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 Party in Interest, and	S.C. No.: 76399 D.C. Case No.: J-17-324384-P3

KENNETH WENDTLAND AND ASHLEY WENDTLAND,

Real Parties in Interest.

PETITIONER'S REPLY BRIEF TO THE ANSWERS TO WRIT OF MANDAMUS OR PROHIBITION

I. INTRODUCTION

The most important relief requested in Amy and Vivian Mulkern's *Writ Petition* is that the presumption and preference of placing abused and neglected children with siblings and family members extends to biological sibling placements, whether they are pre- or post-adoption.

When Amy adopted Vivian, there was an investigation by the Department, but the natural mother ultimately chose to have Vivian adopted through a private agency, and Amy was the adoptor from the agency. The Department should still have had information about Vivian's adoption on file as they were involved from the onset of that case, so they had information necessary to at least make contact with Amy to see if she was interested in placement. In fact, they did make contact, but not until three

months after Baby Girl was born.

After Amy went through the process of licensure and approval to take Baby Girl into her and Vivian's home, the Department again vacillated and decided they would advocate for Baby Girl to remain in her foster home. Baby Girl is less than a year old, and Baby Girl's attorney from the Children Attorney's Project is in agreement that Baby Girl should be placed with Amy and Vivian because it is in her best interests to be placed with her biological sibling (a position – placing children with their biological relations when possible – that this Court has repeatedly championed).

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II. ARGUMENT AND LEGAL ANALYSIS

A. Vivian's Adoption did not Sever her Relationship with Baby Girl

Baby Girl and Vivian are still "family" for purposes of the NRS 432B statutes because the legislature has emphasized the importance of familial and biological relationships for placement options in abuse and neglect proceedings. NRS 432B.550(5) provides a *presumption* that siblings should be placed together, and a *preference* to place children in need of protection with *blood or biological family.*

Federal law also emphasizes the importance of sibling placements, and even requires the State to identify these placement options within 30 days after the removal of the child:

> within 30 days after the removal of a child from the custody of the parent or parents of the child, the State shall exercise due diligence to identify and provide notice to the following relatives: all adult grandparents, all parents of a sibling of a child, where such parent has legal custody of such sibling, and other adult relatives of the child

(including any other adult relatives suggested by the parents), subject to exceptions due to family or domestic violence ...[1]

Amy is the legal parent of Baby Girl's sister, Vivian, so she should have been identified and provided notice of Baby Girl's removal back in October-November of 2017. Had she been provided notice, the ICPC would have been approved, Baby Girl would not have been shuffled through two different foster placements, and she would long ago have permanency being raised with her sister Vivian.

The State is further mandated to place siblings together under Federal Law, as outlined in 42 U.S.C. § 671(a)(31):

... reasonable efforts shall be made –

(A) 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 ...

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[1] 42 U.S.C. § 671(a)(29).

In other words, Federal Law maintains that sibling placements are an important and that "reasonable efforts" should be made to keep siblings together in *all* cases.

The Nebraska Supreme Court was faced with a factually analogous case to this one in *State v. Kristopher E.* ("*Kristopher*"),[2] and held that there is an obligation to place siblings together even if both are not in the care and control of the State, and even if one has already been adopted by third parties, as is the case here.

In *Kristopher*, the Court held that the definition of "siblings" included both biological siblings and legal siblings. It also stated that for purposes of potential placement, "the child's family unit should include the child's siblings even if the child has not resided with such siblings prior to placement in foster care."[3] As a result, the Court held that the Department's duties to make reasonable efforts for sibling placement do not depend on the continued existence of the parent-child relationship with each of the siblings, and still apply even if both siblings are not wards of the State.

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[2] 295 Neb. 324,889 N.W.2d 362 (2016).

[3] *Id.* at 339.

The court also held that sibling relationships survive adoption, stating: "the 'legal custody' requirement includes those parents who had legal custody of a child's full sibling under an adoption decree and those parents whose parental rights to a half sibling or step siblings are intact ... even if an adjudicated child is adopted, the Department must take specific steps to facilitate sibling visitation or ongoing interaction between the child and the child's siblings."[4]

Finally, the court clarified that the obligation to provide notice of the removal of a child to family members is ***strictly notice*** so reasonable efforts can be made by the Department: "The only reason to require the Department to notify the parents of an unadjudicated sibling is to ensure that they are aware that the child has been removed from parental custody and to ensure that the Department makes an effort to place the siblings together or to provide for sibling time if placement together is not possible."

