

IN THE SUPREME COURT IN THE STATE OF NEVADA

IN THE MATTER OF THE
GUARDIANS OF B.A.A.R.,
PROTECTED MINOR.

LUCIA AGUILAR AGUILAR,
Appellant,

vs.

MARIA MARTA RIVAS; AND
JESUS VIDAL AGUILAR,
Respondents.

Case No.: 78626
District Court No.: G051011

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APPELLANT'S OPENING BRIEF

**Appeal from Denial of Motion for Findings on the Issue of
Special Immigrant Juvenile Status Pursuant to Nev. Rev. Stat. § 3.2203**

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies the following are persons and entities as 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.

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JURISDICTIONAL STATEMENT

This is an appeal from a denial of a Motion for Findings on the Issue of Special Immigrant Juvenile Status Pursuant to Nev. Rev. Stat. § 3.2203. The Notice of Entry of Order and Findings of Fact, Conclusions of Law was filed in the district court on March 28, 2019. AA 104-10. This Court has jurisdiction pursuant to Nev. Rev. Stat. § 177.015(3). Notice of Appeal was filed on April 17, 2017. AA 111.

ROUTING STATEMENT

Appellant's case is presumptively assigned to the Court of Appeals. NRAP 17(b)(5).

STATEMENT OF THE ISSUES

- I. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO ENTER FINDINGS ON THE ISSUE OF SPECIAL IMMIGRANT JUVENILE STATUS PURSUANT TO NEV. REV. STAT. § 3.2203.**
- II. WHETHER THE DISTRICT COURT FAILED TO APPLY THE PROPER STANDARD IN EVALUATING APPELLANT'S REQUEST FOR SIJ FINDINGS PURSUANT TO NEV. REV. STAT. § 3.2203.**
- III. WHETHER THE DISTRICT COURT FAILED TO EVALUATE THE THIRD PRONG OF NEV. REV. STAT. § 3.2203 AND IN SO DOING, WHETHER IT FAILED TO EVALUATE B.A.A.R.'S BEST INTERESTS IN A GUARDIANSHIP.**

STATEMENT OF THE CASE

Appellant petitioned for guardianship for her nephew on January 10, 2019. AA 1-6. At a hearing on January 30, 2019, the district court denied the petition on the basis of a lack of jurisdiction as Nevada had not been established as the proposed protected minor's home state. AA 75. The district court instructed Appellant to re-file the same Petition once the minor had lived in Nevada for more than six months. AA 74-75. Appellant re-filed the Petition, as well as a Motion for Findings on the Issue of Special Immigrant Juvenile Status, on February 27, 2019. AA 018-40. Appellant also filed two declarations in support of the Motion. AA 41-47.

The district court held a hearing on the Petition and Motion on March 27, 2019. AA 79-84. No interested party objected to the guardianship or the motion, either in writing or in person at either hearing. At the March 27th hearing, the district court found service proper and granted the Petition for Appointment of Guardian. AA 50-51; 80-81. However, without taking testimony, the district court stated it would take the Motion under advisement. AA 084. On March 28, 2019, the district court entered a Findings of Fact, Conclusions of Law in which it denied Appellant's Motion. AA 64-65. Appellant filed a Case Appeal Statement and Notice of Appeal on April 17, 2019. AA 66-72.

STATEMENT OF THE FACTS

B.A.A.R. was born July 31, 2001 in El Salvador. AA 44. His father is Jesus Vidal Aguilar (hereinafter, "Jesus") and his mother is Martha Maria Rivas (hereinafter, "Marta"). Id. Prior to coming to the United States, B.A.A.R. lived with his mother, three younger siblings, and his maternal grandparents. Id. B.A.A.R.'s parents were never married and separated when he was around three-years-old. Id.

After Jesus separated from Marta, he moved to the U.S. Id. B.A.A.R. stayed in El Salvador in the care of his mother. Id. He lived with his mother, grandfather, and siblings. Id. B.A.A.R.'s mother started to date a man named Jose when he was thirteen-years-old. AA 45. Jose moved in sometime thereafter. Id. B.A.A.R. did not like Jose because Jose frequently fought with his mother and was physically abusive with his sister, Mayrin. Id. When Jose and his mother fought, B.A.A.R. overheard them and sometimes, the couple fought in front of him. Id. They yelled at, pushed, and tried to hit each other. Id. He never saw anyone hit, punch, or slap the other but he was not present for all of fights. Id. The fighting was daily and made B.A.A.R. feel bad. Id. On occasion, B.A.A.R. tried to intervene because he did not like to see Jose mistreat his mom. Id. After their fights, B.A.A.R.'s mother felt badly and cried. Id. When B.A.A.R. tried to

intervene, he would tell Jose to stop fighting with his mom but Jose would only start to argue with B.A.A.R.. Id.

