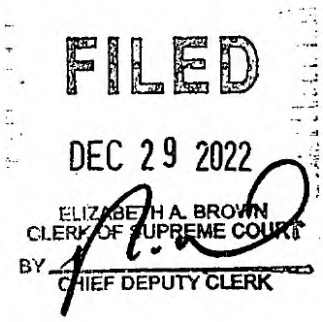
138 Nev., Advance Opinion 87

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



Original petition for a writ of mandamus in a juvenile dependency matter challenging a district court order declaring NRS 432B.393(3)(c) unconstitutional.

Petition denied.

Christopher J. Hicks, District Attorney, and Erin L. Morgan and Jeffrey S. Martin, Deputy District Attorneys, Washoe County,
for Petitioner.

Washoe Legal Services and Jennifer Jeans, Reno.
for Real Party in Interest L.S.C.

John L. Arrascada, Public Defender, and Jennifer Rains and John Reese Petty, Chief Deputy Public Defenders, Washoe County,
for Real Party in Interest Porsha C.-S.

22-40818

Marc Picker, Alternate Public Defender, and Amy Crowe, Deputy Alternate Public Defender, Washoe County,
for Real Party in Interest Rolando C.-S.

BEFORE THE SUPREME COURT, EN BANC.[1]

OPINION

By the Court, HARDESTY, C.J.:

We elect to consider the merits of this petition under the capable-of-repetition-yet-evading-review exception to the mootness doctrine to clarify a substantial issue of public policy and precedential value: whether NRS 432B.393(3)(c) violates due process.

NRS 432B.393(3)(c) relieves a child welfare services agency from its duty to provide reasonable efforts to reunify a child with his or her parent if a court finds that the parental rights of that parent were involuntarily terminated with respect to a sibling of the child. The district court found that this statute violates due process because it could lead to a presumption that the parent is unfit, for purposes of terminating the parent-child relationship, without any consideration of present circumstances. Petitioner Washoe County Human Services Agency (WCHSA) filed a petition for writ of mandamus asking this court to determine that NRS 432B.393(3)(c) is constitutional and to vacate the district court's order.

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[1]The Honorable Mark Gibbons, Senior Justice, participated in the decision of this matter under a general order of assignment.

We conclude that NRS 432B.393(3)(c), insofar as it relieves an agency of making reunification efforts, does not infringe on the fundamental liberty interest a parent has in the care and custody of his or her child and therefore does not violate due process. We thus determine that the district court erred but deny WCHSA's petition as the matter is moot.

BACKGROUND

In August 2020, WCHSA removed real party in interest/minor child L.S.C. from the care and custody of her biological parents, real parties in interest Porsha C.-S. and Rolando C.-S., and placed her in foster care.[2] The next month, WCHSA filed a motion with the district court for a finding under NRS 432B.393(3)(c) that WCHSA was relieved of its statutory obligation to undertake reasonable efforts to reunify L.S.C. with her biological parents. WCHSA asserted that Porsha and Rolando had their parental rights involuntarily terminated as to L.S.C.'s sibling the year before and the order of termination was not under appeal. WCHSA argued that, in light of these facts, the district court was required by NRS 432B.393(3)(c) to find that WCHSA was relieved from its obligation under NRS 432B.393(1) to undertake reasonable efforts to reunify L.S.C. with her parents. Porsha and Rolando opposed the motion, arguing that NRS 432B.393(3)(c) infringes on their fundamental liberty interest in the care, custody, and control of their child without the due process of law.

[2]The record inconsistently reflects real parties in interest's family names. We identify real parties in interest according to the names used in the petition.

A court master recommended that the district court find NRS 432B.393(3)(c) unconstitutional and deny WCHSA's motion that it be relieved of its obligation to make reasonable reunification efforts with L.S.C. The court master found that NRS 432B.393(3)(c) infringes on the parent-child relationship—a fundamental right—and is not narrowly tailored to serve the compelling state interest of protecting the health and safety of children, as it does not allow a court any discretion to consider the circumstances of the past involuntary termination. Her determination that the statutory provision is unconstitutional was based on the fact that a finding under NRS 432B.393(3)(c) results in an expedited permanency hearing and may be used to prove parental fault for the termination of parental rights in proceedings instituted under NRS Chapter 128. The district court entered an order adopting these recommendations over WCHSA's objection.

Later, the court master held a permanency hearing under NRS 432B.590, after which she recommended that the district court adopt the agency's permanency plan of adoption for L.S.C. In making this recommendation, the court master found that WCHSA was relieved of making reasonable efforts to reunify L.S.C. with her family under NRS 432B.393(1), as such efforts were inconsistent with the permanency plan efforts. The district court adopted these recommendations but made no further findings regarding the constitutionality of NRS 432B.393(3)(c).

