IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

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 Parties in Interest,

and

KENNETH WENDTLAND AND ASHLEY WENDTLAND,

Real Parties in Interest.

S.C. NO.: 76399
DC. NO.: [illegible]

BABY GIRL WHITE, A MINOR, AND REAL PARTY IN INTEREST'S, ANSWER IN SUPPORT OF PETITIONERS AMY AND VIVIAN MULKERN'S PETITION FOR WRIT OF MANDAMUS OR PROHIBITION FILED JULY 18, 2018

Filed by Adrian Rosehill, Esq.
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NRAP 26.1 DISCLOSURE

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

Subject Minor Baby Girl White is an individual and has no parent entity; attorney Adrian Rosehill is the only attorney expected to represent Baby Girl White in this Court as counsel.

Respectfully submitted this 6th day of August, 2018.

LEGAL AID CENTER
OF SOUTHERN NEVADA, INC.
CHILDREN'S ATTORNEYS PROJECT

By: _____

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I. EXPEDITED CONSIDERATION IS NECESSARY

A motion under NRAP 8 may be considered on an expedited basis, by even a single justice, where time constraints make the usual procedure of having the motion heard by a panel of this court impracticable.[1] Consideration by the panel is necessary as the issues raised in the Petition must be decided in advance of the evidentiary hearing regarding placement currently pending in the dependency court. Whether the presumptions or preferences provided under NRS 432B -550 will be applied at the hearing, and the status of Petitioners as parties of special interest will impact the degree of participation at the hearing by Petitioners and Respondents, the legal standards applied by the lower court in determining the best interests of Baby Girl While, and the testimony and evidence presented, and must be decided in advance of the hearing.

II. STATEMENT OF FACTS AND PROCEDURE

Baby Girl White adopts and incorporates by reference the Statement of Facts & Procedure (the "Statement") set forth in Petitioners' Petition for Writ of Mandamus or Prohibition on pages 2 – 29 of the Petition, and the references to the Appendix, Vols. I and II, set forth in the Statement.

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[1] NRAP 8(a)(2)(D)

III. ARGUMENT

A. THE TERMINATION OF PARENTAL RIGHTS AND ADOPTION OF VIVIAN DOES NOT TERMINATE HER SIBLING RELATIONSHIP WITH BABY GIRL WHITE.

Even though Baby Girl White was born after her sibling Vivian was adopted, she remains a "sibling" of her adopted sister.[2] In *In re Valerie* case, twin girls Valerie and Victoria A. were born in March 2003, and were removed from their mother's care after the mother was arrested for a probation violation.[3] The natural mother had previously had her parental rights terminated to her daughter Adrianna in dependency proceedings after failing to reunify. Adrianna was subsequently adopted by her maternal grandmother in 2003. Following the removal of Valerie and Victoria A, they were placed with the maternal grandmother. The twins lived with the maternal grandmother and their sibling Adrianna until March 2005, when they were removed from the maternal grandmother after grandmother stated she was "overwhelmed" and could no longer care for the children. The twins were removed and placed with nonrelative, extended family members.[4] In the termination trial, the trial court determined that the older sibling Adrianna was no longer a "sibling" of

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[2] *In re Valerie A.*, 139 Cal. App. 4th 1519, 1522 (2006).

[3] *Id.*.

[4] *Id.*

Valerie and Victoria A. since she had been adopted by the maternal grandmother, and excluded all evidence relevant to the relationship of the twins and their sibling.[5] Following the termination of her parental rights, the mother appealed the decision. On appeal, the Court of Appeals ruled that the lower court erred in excluding all evidence regarding the sibling relationship and reversed and remanded the case for a new permanency planning hearing.[6]

The Court of Appeal of California held that "there should be no doubt . . . that Adrianna is a sibling of the children, for purposes of the dependency statutes even though she has been adopted by the maternal grandmother.[7] In reaching its decision the Court reviewed other statutory provisions that were enacted "to address the significant relationships which exist between dependent children and their siblings, as well as other important family ties."[8] Among the statutes cited was the section providing for postadoptive sibling contact which permitted voluntary contracts to be created by adoptive parents to allow continued contact with siblings, and

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[5] *Id.* at pp.1522, 1524.

[6] *Id* at 1524 –1525.

