Id.*

[92] I App. 142-145.

[93] II App. 303.

meet at The District each day at 9:00 a.m. for the visits.[94]

The foster mother (Ashley) attended the first visit along with a crowd of DFS workers, but the remaining visits were with Amy, Vivian, and Baby Girl alone.[95] The visits went wonderfully and Baby Girl bonded to her sister right away.[96] Baby Girl was very happy and playful with both Amy and Vivian during the visits.[97]

On April 27, the District Attorney stated they would be preparing an objection to Amy having standing to even *request* placement, even though DFS had *asked* her to be a family placement and do an ICPC, and despite the fact that Vivian is Baby Girl's biological sister.[98]

On April 27, the CAP attorney, Adrian Rosehill, informed the team he

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[94] *Id.*

[95] II App. 303-304.

[96] I App 166-169.

[97] II App. 304.

[98] *Id.*

would be advocating for Vivian and Baby Girl to be placed together[99] and that Baby Girl should be placed with Amy due to the undeniable research findings that siblings should grow up and be placed together wherever possible.[100]

On May 1, Amy filed a *Motion for Vivian Mulkern's Joinder in Amy Mulkern's "Motion for Child Placement with her Biological Sibling and Immediate Visitation between Siblings and the Proposed Placement,"* asking the Court to allow Vivian to intervene in this action as a necessary aggrieved party.[101]

On May 8, the Court issued an *Evidentiary Hearing Management Order.*[102]

On May 9, the DA filed *Objection to Hearing Master's Recommendations and Motion to Strike Fugitive Documents and Motion for Revocation*[103] objecting to the Court even considering Amy's *Motion*, as well as objecting to the setting of

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[99] *Id.*

[100] I App. 171-174..

[101] II App. 304.

[102] I App. 175-179.

[103] II App. 180.

the evidentiary hearing, and the requirement to disclose any witnesses or discovery to Amy.[104] The DA argued that Amy should have filed a *Motion to Intervene* but didn't, and that she did not have standing to intervene even had she filed such a *Motion*.[105]

The DA also argued that Amy and Vivian are not persons "with special interest in a child" pursuant to NRS 432B.457(2),[106] that Vivian's adoption severed all relation between Vivian and Baby Girl regardless of biology, that Amy "is not a relative of Baby Girl," and that the Court should strike Amy's pleadings and reconsider its *Evidentiary Hearing Management Order*.[107]

On May 17, the DA filed an *Opposition to Motion for Vivian Mulkern's Joinder in Amy Mulkern's "Motion for Child Placement with her Biological Sibling and Immediate Visitation between Siblings and the Proposed Placement"*

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[104] II App. 187.

[105] II App. 188.

[106] II App. 190.

[107] II App. 191-193.

arguing that Vivian could not be joined because she could not be a party to the case.[108]

On May 18, Amy filed an *Ex Parte Application for an Order Shortening Time* on the DA's *Objection* so trial would not be delayed.[109] Amy filed her *Reply* on May 21.[110] The same day, CAP attorney Mr. Rosehill filed *Baby Girl White's Response*, agreeing that Amy and Vivian should not have standing or be parties in the case, but still requesting placement of Baby Girl White with Amy and Vivian on the merits because it is in Baby Girl's best interests to be raised with her sibling.[111]

On May 22, the parties all attended a hearing on Amy's *Motion for Vivian Mulkern's Joinder et al.* in front of Court Master Norheim.[112] At the hearing, all

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[108] II App. 211-218.

[109] II App. 219-242.

[110] II App. 243-251.

[111] II App. 252-266.

[112] II App. 304.

parties were ordered to brief the issue of whether Vivian and Baby Girl share a legal sibling relationship by June 7, and a hearing was set before Judge Sullivan on June 14.[113]

On May 29, the Court issued an *Order Recognizing Foster Parents as Persons with Special Interest.*[114]

On June 6, CAP attorney Mr. Rosehill filed *Baby Girl White's Response to State's Objection to Hearing Master's Recommendations and Motion to Strike Fugitive Documents and Motion for Revocation.*[115] Amy and the DA filed their requested briefs on the merits on June 7.[116]

On June 14, Judge Frank Sullivan held a hearing on the issue of Vivian's relationship with Baby Girl. After argument, the Court found that Vivian has "no relationship" to Baby Girl – not even a blood relationship – because there was no

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[113] II App. 267.

[114] II App. 273-274.

[115] II App. 275-295.

[116] II App. 296-317; II App. 318-333.

pre-adoption sibling contact order prior to Vivian's adoption (when, of course, Baby Girl did not yet exist).

However, the Court also found that DFS's conduct made *Amy* (but not Vivian) "a party of special interest," and that the foster parents and Amy could all participate in the hearing as such parties, but did not have a right to counsel represent them.[117] The Court held the evidentiary hearing would go forward on June 29.[118]

On June 20, the Court issued a *Decision* adopting its rulings made on June 14, including the order that Vivian and Baby Girl "have no sibling relationship" despite being actual sisters, and that they are not "blood relatives" for purposes of familial preference of placement under NRS 432B.550.[119]

After the *Decision*, all parties stipulated to continue the trial to August 17,

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[117] II App. 334. We will be filing the hearing transcript as a supplemental exhibit that has the statement from Judge Sullivan that the Special Parties of Interest are denied the right to counsel at the evidentiary hearing. That ruling did not make it into the Court's *Decision*.

