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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I. ROUTING STATEMENT

Pursuant to NRAP 17(a)(10), cases involving NRS Chapter 432B are assigned to the Nevada Supreme Court for decision.

II. STATEMENT OF THE ISSUES FOR REVIEW

The Appellant sufficiently stated the issues for review.

III. STATEMENT OF THE RELIEF SOUGHT

The Appellant sufficiently stated the relief it seeks.

IV. STATEMENT OF THE CASE AND FACTS

On June 27, 2019, in case FV19-00435, the District Court terminated the parental rights of real parties in interest, Porsha C.-S. and Rolando C.-S. as to a sibling of the minor child at issue in this case. PA 1-6. Neither parent appeared at the hearing on the petition to terminate parental rights, so their rights were terminated by default. PA 1. The termination of parental rights order does not indicate whether all notices required by law and court order were given. PA 1-6. Nor does it indicate whether the parents were served personally or by publication. *Id.*

According to the order, Rolando C.-S had no contact with the Washoe County Human Services Agency (Agency) during the case. PA 3. Rolando C.-S alleges that at the time of the termination of parental rights hearing, he was in custody at an U.S. Immigration and Customs Enforcement (ICE) detention facility, received no personal notice of the termination of parental rights hearing, and had no means of appearing for the hearing. PA 62-63.

A little more than a year after the termination of parental rights proceedings, the Agency removed the minor child at issue in the case,

L.C.S., from the parental custody of real parties in interest. PA 13-16. L.C.S. remains in the custody of the Agency pursuant to court order. PA 168-172.

Shortly after taking L.C.S. into protective custody, the Agency filed a Motion Seeking a No Reasonable Efforts Finding Pursuant to NRS 432B.393 and the Adoption and Safe Families Action (Motion), asking the District Court to relieve the Agency of providing reasonable efforts to the parents to reunify with L.C.S. based on the prior termination of parental rights as to L.C.S.'s sibling. PA 24-29. The parents opposed that Motion.[1] PA 53-65. The Hearing Master entered the Master's Findings and Recommendations Regarding Motion Seeking a Finding that the Agency is not Required to Provide Reasonable Efforts (MFR) recommending that (1) the District Court should find NRS 432B.393(3)(c) is unconstitutional and decline to make

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[1]By stipulation, the parties agreed to address the Motion after it was determined that L.S.C. is a child in need of protection from her parents pursuant to NRS 432B.330. Order Affirming MFR 1; PA 141.

the finding sought by the Agency; and (2) counsel for Rolando C.-S. and Porsha C.-S. should provide a copy of any final ruling that NRS 432B.393(3)(c) is unconstitutional to the Office of the Attorney General pursuant to NRS 3.241. PA 84-105.

The Agency filed an Objection to the MFR. PA 106-08. Before the District Court, L.S.C. joined in her parents' position opposing the Agency. In this, she argued that NRS 432B.393(3)(c) violates her right to reunification with her family of origin if safe and causes risk of erroneous deprivations of parental rights. Notice of Joinder to Parents' Brief in Opposition to the Objection of the MFR; PA 139-140. After briefing and oral arguments, the District Court entered an Order Affirming the Master's Findings and Recommendations (Order). PA 109-140; 141-67.

The Agency now petitions this Court for a writ of mandamus directing the District Court to 1) vacate the Order Affirming the MFR; and 2) grant the 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. This Court should deny the petition.

V. SUMMARY OF THE LEGAL ARGUMENT

If this Court entertains the writ, this Court should affirm the District Court's order. NRS 432B.393(3)(c) is unconstitutional as it violates a parent's right to due process which is protected by the Fourteenth Amendment. The statute is not narrowly tailored as it does not grant the court discretion to determine whether reasonable efforts should be required on a case-by-case basis and based upon specific evidence. Rather the statute creates an irrebuttable presumption that a parent is forever unfit based on a prior involuntary termination and should not receive reasonable efforts toward reunification under any circumstances.

VI. LEGAL ARGUMENT

A. Introduction

NRS 432B.393 requires the Agency to make reasonable efforts to reunify the family of a child and to make it possible for the safe return of the child to the home. NRS 432B.393(3) sets forth several exceptions to the requirement to provide reasonable efforts to reunify.

At issue here, NRS 432B.393(3)(c) provides:

> 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:
>
> (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;
>
> .

