IN THE SUPREME COURT OF THE STATE OF NEVADA

WASHOE COUNTY HUMAN SERVICES AGENCY,

Petitioner,

v.

THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, AND THE HONORABLE PAIGE DOLLINGER,

Respondents, and

HOPE R.,
CHRISTOPHER R., and Z.R.,
minor child,
Real Parties In Interest.

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Case No. 83524

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

I. INTRODUCTION

Petitioner, Washoe County Human Services Agency ("WCHSA"), met its burden of demonstrating that the extraordinary remedy of mandamus and prohibition is warranted. The district court acted arbitrarily and capriciously, misapplied the law and acted without and in excess of its jurisdiction when it entered a *sua sponte* visitation order in the termination of parental rights action pursuant to NRS Chapter 128. There is no authority, statutory or otherwise, that permits the district court to enter a visitation order in the termination of parental rights action, especially a *sua sponte* visitation order made for the sole purpose of assisting parties in creating evidence for a bench trial.

Real Parties in Interest, Hope R. and Christopher R., fail to provide any authority, statutory or otherwise, to refute this argument. Instead, Hope R. and Christopher R. seemingly suggest that this Court break new legal ground and permit a family court to enter custody and visitation orders in an NRS Chapter 128 action without any express statutory authority to do so.

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II. LEGAL ARGUMENT

A. The District Court Did Not Have Authority or Jurisdiction to Enter the Visitation Order.

WCHSA has met its burden of demonstrating that the extraordinary relief of mandamus or prohibition is warranted. The district court acted arbitrarily and capriciously, misapplied the law and acted without and in excess of its jurisdiction when it entered a *sua sponte* visitation order in a termination of parental rights action pursuant to NRS Chapter 128. *Walker v. Second Judicial Dist. Court in & for County of Washoe*, 136 Nev. Adv. Op. 80, 476 P.3d 1194, 1197 (2020); *Club Vista Fin. Servs. v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012); *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011).

Hope R. and Christopher R. fail to cite to any statutory authority in NRS Chapter 128 which provides the district court express authority to enter a visitation order in a termination of parental rights action pursuant to NRS Chapter 128, especially a *sua sponte* visitation order. *See generally Answer Against Issuance of Writ* ("Answer"); *Real Party in Interest Christopher R.'s Joinde*r *to Answering Brief* ("Joinder"). Hope R. and Christopher R. instead cite to NRS 128.005(1), which contains the "Legislature's declaration that 'the preservation and strengthening of

family life is part of the public policy of this State.'" *Answer* at 10.[1] They also cite to NRS 128.107(3)(b), which requires the district court to consider "[t]he maintenance of regulation visitation" in determining whether to terminate parental rights. However, neither statute relied on by Hope R. and Christopher R., nor any other statute in NRS Chapter 128, provides the district court express authority to enter a visitation order in a termination of parental rights action brought under NRS Chapter 128.

Hope R. and Christopher R. further argue that "[a] family court has broad discretionary power in determining custody, including visitation," quoting *Davis v. Ewalefo*, 131 Nev. 445, 352 P.3d 1139 (2015). *Answer* at 5 (internal quotations omitted). However, as discussed by Real Party in Interest Z.R., *Davis* is readily distinguishable from the instant action. *See Answer in Support of Issuance of Requested Writ* ("Answer in Support") at 5. In *Davis*, this Court examined a "child custody decree" in a divorce proceeding between two parents in which express statutory authority permitted the family court to enter custody and visitation orders. 131 Nev. 446. Specifically, this Court examined whether a family court could

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[1] It should be noted that termination of parental rights actions have the "dominant purpose of serving the best interests of the child." NRS 128.090(2). As indicated in NRS 128.005(2)(c), the Legislature finds that "[t]he continuing needs of a child for proper physical, mental and emotional growth are the decisive considerations in proceedings for the termination of parental rights."

impose travel and visitation restrictions on a parent in a dispute between two parents. *Id.*

Here, the district court entered a *sua sponte* visitation order in a termination of parental rights action brought by a child welfare agency pursuant to NRS Chapter 128, not a custody dispute between two parents. PA 036-39, 049. As Z.R. indicates, unlike a divorce proceeding, there is no similar statutory authority in NRS Chapter 128 that permits the district court to enter affirmative custody and visitation orders. *See Answer in Support* at 5; *see also* NRS Chapter 128, *generally*. The only "custody" determination expressly permitted in NRS Chapter 128 is "judicially depriving the parent…of custody and control of" the child at issue, and "declaring the child to be free from such custody and control." NRS 128.110(1).