[118] *Id.*

[119] II App. 335-345.

2018.[120]

This Writ Petition follows.

III. STATEMENT OF ISSUES PRESENTED AND OF THE RELIEF SOUGHT

A. Issues:

1. Whether the District Court committed an error of law by denying Amy Mulkern and Vivian Mulkern standing to file motions in the district court action.

2. Whether the District Court committed an error of law by ruling that Vivian Mulkern is not a "person of special interest."

3. Whether the District Court committed an error of law by denying Amy Mulkern the right to counsel at the evidentiary

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[120] II App. __.

hearing on placement.

4. Whether the District Court committed an error of law by ruling that no sibling presumption exists because Vivian "is not a sibling or relative" to Baby Girl.

5. Whether the District Court committed an error of law by ruling that no familial preference exists because Vivian is not a "relative" to Baby Girl.

B. Relief Sought:

Primarily, reversing the portions of the district court's *Decision* filed June 20, 2018, which ruled as a matter of law that Vivian and Amy Mulkern have no standing to file motions in this case, that Vivian is not a person of special interest, that Amy Mulkern has no right to counsel at the evidentiary hearing on placement, that no sibling presumption exists between Vivian and Baby Girl, and that no familial preference exists between Vivian and Baby Girl. That reversal would: 1)

grant Amy and Vivian Mulkern standing to file motions and reverse the Court's *Decision* striking their pleadings; 2) make Vivian Mulkern a special party of interest along with Amy; 3) grant Amy and Vivian Mulkern a right to counsel at the evidentiary hearing on placement should they choose to be represented; 4) hold that a sibling presumption exists between Vivian and Baby Girl; and 5) hold that a familial preference exists between Vivian and Baby Girl.

IV. ARGUMENT AND LEGAL ANALYSIS

A. Propriety of the Writ

The Nevada Supreme Court has original jurisdiction over the extraordinary remedies of writs of mandamus, prohibition, and certiorari.[121] The Court has exclusive jurisdiction to issue a writ of mandamus to compel the district court to perform a required act.[122]

Specifically, "A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station,

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[121] Nev. Const. Art. 6 §§ 4, 6.

[122] NRS 34.160.

NRS 34.160, or to control an arbitrary or capricious exercise of discretion."[123] It should issue when there is no plain, speedy, and adequate remedy in the ordinary course of law.[124] The writ is the appropriate remedy to compel performance of a judicial act.[125] Its counterpart, a writ of prohibition, acts to prevent a court from transcending the limitation of its jurisdiction.[126]

Both writs may be issued when there is no plain, speedy, and adequate remedy in the ordinary course of law.[127]

Here, no appeal is available to Amy and Vivian Mulkern as the existing *Decision* is not a final order in this case. The evidentiary hearing on placement is

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[123] *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981).

[124] *Hickey v. District Court*, 105 Nev. 729, 782 P.2d 1336 (1989); NRS 34.160.

[125] *Solis-Ramirez v. Eighth Judicial Dist. Court ex rel. County of Clark*, 112 Nev. 344, 913 P.2d 1293 (1996).

[126] *Goicoechea v. Fourth Judicial Dist. Court ex re. County of Elko*, 96 Nev. 287, 607 P.2d 1140 (1980).

[127] *Hickey v. District Court*, 105 Nev. 729, 782 P.2d 1336 (1989); NRS 34.160; NRS 34.330.

set for August 17, 2018, and the *Decision* governs the legal standard to be applied at the evidentiary hearing, effectively controlling its outcome. Thus, Amy and Vivian Mulkern's only remedy is a writ of mandamus and/or prohibition. They have no other recourse or remedy at law.

B. Standard of Review

Standing is a question of law that this Court reviews *de novo*.[128] In determining standing, this court examines statutory language to determine if a statute confers greater rights of standing than allowed by the Constitution.[129]

Statutory interpretation is a question of law that this Court reviews de novo.[130] When interpreting a statute, the Court first determines whether its

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[128] *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011).

[129] *Citizens for Cold Springs v. City of Reno*, 125 Nev. 625, 630-631, 218 P.3d 847, 851 (2009); *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003) ("Questions of statutory construction, including the meaning and scope of a statute, are questions of law, which this Court reviews *de novo*.")

[130] *State v. Catanio,* 120 Nev. 1030, 102 P.3d 588 (2004).

language is ambiguous.[131] If the language is clear and unambiguous, the Court does not look beyond its plain meaning to give effect to its apparent intent, unless that meaning was clearly not intended.[132]

C. Amy and Vivian Should Have Been Joined as Parties to this Case

The Court erred by ruling that Amy and Vivian had no standing to be joined as parties and by striking all of their pleadings because Amy and Vivian are aggrieved parties and need to be joined to be accorded complete relief under NRCP 19:

> (a) Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person

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[131] *State v. Quinn*, 117 Nev. 709, 713, 30 P.3d 1117, 1120 (2001).