B.A.A.R.'s sister, Mayrin, is now fifteen-years-old. Id. When Mayrin was twelve-years-old, Jose became angry with her because she chatted with boys. Id. On several occasions, B.A.A.R. witnessed Jose push or grab and throw her. Id. When Jose did this, Mayrin often fell to the ground. Id. Jose's abuse left bruises on Mayrin's body. Id. B.A.A.R. did not get involved when Jose hit Mayrin because he was scared Jose would hurt him, too. Id. B.A.A.R. describes Jose as a big, strong guy. Id. Whenever Jose started to abuse Mayrin, it scared B.A.A.R.. Id. B.A.A.R.'s mother, Marta, knew about the fights Jose had with Mayrin, and about the abuse. Id. Sometimes she was there when Jose would hit Mayrin but Marta never tried to intervene. Id. Occasionally, after Jose finished beating Mayrin, Marta would tell him that he should not have done that. Id. Marta did not do anything more. Indeed, Jose threatened that if B.A.A.R. continued to intervene in their fights, it would be dangerous for B.A.A.R. because Jose would kill him. Id. Jose and Marta eventually separated in or around November 2017. Id. B.A.A.R. did not know why but he was happy to know Jose was not able to hurt his family anymore. Id.

Marta did not have employment and instead remained in the home. AA 45. B.A.A.R.'s grandfather did not work either, but he grew corn for the family to eat.

Id. B.A.A.R.'s father sent money to B.A.A.R.'s paternal grandma when he was able. AA 45-46. The amount was never more than \$50 and it was inconsistent. AA 46. If his father did not send the money, B.A.A.R. would often go hungry or go without school supplies, clothes, or other necessities. AA 46. Even with the money his father sent, B.A.A.R. and his siblings would still not have enough to eat. AA 46. They learned to ration their meals to make the food last. AA 46. In 2017, B.A.A.R. stopped going to school during the week so he could help his grandfather farm more corn to feed the family. Id. B.A.A.R. helped his grandfather Monday through Friday, from 6:00 a.m. to 11:30 a.m. Id. Sometimes B.A.A.R. got hurt while working, often encountering snakes and large bugs. Id. His grandfather did not pay him for his work; rather, his payment was being able to eat that week. Id.

When Appellant visited family in El Salvador, she would spend time with B.A.A.R.. AA 41. When she saw him, B.A.A.R. wore old, worn clothes. AA 42. She would bring him clothes or shoes and give him money for food when she came from the U.S. Id. To help B.A.A.R. with his needs, Appellant's husband would hire him to fix a fence on the family property and pay him for his work. Id.

B.A.A.R. also lived in a dangerous colony in El Salvador that was overrun by criminal gang organizations, including the MS-13. AA 46. When he was attending school, he sometimes had to walk forty-five (45) minutes to an hour to get there. On his way to and from school, gang members would harass him and

ask him to use drugs with them. When B.A.A.R. refused, the gang members insulted him and started to menacingly stare at him whenever he would pass by. Id. B.A.A.R. feared the gang members wanted to do harm to him. Id. Shortly after, he stopped going to school to help his grandfather farm. Id.

B.A.A.R. came to the U.S. in June 2018 and was placed into the custody of the Office of Refugee Resettlement (ORR). AA 42, 46. Appellant signed a sponsor agreement with immigration officials, in which she agreed to care for B.A.A.R. and ensure he attend his future immigration court hearings. AA 42. Though his father lives in Las Vegas, his father's home did not have sufficient space for B.A.A.R.. AA 42, 46. If B.A.A.R. lived with his father, he would not have a bedroom and would have to sleep on the couch. AA 42, 46. Since coming into Appellant's care, she has enrolled B.A.A.R. in high school, gotten his immunizations, taken him to appointments and hearings, and provided him with food, clothing, shelter, and anything else he has needed. AA 42, 46. With the Order Appointing Guardian, she intended to add him to her health insurance. AA 42. B.A.A.R. has not gone hungry since arriving in Las Vegas and feels much more tranquil and safe living with Appellant than he did with his mother in El Salvador. AA 42.

