IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE PARENTAL RIGHTS AS TO: R.T., K.G-T., N.H-T., AND E.H-T.,
MINOR CHILDREN,
_____/
JACQUELINE GUERRERO,
Appellant,
vs.
WASHOE COUNTY DEPARTMENT OF SOCIAL SERVICES,
Respondent.
_____/

No. 70210

Appeal from an Order Terminating Parental Rights in FV14-03897
The Second Judicial District Court of the State of Nevada
Honorable William A. Maddox, Senior District Judge, Family Division

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APPELLANT'S SUPPLEMENTAL BRIEF

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Introduction

This Court ordered supplemental briefing on the implications of two statutes—NRS 128.106 and NRS 128.013—and of three Nevada Supreme Court decisions—*In re Parental Rights as to Daniels*, 114 Nev. 81, 953 P.2d 1 (1988), *In re Parental Rights as to Bow*, 113 Nev. 141, 930 P.2d 1128 (1997), and *Cooley v. Div. of Child & Family Services of Nevada State Dept. of Human Res.*, 113 Nev. 1191, 946 P.2d 155 (1997)—on "appellant's claim that the district court's decision terminating her parental rights was based on her poverty." As explained below, these statutes and case law support the proposition that termination of parental rights cannot be based solely on poverty and by implication, support Ms. Guerrero's claim that the district court erred in terminating her parental rights on that basis. Together, the statutes and cases also require family district courts to be especially mindful of the distinction between willful and active neglect by parents on the one hand, and the consequences of insufficient resources on the other. While the former may justify termination of parental rights, the

latter cannot. And family district courts fail when they do not acknowledge and take into consideration this difference.

The statutes

"Statutory interpretation is a question of law reviewed de novo." *Firestone v. State*, 120 Nev. 13, 16, 83 P.3d 279, 281 (2004) (internal quotation marks and footnote omitted). This Court "has established that when it is presented with an issue of statutory interpretation, it should give effect to the statute's plain meaning." *In re P.S.*, 131 Nev. Adv. Op. 95, 364 P.3d 1271, 1271 (2015) (internal quotation marks and citation omitted); *In re Candidacy of Hansen*, 118 Nev. 570, 572, 52 P.3d 938, 940 (2002) ("It is axiomatic that when words of a statute are plain and unambiguous, they will be given their plain meaning."). Additionally, statutes "must be construed as a whole and not read in a way that would render words or phrases superfluous or make a provision nugatory." *Butler v. State*, 120 Nev. 879, 892-93, 102 P.3d 71, 81 (2004) (internal quotation marks and footnote omitted). "[E]very word, phrase, and provision of the statute is presumed to have meaning." *Id.* 120 Nev. at 893, 102 P.3d at 81 (footnote omitted); *Harris Associates v. Clark County School Bd.*, 119 Nev. 638, 642, 81 P.3d 532,

534 (2003) ("we construe statutes to give meaning to all of their parts and language, and this court will read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation.") (internal quotation marks and footnote omitted). Finally, "when the same word is used in different statutes that are similar with respect to purpose and content, the word will be used in the same sense, unless the statutes' text indicates otherwise." *Savage v. Pierson*, 123 Nev. 86, 94, 157 P.3d 697, 702 (2007) (footnote omitted).

The statutes identified by the Court share language. Both create a carve-out for those persons who, because of financial inability (*i.e.* poverty), cannot strictly meet the statutes' obligations.

NRS 128.106 (1)(e) states in relevant part:

> 1. In determining neglect or unfitness of a parent, the court shall consider, without limitation, the following conditions which may diminish suitability as a parent:
> ... .
>
> (e) Repeated or tenuous failure by the parent, although physically and *financially able*, to provide the child with adequate food, clothing, shelter, education or other care and control necessary for the child's physical, mental and emotional health and development, ...

Similarly, NRS 128.013(1)(c) states that "injury" to a child's health or welfare "occurs when the parent ... [n]eglects or refuses to provide for the child proper or necessary subsistence, education or medical or surgical care, although he or she is *financially able* to do so or has been offered financial or other reasonable means to do so."