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."

NRS 432B.393(3) was enacted in response to the federal Adoption and Safe Families Act of 1997 (ASFA). Pub. L. No. 105-89, 111 Stat. 2114. When ASFA was passed in 1997, it created an exception to the requirement to provide reasonable efforts to reunify if the court finds that a parent has been convicted of certain felonies, if the parent has previously had parental rights to another child involuntarily terminated or if any aggravated circumstances as specified by state law apply. These ASFA requirements were intended to protect the health and safety of children, and in passing the law Congress sought to "shift

the pendulum of the child protection system away from what many saw as an unreasonable emphasis on family preservation and towards permanency, and thus health and safety, for the children." Kathleen S. Bean, *Aggravated Circumstances, Reasonable Efforts, and ASFA*, 29 B.C. THIRD WORLD L.J. 223, 224 (2009).

The conditions necessary to invoke NRS 432B.393(3)(c) are uncontested here: (1) the child, L.S.C., was removed from the care and custody of her parents, the Real Parties in Interest Rolando C.-S. and Porsha C.-S., on August 25, 2020, and is in the legal and physical custody of the Agency; (2) the parental rights of Rolando C.-S. and Porsha C.-S. were previously involuntarily terminated as to L. S. C.'s sibling on June 27, 2019, in a separate family case; and (3) the order terminating the parental rights as to that sibling is not currently under appeal. Order Affirming MFR; PA 143.

Given these facts, the Agency sought to be relieved of having to make reasonable efforts to reunify L.S.C.'s with her parents. *See* Motion; PA 24-36. The District Court did not disagree with the Agency's reading of the statute. PA 146. The District 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." Order Affirming MFR; PA 165. The Agency seeks a writ of mandamus from this Court on that issue.

B. Standard 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).

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

(2000) (citing *Round Hill General Imp. Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981)). This 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).

C. NRS 432B.393(3)(c) Infringes on Constitutional Rights

The Due Process Clause of Fourteenth Amendment places certain constraints upon the exercise of governmental power that serves to deprive an individual of a life, liberty, or property interest. The United State Supreme Court has held that a parent's 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). "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." *Santosky v. Kramer*, 455 U.S.745, 753 (1982).

Ceasing rehabilitation and reunification efforts affects the parents' liberty interest in their children and places the parents just steps away from termination of parental rights. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures. *Santosky v. Kramer*, 455 U.S. 745, 75-54 (1982). If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural those resisting state intervention in ongoing family affairs. *Id.*

While a finding pursuant to NRS 432B.393(3)(c) may not preclude a parent from investing in services themselves, the majority of parents whose parental rights are affected pursuant to NRS Chapter 432B are unable to afford the services that are required to reunify. In this particular case, the Hearing Master determined the parents were

indigent at the protective custody hearing for purposes of appointing counsel. Master's Recommendation and Order for Protective Custody; PA 15-16.

Moreover, NRS 432B.393(3)(c) fast-tracks a case toward a termination of parental rights. 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). NRS 432B.590(1)(b) affords very little time for parents to access services and demonstrate any necessary behavioral modification prior to an expedited termination proceeding. Here, the Agency took the child into protective custody on August 25, 2020, and filed the Motion seeking a no reasonable efforts finding less than a month later on September 24, 2020. PA 13-14; PA 24-29.

The application of NRS 432B.393(3)(c) in a termination of parental rights proceeding pursuant to NRS Chapter 128 cannot be overlooked. In terminating parental rights, the State seeks "not merely to infringe [a] fundamental liberty interest, but to end it." *Santosky v. Kramer*, 455 U.S. 745, 759 (1982). The United States Supreme Court has set forth three basic constitutional requirements before the State

may terminate the rights of a parent: (1) that the State must prove that a parent is actually unfit; (2) that unfitness must be proven by clear and convincing evidence; and (3) that such a decision cannot be based solely on a finding that termination would be in the child's best interests. *See Stanley v. Illinois*, 405 U.S. 645 (1972); *Santosky v. Kramer,* 455 U.S. 745 (1982); *Quillon Walcott,* 434 U.S. 246 (1978).

