IN THE SUPREME COURT OF THE STATE OF NEVADA

WASHOE COUNTY HUMAN SERVICES AGENCY,
Petitioner,
vs.
THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE PAIGE DOLLINGER, DISTRICT JUDGE,
Respondents,
and,
ROLANDO C.-S.; PORSHA C.-S.; AND L. S. C., A MINOR CHILD,
Real Parties in Interest.
_____/

No. 83422

ANSWER AGAINST ISSUANCE OF REQUESTED WRIT

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Introduction

Petitioner, Washoe County Human Services Agency (Agency), has petitioned this Court for a writ of mandamus directing the family court to "1) vacate the Order Affirming Master's Findings and Recommendations; and 2) grant Washoe County Human Services Agency's Motion Seeking No Reasonable Efforts finding Pursuant to NRS 432B.393 and the Adoption and Safe Families Act." Petition for Writ of Mandamus (Petition) at 2. The Court should deny the petition.

The actual relief the Agency seeks—to be excused from having to make reasonable efforts to preserve and reunify L. C. S. with her parents—has already been granted, albeit on different grounds. See PA 170 (Master's Findings of Fact and Recommendations After 12-Month Permanency Hearing) ("Washoe County Human Services Agency *is relieved of making reasonable efforts* toward reunification as such efforts are inconsistent with the permanency plan") (italics added); and *Id.* at 169, 170 (identifying the permanency plan as "of adoption with the Washoe County Human Services Agency initiating an action for termination of parental rights"); and see PA 172 (Order Affirming

Master's Findings of Fact and Recommendations After 12-Month Permanency Hearing).[1] Because the Agency no longer must make reasonable efforts to reunify this family, the petition is moot. To the extent that the Agency seeks an opinion on the family court's determination that NRS 432B.393(3)(c) is unconstitutional, it is seeking an advisory opinion from this Court. "[T]his court's duty," however, "is not to render advisory opinions but, rather, to resolve actual controversies by an enforceable judgment." *Personhood v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 602 (2010) (citation omitted).

Additionally, this writ petition may not be the proper vehicle to consider the family court's order at this time because the Agency has an adequate remedy at law: an appeal. NRS 128.105(1)(b) incorporates NRS 432B.393(3)(c) into its "parental fault" matrix and the family court's constitutional ruling can be reviewed on appeal if the petition for termination of parental rights is denied. See *In re Parental Rights as to A.G.*, 129 Nev. 125, 295 P.3d 589 (2013) (appeal by Washoe County Department of Social Services from order denying petition for termination of parental rights).

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[1] "PA" refers to the Petitioner's Appendix.

MEMORANDUM OF POINTS AND AUTHORITIES AGAINST ISSUANCE OF THE REQUESTED WRIT

Background

NRS 432B.393(1) states:

> Except as otherwise provided in this section, an agency which provides child welfare services shall make reasonable efforts to preserve and reunify the family of a child: (a) [b]efore the placement of the child in foster care, to prevent or eliminate the need to remove the child from the home; and (b) [t]o make it possible for the safe return of the child to the home.

Subsection (3)(c) provides one exception:

> An agency which provides child welfare services is not required to make the reasonable efforts required by subsection 1 if the court finds that: ... [t]he parental rights of a parent to a sibling of the child have been terminated by a court order upon any basis other than the execution of a voluntary relinquishment of those rights by a natural parent, and the court order is not currently being appealed[.]

Relatedly, NRS 128.105(1)(b) deems a "finding made pursuant to subsection 3 of NRS 432B.393" to independently constitute parental fault in a termination of parental rights proceeding.[2]

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[2] NRS 128.105(1)(b) states: "The primary consideration in any proceeding to terminate parental rights must be whether the bests interests of the child will be served by the termination. An order of the

The conditions necessary to invoke subsection 3(c) are present here. The family court made the following uncontested findings of fact:

- The child, L. S. C., was removed from the care and custody of her parents, the Real Parties in Interest Rolando C.-S. (Rolando) and Porsha C.-S. (Porsha), on August 25, 2020. She is in the legal and physical custody of the Agency pursuant to the court's order entered December 31, 2020.

