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,
HOPE R.; CHRISTOPHER R.; AND Z. R., A MINOR CHILD,
Real Parties in Interest.

No. 83524

ANSWER AGAINST ISSUANCE OF REQUESTED WRIT

JOHN L. ARRASCADA
Washoe County Public Defender
Nevada State Bar Number 4517
JOHN REESE PETTY
Chief Deputy Public Defender
Nevada State Bar Number 10
jpetty@washoecounty.gov

JENNIFER RAINS
Chief Deputy Public Defender
Nevada State Bar Number 10425
CHRISTINA CHIANG
Deputy Public Defender
Nevada State Bar Number 14982
350 South Center Street, 5th Floor
Reno, Nevada 89501
(775) 337-4827
jrains@washoecounty.gov
cchiang@washoecounty.gov

Attorneys for Hope R., Real Party in Interest

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

NEVADA RULES OF APPELLATE PROCEDURE

MISCELLANEOUS

ANSWER AGAINST ISSUANCE OF REQUESTED WRIT

Introduction

A.

At a hearing held on August 19, 2021, which was set for the purpose of conducting a settlement conference in this matter, the parties could not reach an agreement. PA 30-34.[1] The family court set a mediation appointment to be held prior to trial, *Id.* at 34, 40-41, and then observed that "prior to the COVID 19 pandemic" Hope R. and Christopher R. "were visiting Zelda [their daughter] consistently on a frequency of three times a week. Then due to the COVID 19 pandemic, visits, as we know in all cases, were pulled back." *Id.* at 34-35. Continuing, the court noted that when in-person visitations were reinstated in this matter, they were "scheduled at a frequency of one time per week which [Hope R. and Christopher R.] were attending." *Id.* 35. The court identified two other past "barriers to increasing visitation" but noted that both of those had been resolved.[2] The court then added,

---

[1] "PA" stands for Petitioner's Appendix, which has been filed in this matter. Page references are to the sequential numbering system contained in the Appendix. In this Answer the Petitioner, Washoe County Human Services Agency, is referred to as "the Agency."

[2] One barrier involved parenting instruction from Early Head Start and

> ...and my understanding is that parents' counsel have requested an increase in visitation so that [the parents] can demonstrate a bond to Zelda so that they are able to mount a defense which they are constitutionally entitled to do, in a Termination of Parental Rights action, and that that request to increase visitation from one time per week has been denied by the [Agency.]

Id. 35. The court indicated its inclination to restore the previous visitation schedule because (1) "we're not talking about a situation where parents were not visiting continuously," (2) when they had visitation set for three times a week "they were attending their visits," (3) this was not a "no call, no show" situation, and (4) visitation was not "curtailed due to the fact that they were not availing themselves of those visits." *Id.* at 36. The Agency's attorney acknowledged that "[t]he visits and personal visits were curtailed due to the COVID 19 pandemic, yes." *Id.*

In light of these facts the court ordered that "visitation be scheduled at a frequency of three times a week *which is what it was before the pandemic* and the parents were attending those visits." *Id.* at 36 (italics added). The court left to the Agency and the parents to

---

the other involved suitable housing. PA 35.

arrange "how that visitation [was] going to occur." *Id.* at 37-38. The court recognized that as "an issue of fundamental fairness,"

> [the parents] need to be able to have more of an opportunity, more than one hour a week which is nominal at best, to be able to visit Zelda and demonstrate if they are able to parenting ability [sic] and to put into action what they've been learning by Ms. Herrick [of Early Head Start].

Id. at 37.