[7] *In re Valerie at 1524.*

[8] *Id.*, citing *In re Hector A.*, 125 Cal. App.4th 783, 794-795 (2005).

enforcement by the juvenile court if the parties, including the siblings, are unable to agree on compliance.[9] The court went on to state:

> The statutes we have discussed clearly seek to aid children in our dependency system in preserving their important relationships even though family structures become fractured as a result of parental failure to successfully reunify with their children. If a child can pursue juvenile court enforcement of a postadoption voluntary contract for sibling contact, it seems apparent that **children separated by the dependency process do not cease to be brothers or sisters for purposes of preserving relationships important to all of the affected children.** [10] (Emphasis added)

In the case of *In re Miguel A.*[11], the California Court of Appeals reaffirmed and clarified its decision in *In re Valerie A.* In *Miguel A.* the Department of Social Services ("DSS") argued that *Valerie A.* did not apply as there was no preexisting relationship between siblings Miguel and Jose because Miguel was born after the mother Catherine's parental rights to Jose were terminated and the siblings had not had contact with each other. DSS argued that as a result of the termination of Catherine's parental rights in Jose's dependency case, he and Miguel never concurrently shared a parent. The appellate court disagreed. In reaffirming *Valerie*

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[9] *Id.*

[10] *In re Valerie A.* at 1524.

[11] 156 Cal. App. 4th 389 (2007).

A. the court held that "the termination of parental rights severed only the legal relationship between Catherine and Jose, not the biological relationship.[12] The court further concluded that *Valerie A.* is not restricted to siblings who have a preexisting relationship, and there was no reason in logic or law to impose a preexisting relationship restriction.[13]

Federal law, specifically the Fostering Connections to Success and Increasing Adoptions Act further requires Title IV-E agencies 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; ..." [14]

Based on the foregoing, the termination of the mother's parental rights, which severed the child – parent relationship, and the adoption of Vivian, did not terminate the sibling relationship with Baby Girl White. Their relation by blood or adoption

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[12] *In re Miguel* at 396.

[13] *Id.; See also In re Carol B.*, 550 S.E.2d 636, 639 (2001) (Even though the child has no frequent contact or close relationship with her siblings, the sibling preference should not be ignored.)

[14] *42 U.S.C Sec. 671(a)(31).*

still remains intact. Nevada's dependency system like California's has long recognized the importance of preserving sibling relationships even after the parental relationship has ended. Vivian and Baby Girl White have not ceased to be siblings merely because of their involvement in the dependency process. Their relationship should and must be preserved.

B. IT IS IN BABY GIRL WHITE'S BEST INTEREST TO BE PLACED WITH HER SIBLING.

The Nevada Legislature and the Nevada Supreme Court have long recognized that the overarching consideration in the placement of children is that their best interests be achieved.[15] This court explained that the "preservation of the familial relationship is an important consideration in determining what is in the child's best interest for placement purposes."[16] Accordingly, in furtherance of the best interest of the child, the Legislature enacted NRS 432B.550(5)(a), which creates a presumption that it is in a child's best interest to be placed with siblings.

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[15] *In re Stephanie R.*, 134 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 29, May 3, 2018) (the child's best interest necessarily is the main consideration in the placement decision.); *Clark County Dist. Atty., Juvenile Div. v. Eighth Judicial Dist. Court ex rel. County of Clark*, 167 P.3d 922, 928 (Nev. 2007). *See also,* NRS 125.480(1) (determine custody in divorce), 128.105 (terminate parental rights, and 432B.480(1)(b)(2) (determine custody in abuse/neglect), all noting that in such child welfare proceedings, the best interests of the child should be the primary or even sole consideration).

[16] *Clark County Dist. Atty., Juvenile Div. v. Eighth Judicial Dist. Court ex rel. County of Clark*, 167 P.3d 922, 929 (Nev. 2007).

In particular, NRS 432B.550(5) states:

> 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 interest of the child to be placed together with the siblings of the child.

Thus, it is statutorily required that the court presume it is in Baby Girl White's best interest to be placed in Massachusetts with her sister, Vivian.

NRS 432B.390(7) further states that a child placed in protective custody "must be placed together with any siblings of the child whenever possible." In discussing the familial preference set forth in 432B.390, the Nevada Supreme Court in *Maria L. v. Eighth Judicial Dist. Court (In re N.S.)* [17] concluded that the preference assures that an interested relative's request for placement will be considered before a stranger's request. In considering the suitability of placement with the relative and the child's best interest that court stated:

> We note that although the best interest of the child standard guides a 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". . . .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. [18] (Emphasis added)

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[17] 122 Nev. 305, 130 P.3d 657 (2006).

[18] *Maria L.*, 122 Nev. at 312.

This court held that the district court erred in determining that the protected child's best interest would be served by giving foster parents and the child "an opportunity to become a true family without the interference of the natural family."[19]

The court went on to state while a foster child may develop a meaningful bond with her foster parents where they have been placed in foster care as an infant, has never known the natural parent, and has remained in the foster home for several years, "[a] foster parent's rights regarding his or her foster child must be distinguished from those of the natural or adoptive parent." [20]

Additionally, the Legislature's interest in preserving familial unity is further represented by NRS 127.2825 which provides that "a child placing agency shall, to the extent practicable, give preference to the placement of a child for adoption . . . together with his siblings." DFS until early April 2018 had complied with its statutory mandate and pursued placement of Baby Girl White via ICPC with Ms. Mulkern who had adopted her sister, Vivian, and who is an adoptive resource for her. However, on or about April 3, 2018, after ICPC in Massachusetts had approved

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[19] *Maria L.*, 122 Nev. at 316.