[132] *Id.*

claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff.

Joinder of necessary parties is a long-standing policy of civil procedure in actions such as the one now before the Court, as described in *Robinson v. Kind.*[133] In such cases, all persons with "an interest in the subject matter of the suit"

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[133] *Robinson v. Kind*, 23 Nev. 330, 47 P. 1, 47 P. 977 (1896).

are to be made parties "so that there may be a complete decree which shall bind them all." If the interest of the absent parties "may be affected or bound by the decree, they must be brought before the court, or it will not proceed to a decree." If a party before the court may be subjected to future litigation, or danger of loss, under the decree, the absent person must be made a party.[134]

Additionally, pursuant to NRCP 20(a):

> (a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or of fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction,

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[134] *Id.*, 23 Nev. at 335-336.

occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

In *Roberts v. Farmers Insurance Company*,[135] the Supreme Court found that joinder of a party is proper in the circumstances we have here. Specifically,

> It is true that our permissive joinder rule, 20(a), does allow one to join as defendants those against whom is asserted any right to relief arising out of the same transaction and if any question of law or fact common to all defendants will arise in the action. *Allen v. Pomroy*,

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[135] *Roberts v. Farmers Insurance Company*, 91 Nev. 199, 533 P.2d 158 (1975).

277 A.2d 727 (Me. 1971).

Here, Amy and Vivian's interest are the same; in fact they are a family who have an interest in having Baby Girl placed in their home. If Amy had not filed a motion for placement and visitation of Baby Girl, she would have had no ability to participate in the proceedings because she was not invited to participate by the other parties or the Court as evidenced by their refusal to call her for the April 3 hearing. This is despite the fact that Amy was initially contacted by DFS to be a family preference for placement of Baby Girl and after she did a Home Study, fingerprints, interviews, and had an approved ICPC.

After completing the ICPC process, Amy and Vivian were "aggrieved" when DFS suddenly supported keeping 5½ month old Baby Girl with a foster family because she was "too bonded" despite having a home with a biological sibling ready to accept her. The State, DFS, the child's attorney, and Amy and Vivian Mulkern all have claims that arise from the same transaction and question of law and fact in common. Accordingly, Amy and Vivian should be permitted to

join the district court litigation as parties with standing to file pleadings and papers in the case.

D. The Court Conferred Standing by Inviting a Motion for Placement from Amy

There is no known direct statutory or case authority addressing the issue of standing in 432B proceedings. The district court directed on the record at the April 3 hearing that Amy should file a *Motion* to request placement of Baby Girl in her home, as reflected in the email from DCFS supervisor Taryn LaMaison to Amy.[136]

Ms. LaMaison also indicated that if the *Motion* was not filed by Amy, there likely would be no evidentiary hearing regarding Baby Girl's placement into Amy's home. Because of the ruling that she "lacks standing," Amy had no access to any court records to verify or refute this representation, and the other parties

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[136] I App. 136.

openly objected to providing Amy *any* discovery in the case.[137]

Based upon this representation, coupled with the fact that Amy was denied participation in the April 3 hearing and a chance to voice her and Vivian's requests on the record, Amy had no choice but to obey the district court's (purported) directives, per the DCFS supervisor, and file the *Motion*. The finding that Amy had no right to file a *Motion*, on these facts, should not be tolerated.

If Amy and Vivian are not joined as parties to the litigation, they would have no way to advocate for what they believe is in Baby Girl's best interests because they were already shut out of attending the April 3 review hearing, and told they could not be represented by counsel in the August 17 evidentiary hearing on Baby Girl's placement.

This Court has long held that access to counsel of choice during criminal court proceedings is a fundamental aspect of due process that should be protected

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[137] Thankfully, after the June 14 hearing, the CAP attorney, Adrian Rosehill, Esq., agreed to disclose the court file for our appeal appendix so we could reference it in our appeal.

by our courts.[138] That line of reasoning certainly should apply here, as there can be few more "fundamental rights" than determining who is and is not "family."

E. Amy and Vivian Mulkern Have Standing to File Motions in this Case under NRS Chapter 432B

This subject is in accordance with the above discussion regarding standing. The Chapter 432B statutory scheme does not clearly define who can and cannot be a party in the proceedings, but rather provides limited guidance through its various sections.

NRS 432B.420(1) provides for the "parents or other persons responsible for the welfare of a child who is alleged to have been abused or neglected" to be represented by an attorney at all stages of any proceedings.

NRS 432B.420(2) provides for an attorney for a child who is alleged to have been abused or neglected.

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[138] *United States v. Wade*, 388 U.S. 218 (1967).

NRS 432B.457(1) provides:

1. If the court or a special master appointed pursuant to NRS 432B.455 finds that a person has a special interest in a child, the court or the special master shall:

(a) Except for good cause, ensure that the person is involved in and notified of any plan for the temporary or permanent placement of the child and is allowed to offer recommendations regarding the plan; and

(b) Allow the person to testify at any hearing held pursuant to this chapter to determine any temporary or permanent placement of the child.