The Agency's attorney voiced her objections; namely, "[t]here is no statutory authority in Chapter 128 of the NRS for this court to enter visitation orders," *Id* at 37, and "visitation [is] more appropriately addressed in the 432-B case where the court does have jurisdiction to enter orders regarding visitation." *Id.* at 38. The court rejected the Agency's argument, reasoning:

> So in terms of the Termination of Parental Rights action, the Agency holds the lock and key to the parents' access to the child. One of the prongs of a termination of parental rights case is bests interests. Parents are expected to present evidence at trial in order to begin to be able to rebut presumptions that it's in the child's best interest to terminate parental rights. They have a relationship with the child. That they can parent the child and when they're only allowed access to their child at a frequency of one hour a week and especially in a case like this where again, not an issue of parents not taking advantage or availing

> themselves of the visitation that was offered by the Agency, that simply due to a pandemic situation which was outside of their control and then due to the fact that the plan changed to termination. They've got to be able to have increased access to Zelda to be able to present evidence and testimony at trial. So I am going to issue that order.

Id. at 38-39 (paragraph break omitted).

On August 25, 2021, the court filed its Order After Settlement Conference; Order Setting Mediation and In-Person Trial; Scheduling Order (Order) PA 48-52. As relevant here, the Order states: "[The parents'] visitation with Zelda shall occur at a frequency of three times per week. [The Agency] and its counsel, [the parents] and their counsel, and the children's [sic] counsel shall meet a soon as practicable to set the new dates and times for visitation." *Id.* at 49.

B.

On September 17, 2021, the Agency filed the instant Petition for Writ of Mandamus or Prohibition (Petition) renewing its district court argument that the family court's visitation order is not authorized under Chapter 128 but is more properly allowed by NRS 432B.550(3)(a). Petition at 5-8. On October 14, 2021, this Court filed an Order Directing Answer, which directed the Real Parties in Interest to "file and serve an

answer ... against issuance of the requested writ" as well as "address the propriety of writ relief, in addition to addressing the merits of the petition."

Routing Statement

Real Party in Interest Hope R. agrees with the Agency that the Nevada Supreme Court should keep and decide this writ petition under NRAP 17(a)(10) (specifically assigning cases "involving the termination of parental rights" to the Supreme Court).

MEMORANDUM OF POINTS AND AUTHORITIES AGAINST ISSUANCE OF THE REQUESTED WRIT

Propriety of Writ Relief

Prohibition

"A writ of prohibition may issue to arrest the proceedings of a district court exercising its judicial functions when such proceedings are in excess of the jurisdiction of the district court." *Washoe County District Attorney's Office v. Second Judicial Dist. Court*, 136 Nev. 590, 592, 473 P.3d 1039, 1041 (2020) (internal quotations, citation and footnote omitted). The requested writ of prohibition is inapplicable here because, as will be discussed below, the family court had jurisdiction to hear, consider, and decide the visitation question. See *Goicoechea v.*

Fourth Judicial Dist. Court, 96 Nev. 287, 289, 607 P.2d 1140, 1141 (1980) (a writ of prohibition will not lie "if the court sought to be restrained had jurisdiction to hear and determine the matter under consideration."). Even if the district court erred—and it did not err—a writ of prohibition "does not serve to correct errors; rather its purpose is to prevent courts from transcending the limits of their jurisdiction in the exercise of judicial power." *Mineral County v. State, Dep't. of Conserv.*, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001) (footnote omitted).

Mandamus

Because the Agency does not assert that the family court's decision below implicates issues of statewide importance or is of a kind to warrant "advisory mandamus", see *Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 407 P.3d 702 (2013), its request for mandamus relief must be viewed under traditional guidelines.

In *Walker v. Second Judicial Dist. Court*, 136 Nev. Adv. Op. 80, 476 P.3d 1194 (2020), this Court identified the "chief requisites of a petition to warrant the issuance of a [traditional] writ of mandamus" as:

> (1) The petitioner must show a legal right to have the act done which is sought by the writ; (2) it must appear that the act which is to be enforced by the mandate is that which it is the plain legal

> duty of the respondent to perform, without discretion on his part either to do or refuse; (3) that the writ will be availing as a remedy, and that the petitioner has no other plain, speedy, and adequate remedy.