Yet, NRS 432B.393(3) as applied in a termination of parental rights proceeding violates all three requirements. NRS 128.105(1) states as follows:

> The primary consideration in any proceeding to terminate parental rights must be whether the best interests of the child will be served by the termination. An order of the 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 include a finding that:
> (a) The best interests of the child would be served by the termination of parental rights; and
> (b) **The conduct of the parent or parents was the basis for a finding made pursuant to subsection 3 of NRS 432B.393 or demonstrated at least one of the following**:
> (. . .)

Emphasis added. Accordingly, if a court makes a finding in a dependency case that the Agency does not need to provide reasonable

efforts to reunify pursuant to NRS 432B.393(3)(c), then that finding would suffice for the fault grounds in a termination of parental rights proceeding. The court presumes unfitness with no assessment or finding of the parent's actual fitness by clear and convincing evidence. As such, the sole issue before the court in a termination of parental rights proceeding is the best interests of the child violating *Stanley, Santosky,* and *Quillon.* As noted by the Hearing Master, a finding within a 432B action that almost instantly allows a court in a 128 action to terminate a parent's rights based on a prior termination of parental rights, rather than based on a parent's actual unfitness, is not constitutional. MFR; PA 101-02.

D. NRS 432B.393(3)(c) Violates a Parent's Right to Procedural Due Process

Because parents have liberty interest in the custody of their children, procedural due process requires that the State provide notice and a hearing. *See Santosky v. Kramer*, 455 U.S. 745 (1982). "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394, (1914) (cited in *Goldberg*

v. Kelly, 397 U.S. 254, 263-271 (1970). "The extent to which procedural due process must be afforded to the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' (*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168, (1951) (Frankfurter, J., concurring) and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication." *Goldberg* at 262-263. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Id.* at 269.

As noted by the District Court, NRS 432B.393(3)(c) does not afford a parent the opportunity to be heard if his or her parental rights have been previously terminated in a past proceeding. Order 21-22; PA 161-62. The statute bypasses a parent's right to procedural due process by not allowing him or her to present evidence of the circumstances surrounding the past proceeding or evidence of change. Notably, here, Mr. Rolando C.-S was afforded no opportunity to show that he received no personal notice of the termination of parental rights proceeding and

no ability to appear at the proceeding as he was in an ICE detention facility.

When a protected right is implicated this Court must balance three factors: (1) the private interest that will be affected by the deprivation of such interest through the procedures used; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirement would entail. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

As has been discussed *supra*, the interest of parents in the care, custody and control of their children is perhaps the oldest of the fundamental liberty interests recognized by the United States Supreme Court.

The risk of erroneous deprivation is great. As noted by the Hearing Master, the statute "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 [;] fails to consider 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. [2] MFR; PA

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[2] The Hearing Masted noted that Nevada has recognized that parents

147-48. While past conduct may be indicative of current conduct, a parent's "past actions alone are not sufficient to brand a parent unfit for life." *In re Kelly S.*, 715 A.2d 1283, 1287 (R.I. 1998).

As noted by the District Court, compelling state interests can be served without violating a parent's right to due process by affording the court to the discretion to determine whether reasonable efforts must be made on a case-by-case basis. PA 164.

In *Stanley v. Illinois*, the United States Supreme Court rejected a statutory scheme in which the children of unwed fathers, upon the death of the mother, were declared to be dependents without first having a hearing on the fitness of the father. 405 U.S. 645 (1975). The Court noted "[p]rocedure 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

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can and do change as part of the restoration of parental rights laws set forth under NRS 128.170-190. MFR 13; PA 96.

needlessly risks running roughshod over the important interest of both parent and child. It therefore cannot stand." *Id.* at 656-57. The *Stanley* Court further found "[t]he State's interest in caring for Stanley's children is *de minimis* if Stanley is shown to be a fit father. [The State] insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family." *Id.* at 657-58. *Stanley* sets forth the constitutional mandate that courts determine the actual fitness of parents prior to intervening in the parent-child relationship. Like the statute at issue in *Stanley*, NRS 432B.393(3)(c) presumes parents with prior terminations are always and forever unfit with no further factual findings or analysis. "A statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment." *Vlandis v. Kline* 412 U.S. 441, 446 (1973)(quoting *Heinder v. Donnan*, 285 U.S. 312, 329 (1932)).