On January 10, 2019, Appellant filed a Petition for the Appointment of Guardian and served the relatives within the second degree of consanguinity who

had not consented to the guardianship and waived service. AA 1-6; AA 8-13. At the hearing on the Petition on January 30, 2019, the district court stated that because B.A.A.R. arrived in Las Vegas, Nevada on August 9, 2019, the district court did not yet have jurisdiction over him. AA 74. Rather, El Salvador still had jurisdiction over him. *Id.* As a result, the district court denied the Petition but instructed Appellant to re-file the Petition with the same case number on or after February 9, 2019. AA 74-77. Also at the hearing, the district court instructed Appellant to file an affidavit for B.A.A.R. and Appellant, if she intended to file a motion related to Special Immigrant Juvenile Status because "that's usually easier than [] putting him on the stand and him saying something that... causes a problem... [S]ometimes people say the wrong things." AA 78.

On February 27, 2019, Appellant re-filed the Petition with a Motion for Findings on the Issues of Special Immigrant Juvenile Status Pursuant to Nev. Rev. Stat. § 3.2203, a declaration for Appellant, and a declaration for B.A.A.R. AA 18-23, 26-40, 41-43, 44-47. Appellant properly served the documents on those required. AA 48-49. The Motion argued that B.A.A.R.'s mother neglected him under Nev. Rev. Stat. §§ 432B.140, 432B.020(c), and 432B.393(2) and under Nev. Rev. Stat. § 200.508(2) which criminalizes child abuse and neglect. In the Motion and declaration of B.A.A.R., Appellant described the domestic violence present in B.A.A.R.'s household, between his mother, Marta, and her live-in boyfriend Jose.

AA 34-36. She also described the child abuse Jose committed against B.A.A.R.'s younger sister. Id. Further, Appellant described how B.A.A.R. went without food, clothing, and education, having to drop out of high school to work on a farm to feed himself and his siblings. AA 35.

At the hearing on March 27, 2019, the district court granted the guardianship. AA 50-51. However, the district court did not grant the motion. AA 83. Initially, the district court stated Appellant needed to provide additional information because it was "not sure what theory [Appellant was] advancing... because technically, from the information provided in [B.A.A.R.'s] Affidavit, I don't think [Appellant] meets the grounds for abandonment." AA 82. Notably, Appellant did not argue abandonment as a basis for the request for findings. See AA 26-40. The district court further stated

I'm not sure you meet the ground for neglect. The abuse that's alleged is likewise – I mean all of them are kind of – I mean, borderline at best. And so I don't know.

AA 82. The district court asked for the proposed order. Appellant argued that the motion was based on the abuse of his sister and his mother's failure to protect her daughter. B.A.A.R.'s declaration demonstrates that he witnessed the abuse occur in the family home "more times than he can count." AA 82. The district court countered that the declaration mentioned B.A.A.R. never witnessed the abuse. AA 82. However, B.A.A.R.'s declaration very clearly states, he "saw [Jose] push [his

sister] and throw her around[,]" which Appellant explained to the district court. AA 45; 82. The district court questioned where the abuse occurred and when Appellant stated in El Salvador, the district court stated "the SIJ requires that I make findings, State Court findings of abuse, neglect, abandonment" before taking the matter under advisement. AA 83. Though the district court initially stated it needed "more information" regarding the allegations in the motion, it did not permit Appellant or B.A.A.R. to give testimony or for Appellant to supplement the record. AA 79-84.

The following day, the district court entered Findings of Fact, Conclusions of Law wherein it denied Appellant's Motion. AA 64-65. In so doing, the district court found

insufficient factual support for a finding that reunification is no viable due to abuse, as the sole purveyor of said abuse no longer resides in the household; there has been no abandonment by either parent, and the allegations of poverty are insufficient, without greater detail, to support a finding of neglect.

AA 65. The district court added a footnote for the last finding, stating that very it requires a very specific and detailed history of neglect if the sole basis for such neglect is a parent's poverty, inter alia. This appeal follows.