WCHSA petitioned this court for a writ of mandamus to overturn the district court's declaration that 432B.393(3)(c) is

unconstitutional. Porsha, Rolando, and L.S.C. timely filed answers to the petition, as directed.[3]

DISCUSSION

We elect to consider the merits of this petition for a writ of mandamus

"Writ relief is an extraordinary remedy that is only available if a petitioner does not have a plain, speedy and adequate remedy in the ordinary course of law." *In re William J. Raggio Family Tr.*, 136 Nev. 172, 175, 460 P.3d 969, 972 (2020) (internal quotation marks omitted); *see also* NRS 34.170. This court has considered writ petitions when doing so "will clarify a substantial issue of public policy or precedential value," *Walker v. Second Judicial Dist. Court*, 136 Nev 678, 684, 476 P.3d 1194, 1199 (2020) (internal quotation marks omitted), and "where the petition presents a matter of first impression and considerations of judicial economy support its review," *Dekker/Perich/Sabatini Ltd. v. Eighth Judicial Dist. Court*, 137 Nev., Adv. Op. 53, 495 P.3d 519, 522 (2021); *see also Buckwalter v. Eighth Judicial Dist. Court*, 126 Nev. 200, 201, 234 P.3d 920, 921 (2010) (additionally noting that the issue before the court was reviewable on mandamus because it was "not fact-bound"). This court "review[s] questions of law . . . de novo, even in the context of writ petitions." *Helfstein v. Eighth Judicial Dist. Court*, 131 Nev. 909, 913, 362 P.3d 91, 94 (2015).

The district court's order concerning the waiver of reunification efforts in an NRS Chapter 432B proceeding is not appealable. *See* NRAP 3A(b); *Clark Cty. Dist. Attorney v. Eighth Judicial Dist. Court*, 123 Nev. 337, 342, 167 P.3d 922, 925 (2007) (considering a petition for extraordinary relief after recognizing that the challenged order, entered under NRS Chapter

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[3]L.S.C.'s appearance in the district court proceedings was waived at the request of her counsel.

432B, was not appealable). Further, whether NRS 432B.393(3)(c) is unconstitutional is a purely legal issue of first impression and has substantial precedential value. *See Lyft, Inc. v. Eighth Judicial Dist. Court*, 137 Nev., Adv. Op. 86, 501 P.3d 994, 998 (2021) (considering a petition for writ of mandamus because the question of whether the statute at issue superseded a procedural rule "present[ed] a novel question of law requiring clarification"). For these reasons, we elect to hear this petition for a writ of mandamus to address the constitutionality of NRS 432B.393(3)(c).

While the matter is moot, it falls under the capable-of-repetition-yet-evading-review exception to the mootness doctrine

"The question of mootness is one of justiciability" and requires that this court render judgments only on actual controversies. *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010). Although controversies may exist at the beginning of a case, they can be rendered moot by subsequent events. *Id.* This case was rendered moot when the district court found that WCHSA was relieved of providing reasonable reunification efforts to Porsha and Rolando with respect to L.S.C. on grounds other than NRS 432B.393(3)(c).

However, cases involving moot controversies may still be considered by this court if they concern "a matter of widespread importance capable of repetition, yet evading review." *Bisch v. Las Vegas Metro. Police Dep't*, 129 Nev. 328, 334, 302 P.3d 1108, 1113 (2013). "To satisfy the exception to the mootness doctrine, [petitioner] must show that (1) the duration of the challenged action is relatively short, (2) there is a likelihood that a similar issue will arise in the future, and (3) the matter is important." *Degraw v. Eighth Judicial Dist. Court*, 134 Nev. 330, 332, 419 P.3d 136, 139 (2018) (internal quotation marks omitted).

We conclude that this petition meets the elements of this exception to mootness. First, the duration of the challenged action is relatively short given the expedited nature of dependency proceedings under NRS Chapter 432B. Particularly, under NRS 432B.590(1)(b), "[w]ithin 30 days after making any of the findings set forth in subsection 3 of NRS 432B.393," the court must hold a permanency hearing. A permanency hearing will moot a dispute regarding NRS 432B.393(3)(c) by making a reasonable-efforts finding on a different basis, as was the case here. Thus, we conclude that the time period to challenge an order made pursuant to NRS 432B.393(3)(c) is necessarily limited by law.[4] *See Degraw*, 134 Nev. at 332, 419 P.3d at 139 (determining that the duration element was met because "the time period to challenge the [action at issue] may be limited"). Second, as for whether there is a likelihood that the issue will arise in the future, this court typically does not rely on the assurances of the parties alone that an issue will recur. *Id.* at 333, 419 P.3d at 139; *Personhood Nev.*, 126 Nev. at 602, 245 P.3d at 574. Still, this court has measured the likelihood of recurrence contextually, i.e., from how common the issue at hand is to the larger body of disputes, such as the ubiquitous relevancy of bail issues in criminal cases. *See Valdez-Jimenez v. Eighth Judicial Dist. Court*, 136 Nev. 155, 160, 460 P.3d 976, 983 (2020)