- The parental rights of Rolando and Porsha were previously involuntarily terminated as to L. S. C.'s sibling on June 27, 2019, in a separate family case.

- The order terminating the parental rights as to that sibling is not currently under appeal.

PA 143 (Order Affirming Master's Findings and Recommendations) (Order).

Given these facts the Agency sought to be relieved of having to make reasonable efforts as to L. S. C.'s reunification with her parents. See PA 24-36 (Motion Seeking a No Reasonable Efforts Finding Pursuant to NRS 432B.393 and the Adoption and Safe Family Act[3])

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court for the termination of parental rights must be made in light of the considerations set forth in this section and NRS 128.106 to 128.109, inclusive, and based on evidence and including the finding that: ... [t]he conduct of the parent or parents was the basis for a finding made pursuant to subsection 3 of NRS 432B.393 ... ."

[3] Porsha opposed the Agency's motion. See PA 53-57 (Opposition to Motion Seeking a No Reasonable Efforts Finding Pursuant to NRS 432B.393 and the Adoption and Safe Family Act). As did Rolando. See

(Motion). The family court did not disagree with the Agency's reading of the statute. The family court however, found the plain language of NRS 432B.393(3)(c) unconstitutional "as it violates a parent's rights to due process which is protected by the Fourteenth Amendment." PA 165 (Order).

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PA 58-65 (Opposition to Motion Seeking a No Reasonable Efforts Finding Pursuant to NRS 432B.393 and the Adoption and Safe Family Act as to [Rolando]). A family court master concluded that NRS 432B.393(3)(c) was unconstitutional because "it is not narrowly tailored to serve the compelling state interests of ensuring the health and safety of children, of ensuring children do not linger in foster case, and of providing costly reasonable efforts that will be futile." The master added, whether "reasonable efforts are required should be made on a case by case basis, and based upon specific evidence, as contemplated by NRS 432B.393(7) but disallowed by the plain language of NRS 432B.393(3)(c). Additionally, as a finding made pursuant to NRS 432B.393(3)(c) is almost immediately used as a fault or unfitness finding in an action brought to permanently deprive a parent of a fundamental right, the finding of fault and/or unfitness should be made together with the request for a finding that reasonable efforts do not need to be provided, and the findings should be made by clear and convincing evidence of actual fault, unfitness, and/or aggravating circumstances." PA 104 (Master's Findings and Recommendations Regarding Motion Seeking a Finding that WCHSA is not Required to Provide Reasonable Efforts) (Master's Findings and Recommendations Regarding Motion). The Agency objected to the master's findings and recommendations, PA 106-108, 128-138, and Rolando, PA 109-119, and Porsha, PA 120-127, filed oppositions, which was joined by L. S. C, though her counsel Washoe Legal Services. PA 139-140. The family court affirmed. PA 141-167 (Order).

Routing Statement

This writ petition is assigned to the Nevada Supreme Court under NRAP 17(a)(10) (assigning cases "involving the termination of parental rights" to the Supreme Court for decision).

Standards of Review

"Whether to grant extraordinary relief is solely within this court's discretion." *MDC Restaurants, LCC v. Eighth Judicial Dist. Court*, 134 Nev. 315, 318, 419 P.3d 148, 151 (2018) (citing *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 647, 677, 818 P.2d 849, 851 (1991)). A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office or where discretion has been manifestly abused or exercised arbitrarily or capriciously." *Sonia F. v. Eighth Judicial Dist. Court*, 125 Nev. 495, 498, 215 P.3d 705, 707 (2009) (internal quotation marks and citations omitted). However, "the writ will not be issued if the petitioner has a plain, speedy, and adequate remedy at law. NRS 34.170." *Martinez Guzman v. Second Judicial Dist. Court*, 137 Nev. Adv. Op. 61, 496 P.3d 572, 575 (2021).