SUMMARY OF ARGUMENT

The district court committed at least four reversible errors in Appellant's case. First, the district court ignored Appellant's arguments regarding negligent

treatment under Nev. Rev. Stat. §§ 432B.020(1)(c) and 432B.140, as well as the argument regarding criminal neglect and child abuse under Nev. Rev. Stat. § 200.508(2), as each claim related to the domestic violence and child abuse of his sister. Further, the district court ignored the argument that had the abuse occurred in Nevada, Child Protective Services would have no obligation to reunify B.A.A.R. with his mother under Nev. Rev. Stat. § 432B.393(2). The district court instead focused its order on alleged arguments of abandonment and abuse, which Appellant did not make. Second, the district court dismissed Appellant's arguments, and the evidence in support thereof, regarding neglect as it related to B.A.A.R.'s mother's failure to adequately provide for him as he suffered frequent bouts of hunger, tattered clothing, and was forced to drop out of school to grow food for himself and his siblings to eat. The district court equated the prong non-viability of reunification prong to the evidentiary standard required for the termination of parental rights, which is not the standard listed in either the federal or state statute. This, in conjunction with the district court's comments regarding location of the alleged abuse and neglect during the March 27, 2019 hearing, strongly suggest a fundamental misunderstanding of the SIJ statute. Third, it failed to make findings regarding whether it is in B.A.A.R.'s best interests to return to El Salvador and to evaluate best interests in a guardianship proceeding.

The district court refusal to make requested findings on the issue of Special Immigrant Juvenile Status for the foregoing bases amounts to an abuse of discretion. Appellant presented compelling, credible, and unchallenged evidence to support the requested findings. The district court failed to consider the evidence and failed to evaluate the best interests of the subject minor in the case. The district court's failures warrant remand so that it can enter appropriate findings based on the evidence presented thereto.

ARGUMENT

To prevent undocumented children in B.A.A.R.'s situation from returning to countries where they face harm, Congress amended the Immigration and Nationality Act in 1990 to include the category of Special Immigrant Juveniles ("SIJ"). 8 U.S.C. § 1101(a)(27)(J); *see also Yeboah v. U.S. Dep't. of Justice, I.N.S.*, 223 F.Supp. 650, 659 (E.D.Pa. 2002); *see also* AA 33 (*citing* Baum et al., *Most in Need but Least Served: Legal and Practical Barriers to Special Immigrant Juvenile Status for Federally Detained Minors*, 50 Fam. Ct. Rev. 621, 621 (2012)). The SIJ provision extends protection from deportation to undocumented children who have suffered abuse, abandonment, neglect, or similar harm. 8 U.S.C. § 1101(a)(27)(J).

Before a child can apply for status as an SIJ, a juvenile court must first find that: (1) the child has been declared dependent on the juvenile court or the court

must have legally committed the child to, or placed him under the custody of, an agency or department of the State, or an individual or entity appointed by the State or juvenile court; (2) the child's reunification with one or both of his parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;¹ and (3) the child's best interest would not be served by being returned to his country of origin. *Id.* (2006, supp. 2009); NRS 3.2203(a)-(c).

While the federal government has exclusive jurisdiction over immigration, state courts play an important, indispensable role in the SIJ process. Under 8 U.S.C. § 1107(a)(27)(J), Congress has delegated to state courts the determination of a child's dependency and best interests. This delegation affirms the institutional competence of state courts as the appropriate forum for child welfare determinations regarding abuse, neglect, or abandonment, and a child's best interests." *Leslie H. v. Superior Court*, 224 Cal.App.4th 340, 349, 128 Cal.Rptr. 3d 729 (2014) (internal citations omitted). Under the federal law and now Nevada law, a state juvenile court has the authority to make SIJS findings using state law if the evidence presented supports those findings. 8 U.S.C. § 1107(a)(27)(J); NRS 3.2203. The requested findings are solely a preliminary factual determination, not a legal conclusion, that must be made prior to the filing of an application for

¹ *Amaya v. Rivera*, 135 Nev. Adv. Opn. 27, 444 P.3d 450 (2019) (holding that the "1 or both" language in the statute means that reunification may not be viable with either parent due to abuse, abandonment, neglect, or some other basis under state law).

immigration relief from the USCIS office. *See* 8 C.F.R. § 204.11(d)(2) (2009); NRS 3.2203(a)-(c).