Under the unambiguous terms of these statutes, a "financially able" person may be deemed a neglectful or unfit parent if he or she repeatedly fails to provide (or tenuously provides) his or her child with adequate food, clothing, shelter, education or other care thereby statutorily injuring the child. The key here is the parent's willful failure to fully care for the child even though having the financially ability to do so.[1] The failure to provide when financially able warrants a finding of neglect or unfitness because it evinces a disregard for the health and welfare of the child. But these statutes do not allow for finding a parent neglectful or unfit when he or she is not "financially able" to meet them. Being unable to fully meet an obligation due to poverty standing alone,

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[1] See Merriam-Webster's Collegiate Dictionary 3 (11th ed. 2012) (defining "able" as "having sufficient ... resources to accomplish an object"); The American Heritage Dictionary of the English Language 4 (5th ed. 2011) (defining "able" as "[h]aving sufficient ... resources to accomplish something").

does not manifest disregard for the health or welfare of the child. And the Court should not read such an allowance into the statute. These statutes implicitly recognize that "the challenge of differentiating between willful or active neglect on one hand and the consequences of insufficient resources on the other does not justify removal of children living in poverty." J. Wallace and L. Pruitt, Judging Parents, Judging Place: Poverty, Rurality, and Termination of Parental Rights, 77 Mo. L. Rev. 95, 114-15 (2012). By expressly drawing a distinction between those parents who are financially able and those parents who are not, the statutes demand different responses from social service agencies and family courts.

The cases

The cases identified by the Court—*In re Parental Rights as to Daniels*, 114 Nev. 81, 953 P.2d 1 (1988), *In re Parental Rights as to Bow*, 113 Nev. 141, 930 P.2d 1128 (1997), and *Cooley v. Div. of Child & Family Services of Nevada State Dept. of Human Res.*, 113 Nev. 1191, 946 P.2d 155 (1997)— were each later overruled by *In re Termination of Parental Rights as to N.J.*, 116 Nev. 790, 799-800 n.4, 8 P.3d 126, 132 n.4 (2000) (abandoning approach established in *Champagne v. Welfare*

Division, 100 Nev. 640, 691 P.2d 849 (1985), of requiring "a finding of parental fault to terminate parental rights before the district court considers the best interest of the child."). The specific holdings of these cases are not directly applicable to this appeal. But the comments of the dissenting Justice are; as are the majority's counter remarks.

For example in *Daniels* Justice Springer noted that the parents' "destitution and poverty" were not identified as the grounds for termination of parental rights, even though the real reason for termination of parental rights was "primarily because [the] parents were destitute." Instead, the identified grounds were "abandonment" and "failure of parental adjustment." And he decried the use of "standard rubric" to take "poor children away from their parents." 114 Nev. at 95-96, 953 P.2d at 10 (internal quotation marks omitted). He added that the record did not contain "a hint of the parents' having any intention to abandon or relinquish all parental rights;" it "show[ed] only an *inability* to support their children, not an *unwillingness*." *Id.* 114 Nev. at 96, 953 P.2d at 10 (internal quotation marks omitted, italics in the original). In contrast, the majority stated that the case involved an

attempt by the parents "to shift personal accountability and responsibility to" social services. *Id.* 114 Nev. at 91, 953 P.2d at 8.

In *Bow* Justice Springer was more direct: "The case now before us is ... tragic ... because this mother's children were taken away from her because she was *poor*. 113 Nev. at 153, 930 P.2d at 1135 (italics in the original). He added:

> [i]n the present case, the State took a child away from a poor mother because she was "without independent housing, employment, and appropriate finances, and unable to provide adequately for the physical, emotional, and financial needs of her son," and then terminated her parental rights because the mother was found to have "chronically failed to complete the reunification plan."

Id. 113 Nev. at 155, 930 P.2d at 1137. In the majority's view termination was predicated on "parental unfitness" and "failure of parental adjustment." *Id.* 113 Nev. at 148-49, 930 P.2d at 1133-34. Justice Shearing bluntly concurred: "It may not be the parents' fault that they are incapable of caring for their children, *but fault is not the important or even relevant consideration*." *Id.* 113 Nev. at 152, 930 P.2d at 1135 (italics added). In Justice Shearing's world "termination shows compassion to children by not condemning them to live with abusive

and neglectful parents and thereby preventing their growing up to repeat the cycle of violence and neglect with their own children." *Id.* 113 Nev. at 153, 930 P.2d at 1135. Justice Springer rejected Justice Shearing's compassion argument. While not doubting that the child was thriving in the foster home, he rejected the notion that this fact was sufficient to "justify permanently depriving [a] ... mother of her natural son and depriving the child of his priceless heritage." *Id.* 113 Nev. at 153, 930 P.2d at 1136.