Because "[m]andamus will not lie to control discretionary action, unless discretion is manifestly abused or is exercised arbitrarily or

capriciously," the Court reviews the district court's order under a manifest abuse of discretion standard. *Office of Washoe County Dist. Atty. v. Second Judicial Dist. Court*, 116 Nev. 629, 635, 5 P.3d 562, 565 (200) (citing *Round Hill General Imp. Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981)). The Court reviews a district court's legal conclusions, such as the constitutionality of a statute, de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008); *Silvar v. Eighth Judicial Dist. Court*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006) ("The constitutionality of a statute is a question of law that we review de novo."). Finally, the Court analyzes "substantive due process challenges to statutes impinging on fundamental constitutional rights under a strict scrutiny standard." *In re the Parental Rights as to D.R.H.*, 120 Nev. 422, 427, 92 P.3d 1230, 1233 (2004) (footnote omitted).

Discussion

The writ petition is moot

In *Personhood Nevada v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) (citations omitted), this Court said, "[t]he question of mootness is one of justiciability. This court's duty is not to render

advisory opinions but, rather, to resolve actual controversies by an enforceable judgment. Thus, a controversy must be present through all stages of the proceeding, and even though a case may present a live controversy at its beginning, subsequent events may render the case moot." The general rule that the Court will decline to hear a moot case "comports with [the Court's] duty 'to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue before it.'" *Valdez-Jimenez v. Eighth Judicial Dist. Court*, 136 Nev. 155, 158, 460 P.3d 976, 981-82 (2020) (citation omitted).

Here, the Agency sought to be relieved of its obligation, under NRS 432B.393(1), to provide reasonable efforts to reunify L. S. C. with her parents. PA 24-28 (Motion). The motion was denied on July 2, 2021, when the family court affirmed the findings and recommendations of the court master. PA 141-167 (Order). Approximately one month later, on August 6, 2021, the master entered separate findings of fact and recommendations after a 12-month permanency hearing. The court master identified the permanency plan

for L. S. C. as "adoption with the [Agency] initiating an action for termination of parental rights proceedings[.]" PA 169, 170 (Master's Findings of Fact and Recommendations After 12-Month Permanency Hearing). And, as a result, the master also relieved the Agency of its obligation to make "reasonable efforts toward reunification as such efforts are inconsistent with the permanency plan." *Id.* at 170. The family court affirmed and adopted these recommendations. PA 172-73 (Order Affirming and Adopting Master's Findings od Fact and Recommendations After 12-Month Permanency Hearing). While the master's recommendation to relieve the Agency of its obligation to provide reasonable efforts rests on grounds other than NRS 432B.393(3)(c), the Agency has nevertheless received the relief it had specifically requested, see PA 27 (Motion) ("WCHSA respectfully requests ... that this Court enter an order relieving the agency from providing reasonable efforts to reunify and preserve the family in this case"), and has in fact, been relieved of the obligation to provide reasonable efforts for this family. Hence, the writ petition is moot.[4]

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[4] As an aside, at various points in its petition the Agency asserts (in an effort to create urgency) that the family court's ruling jeopardizes federal funding. See for example Petition at 8, 9, 10, 11, 12. But the

Petitioner has an adequate remedy at law

"A writ of mandamus is not a substitute for an appeal." *Archon Corporation v. Eighth Judicial Dist. Court*, 133 Nev. 816, 819, 407 P.3d 702, 706 (2017) (citation omitted). This Court has consistently held that an appeal generally provides an adequate legal remedy. See *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 841 (2004) (noting that an appeal, even if not immediately available, is generally an adequate remedy precluding writ relief); *Washoe County v. City of Reno*, 77 Nev. 152, 156, 360 P.2d 602, 603 (1961) (noting that a remedy "does not fail to be speedy and adequate, because, by pursuing it through the ordinary course of law, more time probably would be consumed than in a mandamus proceeding.") (footnote omitted).