Additionally, in *Davis*, this Court did not extend a family court's discretionary power to include entering affirmative custody and visitation orders in a termination of parental rights action pursuant to NRS Chapter 128. *See* 131 Nev. 446. There are several Nevada cases that cite to *Davis,* but none of those cases examine or apply the holding relied on by Hope R. and Christopher R. to a termination of parental rights action pursuant to NRS Chapter 128. *See, i.e., Matter of K.A.J.,* 473 P.3d 418, Docket No. 78217 (September 30, 2020)(unpublished disposition)(examining a guardianship action)*; Herzog v. Herzog*, 134 Nev. 949, 427 P.3d 125 (2018) (examining a divorce action); *Faulkenburg v. Faulkenburg*, 134 Nev. 936, 413 P.3d

837, Docket No. 71572 (February 26, 2018)(unpublished disposition)(examining a divorce action); *Arcella v. Arcella*, 133 Nev. 868, 872, 407 P.3d 341, 346 (2017) (examining a divorce action).[2]

Even more notably, *Davis* did not extend a family court's discretion so far as to permit the court to enter *sua sponte* visitation orders for the sole purpose of creating evidence on behalf of a party. *See* 131 Nev. 446. Thus, Hope R. and Christopher's R.'s reliance on *Davis* is inapposite.

Hope R. and Christopher R. next aver that the *sua sponte* visitation order is permissible based on the district court's inherent power to enter such orders. *Answer* at 11. However, "[i]Inherent judicial power is not infinite…and it must be exercised within the confines of valid existing law." *Halverson v. Hardcastle*, 123 Nev. 245, 263, 163 P.3d 428, 441 (2007). "Inherent powers, because of their very potency, must be exercised with restraint and discretion." *Sparks v. Bare*, 132 Nev. 426, 433, 373 P.3d 864, 868 (2016)(quoting *Chambers v. NASCO, Inc*., 501 U.S. 32, 44–45, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991))(internal quotations and alterations omitted).

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[2] There is one case examining an order terminating parental rights that compares *Davis* for the proposition that "deficiencies in a district court's order prevent this court from evaluating whether the decision was made for appropriate legal reasons." *Matter of A.R.B.*, 133 Nev. 1030, 408 P.3d 561 (December 27, 2017)(unpublished disposition). However, this does not implicate the holding in *Davis* relied on by Hope R. and Christopher R. that a family court has broad discretionary power to enter custody and visitation orders.

As previously discussed, the district court did not act within the confines of valid existing law. Hope R. and Christopher R. do not provide any authority to support their contention that a family court's inherent power extends so far as to permit the court to enter a *sua sponte*, pre-trial visitation order for the sole purpose of assisting a parent in creating evidence for their defense in their termination of parental rights bench trial. *See generally Answer, Joinder*.

Neither Hope R. nor Christopher R. complied with NRCP 7(b) by filing a motion for expanded visitation in the lower court or making such a request on the record. *See* PA 032-046. Rather, following a shuttle style settlement conference, the district court decided on its own to enter the pre-trial visitation order for the sole purpose of assisting the parents in presenting evidence during the bench trial. PA 034, 036-039.[3]

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[3] Hope R. and Christopher R. argue that WCHSA filing the instant petition seeking extraordinary relief is somehow an indication of "the power disparity between the Agency and the parents." *Answer* at 12, fn. 5. As discussed herein, and in the Petition, WCHSA is more than willing to address visitation between Z.R., Hope R., and Christopher R. in the proper forum, which is the separate juvenile dependency action pursuant to NRS Chapter 432B. Hope R. and Christopher R. are represented by competent counsel in that action. Prior to the district court's *sua sponte* visitation order in the termination action, nothing precluded counsel from filing the proper motion in the Chapter 432B case and presenting evidence to support a position that increased visitation is in the best interests of Z.R. It appears that Hope R. and Christopher R. continue to oppose properly addressing visitation in the Chapter 432B case, including ensuring the juvenile dependency court makes a finding that visitation is in Z.R.'s best interests, solely for their own benefit.

While the district court allowed WCHSA's counsel an opportunity to place the objection on the record, WCHSA did not have any notice that ongoing visitation would be addressed; that expanded visitation would seemingly be requested off of the record and in a shuttle style settlement conference; and that a visitation order would be entered. PA 037-38; Petitioner's Reply Appendix ("PRA") 026-028, 030-032. At the bare minimum, neither Hope R. nor Christopher R. made a request for expanded visitation in their settlement conference statements, which details the issues to be addressed at the settlement conference. PRA 026-028, 030-032.