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[4] *Id.* at 340.

The State's reliance on *Bopp v. Lino*[5] ("*Bopp*") to deny Vivian and Baby Girl's ability to forge a relationship is misplaced because requiring Baby Girl and Vivian to have had a "sibling visitation plan" prior to Baby Girl's birth is facially absurd – Baby Girl didn't exist when Vivian was adopted.

In *Bopp*, this Court denied grandparent visitation post-adoption because they did not petition for visitation in the adoption proceeding prior to the entry of the decree of adoption under NRS 127.171, which states:

NRS 127.171 Right to visitation of child by sibling and other relatives; limitations.

1. Except as otherwise provided in NRS 127.187 to 127.1895, inclusive, in a proceeding for the adoption of a child, the court may grant a reasonable right to visit to:

(a) ***A sibling of the child if the child is in the custody of an agency which provides child welfare services and a similar right has been granted previously pursuant to NRS 432B.580***; and

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[5] *Bopp v. Lino*, 110 Nev. 1246, 885 P.2d 559 (1994).

(b) Certain relatives of the child only if a similar right had been granted previously pursuant to NRS 125C.050.

2. The agency which provides child welfare services shall provide the court which is conducting the adoption proceedings with a copy of any order for visitation with a sibling of the child that was issued pursuant to NRS 432B.580.

3. The court may not grant a right to visit the child to any person other than as specified in subsection 1.

[Emphasis added].

Bopp is not analogous to this case because here, there is no family member petitioning for visitation rights to an adopted child after the *Decree of Adoption* is entered. Here, Baby Girl is a ward of the State, who has not been adopted and whose rights have not been terminated. Under NRS 432B.580, the Department has the obligation to make efforts to place Baby Girl with siblings, or ensure the child has contact with siblings.

Of course there is no sibling visitation plan with Vivian and Baby Girl that was entered prior to Vivian's adoption – Baby Girl was unknown at that time. However, the Department is obligated to provide notice to all known relatives and siblings, including Vivian, who is Baby Girl's biological sibling, to satisfy the "reasonable efforts" mandate of the legislature.

This is not a case where the Court is determining visitation rights – it a determination of the priority of placement in an abuse and neglect case under NRS Chapter 432B. Additionally, NRS 127.171(a) provides an exception for Baby Girl to *have* a relationship with Vivian because Baby Girl is subject to the mandates of NRS 432B.580,[6] so *Bopp* does not apply to sever Vivian and Baby Girl's relationship.

B. The Sibling Presumption under NRS 432B.550

The State argues that the "sibling presumption" under NRS 432B.550 was only intended to keep siblings together that have had a previous relationship, but that is not

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[6] NRS 432B.580(2)(b)(2) requires the Department to report to the Court all efforts made by the Department to place the child with siblings.

in line with the plain language of the statute ***or*** supported by the overwhelming research regarding siblings in abuse and neglect cases. It also makes no sense when applied to an infant who is just born.

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 interests of the child to be placed together with the siblings of the child.

Despite the discussion about the definition of "sibling" that was had between some members of the Assembly Committee over NRS 432B.550, as cited in the State's *Answering Brief*, beginning at 24, the actual statute as codified has no limiting definition of sibling, nor does it impose any limitations, such as having had a pre-existing relationship.

Although there is a great deal of research indicating the siblings that have a previous relationship should be placed together, the research does not limit the recommendations of sibling placement to ***only*** siblings with some pre-existing relationship. There is a great deal of research indicating that siblings should be placed together, whether or not they have a pre-existing bond or relationship, and that is obviously the case for any infant whose placement is in issue just after the infant is born.

Mental health experts believe that sibling relationships are "longer lasting and more influential than any other, including those with parents, spouse, or children;"[7] and that "over the course of an entire life span, siblings have significant influence on each other's lives. If nurtured and maintained, these relationships can provide emotional security, affect the intellectual, social, emotional, and moral development of one another, and offer lifetime companionship."[8]

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[7] Nat'l Adoption Info. Clearinghouse, *The Sibling Bond: Its Importance in Foster Case and Adoptive Placement 1* (1992).