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[4]While the hearing master's findings of fact and recommendations regarding the permanency hearing here were titled "Masters Findings of Fact and Recommendations After 12-Month Permanency Hearing" and only broadly cited to NRS 432B.590 as the legal basis for its permanency hearing, we note that NRS 432B.590(1)(a)'s requirement that the courts hold an annual permanency hearing after the removal of a child from the child's home does not discharge the courts from holding a permanency hearing within 30 days of making any findings under NRS 432B.393(3) per NRS 432B.590(1)(b).

(determining that "the second factor of the mootness exception" had been satisfied "[b]ecause the constitutional issues concerning the inquiries and findings required for setting bail are relevant in many criminal cases[and] will arise in the future"). Similarly, issues regarding a child welfare agency's duty to provide reasonable efforts to reunify children with their parents are relevant to a variety of child welfare cases that have previously, and will likely continue to, come before this court. *See, e.g., In re Parental Rights as to A.G.*, 129 Nev. 125, 132, 295 P.3d 589, 593 (2013).

Lastly, we determine that the third factor—importance of the matter—is satisfied, as the matter involves the constitutionality of a statutory provision that is part of a larger statutory scheme governing the protection of Nevada's children from abuse and neglect. *See* NRS Chapter 423B. For these reasons, we elect to hear this matter under the capable-of-repetition-yet-evading-review exception to the mootness doctrine.

NRS 432B.393(3)(c) does not violate due process because it does not infringe on a fundamental liberty interest

The Due Process Clauses of the United States and Nevada Constitutions prohibit the state from depriving any person "of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1; Nev. Const. art. 1, § 8(2). Statutes are presumed constitutional, and the party challenging a statute has the burden of showing otherwise. *State v. Castaneda*, 126 Nev. 478, 481, 245 P.3d 550, 552 (2010), *modified on other grounds on denial of reh'g*, No. 52911, 2010 WL 5559401 (Nev. Dec. 22, 2010) (Order Denying Rehearing and Modifying Opinion).

"Substantive due process protects certain individual liberties against arbitrary government deprivation regardless of the fairness of the state's procedure." *Eggleston v. Stuart*, 137 Nev., Adv. Op. 51, 495 P.3d 482, 489 (2021). In the context of a substantive due process challenge to a

statute, courts apply strict scrutiny if the statute infringes on a fundamental constitutional right; otherwise, the statute is reviewed under the rational basis test and will be upheld it if it is rationally related to a legitimate state interest. *State v. Eighth Judicial Dist. Court (Logan D.)*, 129 Nev. 492, 501-03, 306 P.3d 369, 375-77 (2013). "Procedural due process claims arise where the State interferes with a liberty or property interest and the State's procedure was constitutionally insufficient." *Eggleston*, 137 Nev., Adv. Op. 51, 495 P.3d at 489. Therefore, with respect to both substantive and procedural due process, the threshold issue regarding NRS 432B.393(3)(c)'s validity is whether that statute infringes on a fundamental liberty interest.

Here, the district court found that NRS 432B.393(3)(c) infringes on the fundamental liberty interest that parents have in the care, custody, and control of their children because a finding under NRS 432B.393(3)(c) can be used as a basis for finding parental fault in a termination of parental rights proceeding under NRS 128.105(1).[5] The district court applied strict scrutiny and found that NRS 432B.393(3)(c) is not narrowly tailored to serve the compelling interests of the health and safety of children because it presumes parental unfitness based on a prior termination of parental rights without any consideration of the individual circumstances of that prior termination. Based on this finding, it found that NRS 432B.393(3)(c) facially violated both substantive and procedural due process. While the district court considered the application of NRS 432B.393(3)(c) to the

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[5]NRS 128.105(1) allows parental rights to be terminated where the court finds that (1) termination is in the best interest of the child, and (2) parental fault exists. Parental fault exists where, among other things, "[t]he conduct of the parent or parents was the basis for a finding made pursuant to subsection 3 of NRS 432B.393." NRS 128.105(1)(b).

parties' individual circumstances, it did not find that NRS 432B.393(3)(c) violated due process as applied to them, but rather that it facially violated procedural and substantive due process.

WCHSA argues that NRS 432B.393(3)(c) does not implicate the fundamental liberty interest that parents have in the care, custody, and control of their children because a finding under that statute does not result in the deprivation of parental rights. WCHSA acknowledges that the parental fault prong of NRS 128.105 can be established by a prior finding under NRS 432B.393(3)(c), but it contends that if this finding infringes on a fundamental right, then NRS 128.105 is the offending statute, not NRS 432B.393(3)(c). We agree.