WCHSA also did not have an opportunity to brief the issue prior to the district court's decision. Instead, the district court made the decision on its own accord and without any formal prompting from Hope R. and Christopher R., creating the appearance of advocacy on their behalf. PA 034, 036-039. Additionally, as discussed below, the district court did not even consider or comment on the interests of the child. PA 034, 036-039, 049. Rather, Z.R. is currently being used as a discovery mechanism in an attempt to create evidence for Hope R. and Christopher R.'s defense in the termination of parental rights bench trial.

Finally, Christopher R. cites to NRS 3.223, stating that NRS 3.223 "grants the family court original, exclusive jurisdiction in any proceeding brought pursuant to title 5 of NRS or chapter 128 or 432B of NRS." *Joinder* at 2. Christopher R.'s reliance on NRS 3.223 is misplaced. There is no dispute that the district court has

jurisdiction to preside over the termination of parental rights action. However, NRS 3.223 does not confer authority or jurisdiction on the district court to enter visitation orders in the Chapter 128 action.

As discussed in the Petition, in the context of a termination of parental rights action initiated by a child welfare agency, a court's authority and jurisdiction over custody and visitation matters arises out of the separate juvenile dependency proceeding governed by NRS Chapter 432B. *Petition* at 4-7. In the juvenile dependency proceeding, the juvenile court has express statutory authority to enter orders regarding visitation, and the parties have a mechanism to have any such visitation enforced or modified. *See* NRS 432B.550(3)(a); NRS 432B.570(2). There is no such statutory authority or similar mechanism in NRS Chapter 128. *See generally* NRS Chapter 128.

Hope R. and Christopher R. claim that "[t]he Agency insists that a family court can only enter visitation orders under NRS 432B.550(3)(a)," noting that NRS 432B.550(3)(a) provides a parent the reasonable right to visitation when a child is found to be "in need of protection" and placed with someone other than a parent. *Answer* at 11, fn. 4. WCHSA cites to NRS 432B.550(3)(a) due to the context in which the district court action at issue arose – a termination of parental rights action initiated by WCHSA, a child welfare agency, regarding a child in its custody pursuant to NRS Chapter 432B. As discussed *infra*, there are statutes which permit

a family court to enter visitation orders in other contexts, none of which are located in NRS Chapter 128, or are applicable to the instant case.

Hope R. and Christopher R. also aver that NRS 432B.550 "is not cross-referenced by Chapter 128," which bolsters WCHSA's argument. NRS Chapter 128 does not cross-reference Chapter 432B because it is an action separate and apart from the juvenile dependency action. Matters such as custody and visitation of a minor child that is found to be in need of protection, and therefore in need of intervention by a child welfare agency, are addressed in the Chapter 432B action. In a separate action brought pursuant to NRS Chapter 128, the district court is solely charged with determining whether or not to terminate a parent's rights. *See* NRS 128.105; NRS 128.110.[4]

There is no express statutory authority in NRS Chapter 128 allowing the district court to enter a *sua sponte* pre-trial visitation order in the termination of parental rights action. Hope R. and Christopher R. also provide no authority to support their contention that the district court's discretionary power or inherent power reaches so far as to permit the district court to enter a *sua sponte* visitation

[4] A termination of parental rights action brought under NRS Chapter 128 can be heard by any district court judge. NRS 128.020. In this case, the termination of parental rights action was assigned to the same district court judge who presides over the juvenile dependency cases in Washoe County as a matter of Second Judicial District Court policy, not statute.

order in a termination of parental rights action for the sole purpose of assisting a parent in creating evidence. Thus, extraordinary relief of mandamus or prohibition is warranted as the district court acted arbitrarily and capriciously, misapplied the law and acted without and in excess of its jurisdiction when it entered a *sua sponte* visitation order in a termination of parental rights action pursuant to NRS Chapter 128. *Walker*, 136 Nev. Adv. Op. 80; *Club Vista Fin. Servs.*, 128 Nev. at 228.

B. Hope R. and Christopher R. Suggest That This Court Break New Legal Ground.

As discussed above, there is no legal basis for the district court's *sua sponte* visitation order. As a result, Hope R. and Christopher R. assert that "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." *Answer* at 10. This argument fails to consider that permitting a family court to enter a visitation order in a termination of parental rights action would implicate NRS Chapter 125C, which requires the court to make specific findings before entering any such order. *See* NRS 125C.010; *see, i.e., Davis,* 131 Nev. at 451("Nevada law…requires express findings as to the best interest of the child in custody and visitation matters."). Adopting this argument would have widespread implications for the practice of family law, including the potential for conflicting orders in different proceedings.