I. THE DISTRICT ABUSED ITS DISCRETION WHEN IT FAILED TO ENTER FINDINGS ON THE ISSUE OF SPECIAL IMMIGRANT JUVENILE STATUS PURSUANT TO NEV. REV. STAT. § 3.2203.

The district court has broad discretion in making decisions regarding the custody of a child and its decision will not be disturbed on appeal absent a clear abuse of discretion. *Rico v. Rodriguez*, 121 Nev. 695, 701, 120 P.3d 812, 816 (2005). However, a reviewing court must “be satisfied that the district court’s determination was made for appropriate reasons,” *id.*, and thus, “deference is not owed to legal error, or to findings so conclusory they may mask legal error.” *Davis v. Ewalefo*, 131 Nev. 445, 445, 352 P.3d 1139, 1142 (2015) (internal citations omitted).

A. The District Court Erred in Ignoring Appellant’s Claim Regarding Nev. Rev. Stat. §§ 432B.020(1)(c), 432B.140, and 200.508(2).²

In her Motion, Appellant argued B.A.A.R.'s mother neglected him under Nevada law due to exposure to domestic violence which permeated the household, the child abuse suffered by his sister, the death threat his mother's boyfriend conveyed that went unheeded by his mother, and his mother's failure to provide adequate provisions for his care or take reasonable measures to do so, to the point

² As it relates to the child abuse of B.A.A.R.’s sister, threat to kill B.A.A.R., and the domestic violence between his mother and Jose.

where B.A.A.R. suffered frequent bouts of hunger and had to drop out of school to grow corn for food to eat. AA 34-37.

To support the contention returning to El Salvador was not in B.A.A.R.'s best interests, he and Appellant submitted declarations, signed under penalty of perjury, which detailed what it was like living in his mother's household, his inability to attend school, and the harassment and threatening looks he received by members of the MS-13. AA 47-56. B.A.A.R. and Appellant testified that Appellant has provided for B.A.A.R.'s needs, including food, shelter, education, and medical care since his arrival in the U.S. AA 41-43, 44-47. B.A.A.R. stated he is happy to return to school and he feels safer and more tranquil in his aunt's house. AA 47.

Despite Appellant presenting this uncontested evidence to the district court, it found insufficient evidence to support a finding of neglect "based on poverty" as well as abandonment and abuse. AA 65.

Eighth Judicial District Court Rule 2.20(e) states the "failure of an opposing party to serve and file a written opposition may be construed as an admission that the motion... is meritorious and a consent to granting the same." Appellant submitted declarations signed under penalty of perjury and was prepared to testify under oath at the hearing. The district court did not make any finding regarding the credibility of Appellant or B.A.A.R., and did not make any other dispositive

finding. Indeed, B.A.A.R.'s mother's failure to answer the petition or motion or attend the hearing, despite proper service, further demonstrates the un-viability of reunification with her.

1. B.A.A.R.'s mother neglected him under Nev. Rev. Stat. §§ 432B.140 and 432B.020(1)(c).

Nevada defines a "negligent treatment or maltreatment" of a child occurs

if a child has been *subjected to harmful behavior that is terrorizing, degrading, painful or emotionally traumatic*, has been abandoned, *is without proper care*, control or supervision *or lacks the subsistence, education, shelter, medical care, or other care necessary for the well-being of the child* because of the faults or habits of the person responsible for the welfare of the child or the neglect or refusal of the person to provide them when able to do so.

NRS § 432B.140 (emphasis added). Further, neglect of a child means...

negligent treatment or maltreatment as set forth in NRS 432B.140, of a child caused or *allowed* by a person responsible for the welfare of the child under circumstances which indicate that the child's health or welfare is harmed or threatened with harm...

NRS § 432B.020(1)(c) (emphasis added). The term "allow" is defined as "to do nothing to prevent or stop the abuse or neglect of a child in circumstances where the person knows or has reason to know that a child is abused or neglected." *Id.* at § 432B.020(3). Bryan's mother has neglected him under these definitions.