NRS 432B.510 states in relevant part:

1. A petition alleging that a child is in need of protection may be signed only by:

(a) A representative of an agency which provides child welfare

services;

(b) A law enforcement officer or probation officer; or

(c) The district attorney.

2. The district attorney shall countersign every petition alleging need of protection, and shall represent the interests of the public in all proceedings. If the district attorney fails or refuses to countersign the petition, the petitioner may seek a review by the Attorney General. If the Attorney General determines that a petition should be filed, the Attorney General shall countersign the petition and shall represent the interests of the public in all subsequent proceedings.

NRS 432B.580 provides the right to notice and opportunity to be heard in the court proceedings to certain persons, and states in relevant part:

6. Except as otherwise provided in subsection 7 and subsection 5 of NRS 432B.520, notice of the hearing must be given by registered or

certified mail to:

(a) All the parties to any of the prior proceedings;

(b) Any persons planning to adopt the child;

(c) A sibling of the child, if known, who has been granted a right to visitation of the child pursuant to this section or NRS 127.171 and his or her attorney, if any; and

(d) Any other relatives of the child or providers of foster care who are currently providing care to the child.

....

10. The provision of notice and a right to be heard pursuant to this section does not cause any person planning to adopt the child, any sibling of the child or any other relative, any adoptive parent of a sibling of the child or a provider of foster care to become a party to the hearing.

Those provisions broadly indicate that the District Attorney or the Attorney General represent the interests of the public in a case.[139] The parent or guardian of who is alleged to have abused a child is a party, and the child is a party.[140]

All interested parties are to be allowed to offer recommendations regarding the plan; and to testify at any hearing held pursuant to this chapter to determine any temporary or permanent placement of the child.[141]

Notice and opportunity to be heard must be provided to certified mail to: all of the parties to any of the prior proceedings; any persons planning to adopt the child; sibling of the child, if known, who has been granted a right to visitation of the child and his or her attorney, if any; and any other relatives of the child or providers of foster care who are currently providing care to the child.[142]

While the legislature did not mandate that the Court *has* to join the above

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[139] NRS 432B.510.

[140] NRS 432B.420(1)-(2).

[141] NRS 432B.457(1).

[142] NRS 432B.580.

persons as parties to a 432B proceeding, there is no indication the Court is *prohibited* from doing so.

Here, the Court already ruled that Amy is a "special party of interest" under NRS 432B.457, and therefore she has the right offer recommendations for the plan and testify at the hearings. Notably, Amy was contacted by DFS, invited to be a part of the proceedings and apply for the ICPC, and then denied the ability to attend court by telephone on April 3 and be involved in the recommendations for the plan of placement.

Even after the April 3 hearing when Amy was denied the right to participate, the district court invited her to file a motion to request placement of Baby Girl, therefore conferring standing upon her to file the motion. But at that point, Amy was denied any right to participate to provide her recommendations and had no other remedy than to follow the district court's requests that she file a motion for placement.

The ability to participate in hearings and offer recommendations – with the

assistance of counsel – is not an alternative to being able to file a motion. There is no other procedural mechanism to actually submit recommendations and be involved in a plan for placement, and denial of the right to make requests to the court is effectively a denial of any kind of "due process."

F. Vivian Should Also be Considered a "Special Party of Interest"

The district court's *Decision* stated as a matter of fact that Vivian is the biological sister of Baby Girl, but then found that even if the district court considered her a "legal sibling," she would not qualify as a person with special interest to Baby Girl under NRS 432B.457 because she was adopted before Baby Girl was born. The statute provides that a "person has a 'special interest in a child' if:

(a) The person is:

(1) A parent ***or other relative of the child***;

(2) A foster parent or other provider of substitute care for the child;

(3) A provider of care for the medical or mental health of the child; or

(4) A teacher or other school official who works directly with the child."[143]

Respectfully, the district court's conclusion that a biological sister has a lesser status than a school teacher is erroneous. Vivian, as Baby Girl's biological sibling, is a "relative" of Baby Girl, which confers special party of interest standing upon her pursuant to NRS 432B.457(2)(a)(1).

G. Amy should be Afforded Counsel at the Evidentiary Hearing

The Court has already ruled that Amy is a "special party of interest" at the upcoming hearing, but denied her counsel. The statute does not prohibit special parties of interest from having counsel, and the various departments of the district court are not uniform in their procedure for allowing or denying counsel to special parties of interest.

Denying special parties of interest results in these parties not having the ability to advocate their positions with counsel of record, and relegates their input

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[143] Emphasis added.

to that of witnesses and not parties who are participating in the legal process with meaningful advocacy for their positions.[144]

The statute provides that special parties of interest are to be "involved in and notified of any plan for the temporary or permanent placement of the child and allowed to offer recommendations regarding the plan."[145] Denying such a party legal counsel to accomplish those goals would frustrate the statutory directive and be inequitable because it would leave a lay party alone to address the District Attorney, DFS, the other potential parents, and the child(ren), all of whom would have legal counsel, placing the special party of interest at an obvious disadvantage.