Other state courts have upheld the constitutionality of their "no reasonable efforts" statute because the statute was discretionary and

allowed the court to consider the totality of the circumstances before making such a finding. *In re Heather C.,*, the Maine court determined that its no reasonable efforts statute was constitutional because it is discretionary. *In re Heather C.*, 751 A.2d 448 (ME 2000). "The statute is written to allow, but does not mandate, that the Department be relieved of its responsibilities. Where the court is accorded discretion by the Legislature, it must exercise that discretion in a reasonable manner." *Id.* at 455.

E. NRS 432B.393(3)(c) Violates Substantive Due Process

The Nevada Supreme Court "analyzes substantive due process challenges to statutes impinging on fundamental constitutional rights under a strict scrutiny standard; under this standard, the statute in question must be narrowly tailored to serve a compelling state interest." *In re Parental Rights as to D.R.H.,* 120 Nev. 422, 427, 92 P.3d 1230, 1233 (2004). A statute is narrowly tailored if it uses "the least restrictive means consistent with attaining its goal." *Id.*

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. As the District Court noted, the statute presumes that a parent whose parental rights were terminated for an unknown reason in the past is unfit as a parent for life and should not receive reasonable efforts toward reunification under any circumstances; however, there are other scenarios, as the Hearing Master pointed out, where reasonable efforts may indeed result in a successful and efficient reunification. Order 21, PA 161.

In fact, the statute makes it possible that courts will not only unconstitutionally terminate the rights of fit parents based solely on their past transgressions but also undermines the State's interest in keeping children with fit parents. Vivek S. Sankara, *Child Welfare's Scarlet Letter: How A Prior Termination of Parental Rights Can Permanently Brand A Parent As Unfit*, 41 N.Y.U. Rev. L. & Soc. Change 685, 705 (2017).

The District Court noted that the majority of state statutes reviewed by it allows the court discretion in making a finding pursuant to their "no reasonable efforts statute." Order 12; PA 152. *See, e.g.* OR. REV. STAT. § 419B.502(6) (2015) requiring "the conditions giving rise to the previous action have not been ameliorated." *See, e.g.* KY. REV. STAT. ANN. § 625.090(2)(h)(3) (LexisNexis 2014) requiring "the conditions or factors which were the basis for the previous termination finding have not been corrected." *See, e.g.* IOWA CODE ANN. § 232.116(1)(d)(2) (West 2014 & 2016 Supp.) requiring "[s]ubsequent to the child in need of assistance adjudication, the parents were offered or received services to correct the circumstance which led to the adjudication, and the circumstance continues to exist despite the offer or receive of services." In doing so, these state statutes are narrowly tailored to determine whether bypassing reasonable efforts is truly warranted.

F. Presumption of Constitutionality Does Not Apply

The Agency argues that the District Court did not apply the presumption that statutes are constitutional. However, this

presumption only applies when the statute does not infringe upon a fundamental right. This Court has stated that if the statute infringes on a fundamental right, then it must analyze the statute under strict scrutiny. *In re Parental Rights of J.L.N.*, 118 Nev. 621, 625; 55 P.3d 955, 958 (2002), citing *Troxel v. Granville*, 530 U.S. 57, 66 (2000)(plurality opinion) (citing *Stanley v. Illinois*, 405 U.S. 645, 6551 (1972)). In circumstances such as these, the burden is on the Agency to show that the statute in question is narrowly tailored to serve a compelling state interest.

G. ASFA Did Not Intend to Preclude Reasonable Efforts in all Cases

ASFA did not intend to preclude reasonable efforts in all cases where there was a prior involuntary termination. Voices for Adoption, a group represented by Sue Badeau, called upon Congress to include "termination of parental rights of a sibling as one of the exceptions [to the reasonable efforts requirement], with the provision applying to a parent whose rights have been terminated and who will not respond to rehabilitative services and a court finds it unlikely that further services

would result in reunification." *Child Welfare Reform: Hearing on S. 511, S. 742, and H.R. 867 Before the Subcomm. on Social Security and Family Policy of the S. Comm. on Finance*, 105th Cong. 40 (1997) (statement of Susan Badeau, Rep., Voice for Adoption). Thus, the Voices for Adoption group recognized that it was important to include that this exception would only apply when it was clear that reunification efforts would be futile.

Congress intended states to be able to deny reasonable efforts only with evidence of an act or circumstance that was meant to inflict or did inflict a very serious harm or detriment on a child. Kathleen S. Bean, Aggravated Circumstances, Reasonable Efforts, and ASFA, 29 B.C. Third World L.J. 223, 252 (2009). "That ASFA does not require a petition for the child before the court based on the parent already having an involuntary TPR with another child recognizes how important the circumstances of any prior terminations can be." *Id.* at 262.