As discussed in great detail throughout, B.A.A.R.'s mother *allowed* his sister to be abused in the household and B.A.A.R. witnessed it on several

occasions. He reported feeling scared and afraid Jose would abuse him, too, if he tried to defend his sister. Moreover, his mother allowed B.A.A.R. and his siblings to be exposed to domestic violence. B.A.A.R. frequently witnessed arguments and physical confrontations, though minor, between his mother and Jose. He reported feeling badly and would cry when the fights occurred. Further, at one point, Jose threatened to kill B.A.A.R. to his mother if B.A.A.R. continued to intervene and his mother *allowed* Jose to continue to terrorize B.A.A.R. following the threat. This constitutes subjecting B.A.A.R. to “harmful behavior that is terrorizing... or emotionally traumatic.” NRS § 432B.140. Because his mother “did nothing to prevent or stop the abuse” of B.A.A.R.’s sister and neglect of B.A.A.R. in circumstances where she knew or had reason to know that B.A.A.R. was subject to such behavior constitutes negligent treatment of a child under Nevada law. This district court ignored this argument completely. Thus, the order denying the motion should be reversed and the matter remanded for further proceedings.

2. B.A.A.R.’s mother neglected him under Nev. Rev. Stat. § 200.508(2).

Appellant argued that the abuse of B.A.A.R.’s sister by his mother’s boyfriend, that his mother was aware of and yet did nothing about, constituted criminal neglect under Nev. Rev. Stat. § 200.508(2). That statute defines abuse or neglect as

physical injury of a non-accidental nature, sexual abuse, sexual exploitation, negligent treatment or maltreatment of a child under the age of 18 years... under circumstances which indicate that the child's health or welfare is harmed or threatened with harm.

NRS § 200.508(4)(a).

A person who

is responsible for the safety and welfare of a child pursuant to NRS 432B.130 and who permits or allows that child to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as a result of the abuse or neglect[,]

not involving sexual abuse or exploitation but resulting in substantial bodily harm, is guilty of a category B felony and can face two to twenty years in prison. NRS § 200.508(2). In cases not involving substantial bodily harm, the crime is a wobbler, where the perpetrator faces anywhere from six (6) months to one (1) year for a gross misdemeanor and one (1) to five (5) years for a category C felony. *Id.*; NRS § 193.130(2)(c).

B.A.A.R.'s mother allowed her boyfriend to subject her daughter and B.A.A.R. to unjustifiable physical and emotional suffering. There are Nevada criminal neglect cases where this Court has affirmed a conviction or termination of parental rights based on similar factual scenarios. *See Smith v. State*, 112 Nev. 1269, 927 P.2d 14 (1996) (case involving a mother charged with negligent treatment and neglect under NRS 432B.140 and NRS 200.508 for the death of her

son by her boyfriend's hands); *R.M. v. McKinney*, No. 76911, 2019 Nev. Unpub. LEXIS 767 (July 11, 2019) (parental rights terminated as to two siblings where one parent abused one child. The other non-abusive parents' rights were terminated as well for unfitness under the criminal neglect statute and NRS 432B.140 because she knew or should have known about the abuse). Appellant presented sufficient evidence to support her requested findings and it was an abuse of discretion for the district court to find otherwise.

II. THE DISTRICT COURT FAILED TO APPLY THE PROPER STANDARD IN EVALUATING APPELLANT'S REQUEST PURSUANT TO NEV. REV. STAT. § 3.2203.

The standard in the SIJ statute is whether reunification with one or both parents is not viable due to abuse, abandonment, or neglect, or a similar basis under state law. NRS § 3.2203. Though one can request findings in a proceeding arising under Chapter 128, the SIJ statute does not state that a district court must determine that the parent's rights should be terminated. *See id.* The termination of parental rights is a legal conclusion while the request for SIJ findings are merely a factual inquiry that can arise in a divorce, custody, adoption, juvenile delinquency, or guardianship proceeding. *Id.*

The district court stated in its order that

[t]his [c]ourt would require very specific and detailed history of neglect if the sole basis for such neglect is a parent's poverty. While lack of financial resources may be sufficient to temporarily remove a child from a parent[,] it is never a

sufficient basis to terminate the relationship; *or in other words, to find that reunification is not viable.*
AA 65 (emphasis added).