H. Vivian and Baby Girl have a Sibling and/or Relative Relationship

The legislature could not have been more clear that there is ***a biological and sibling placement preference***, regardless of whether the protected child's parent's

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[144] *United States v. Wade*, 388 U.S. 218 (1967).

[145] NRS 432B.457(1).

rights have been terminated[146] or the sibling of a protected child's parent's rights have been terminated (as is the case here).

Whether the Court wishes to rely on the "sibling" language or the "person related within the fifth degree of consanguinity" language, Vivian and Baby Girl's relationship applies.

NRS 432B.550(5), the statute relating to preferences in placing children in need of protection, states:

> 5. In determining the placement of a child pursuant to this section, if the child is not permitted to remain in the custody of the parents of the child or guardian:
>
> (a) ***It must be presumed to be in the best interests of the child to be placed together with the siblings of the child.***
>
> (b) Preference must be given to placing the child in the following order:

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[146] *See* NRS 128.110(2).

(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.

The plain meaning of a statute should be followed absent an ambiguity.[147] Whether a statute is deemed ambiguous depends upon whether the statute's language is susceptible to two or more reasonable interpretations.[148] When a statute is ambiguous, this Court should look to the Legislature's intent in interpreting the statute.[149] Legislative intent may be deduced by reason and public policy.[150]

In this case, the statute unambiguously states that the preference for

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[147] *White v. Warden*, 96 Nev. 634, 614 P.2d 536 (1980).

[148] *Irving v. Irving*, 122 Nev. 494, 134 P.3d 718 (2006).

[149] *State v. Catanio*, 120 Nev. 1030, 102 P.3d 588 (2004).

[150] *Id.*

placement ***above foster care*** is 1) sibling placement and 2) relatives within the fifth degree of consanguinity. No matter which the Court elects Vivian falls under, or both, the legislature is clear that Baby Girl should be with her biological sibling, Vivian. There is no concern whether they are "legal" siblings or not – even though we believe they are pursuant to the below analysis – they are related within the *second* degree of consanguinity.

The recent holding in *R. v. Eighth Judicial Dist. Court*[151] ("*R.*") indicates this Court's interpretation that familial preferences survive a termination of parental rights.

In *R.*, the trial court placed the protected child with the maternal relatives against DCFS's wishes. DCFS's position was that the protected child was no longer "related" to the maternal relatives because the mother's rights were terminated, and that the two-year-old had bonded with the foster family and it was no longer in the child's best interests to be moved. DCFS brought a writ of

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[151] 134 Nev.__,__ P.3d __ (Adv. Opn. No. 29, May 3, 2018)

mandamus to the Nevada Supreme Court.

Although this Court granted the Petitions for Mandamus because the trial court relied upon the wrong statute when it made its decision, the decision held that a familial placement preference survives the termination of parental rights pursuant to NRS 128.110(2), which mirrors NRS 432B.550(5), in relevant part, except that NRS 432B.550(5) is ***not permissive when it comes to the preference***, and provides:

> 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.***

Other jurisdictions have also held that sibling relationships survive termination of parental rights, ***even when they were not preexisting sibling relationships, as is the case here.*** [152]

Sibling relationships are some of the longest a child has in his or her lifetime. Biological siblings provide each other with friendship, support and a connection that lasts in most cases far longer than even the parent-child relationship. Whether or not a sibling was adopted does not change the biology and blood relationship between the siblings and the statute allows the latter-born sibling to be a presumptive placement with a ***preference*** for placement with the earlier-born sibling. That is the reason DFS contacted Amy to be Baby Girl's

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[152] *See In re Valerie A.,* 139 Cal. App. 4th 1519, 1522 (2006) (holding that the lower court erred by excluding evidence regarding the sibling relationship post-termination); *In re Hector A.*, 125 Cal. App. 4th 783 (2005) (holding that children separate by the dependency process do not cease to be brothers or sisters for purposes of preserving relationships); *In re Miguel A.*, 156 Cal. App. 4th 389 (2007), (holding that siblings who have no preexisting relationships are still considered to be siblings after a termination of parental rights).

familial placement in the first place, which is the appropriate result considering *children's* best interests.[153]

I. Statutes Should Not Be Interpreted to Produce an Absurd Result

This Court has also repeatedly stressed that when interpreting a statute, the words of the statute should be construed in light of the policy and spirit of the law, and the interpretation made should avoid absurd results.[154] It is not necessary to go beyond the presentation that led to the adoption of the words in question to know "the policy and spirit of the law."[155]

Respectfully, the district court's *Decision* should be reversed because its interpretation leads directly to an absurd result, closing the door on unknown numbers of latter-born potential sibling placements. The legislature was very clear throughout the 432B statutory scheme that ***sibling*** relationships are some of the

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[153] *See* Home Study, II App. 361 ([the Nevada caseworker] reports that the team supports this placement as placing Baby Girl White with a biological sibling is a preference.")

[154] *Hunt v. Warden*, 111 Nev. 1284, 1285, 903 P.2d 826, 827 (1995)).

[155] *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1302, 148 P.3d 790, 793 (2006).

most important considerations when placing a child that has been abused and neglected, especially from the child's point of view.