Agency does not demonstrate that any federal funding has been or will be denied to the State of Nevada as a result of the family court's order. Generally, this Court need not consider arguments not cogently made. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n. 38, 130 P.3d 1280, 1288 n. 3 (2006). Even if the assertion seemed concerning, petitioner's own admission that "'reasonable efforts' is a standard used by the federal government to provide federal funding to the states," Petition at 11, demonstrates that Nevada is not in jeopardy to lose federal funds based on the family court's order because Nevada follows that standard. Indeed, Nevada requires "reasonable efforts" be made by agencies providing child welfare services pursuant to NRS 432B.393(1) ("... an agency which provides child welfare services *shall make reasonable efforts* to preserve and unify the family of a child") (italics added). Nevada is in compliance with federal standards.

NRS 128.105(1)(b) incorporates NRS 432B.393(c) into its "parental fault" matrix and the family court's ruling can be reviewed on appeal if the Agency's petition for termination of parental rights is denied. Stated differently, the effect of the family court's order may be felt only where the Agency will not benefit from a finding under NRS 432B.393(3). And if the petition is denied on any basis, the Agency can appeal and challenge the family court's order. See *In re Parental Rights as to A.G.*, 129 Nev. 125, 295 P.3d 589 (2013) (appeal by Washoe County Department of Social Services from order denying petition for termination of parental rights). Because the Agency has an adequate remedy at law, a writ does not lie.[5]

If the Court entertains the writ, it should affirm the family court's order

NRS 432B.393(3)(c) excuses an agency that provides child welfare services from making reasonable efforts to reunify a family if a court

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[5] Relying on *In re A.B.*, 128 Nev. 764, 769, 291 P.3d 122, 126 (2012), the petitioner argues that the family court's order "concerns matters of temporary child custody, [and therefore] is not substantially appealable[.]" Petition at 7. But *In re A.B.* is inapposite. Unlike *A.B.*, the order below did not involve child custody. Instead, it addressed the Agency's motion to be relinquished of its statutory obligation to make reasonable efforts under NRS 432B.393(1) on behalf of the child and family.

finds that the parental rights of a parent to a sibling of the child have been terminated by a court order upon any basis other than the execution of a voluntary relinquishment of those rights by a natural parent, and the court order is not currently being appealed. When the language of a statute is unambiguous, its text controls. *Leven v. Frey*, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007) ("Generally, when a statute's language is plain and its meaning clear, the courts will apply that plain language.") (footnote omitted); *Figueron-Beltran v. United States*, 136 Nev. 386, 391, 467 P.3d 615, 621 (2020) ("If the statute's language is clear and unambiguous, we enforce the statute as written.") (internal quotation and citation omitted). Here, the family court noted that "[t]here does not appear to be a dispute that this statute does not give the Court any discretion to take other circumstances into account if there is a prior termination of parental rights." PA 146 (Order).[6] This undisputed conclusion forms the basis of its unconstitutionality. "Like

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[6] Agreeing with the Agency. PA 26 (Motion) ("the language of the ... statute is not discretionary") and PA 82 (Reply to Oppositions to Motion Seeking a No Reasonable Efforts Finding Pursuant to NRS 432B.393 and the Adoption and Safe Families Act) ("the plain language of the statute provides that the agency is not required to provide efforts if there is a termination of parental rights by court order, which is not being appealed").

Stanley [*v. Illinois*, 405 U.S. 645 (1972)[7]], Nevada presumes parents with prior terminations are always and forever unfit ... with no further factual findings or analysis." PA 94-95, 99 (Master's Findings and Recommendations Regarding Motion).

The family court credited the master's observations that a statute that "does not afford the court discretion to consider the individual circumstances of [a] past termination fails to consider the health and safety of the current child involved[;] fails to consider how a parent has changed his or her life circumstances since the past termination[;] fails to consider why reasonable efforts would be futile in the current case[;] fails to consider how reasonable efforts would harm the current child at issue[;] fails to consider cases in which a termination is based upon default after publication[8][;] fails to consider

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[7] In *Stanley v. Illinois*, the Supreme Court said, "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand." 405 U.S. at 656-57 (footnote omitted).