There is a minimum of three errors, both factual and legal, with this conclusion. First, Appellant offered at least three factual bases to support a finding of neglect. Thus, the sole basis of neglect in the instant case would not have been based on B.A.A.R.'s mother's poverty. Second, Appellant presented sufficient evidence to demonstrate neglect due to his mother's failure to provide proper care, subsistence, and education necessary for the well-being of the child. Her failure to provide for him was not due to poverty beyond her control, as reflected in the declarations. If such evidence would be sufficient for a child living in Nevada at the time the neglect occurred, it should be sufficient for a child living in another country at the time it occurred. *August H. v. State*, 105 Nev. 441, 777 P.2d 901 (1989) (case involving a court granting temporary custody to DPS based on findings of neglect in the form of the parents' failure to ensure adequate hygiene); *Anderson v. State*, No. 68323, 2016 Nev. App. Unpub. LEXIS 109 (Nev. Ct. App. Mar. 16, 2016) (a case involving a mother who hide her child from the police which prevented anyone from being able to properly care for him constituted neglect).

Third, the district court erroneously equivocated non-viability of reunification to that required to terminate a parental relationship. Nothing in the

SIJ statute even remotely suggests that “reunification with one or both parents” must rise to the level of termination of the parental relationship with the child. Indeed, a party can file a motion seeking SIJ findings in a custody or divorce proceeding, which indicates that termination of the parental relationship is not required. Essentially, the district court improperly heightened the burden of proof required for factual findings under Nev. Rev. Stat. § 3.2203. Such could not have been the Nevada Legislature’s intent when it codified 8 U.S.C. § 1107(a)(27)(J) in October 2017. This conclusion, coupled with its comment at the March 27, 2019 hearing regarding lack of jurisdiction if the events to the abuse or neglect occurred in another country, indicate the district court has a fundamental misunderstanding of the SIJ statute. Because the district court impermissibly heightened the standard of proof, it abused its discretion. This Court should reverse its March 28, 2019 order and remand for further proceedings.

III. THE DISTRICT COURT FAILED TO EVALUATE THE THIRD PRONG OF NEV. REV. STAT. § 3.2203 AND IN SO DOING, FAILED TO EVALUATE B.A.A.R.’S BEST INTERESTS IN A GUARDIANSHIP PROCEEDING.

Eligibility for SIJS requires a finding that it is not in the best interests of the child to return to her country of origin. NRS 3.2203(c); 8 U.S.C. § 1101(a)(27)(j)(ii). A court is not required to "make a determination as to whether the minor child would be at risk of harm if returned to the country of origin; a court need[] [only] find that return would not be in the child's best interests." *In re E.G.*,

2009 WL 2534556, at *3 (N.Y. Fam. Ct. Aug. 14, 2009). Further, Nevada has held that a district court must make best interest of the child findings in cases where living conditions in other countries is at issue. *See Davis*, 131 Nev. At 451, 352 P.3d at 1141; *see also Ramirez v. Menjivar*, No. 74030, 2018 Nev. Unpub. LEXIS 1203 (Nev. Sup. Ct. Dec. 27, 2018). As this Court has found previously, the best interest of the child standard “guides the district court at all times,” including in guardianship appointments. *In re N.S. v Eighth Judicial District Court*, 122 Nev. 305, 313, 130 P.3d 657, 662 (2006).

Here, the district court failed to consider the third prong of the SIJ statute, which is whether it is in the child’s best interest to return to his country of origin. NRS § 3.2203(c); 8 U.S.C. § 1101(a)(27)(j)(ii). In his declaration, B.A.A.R. testified that he witnessed arguments and pushing between his mother and her boyfriend, Jose, on a regular basis. AA 45-46. While he never witnessed it escalate beyond pushing, he testified he did not witness all of their fights, which occurred almost every day. AA 46. He testified he saw his mother cry a lot. *Id.* When he tried to intervene, Jose, who B.A.A.R. described as a big strong guy who scared him, would argue with B.A.A.R. *Id.* Further, he testified he witnessed Jose frequently abuse his younger sister. *Id.* Jose would push, grab, and throw his sister to the ground, resulting in bruises all over her body. *Id.* His mother witnessed the abuse, too, however, she failed to protect his sister. *Id.* Her actions

were limited to suggesting to Jose that he “shouldn’t do that.” *Id.* On one occasion, Jose told his mother that if B.A.A.R. continued to try to intervene in their fights, Jose would kill him. *Id.* Because Jose had been to prison, B.A.A.R. took this threat seriously. *Id.*