The Court ruled that Vivian does not have the familial preference of placement with Baby Girl under NRS 432B.550(5)(a) and held that her adoption three years before Baby Girl was born somehow rendered no longer a "relative," severing the sibling reality solely because there was no "sibling visitation plan" for the then-non-existent little sister in place when Vivian was adopted. The Court also opined that allowing adopted siblings to be considered the presumptive or preferred placement under NRS 432B.550 would "interfere" with an adopted family's rights to finality and permanency.[156]

Although we understand that adoption may operate to sever the legal relationship between the adopted child and that child's *biological parent*, it never severs their biological connection with their siblings. Here, no person is forcing

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[156] We will be filing hearing transcript from the June 14 hearing that contains the Judge's analysis and basis for his rulings as a supplemental exhibit.

an adoptive family to take a child who is abused or neglected. An adopted sibling's family is a placement resource that would benefit the siblings given the mountains of research showing the benefits of a child being raised with persons with whom they have a biological connection.[157] Placing siblings together is what benefits the children from ***their*** point of view.

There is no "down-side" to the requested holding. All that would practically happen (which is now currently happening in many dependency cases every day), is that a family which has a biological child of another sibling that has been removed from care gets the *option* of uniting the siblings since it is an elective placement. DFS never forces these children on the adoptive family's home.

It would be facially absurd to so construe the statute to require that a sibling visitation plan be in place upon adoption of an older child with a sibling who did

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[157] *Maria L. v. Eighth Judicial Dist. Court (In re N.S.)*, 122 Nev. 305, 130 P.3d 657 (2006); *Clark County Dist. Atty. v. Eighth Judicial Dist. Court*, 123 Nev. 337, 167 P.3d 922 (2007).

not yet exist. If that *were* required, every person who adopts a child would have to consider the future possibility of an unborn sibling and enter into a sibling agreement with a future unknown person "Doe." This interpretation is not reasonable, producing traps for the unwary and different results in factually identical cases for no valid public policy reason.

The Court's conclusion that Vivian and Baby Girl are "no longer blood relatives" is also absurd . If that were the case, a sibling who is adopted should be able to marry their biological sibling, which would ***also*** be an absurd result. Biology ***is*** a blood connection, and the word "consanguinity" is defined in Black's Law Dictionary as "denoting blood relationship," which is the word used in the statute, and not a "legal" relationship.

J. It is in Vivian and Baby Girl's Best Interests to be Considered Siblings and Placed Together Immediately

NRS 432B.390(7) states that a child placed in protective custody ***must be***

placed together with any siblings of the child whenever possible.

NRS 432B.550(5) states that "[in] determining the placement of a child [in need of protection], if the child is not permitted to remain in the custody of the parents of the child or guardian, ***it must be presumed to be in the best interests of the child to be placed together with the siblings of the child.***"

DCFS Policy Section 1001.5.2(H) states:

> Every effort must be made to place siblings together in the same relative, foster/adoptive family home, and/or guardianship placement. If this is not feasible, agencies must facilitate and maintain contact between the siblings through monthly visitations, telephone calls, and written communications.

NRS 125C.0035, which delineates the "best interest" factors for the custody of children includes the following factor in subsection (I): the ability of the child to maintain a relationship with any sibling. Other jurisdictions have supported this

factor as well.[158]

Federal law further supports placing Vivian and Baby Girl in the same adoptive home under the Fostering Connections to Success and Adoptions Act, requiring Title IV-E agencies to provide that reasonable efforts shall be made "to place siblings removed from their home in the same foster care, kinship, guardianship, or adoptive placement, unless the State documents that such a joint placement would be contrary to the safety or well-being of any of the siblings."[159]

Maria L. v. Eighth Judicial Dist. Court (In re N.S.),[160] granting a writ of mandamus to a grandmother of a protected child who was denied placement opportunities, a guardianship petition, and a visitation petition, emphasized the

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[158] *See Schmidt v. Bakke*, 2005 ND 9, 691 N.W.2d 239, 244, 245 (N.D. 2005) ("[T]he effect of the separation of siblings is a consideration in the trial court's analysis of the best interests of the child and whether to grant a motion to relocate a child out of this state . . . as a general rule the courts do not look favorably upon separating siblings in custody cases."); *Stark v. Anderson*, 748 So.2d 838, 844 (Miss. Ct. App. 1999) (noting that there is a general rule that keeping siblings together is in their best interest).

[159] 42 U.S.C. Sec 671(a)(31).

[160] 122 Nev. 305, 130 P.3d 657 (2006).

agency's duty to observe the family preferences for placement.

In making its decision, this Court observed that the familial preference outlined in NRS 432B.390 assures an interested relative that a district court will consider his or her request for placement before a stranger's request. The district court's responsibility in this situation, after considering the suitability of the relative's home and the child's best interest, is to determine whether placement with the relative is appropriate.

> We note that although the best interest of the child standard guides the district court at all times, here the analysis "'does not turn on whether the foster home is a "better" home, or the foster parents are "better" parents than the alternative home or family setting'" The district court's inquiry should instead focus on whether the "'proposed placement plan satisfies the legislative goals and objectives of the [statute] by providing a stable, safe and healthy environment for the child considering all of the circumstances

surrounding the placement.