[8] Or, for that matter, termination without notice to the parent. *Cf.* In the Matter of the Parental Rights as to J.F., docket no. 65044 (unpublished Order of Reversal and Remand filed on February 27, 2015, finding that "appellant was provided no notice of the evidentiary

the needs of each individual child[;] fails to consider the reasons for the instant removal, which may be completely different from the past removal for which no services were ever offered and/or provided[;] fails to consider a parent who may have matured, may have better support systems in place, may have the wherewithal to be completely engaged in services during the instant removal[;] fails to consider a scenario in which a very young parent had parental rights terminated and it is 20 or more years later, and that parent may be able to better engage in newer and more advanced or useful services[;] fails to consider all long ago the prior termination was[; and] fails to consider that parents can and do change and may become fit parents in the future." PA 147-48 (Order) (footnote added).[9]

"NRS 432B.393(3)(c) cannot be considered in a vacuum." PA 152 (Order). The presumption that parents with prior terminations are always and forever unfit can be used as a fault or unfitness finding in a

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hearing terminating her parental rights").

[9] The family court also noted that other states have enacted legislation that grants the type of discretion to family courts that is denied by NRS 432B.393(3)(c). PA 148-52. (Order). Thus, the ability to narrowly tailor the statute to provide reasonable discretion to the family court is available. Where the legislature has failed the narrow tailoring test, it can go back and develop how to achieve its goals by other means, and other state statutes provide helpful models.

termination of parental rights action. PA 104 (Master's Findings and Recommendations Regarding Motion); and PA 152-54 (Order). The Agency counters that "[w]hile it is true that [an order under NRS 432B.393(3)(c) may be used] to establish parental fault, there is no requirement in NRS 432B.393(3) that a child welfare agency initiate a termination action or use a 'no reasonable efforts' finding pursuant to NRS 432B.393(3) to establish parental fault in any such action. ... A child welfare agency *may choose* to rely on the other parental fault grounds outlined in NRS128.105(1)(b)." Petition at 18 (italics added). The notion that a child welfare agency would forgo a conclusive presumption of fault or unfitness and instead "choose to rely on other [statutory] parental fault grounds" begs credulity.[10] This Court is "not required to exhibit a naivete from which ordinary citizens are free." *United States v. Stanchich*, 550 F.2d 1294, 1300 (2nd Cir. 1977) (Friendly, J.). As the family court observed, "[a] 'no reasonable efforts' finding [provides] the fault grounds with the Petitioner having to prove

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[10] This case is illustrative. The Agency moved the family court to be relieved of having to make reasonable efforts under NRS 432B.393(3)(c) less than a month after filing an amended petition for hearing. *Compare* PA 17-23 (Amended Petition for Hearing) (filed on September 3, 2020) *with* PA 24-29 (Motion) (filed on September 24, 2020).

by clear and convincing evidence that the parent is actually unfit. It creates an irrebuttable presumption of unfitness and '[a] statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment.'" PA 155 (Order) (quoting *Vlandis v. Kline*, 412 U.S. 441, 446 (1973)) (alteration in the original).[11]

The Agency argues that there is no "constitutional right to 'reasonable efforts.'" Petition at 11-13. But the argument misses the mark; NRS 432B.393(1) creates a statutory right. The statute's use of the word "shall"—stating that absent a legal statutory exception "an agency which provides child welfare services *shall* make reasonable efforts to preserve and reunify the family of a child"—creates an obligation impervious to discretion. In construing statutes, "may" is construed as permissive and "shall" is construed as mandatory unless the statute demands a different construction to carry out the clear intent of the legislature. *Thomas v. State*, 88 Nev. 382, 498 P.2d 1314 (1972). Stated differently, "shall" is presumptively imperative, and

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[11] In contrast, many of the other grounds constituting parental fault "are rebuttable and once established, the burden shifts to the parent to overcome the presumptions." *In re Parental Rights as to A.G.*, 129 Nev. at 133, 295 P.3d at 594 (discussing presumptions).

operates to create a duty rather than confer discretion. See *State Comm'n on Ethics v. JMA/Lucchesi*, 110 Nev. 1, 9-10, 866 P.2d 297, 302 (1994). Under NRS 432B.393(1), in order for a child welfare agency to be excused from providing reasonable efforts to reunify a family, a statutory exception must exist that meets fundamental principles of due process. The family court found NRS 432B.393(3)(c) to be otherwise. *Cf. Stanley v. Illinois*, 405 U.S. at 656-57.