[8] Ellen Marrus, *"Where Have You Been, Fran?" The Right of Siblings to Seek Court Access to Override Parental Denial of Visitation*, 66 Tenn. L.

Experts have opined that siblings "spend more time together and have longer relationships with one another than children have with their parents,"[9] and that the bond between them "is often experienced 'viscerally, forcefully, without conscious understanding, but with a sixth sense that this relationship is a vital key to one's own knowledge of one-self."[10] In other words, sibling relationships ***promote a child's identity***, whether or not there is a pre-existing relationship between them.

Sibling relationships have a great social impact on children as well. Often, a sibling is a child's first friend, and if the child is not school age, may be the child's only friend.[11]

Rev. 977, 987 (1999).

[9] Th. Powell & P.A. Ogle, *Brothers and Sisters: A Special Part of Exceptional Families* (1985).

[10] Paige Ingram Castaneda, *O Brother (or Sister), Where Art Thou: Sibling Standing in Texas*, 55 Baylor L. Rev. 749, 773-74 (2003) (quoting Stephen P. Bank & Michael D. Kahn, *The Sibling Bond 60* (1982).

[11] Meghann M. Seifert, *Sibling Visitation After Adoption: The Implications Of the Massachusetts Sibling Visitation Statute*, 84 B.U.L. Rev. 1467 (2004).

This is especially important in the context of children who have been removed from their natural parents and adopted, because adopted children "as a group are more vulnerable to various emotional, behavioral, and academic problems than their nonadopted peers living in intact homes with their biological parents."[12]

None of the research suggests significance between whether a sibling is in the custody of the Department, no longer in the custody of the Department, half-siblings, or, as here, when the elder child was removed from the natural parents' custody and adopted prior to the newest sibling's birth. The statute plainly does not differentiate between these nuances of the "definition" of siblings.

1. The Sibling Presumption Does not Lead to an "Absurd Result"

The State's argument that a common sense definition of "sibling" for placement purposes would create "issues" should be rejected.

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[12] David Brodzinsky, *Long-Term Outcomes in Adoption*, 3 Future of Children 153 (1993).

The sibling presumption is just that – a presumption. Families that have siblings in their home that are known to the Department are provided notice of the removal of their child's sibling. At that point, the family that has a sibling has the election to proceed as a placement ***option***. If it is not in the children's best interests to be placed together, or if the family cannot or will not be a placement option, or if it is not possible or practicable to place the children together, the presumption can be overcome and other options considered and executed.

That is exactly the circumstance that occurred in ***this case***. The father of Baby Girl's brother, Robert Hines, was contacted by the Department to be a placement option for Baby Girl, and he declined, stating he could not afford to raise his son, Marquez, *and* Baby Girl. The Department then continued seeking placement options, but no one forced Robert to do anything, nor was there a requirement to place Baby Girl with Robert because he has a sibling in his home.

According to the Department's own policies and Federal Law, the Department should be seeking out familial and sibling placement options within 30 days of

removal, so the inquiry should be done as soon as possible so permanency would not be disrupted. If, in the future, another sibling is born, that family could have the ***option***, but not be required, to take the newborn sibling.

The State's example that one child in a "secure, adoptive foster home" could be removed if a newborn sibling is born should the Court uphold the broader definition of a sibling presumption is a scenario that is so highly unlikely to occur it is almost not worth considering. Once a child is removed and goes into foster care, the goal is permanency. If a child is in a "secure, adoptive foster home" it is likely that an adoption is imminent or has already occurred.

In that context, it would be impossible for the Department to remove that child from the adoptive family to place with the newborn sibling because that child would have already been adopted by the family. The ***only*** option would be to provide notice to the adoptive family (if they are known by the Department) and allow them to decide ***if*** they are interested in being a placement option. This is an elective process

that seeks to put the ***children's best interests first***, which is why the consideration of sibling contact is so crucial to this analysis.

The only requirement imposed by the statute in the context of sibling placements is on the Department to make reasonable efforts to locate, provide notice, and make other practical, reasonable efforts to place siblings together and maintain sibling contact. There are *zero* obligations placed upon adoptive families or even other relatives to accept those children into their home. Ignoring a viable biological sibling placement option is only taking one more thing away from that neglected child – and it is the child who would be most negatively impacted by that ruling.