Finally, in *Cooley* Justice Springer squarely stated the contextual challenge presented in these cases: "It is one thing to remove a child, in the child's best interest, from the home of poor ... parents," he wrote, "it is quite another thing to sever the natural parents' rights just because the children have been placed in what state welfare officials see as the 'better' home." 113 Nev. at 1200, 946 P.2d at 160. (Here "better" being derived from "simply weighing the new foster home against the home of the poverty-stricken ... natural parents and pleading to the court that it is in the best interest of the child that the child be given some new parents." 113 Nev. at 1200, 946 P.2d at 160-61.) In response, the majority defensively disclaimed reliance on poverty; stating that it was

not a factor "for our decision in this case, nor [has] it been [a] factor[] in other termination of parental rights cases." *Id.* 113 Nev. at 1199, 946 P.2d at 160.

Implications

"[M]ost if not all courts who have confronted the issue have held that children cannot be separated from their parents solely because of poverty." J. Shaughnessy, An Essay on Poverty and Child Neglect: New Interventions, 21 Wash. & Lee J. Civil Rts. & Soc. Just. 5, 11 (2014) (footnote omitted). Yet, "the limitation on removal because of poverty is frequently honored more in the breach than in the observance." *Id.*

> There are any number of cases upholding separations on the grounds that poverty alone was not the basis for the state's action, even though it was given substantial weight in the court's reasoning. In some of these cases, it appears that courts are failing to acknowledge that the facts they rely upon to make a finding of parental unfitness are themselves likely manifestations of parental poverty.

Id. (footnote omitted). The observations quoted above capture Justice Springer's frustrations.

If Justice Springer was writing today Ms. Guerrero's case would no doubt catch his eye. The evidence below does not contain "a hint" of

her "intention to abandon or relinquish all parental rights." As in *Daniels* the evidence showed only an inability to support her children, not an unwillingness.[2] And, as in *Bow*, WCDSS took Ms. Guerrero's children because she was without independent housing, employment and appropriate finances and terminated her parental rights because she did not fulfill its reunification plan. Finally, taking a page from *Cooley*, WCDSS continues to assert the "best interest" of the children on the basis that the children are doing "better" in the foster placement. See Respondent's Answering Brief at 45-50. But the fact that the children are thriving does not justify permanently depriving Ms. Guerrero of her children.

Succinctly stated, the implications of the statutes and cases discussed above is that the district court erred in terminating Ms. Guerrero's parental rights; and unsurprisingly, masked its rulings in standard official rubric while expressly failing (refusing) to acknowledge Ms. Guerrero's situation as a manifestation of her poverty. In fact, the district court did not accept Ms. Guerrero's poverty as a factor. 1JA 148

[2] Indeed here the evidence showed that Ms. Guerrero provided for her children through part-time employment, food stamps, TANF monies, selling plasma, collecting cans and bottles, Medicaid, and utilizing community resources.

(Order Terminating Parental Rights) ("Ms. Guerrero has made efforts to assume all of her responsibilities as a parent but falls short in each of the important areas required. It is suggested that poverty is what caused her failure to do what is necessary to reunify with her children. That is not at all the truth. She has not consistently remained employed enough to support the children financially. She has not been able to maintain a stable and safe place for the children to live."). Significantly for purposes of this appeal, the district court did not find that Ms. Guerrero had willfully disregarded her children, it found only that she did not consistently meet some undefined "minimal level" of performance (expected by WCDSS). *Id.* 149-50 ("[Ms. Guerrero] has made some effort but again when necessary fails to follow through to accomplish necessary tasks. A minimal level must be achieved, not perfection, but a minimal level must be achieved in order to provide children with the basic necessities.").

CONCLUSION

The statutes and cases discussed above require family district court judges to be mindful of the distinction between willful and active neglect by parents on the one hand, and the consequences of insufficient

resources on the other. Family district courts fail when they do not acknowledge and take into consideration this difference. Respectfully, here the district court judge failed. This Court should reverse and remand.

Dated this 27th day of February 2017.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This brief has been prepared in a proportionally spaced typeface using Century in 14-point font.

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page 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 brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 27th day of February 2017.

/s/ John Reese Petty
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 27th day of February 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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