The Agency also asserts that NRS 432B.393(3)(c) "does not infringe on a fundamental right" and offers a constitutional defense of the statute under a less onerous rational relationship standard of review. Petition at 23-24. Yet, the United States Supreme Court has held that a parent's or parents' right to the care and custody of their children is among the oldest of the judicially recognized fundamental liberty interests protected by the Due Process Clauses of the federal and state constitutions. *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."). "The parent-

child relationship is a fundamental liberty interest" protected by the Fourteenth Amendment. A challenge "to a statute [that] infringes on a fundamental right" must be analyzed "under a strict scrutiny standard and the statute will be invalidated unless it is narrowly tailored to serve a compelling state interest." PA 158 (Order) (internal quotations and citations omitted).

The family court rejected the Agency's contention that the statute is narrowly tailored because a separate statute—NRS 432B.590—gives the court discretion to adopt a permanency plan, stating:

> While it is true that NRS 432B.590 affords the Court with discretion regarding permanency planning, it does not logically follow that NRS 432B.393(3)(c) is therefore narrowly tailored to serve a compelling state interest. In fact, NRS 432B.590(1)(b) requires the Court to hold a permanency hearing within 30 days after making a "no reasonable efforts" finding pursuant to NRS 432B.393(3)(c), which essentially "fast-tracks" many dependency cases toward a termination of parental rights. Furthermore, a finding based on NRS 432B.393(3)(c) would allow the court to find that one prong under NRS 128.105(1)(b) has already been met, thus eliminating the need to prove by clear and convincing evidence in a termination of parental rights case that the parent is unfit. The results of a "no reasonable efforts" finding *could potentially be catastrophic*, given that it would speed up a subsequent termination of parental rights proceeding without

> ever giving that parent he opportunity to reunify with their child.

PA 160 (Order) (italics added). And the family court specifically found that NRS 432B.393(3)(c) was not narrowly tailored to serve a compelling state interest:

> NRS 432B.393(3)(c) *is not narrowly tailored* to protect the health and safety of individual children, to ensure that additional services would be futile, or to determine whether reasonable efforts to reunify would cause harm to the specific child at issue. This statute does not consider the individual circumstances of the past termination and fails to allow the court to consider these circumstances in making a decision regarding reasonable efforts to reunify.

Id. and PA 161 ("A narrowly tailored statute provides the court with the discretion to look at the circumstances surrounding the past termination and the efforts the parent is making regarding the current removal to determine if reasonable efforts to reunify are necessary."[12]).

In order for reasonable efforts to be excused under NRS 432B.393(3)(c), the family court should be required to articulate with some specificity the link between the triggering circumstances and the threat to the current or future health and safety of the child. Although

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[12] See footnote 9, *supra*.

the health and safety of children is a compelling state interest, relieving the Agency of its obligation to provide reasonable efforts based solely on a prior termination of parental rights of a sibling without more, does not sufficiently confine the application of the statute to that compelling state interest. Here NRS 432B.393(3)(c) violates the Fourteenth Amendment because it is not narrowly drawn to meet any compelling state interest, does not grant the family court discretion, and instead creates a conclusive presumption of unfitness or parental fault.

The statute is severable

"The severability doctrine obligates the judiciary to uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional provisions. This preference in favor of severability is set forth in NRS 0.020(1), which charges courts with preserving statutes to the extent they can be given effect without the invalid provision or application." *Sierra Pac. Power v. State Dep't of Tax*, 130 Nev. 940, 945, 338 P.3d 1244, 1247 (2014), *cert. denied*, 577 U.S. 1061 (2016) (internal quotations and citation omitted).

NRS 432B.393(1) requires "an agency which provides child welfare services [to] make reasonable efforts to preserve and reunify the

family of a child," except "as otherwise provided in this section." Subsection 3(c) is not the only exception.