Id. at 1196 (alteration in the original, citations omitted). Where this Court "is asked to direct its traditional powers of mandamus at a lower court or judicial officer, there is significant overlap between the first and second requirements. That is, the question of whether a petitioner has a legal right to any particular action by the lower court turns, in part, on whether the action at issue is one typically entrusted to that court's discretion, and whether that court has exercised its discretion appropriately." *Id.* (citing *Martinez Guzman v. Second Judicial Dist. Court*, 136 Nev. 103, 105, 460 P.3d 443, 446 (2020) and Thomas Carl Spelling, *A Treatise on Injunctions and Other Extraordinary Remedies* 1173, 1230 (2d ed. 1901) ("noting that '[i]n order to entitle a party to mandamus to compel action by the judge of an inferior court ... it is incumbent upon him to show that it is clearly the duty of such judge to do the act sought to be coerced'"). Finally, "[w]here a district court *is* entrusted with discretion on an issue, the petitioner's burden to demonstrate *a clear legal right* to a particular course of action by that

court is substantial; [this Court] can issue traditional mandamus only where the lower court has *manifestly* abused that discretion or acted arbitrarily or capriciously." *Id.* (second italics added, citations omitted).[3]

As this Court explained, "traditional mandamus relief does not lie where a discretionary lower court decision 'result[s] from a mere error in judgment'; instead, mandamus is available only where 'the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias, or ill will.'" *Id.* at 1197 (citations omitted).

Discussion

A family court has "broad discretionary power in determining child custody, including visitation." *Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015) (internal quotations and citations omitted). Here the Agency complains that the family court's visitation order—which mirrored a previously existing visitation order that had been

---

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

interrupted by the COVID-19 pandemic and which essentially returned the parents and the child to their *status quo ante*—was an abuse of discretion because "[t]here is no authority in NRS Chapter 128, or otherwise, permitting the juvenile court to enter such an order." Petition at 5. But NRS 128.005(1) contains the Legislature's declaration that "the *preservation and strengthening of family life is a part of the public policy of this State*." Appropriate visitation orders conform to this directive as they may lead to "the preservation and strengthening of [the parents' and child's] family life." And notably, there is nothing in Chapter 128 that prevents, precludes, or prohibits a family court from entering parent-child visitation orders where appropriate in a termination action. That is, Chapter 128 does not contain any language limiting a court's power to enter a parent-child visitation order in an appropriate circumstance. In fact, NRS 128.107(3)(b) requires a court, in a termination action, to consider "[t]he maintenance of regular visitation or other contact with the child which was designed and carried out in a plan to reunite the child with the parent or parents." Because the parents' ability to demonstrate compliance with visitation plans is a factor that the family court can (must) consider, it stands to

reason that the court can enter appropriate visitation orders in addition to or as a continuation of a prior visitation order.

Additionally, a "judge sitting in the family division is a district court judge who retains his or her judicial powers derived from the Constitution to dispose of justiciable controversies." *Landreth v. Malik*, 127 Nev. 175, 187-88, 251 P.2d 163, 171 (2011). Because all judges "possess inherent power, for example, of equity and of control over the exercise of their jurisdiction," *Halverson v. Hardcastle*, 123 Nev. 245, 270, 163 P.3d 428, 446 (2007) (internal quotations and footnote omitted), every family court judge has the inherent power to enter appropriate parent-child visitation orders in the cases before them.[4]

The family court below clearly and thoughtfully expressed its reasons for returning the parents and child to the previously existing

---

[4] The Agency insists that a family court can only enter visitation orders under NRS 432B.550(3)(a), which recognizes that a parent "retains the right to consent to adoption, to determine the child's religious affiliation and to reasonable visitation" when the child has been found to be "in need of protection" and the child "is placed other than with a parent." But this statute does not purport to be an exclusive visitation statute and it is not cross-referenced by Chapter 128. Additionally, the language in NRS 432B.550(3)(a) is not solely directed at "visitation" but encompasses "adoption" and preferred "religious affiliation." Clearly, the language in this statute serves to legislatively honor a non-custodial parent's rights and continuing role (albeit somewhat constrained) in his or her child or children.