Further, his mother did not have employment and provided no provision for his care directly. *Id.* B.A.A.R.’s father would inconsistently send nominal amounts, which B.A.A.R. had to retrieve from his paternal grandmother’s house. *Id.* at 46-47. Without the money, he would not be able to eat. *Id.* at 47. However, even with the money, B.A.A.R. and his siblings often went without eating. *Id.* They learned to ration their food to make their meals last. *Id.* In 2017, B.A.A.R. dropped out of high school to work on a farm to provide corn for his sibling and him to eat. *Id.* Moreover, prior to leaving school, MS-13 gang members had started to harass B.A.A.R. on his way to and from school. *Id.* They offered him drugs and when he refused, they began to glare menacingly at him. *Id.*

Now in the care of his aunt, Appellant, he has returned to school, has health insurance, and never goes without food or other necessities. *Id.* at 48. Appellant ensures B.A.A.R. attends all of his court and medical appointments. *Id.* He reports feeling safe and more tranquil while living with his aunt. *Id.* There was sufficient uncontested evidence in the record to establish that it was not in

B.A.A.R.'s best interest to return to his country of origin. The district court's failure to analyze this prong was an abuse of discretion.

Additionally, as in any matter pertaining to the custody and care of a child, the district court was required to analyze the best interest of B.A.A.R. in his guardianship proceeding. Appellant, in actual custody and care of B.A.A.R. in Las Vegas, petitioned the district court for legal guardianship of him. Though B.A.A.R.'s father lives in Las Vegas, he failed to take B.A.A.R. once released from the ORR care facility and failed to respond to any of the proceedings. His mother also failed to respond to any of the filings and failed to attend either hearing, whether in person or through counsel. The district court granted Appellant's petition, giving her legal authority over B.A.A.R. This indicates that the district court believed it was in B.A.A.R.'s best interest to remain in the custody and care of his aunt.

Had the district court weighed B.A.A.R.'s best interests when ruling on the motion, it is unclear how it could have come to the same result as it did. It is not in a child's best interest to be exposed to domestic violence and child abuse perpetrated by a convict living in the household. Though Jose moved out shortly before B.A.A.R. fled El Salvador, that does not absolve his mother's prior failure to protect her children and it does not suggest she will not continue to fail to protect them in the future. Moreover, there is no evidence in the record to suggest

she ended the relationship because of the child abuse against his sister. In fact, she knew about the abuse and witnessed herself yet failed to protect B.A.A.R. or his sister in those moments.

It is also not in B.A.A.R.'s best interest to go without proper sustenance and care, to go without an education, and be forced to work to grow food for himself to eat. His mother is unable to adequately provide for him. Had this occurred in Nevada, she could be liable for educational neglect under Nev. Rev. Stat. § 432B.140 at the very least. On the contrary, it is in B.A.A.R.'s best interest to remain in Las Vegas under the care of his aunt and now legal guardian where he has adequate food, shelter, and access to medical care and education in a loving, tranquil, supportive home environment.

Had the district court evaluated the best interests of B.A.A.R., its findings would have necessarily included the requested findings regarding neglect. Its failure to do so, when required to under this Court's precedent, was an abuse of discretion warranting reversal.

CONCLUSION

Appellant presented the district court with compelling, credible, and unrefuted evidence that demonstrated reunification of B.A.A.R. with his mother was not viable due to neglect and that it was not in B.A.A.R.'s best interests to return to El Salvador. The district court erred in finding insufficient evidence to

support the request for findings while ignoring evidence in the record, heightened the evidentiary standard, and failed to evaluate the best interests of B.A.A.R. under the SIJ statute and generally in a guardianship proceeding. Appellant's case must be remanded to the district court to enter findings that were supported by the evidence presented.

DATED this 3rd day of October, 2019.

Respectfully submitted,

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VERIFICATION

I hereby certify that this appellate 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 this brief has been prepared in Times New Roman using Microsoft Word 2007.

I further certify that this appellate brief complies with the page or type-volume limitations of NRAP 3C(h)(2) because it is proportionally spaced, has a typeface of 14 points or more, and contains approximately 5,971 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my 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 by a reference to the page and volume number, if any, of the transcript or appendix where 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 3rd day of October, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY AND AFFIRM that this document was filed electronically with the Nevada Supreme Court on October 3, 2019 and mailed via U.S. mail to the following:

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