NRS 432B.393(3) provides in full:

> 3. An agency which provides child welfare services is not required to make the reasonable efforts required by subsection 1 if the court finds that:
>
> (a) A parent or other person responsible for the child's welfare has:
>
> (1) Committed, aided or abetted in the commission of, or attempted, conspired or solicited to commit murder or voluntary manslaughter;
>
> (2) Caused the abuse or neglect of the child, or of another child of the parent or other person responsible for the child's welfare, which resulted in substantial bodily harm to the abused or neglected child;
>
> (3) Caused the abuse or neglect of the child, a sibling of the child or another child in the household, and the abuse or neglect was so extreme or repetitious as to indicate that any plan to return the child to the home would result in an unacceptable risk to the health or welfare of the child; or
>
> (4) Abandoned the child for 60 or more days, and the identity of the parent of the child is unknown and cannot be ascertained through reasonable efforts.

(b) A parent of the child has, for the previous 6 months, had the ability to contact or communicate with the child and made no more than token efforts to do so;

(c) The parental rights of a parent to a sibling of the child have been terminated by a court order upon any basis other than the execution of a voluntary relinquishment of those rights by a natural parent, and the court order is not currently being appealed;

(d) The child or a sibling of the child was previously removed from the home, adjudicated to have been abused or neglected, returned to the home and subsequently removed from the home as a result of additional abuse or neglect;

(e) The child is less than 1 year of age, the father of the child is not married to the mother of the child and the father of the child:

(1) Has failed within 60 days after learning of the birth of the child, to visit the child, to commence proceedings to establish his paternity of the child or to provide financial support for the child; or

(2) Is entitled to seek custody of the child but fails to do so within 60 days after learning that the child was placed in foster care;

(f) The child was delivered to a provider of emergency services pursuant to NRS 432B.630;

(g) The child, a sibling of the child or another child in the household has been sexually abused or has been subjected to neglect by pervasive

> instances of failure to protect the child from sexual abuse; or
>
> (h) A parent of the child is required to register as a sex offender pursuant to the provisions of chapter 179D of NRS or the provisions of the federal Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. §§ 16901 et seq.

Because subsection 3(c) is not the only exception applicable to subsection 1 upon which a no reasonable efforts finding can be made, *i.e.* the exception clause found in subsection 1 has other section referents, subsection 1 can be given effect even in the absence of subsection 3(c). Accordingly, the Court can uphold the constitutionality of NRS 432B.393 while finding subsection 3(c) unconstitutional because "it is possible to strike only the unconstitutional provision[]," while preserving the rest of the statute, which can be "given effect without the invalid provision or application." *Sierra Pac. Power v. State Dep't of Tax*, 130 Nev. at 945, 338 P.3d at 1247.

Conclusion

The Court should deny the petition as either moot or on the basis that an adequate appellate remedy exits. If the Court elects to entertain the petition, it should find that the family court did not manifestly abuse its discretion and should, on de novo review, find NRS

432B.393(3)(c) unconstitutional and strike the offending language from the statute.

Dated this 30th day of November 2021.

By: *John Reese Petty*
JOHN REESE PETTY
Chief Deputy Public Defender

By: *Jennifer Rains*
JENNIFER RAINS
Chief Deputy Public Defender

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this answer 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 answer has been prepared in a proportionally spaced typeface using Century in 14-point font.

2. I further certify that this answer complies with the page- or type-volume limitations of NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points and contains a total of 4,572 words. NRAP 32(a)(7)(A)(i), (ii).

3. Finally, I hereby certify that I have read this answer, 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 answer complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the answer regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied upon is to be found. I understand that I may be subject to sanctions in the event that the accompanying answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 30th day of November 2021.

/s/ John Reese Petty
JOHN REESE PETTY
Chief Deputy, Nevada State Bar No.10

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 30th day of November 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Erin L. Morgan, Deputy
Washoe County District Attorney's Office

I further certify that I emailed a true and correct copy of the attached document to:

Amy Crowe, Deputy
Washoe County Alternate Public Defender's Office

Jennifer Jeans
Washoe Legal Services

John Reese Petty
John Reese Petty
Washoe County Public Defender's Office