visitation schedule: (1) "we're not talking about a situation where parents were not visiting continuously," (2) when they had visitation set for three times a week "they were attending their visits," (3) this was not a "no call, no show" situation, and (4) visitation was not "curtailed due to the fact that they were not availing themselves of those visits." Stated differently, the court found that the parents were not at fault. The court also based its decision on notions of "fundamental fairness" noting that the parents needed "to be able to have more of an opportunity, more than one hour a week which is nominal at best, to be able to visit Zelda and demonstrate if they are able to parenting ability." Not surprisingly, the court found this pragmatic reality to be true: "the Agency *holds the lock and key* to the parents' access to the child."[5]

The family court's reasoning and conclusions, which are based on the record, are the antitheses of arbitrary or capricious action, and they cannot be characterized as the product of either "partiality, prejudice, bias or ill will." *Walker v. Second Judicial Dist. Court*, 476 P.3d at 1197

[5] Indeed, the fact that the Agency is fighting the court's *status quo ante* visitation order here underscores the family court's salient observation on the power disparity between the Agency and the parents.

(citation omitted). This Court should defer to the family court's factual findings as they are not clearly erroneous and they are supported by substantial evidence. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009); *State ex rel. Cannizzaro v. First Judicial Dist. Court*, 136 Nev. 315, 321, 466 P.3d 529, 535 (2020) (Silver, J., and Pickering, J., dissenting) (in a writ action noting that "this court defers to the district court and will not intercede except when clear error appears") (*citing Ogawa*).

CONCLUSION

None of the three requisites of a petition to warrant the issuance of a traditional writ of mandamus are present here.

First, the Agency has not established a clear legal right to prevent the family court from exercising judicial discretion to reinstate a previously existing visitation schedule. At best the Agency asserts that the current visitation order "impedes" the ability of the parties to address visitation in the dependency action because the "dependency court may be required to enter an inconsistent order." Petition at 8. But that claim fails for two reasons: First, even if true, the Agency fails to identify how it would suffer a legal injury by an "inconsistent order."

Presumably, that order would favor the Agency. Second and more importantly, in Nevada inconsistent court orders on the same subject matter cannot legally exist. A second or subsequent court cannot legally enter an order that is "inconsistent" with terms of an existing court order. See *Rohlfing v. Second Judicial Dist. Court*, 106 Nev. 902, 906, 803 P.2d 659, 662 (1990) ("The district courts of this state have equal and coextensive jurisdiction; therefore, the various district courts lack jurisdiction to review the acts of other district courts."); *State Engineer v. Sustacha*, 108 Nev. 223, 226, 826 P.2d 959, 961 (1992) ("one district court generally cannot set aside another district court's order.").

Second, because the family court has discretion to enter visitation orders and because this order was neither arbitrary nor capricious nor a manifest abuse of discretion, the Agency fails to demonstrate what plain legal duty the family court failed to or refused to do.

Finally third, because the Agency can point to no actual legal injury it suffers by the visitation order—as opposed to a general dissatisfaction with the family court's visitation order—and cannot establish an abuse of discretion, let alone a manifest abuse of discretion

on the part of the family court, it is entitle to no legal relief or remedy. Because it is not entitled to a remedy a writ of mandamus is unavailing.

Accordingly, this Court should deny the Agency's petition for writ of mandamus.

Dated this 21st day of October 2021.

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

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

By: *Christina Chiang*
CHRISTINA CHIANG
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 3,065 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 21st day of October 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 21st day of October 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:

Benjamin Pearce, Deputy
Washoe County Alternate Public Defender's Office

Drew Bradley,
Washoe Legal Services

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