2. The Sibling Presumption is Not a "Slippery Slope"

The State's argument that a common sense definition of "sibling" could lead to "inheritance issues" is also misplaced. In this *Writ* application, the Court is asked to interpret the sibling presumption in the context of the NRS Chapter 432B statutes

only, and that interpretation would not have any effect on inheritance laws or any other statutory schemes unrelated to abuse and neglect cases.

"Broadly" defining siblings in 432B cases makes sense because children who are removed from their natural parents are already vulnerable, lacking contact from their biological families, and need as much family connection and support as possible.

The policy of providing them with all options for family and biological contact includes consideration of siblings, which only opens the door to additional possibilities for healthy placements, which is consistent with the legislative goals of NRS Chapter 432B.

3. The State's Public Policy "Concerns" are a Red Herring

As stated above, permanency for adopted children would not be undermined if a sibling presumption is interpreted to include biological siblings, because a "sibling presumption" does not result in any mandatory placements or relocation of children with their siblings.

The same goes for the public policy concerns of privacy in adoptions. Allowing a sibling presumption does not infringe upon the rights of adoptive families because it would not ***require*** the release of any confidential information. Should the Department be aware of an adoptive family because their records are available to the Department, the family may get a letter or phone call asking if they are interested in being considered as a placement option. That would be the extent of the "interference" for purposes of placement.

Should the adoptive family wish to maintain confidentiality, they could do so by way of going through a private adoption agency and by requesting the information in their adoption file stay confidential with the agency. They could also have the Department make a notation in their file that they are not interested in any further contact for additional placements, should that circumstance arise.

Finding a sibling presumption for biological siblings would not grant the Department a greater right to inspect adoption records, nor would it place any additional burdens on adoption agencies. This is an elective option that maximizes

all available options for a permanent, healthy placement for children, which is the most important public policy consideration in Chapter 432B proceedings.

C. The Department Regularly Places Biological Siblings Together

Should this Court find that no sibling presumption between biological siblings exists, it reduce the likelihood of the Department finding meaningful placements because only a limited type of family members will be sought out for placement options. With the number of children coming into care, the research showing the benefits of a biological connection in children's lives, and the shortage of foster placements, the Court should allow the Department to cast as wide a net as possible out to seek meaningful, *familial* placements for children in abuse and neglect cases.

An interpretation that the definition of "sibling" includes both legal and biological connections in 432B cases adds uniformity to the process within which the Department is already engaging. From the statements made in the State's *Answer*,

page 31,[13] it appears the Department wants this Court to grant the bureaucracy the authority to place children with their biological siblings arbitrarily and capriciously without having guidance and instruction on whether biological siblings should be considered each and every time. That is the ***opposite*** of how the bureaucracy should behave.

Nothing requested in this writ petition creates more work for the Department, because all known family connections should already be identified and considered as part of the placement process by law. There is no "requirement" to place with a sibling by clarifying this definition – the standards for placement are still presumptions and preferences, not directives.

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[13] State's *Answer*, page 31: "The Department often places children with adopted siblings. However, requiring the Department to locate and place children with adopted siblings under a legal presumption or preference will be extremely detrimental as previously described."

III. 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 instead mandate adoption of the terms requested in this *Writ Petition*, 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.

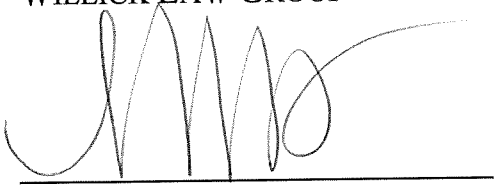
C. Granting Amy and Vivian Mulkern a right to counsel at the evidentiary hearing on placement should they choose to be represented.

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 9 day of August, 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 9th day of August, 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 9 day of August, 2018, I served a true and correct copy of the *Reply to Answer to Petition for Writ of Mandamus or Prohibition* electronically with the Clerk of the Nevada Supreme Court, to the following:

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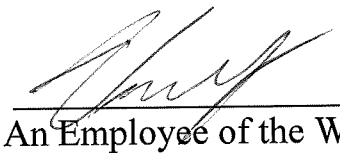

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