As noted by the California Court of Appeals, an "underlying purpose of the relative placement preference is to facilitate reunification. A relative, who presumably has a broader interest in family unity, is more likely than a stranger to be supportive of the parent-child relationship and less likely to develop a conflicting emotional bond with the child."

Further, the Supreme Court of Wyoming, in interpreting a federal status conditioning financial assistance on a state's adoption of a familial preference, reasoned that such a "requirement helps avoid a situation where a child becomes overly attached to a foster family which is not biologically related to him. The Minnesota Supreme Court has, in turn, concluded that "a party seeking avoidance of the statutory order of preference [has] the obligation to make an affirmative showing that the first preferred placement would be

detrimental to the child."

Ultimately, this Court in *Maria L.* held that the district court erred in determining that the protected child's best interest would be served by giving the foster parents and the child "an opportunity to become a true family without the interference of the natural family."

Citing the United States Supreme Court case *Smith v. Organization of Foster Families*,[161] the Supreme Court recognized that a foster child may develop a meaningful bond with her or her foster parents, especially "where a child has been placed in foster care as an infant, has never known his natural parents, and has remained ***continuously for several years*** in the care of the same foster parents." Despite this acknowledgment, the Court *still* concluded that "A foster parent's rights regarding his or her foster child must be distinguished from those of a natural or adoptive parent."

The Court did not question that the protected child bonded with her foster

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[161] *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977).

parents with whom she lived continuously since birth. Rather, its concern lay in the fact that the foster family was given the opportunity to bond with the protected child ***to the exclusion of her natural family***. Accordingly, the Court held that the grandmother's petition for guardianship should be reinstated, and even if she was not found to be a fit guardian, that her visitation petition be reconsidered.

Clark County Dist. Attorney v. Eighth Judicial Dist. Court,[162] citing *Maria L.*, also supports Amy's position, holding that the district court erred by failing to apply a familial preference to the child's initial placement arrangement. The Court then noted that *if* the child is placed with a non-relative, but a potential placement with a relative is later timely filed, the Court should then consider placing the child with relatives, if that placement serves the child's best interest.[163]

Here, the test is not whether the foster family can provide a stable, loving home to Baby Girl, or whether their home is "better." The test is whether the placement satisfies the legislative goals and is in *both* children's best interests. If

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[162] 123 Nev. 337, 167 P.3d 922 (2007).

[163] *Id.*

as suggested Baby Girl has a secure attachment to her foster parents at nine months, that only shows she can attach to Vivian and Amy and build healthy ties and attachments.

Amy, Vivian, and Baby Girl had a chance to spend time together two hours per day for four days in April and it was wholesome, wonderful, *family* time. The sibling bond was apparent and it was clear that Vivian and Baby Girl were delighted with one another.[164] There is a mountain of research showing how important it is to have a biological sibling connection for adopted children, and here we have the opportunity to have two siblings raised together in one home. A Child Welfare Information Gateway article titled "Sibling Issues in Foster Care and Adoption" describes the situation:

> Sibling relationships are emotionally powerful and critically important not only in childhood but over the course of a lifetime. As children, siblings form a child's first peer group, and they typically

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[164] I App. 166-169.

spend more time with each other than with anyone else. Children learn social skills, particularly in sharing and managing conflict, from negotiating with brothers and sisters. Sibling relationships can provide a significant source of continuity throughout a child's lifetime and are likely to be the longest relationships that most people experience.[165]

Vivian, Amy and Baby Girl need to begin bonding immediately so they can form healthy attachments and share in each milestone together. Baby girl is less than a year old, much too young to have formed attachments with the foster family that would be against her best interests to be placed with a biological sibling.

K. DFS Should be Equitably Estopped from Denying Vivian and Baby Girl's Sibling Relationship

In Nevada, equitable estoppel has four elements: (1) the party to be

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[165] https://www.childwelfare.gov/pubs/siblingissues/index.cfm

estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; (4) he must have relied to his detriment on the conduct of the party to be estopped.[166]

1. DCFS Was Apprised of the True Facts

When DCFS contacted Amy on January 26, it was aware that she was the adoptive parent of Vivian, and that Vivian and Baby Girl were biological siblings. Based upon that premise, DCFS stated that they wanted Amy to be the placement for Baby Girl because she was the preference given that she was Vivian's mother and siblings should be placed together whenever possible.

That preference was repeated in all of the paperwork relating to Amy's ICPC and Home Study, including the specific reference in the Home Study on page 3 that the team supported placement with Amy because Baby Girl White

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[166] *Hermanson v. Hermanson*, 110 Nev. 1400, 887 P.2d 1241 (1994).

would be with a biological sibling – until "upper management" intervened to re-direct placement, apparently per the wishes of a DFS higher-up. No actual or relevant facts have changed since the date DCFS contacted Amy and asked her to do an adoption Home Study and ICPC.