[20] *Maria L.*, 122 Nev. at 316.; See also *Clark County Dist. Atty. v. Eighth Judicial District Court*, 123 Nev. 337,167 P.3d 922 (2007) (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 this placement serves the child's best interest.)

placement of the baby with Ms. Mulkern, DFS upper management, and not the caseworker or her supervisor, made the decision to not place Baby Girl White with her sibling instead choosing to have the baby remain with the current foster placement, contrary to the statutory presumption and the best interests of Baby Girl White and her sibling Vivian.

C. AN ABUNDANCE OF LOVE AND SUPPORT FROM THE CURRENT FOSTER PLACEMENT DOES NOT REBUT THE STRONG PRESUMPTION IN NRS 432B.550(5).

Several months of care and love by the unrelated alternative adoptive resource does not rebut the very clear presumption and strong mandate of the law. As previously stated in examining the best interests of a child, the question does not turn on whether one home is better than another, but instead 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 circumstances surrounding placement."[21] In 2005, when the Nevada Assembly Committee discussed amending NRS 432B.550 to include the best interest presumption, the Department of Social Services for Washoe County recognized that, "splitting siblings in foster care interrupts the sole connection a child may have to his or her family of origin. The loss can negatively impact the child throughout his or her lifetime."[22]

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[21] *In Re. Guardianship of Person, Estate of N.S.*, 122 Nev.305, 313 (Nev.2006).

[22] Nev. Assem. Comm. On Health and Human Servs., *Hearing on A.B. 42,* 73rd Reg. Sess. (March 7, 2005).

Such a strong presumption simply cannot be rebutted by the fact that there are other potential adoptive parents who have provided care to a child and want to keep that child, regardless of how good the care or how strong the love. If it could, the statutory presumption would be essentially obliterated, and children would never be able to be placed with their siblings who happen to reside out of state. Under the current adoptive placement's rationale, any care-givers who provided excellent care to a child during the time the court is required to wait for ICPC approval before it can place with an out-of-state resource, should take priority over the statutorily-preferred care-giver who just happened to live in another state. The Court should not allow such a gutting of this crucial presumption.

It is also significant to note that Baby Girl White has only been in the care of the current adoptive placement for approximately seven months. This is not a case where the child has been with care-giver for almost her entire life. Baby Girl White lived with her mother for two days, and then was placed in a foster home for approximately two months. It is assumed that she was happy, well-cared for and made progress developmentally during the approximately two months she lived with that family. She then transitioned to the current adoptive placement without incident and quickly bonded with them. Accordingly, this does not appear to be a child with attachment issues and there is no reason to suggest she will not transition just as easily and bond just as quickly with her sister Vivian and Ms. Mulkern in Massachusetts.

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IV. CONCLUSION

Based on the foregoing, Baby Girl White respectfully requests that this Court find that:

A. The sibling presumption under NRS 432B.550(5) exists between Vivian and Baby Girl White, and that it must be presumed that it is in Baby Girl White's best interest to be placed with her sister in Massachusetts. Vivian remains a sibling of Baby Girl White and the statutory presumption and the childrens' bests interest mandate that they be placed together absent clear and convincing evidence the preferred placement would be detrimental to Baby Girl White.

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B. The familial preference exists between Vivian and Baby Girl White. Vivian and Baby Girl White remain biological and blood relatives, and their relationship should be fostered and allowed to blossom by being placed together.

DATED this 6th day of August, 2018.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP. 32(a)(6) because it has been prepared in a proportionally spaced typeface, size 14, Times New Roman.

2. I further certify that this Brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted NRAP 32(a)(7)(C), it contains 2887 words.

3. Finally, I hereby certify that I have read this Brief, and to the best of knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Brief complies 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 a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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 6th day of August, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of August, 2018, I served the foregoing **BABY GIRL WHITE, A MINOR, AND REAL PARTY IN INTEREST'S, ANSWER IN SUPPORT OF PETITIONERS AMY AND VIVIAN MULKERN'S PETITION FOR WRIT OF MANDAMUS OR PROHIBITION FILED JULY 18, 2018,** by the Court's electronic system (EFS E-File & Serve) and/or depositing in the U.S. Mail in a sealed envelope with first-class postage fully prepaid thereon, to the following:

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