The Agency argues the District Court failed to consider the language of ASFA as set forth in 42 U.S.C. 671(a)(15)(D)(iii). Any failure is on the part of the Agency which neither cited nor addressed

this statutory provision in its Motion, Reply to the Opposition to Motion, or in its Objection to the MFR. PA 24-29; PA 79-83; PA 128-38. At most, in its Brief in Support of Objection, the Agency cited to a code of federal regulation which does not exist, leaving the District Court to speculate as to the correct citation.[3] Order 5-6; PA 146-47.

Section 478 of 42 U.S.C. 678, states "nothing in this part shall be construed as precluding State courts from exercising their discretion to protect the health and safety of children in individual cases, including cases other than those described in section 471(a)(15)(D)." ASFA, as written, sets out the process the agency is required to follow to be relieved of providing reasonable efforts by the phrase "is not required" versus "shall not." *Making Sense of the ASFA Regulations, A Roadmap for Effective Implementation*, American Bar Association, Chapter 7, p. 52. ASFA is not intended to govern the court, but rather to govern the

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[3]In its Brief in Support of the Objection, the Agency cited to a Code of Federal Regulation that does not exist: 45 C.F.R. 1361.21(b)(3)(iii). PA 128-138.

agencies, their activities, and what judicial orders they need to obtain in order for a child to be eligible for Title IV-B and Title IV-E funding. *Id.*

Nor is Nevada's statute consistent with the Code of Federal Regulations. 45 C.F.R. 1356.21(b)(3)(iii) provides as follows:

> Reasonable efforts to prevent a child's removal from home or to reunify the child and family are not required **if the title IV-E agency obtains a judicial determination that such efforts are not required** because:
> (. . .)
> (iii) The parental rights of the parent with respect to a sibling have been terminated involuntarily. (Emphasis added).

NRS 432B.393(3)(c) states as follows:

> (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**:
> (. . .)
> (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. (Emphasis added).

As noted by the District Court the Nevada statute and the federal regulation are similar in that they both provide for certain circumstances in which reasonable efforts are not required, the two are

not the same because the Nevada statute is mandatory while 45 C.F.R. 1356.21(b)(3)(iii) is discretionary. Order 7; PA 147. The difference between allowing a court the discretion to make a "no reasonable efforts" finding and a non-discretionary statute requiring a "no reasonable efforts" finding is the difference between a statute which affords parties due process and one that does not.

Moreover, the question concerning the best interests of the child has historically been within the jurisdiction of the court. One of the driving motivations of AFSA was to again get the courts involved in the area of child welfare. ASFA empowered courts to oversee the efforts of child protective divisions across the country.

H. NRS 432B.393(3)(c) Runs Counter to the Statute Read as a Whole

That NRS 432B.393(3)(c) mandates the court to relieve the agency of reasonable efforts also runs counter to the statute read as a whole. Notably, NRS 432B.393(7) provides that in making a determination as to whether reasonable efforts should in fact be suspended, a court must make such a determination (1) on a case-by-case basis, (2) base its determination upon specific evidence, and (3) must expressly state its

determination in its order. *See* NRS 432B.393(7)(a)-(c). A case-by-case analysis based on specific evidence is unnecessary if the sole issue before the court is whether the agency submitted a valid order terminating the parental rights of the parent at issue involuntarily. As noted by the District Court, the Agency would be able to legally object to anything coming in at a hearing, other than proof of the order and any evidence regarding whether or not the order is under appeal. Order Affirming MFR; PA 156-57.

VII. CONCLUSION

The Court should find that the District 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 22nd day of December 2021.

By: *Amy Crowe*
AMY CROWE
Deputy Alternate 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 4,880 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 22nd day of December 2021.

/s/ Amy Crowe
Amy Crowe, Nevada State Bar No. 9537
Washoe County Deputy Alternate Public Defender

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 22nd day of December 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:

Jennifer Rains
Washoe County Public Defender's Office

John Petty
Washoe County Public Defender's Office

Jennifer Jeans
Washoe Legal Services

/s/Amy Crowe
Amy Crowe
Washoe County Alternate Public Defender's Office