2. DCFS Intended Its Conduct to Be Acted Upon, or Acted in Such a Way That Amy Had the Right to Believe it Was So Intended

DCFS reached out to Amy and asked her to do an ICPC and be the adoptive placement for Baby Girl. The agency did so with the understanding that Amy already had Vivian in her home, and that having the biological siblings together was in their best interest and consistent with their legislative mandate. Based upon DCFS' representations from January 26 to the April 3 hearing, Amy had every right to believe their intention was to place Baby Girl in her home given the representations made directly to Amy and to the ICPC participants.

3. Should the Court Even Consider Vivian Not to Be Baby

Girl's Sibling, Amy Was "Ignorant" of this Legal Position

We believe that Nevada Law supports Vivian and Baby Girl's sibling relationship, but should the Court question their legal relationship, Amy was unaware of this fact when she invested her time, energy, efforts, and money into fulfilling the requirements to have Baby Girl placed in her home. It was not until Amy completed the ICPC and Home Study that the issue of the "legal relationship" even raised by persons seeking a way to evade the sibling placement preference. Until that time, Amy was unaware DCFS would take this contrasting position.

4. Amy Relied to Her Detriment on the Conduct of DCFS

Amy agreed to be the adoptive placement for Baby Girl, prepared herself and her family, both immediate and extended, for their new family member, and participated in good faith in the ICPC and Home Study. The Home Study came back with glowing results and the ICPC was approved, but Amy was then told she had no right to participate in the review hearing, and that "upper management"

went against both the supervisor's and the case worker's recommendations and decided the foster family should keep Baby Girl over Amy's sibling preference. DCFS management, represented by the DA, is now going against the child's own CAP attorney as well as the DCFS caseworker and supervisor for Baby Girl to recommend Baby Girl stay in the foster home.

DCFS reached out to place Baby Girl in Amy's home. This fact renders DCFS estopped from now refusing to recognize Amy's home as a sibling preference option. On the one hand, they agreed Vivian was Baby Girl's biological sibling and it gave Amy preference and standing to have Baby Girl placed with her and invited her to do the ICPC. On the other hand, when their whim (or some not-revealed private agenda) suited them, they argued that Baby Girl had "no legal ties" to Vivian and she should stay with her current foster family because as a five-and-a-half month old having lived with two different families, she was "too bonded" to the second of those families.

Amy was forced to pay out of pocket for a private attorney to represent her

to seek placement of Baby Girl and visitation of Baby Girl after she relied upon DCFS' representations that she had legal preference to have Baby Girl placed in her home. Should DCFS prevail on the above legal argument, they should still be equitably estopped from keeping Baby Girl from Vivian due to their actions seeking placement with Amy and Vivian between January and April.

V. CONCLUSION

Amy and Vivian respectfully request the Court prohibit the lower court from going forward with the evidentiary hearing under the terms of the *Decision,* and mandate they adopt the terms requested in this *Writ*, which include:

A. Granting Amy and Vivian Mulkern standing to file motions and reverse the Court's *Decision* striking their pleadings.

B. Making Vivian Mulkern a special party of interest along with Amy.

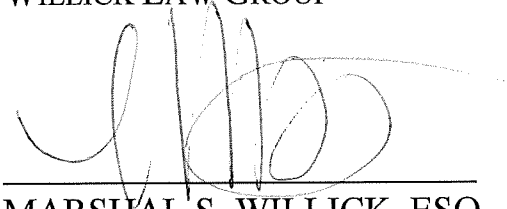
C. Granting Amy and Vivian Mulkern a right to counsel at the evidentiary hearing on placement should they choose to be represented.

D. Holding that a sibling presumption exists between Vivian and Baby Girl.

E. Holding that a familial preference exists between Vivian and Baby Girl.

DATED this 16 day of July, 2018.

Respectfully Submitted By:
WILLICK LAW GROUP



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VERIFICATION

STATE OF NEVADA)

)

COUNTY OF CLARK)

Lorien K. Cole, Esq., being first duly sworn, deposes and says that:

I am an attorney duly licensed to practice law in the State of Nevada. I am employed by the WILLICK LAW GROUP, and I am one of the attorneys representing the Petitioners, Amy Mulkern and Vivian Mulkern. I have read the preceding filing, and it is true to the best of my knowledge, except those matters based on information and belief, and as to those matters, I believe them to be true. The Plaintiff resides outside of this State, and under NRS 15.010, I sign this Verification on their behalf.

LORIEN K. COLE, ESQ.

SIGNED and SWORN to before me

this 17th day of July, 2018.

NOTARY PUBLIC in and for said County and State

VICTORIA JAVIEL
Notary Public, State of Nevada
Appointment No. 03-83174-1
My Appt. Expires Jul 16, 2019

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the WILLICK LAW GROUP and that on ___ day of July, 2018, I served a true and correct copy of the *Petition for Writ of Mandamus or Prohibition* by electronically with the Clerk of the Nevada Supreme Court, to the following:

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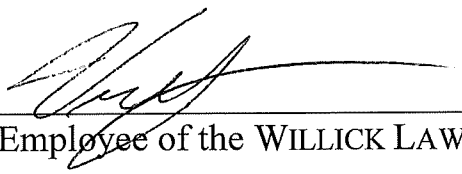

An Employee of the WILLICK LAW GROUP

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