It is well-established that the parent-child relationship is a fundamental liberty interest. *See In re Parental Rights as to A.G.*, 129 Nev. at 135, 295 P.3d at 595 (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000)). Thus, parents are entitled to due process protections before being deprived of the custody of their child or having their parental rights terminated. *Id.* A finding under NRS 432B.393(3)(c), however, does not terminate parental rights or alter the custody of the children. Rather, it relieves the agency from providing reunification efforts.

In finding that the statute infringes on a parent's fundamental right, the district court relied on NRS 128.105(1), which provides that a finding under NRS 432B.393(3)(c), among other things, may establish parental fault in a parental rights termination proceeding. The court reasoned that a parent could have his or her parental rights terminated under NRS 128.105(1) based on NRS 432B.393(3)(c)'s presumption that a parent whose parental rights were previously terminated remains unfit for life. The constitutionality of NRS 128.105(1), however, was not before the

district court in this NRS Chapter 432 proceeding. No parental rights termination proceedings had been instituted against Porsha and Rolando when WCHSA moved for a finding under NRS 432B.393(3)(c). The concern that NRS 128.105(1) infringes on a parent's fundamental right by allowing parental fault to be presumed from a prior termination pursuant to NRS 432B.393(3)(c) is a basis for challenging NRS 128.105, not NRS 432B.393(3)(c). Unlike NRS 128.105, NRS 432B.393(3)(c) does not facially infringe on a parent's fundamental right to the care and custody of his or her children, as it involves neither the removal of a child from a parent's custody or the termination of parental rights.[6]

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[6]During oral argument before this court, counsel for L.S.C. argued for the first time that NRS 432B.393(3)(c) infringes on her client's fundamental liberty interest in being reunited with her family of origin if safe and appropriate. Because this argument was not properly raised in L.S.C.'s appellate brief or below, we decline to consider it. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

Additionally, Porsha argues on appeal that NRS 432B.393(1) creates a right to reasonable reunification efforts. This argument was not raised before the district court or considered by the district court in determining that NRS 432B.393(3)(c) is unconstitutional, and we thus decline to consider it as well. However, we note, as other jurisdictions have, that "[t]he statutory directive to employ reasonable services, absent aggravated circumstances, does not give rise to a constitutional right." *In re K.R.*, No. 99-2009, 2000 WL 854325, at *2 (Iowa Ct. App. 2000) (citing *Suter v. Artist M.*, 503 U.S. 347, 363 (1992) (determining that the term "reasonable efforts," as it appeared in the federal Adoption Assistance and Child Welfare Act, did not confer a federally enforceable right upon the act's beneficiaries)); *accord In re Eden F.*, 741 A.2d 873, 886 n.22 (Conn. 1999) ("At no time did the [Supreme C]ourt suggest that a showing of reasonable or diligent efforts at reunification was itself constitutionally mandated."). We do recognize that other jurisdictions have suggested that the discharge of reunification efforts can affect a parent's right to the care, custody, and control of his or her child in other contexts. *See, e.g., In re ECH*, 423 P.3d

Because NRS 432B.393(3)(c) does not infringe on a fundamental liberty interest, it cannot deprive any party of a fundamental liberty interest without the due process of law, unless it violates substantive due process under the lenient rational basis test. *Logan D.*, 129 Nev. at 503, 306 P.3d at 377. Since NRS 432B.393(3)(c) rationally relates to the legitimate interest that Nevada has in preventing the return of children to a dangerous home or from languishing too long in foster care, we end our analysis here and conclude that NRS 432B.393(3)(c) does not violate due process.

CONCLUSION

We elect to hear this petition for writ of mandamus to address a legal issue of statewide public importance: whether NRS 432B.393(3)(c) violates due process. Because this statute does not infringe on a fundamental liberty interest and survives the rational basis test, we conclude that it does not violate due process. The district court therefore erred in determining otherwise. Because WCHSA had its obligation to provide reasonable reunification efforts discharged on another basis, we deny this petition for writ of mandamus as being moot. *See, e.g.*, *Valdez-Jimenez*, 136 Nev. at 167, 460 P.3d at 988 (reaching the merits of petitions for writs of mandamus under the capable-of-repetition-yet-evading-review

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295, 302 (Wyo. 2018) ("A change in permanency plan is not termination; however, as we [have] recognized[,] . . . the decision to halt reunification efforts certainly affects a parent's substantial rights, as it will likely have a significant impact on a termination decision." (citation omitted)).

exception to mootness, but nonetheless denying the petitions as no relief remained to be granted).

_____, C.J.
Hardesty

We concur:

_____, J.
Parraguirre

_____, J.
Stiglich

_____, J.
Cadish

_____, J.
Pickering

_____, J.
Herndon

_____, Sr. J.
Gibbons