Hope R. and Christopher R. suggest that this Court break new legal ground and allow a family court to enter affirmative custody and visitation orders in an action pursuant to NRS Chapter 128, which can be brought by parties other than a child welfare agency, without express statutory authority permitting the court to do so. In comparing NRS Chapter 128 to that of NRS Chapter 125 (dissolution of marriage) and NRS Chapter 126 (parentage), which all appear in Title 11, Chapter 128 is the only chapter that does not give a family court express authority to enter affirmative child custody and visitation orders. *See* NRS 125.007; NRS 125.230; NRS 126.161(4); NRS 126.191. This follows logic as the sole issue in a proceeding pursuant to NRS Chapter 128 is whether a petition to terminate parental rights should be granted, not ongoing matters of custody and visitation that can be the subject of future modification.

Should this Court adopt Hope R. and Christopher R.'s argument, parents would then be permitted to seek child custody and visitation orders in NRS Chapter 128 actions. This would result in a family court being forced to follow the requirements outlined in NRS Chapters 125C and 128 in one action, despite the conflicting nature of the two chapters.

C. Hope R. and Christopher R. Seemingly Concede that the Visitation Order is Arbitrary and Capricious.

Finally, Hope R. and Christopher R. argue that "in Nevada inconsistent court orders on the same subject matter cannot legally exist" and that "[a] second or

subsequent court cannot legally enter an order that is 'inconsistent' with terms of an existing court order." *Answer* at 14. By their own argument, Hope R. and Christopher R. seemingly concede that the district court acted arbitrarily and capriciously in entering the *sua sponte* visitation order in the termination of parental rights action when there is a pending dependency action in which the dependency court has specific statutory authority to address visitation.

The prior visitation order, visitation schedule or "*status quo ante* visitation order" that Hope R. and Christopher R. reference throughout the Answer arose from the Chapter 432B case, not the termination of parental rights action. *See Answer* at 9-10, 12, fn. 5*; see* PRA 020. When the district court entered the *sua sponte* visitation order, the specified visitation plan in the separate dependency action was one time per week, which directly conflicts with the district court's *sua sponte* visitation order in the termination action. PRA 020; *compare* PA 049. Again, neither Hope R. nor Christopher R. objected to the visitation plan, requested that it be modified or in any way challenged the visitation plan in the separate dependency proceeding. Thus, the district court acted arbitrarily and capriciously in entering a *sua sponte* visitation order in the termination of parental rights action.

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D. If this Court Adopts Hope R. and Christopher R's Argument, the District Court Nonetheless Violated Nevada Law by Failing to Address the Child's Best Interest.

If this Court adopts Hope R. and Christopher R's argument and determines that NRS Chapter 125C transcends into Chapter 128, the district court's *sua sponte* visitation order remains arbitrary, capricious and a manifest abuse of discretion. The *sua sponte* visitation order is contrary to established rules of law and is a clearly erroneous application of law as the district court failed to consider or address the child's best interests. *Armstrong*, 127 Nev. at 931-32.

Nevada law is clear that a family court must make specific findings as to the best interest of the child when entering a visitation order. *See* NRS 125C.010; *see also Davis*, 131 Nev. at 451. At the settlement conference, the district court pronounced that the *sua sponte* visitation order is appropriate for the sole reason of allowing Hope R. and Christopher R. "to be able to have increased access to [Z.R.] to be able to present evidence and testimony at trial." PA 039, lns 4-6. The written visitation order is devoid of any analysis, comment, or reference to the interests of Z.R. PA 049.[5] This is contrary to established rules of law and is a clearly erroneous

[5] After WCHSA filed a motion to stay in the district court, the court decided to hold an evidentiary hearing regarding the visitation schedule mandated by the *sua sponte* visitation order. PRA 037. The district court did not make verbal findings or orders at that time. PRA 040. As of the date of this filing, the district court has not entered a written order.

application of law. *See Davis*, 131 Nev. at 451 ("These deficiencies violate Nevada law, which requires express findings as to the best interest of the child in custody and visitation matters.'"). Thus, extraordinary relief is warranted.

III. CONCLUSION

For the foregoing reasons, as well as set forth in the Petition, WCHSA respectfully requests this Court grant a writ of mandamus or prohibition and direct the district court to vacate the order for visitation pending trial.

Dated this 29th day of November, 2021.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this reply in support of petition for writ of mandamus or prohibition 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 reply has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

2. I further certify that this reply complies with the page- or type-volume limitations of NRAP 21(d) because, excluding the parts of the reply exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, is 14 pages, and contains 3,291 words.

3. Finally, I hereby certify that I have read this reply 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 reply 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 the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the

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accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: November 29, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on November 29, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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