IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE PARENTAL RIGHTS AS TO E.C.H., A/K/A E.C.Y.

THEODORE C. H. AND CHRISTINA N. Y.-H.,
Appellants,
vs.
THE STATE OF NEVADA DIVISION OF CHILD AND FAMILY SERVICES, DEPARTMENT OF HUMAN RESOURCES,
Respondent.

No. 43819

FILED

SEP 23 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order terminating appellants' parental rights. Eighth Judicial District Court, Family Court Division, Clark County; Gerald W. Hardcastle, Judge.

In order to terminate parental rights, a petitioner must prove by clear and convincing evidence that termination is in the child's best interests and that parental fault exists.[1] If substantial evidence in the record supports the district court's determination that clear and convincing evidence warrants termination, this court will uphold the termination order.[2] In the present case, the district court determined that it is in the child's best interests that appellants' parental rights be terminated. The district court also found by clear and convincing evidence

[1]See Matter of Parental Rights as to D.R.H., 120 Nev. 422, 428, 92 P.3d 1230, 1234 (2004); NRS 128.105.

[2]Matter of D.R.H., 120 Nev. at 428, 92 P.3d at 1234.

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appellants' unfitness, failure of parental adjustment, and only token efforts.

As for unfitness,[3] a parent is unfit when by his or her own fault, habit, or conduct toward the child, the parent fails to provide the child with proper care, guidance, and support.[4] Failure of parental adjustment[5] occurs when a parent is unable or unwilling, within a reasonable time, to substantially correct the conduct that led to the child being placed outside the home.[6] Evidence of failure of parental adjustment is established by the parent's failure to comply with the case plan to reunite the family within six months after the child has been placed outside the home.[7] With respect to token efforts, under NRS 128.109(1)(a) and (2), if a child has lived outside the home for more than fourteen months, it is presumed that the parent has made only token efforts to care for the child and that termination is in the child's best interest.

Here, the district court concluded that the parties have a history of instability, which has resulted in the child being in foster care for approximately two years. While the parties made significant recent progress with their case plans, the court expressed concern that it was not reasonable for the child to wait any longer for the parties to demonstrate

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[3]NRS 128.105(2)(c).

[4]NRS 128.018.

[5]NRS 128.105(2)(d).

[6]NRS 128.0126.

[7]NRS 128.109(1)(b).

that they are fit parents and that the child should be returned to them. The court also focused on the child's best interest, and on the love and attention that the foster family is committed to giving him. The court further noted that the child has been integrated into the foster family, and they have expressed the desire to adopt the child. In the end, the district court determined that since Christina and Theodore, the parents, were given far more time than the law allows for reunification, the court gave greater importance to the child's interests than the parents' interests, and concluded that it is in the child's best interest to terminate Christina's and Theodore's parental rights.

On appeal, the appellants contend that the district court abused its discretion when it terminated their parental rights, as the evidence does not support the district court's conclusions. Appellant Christina N. Y.-H. also contends (1) that the district court erroneously relied on evidence regarding the death of the child's sibling, (2) that the respondent Division of Child and Family Services failed to make reasonable efforts for reunification, (3) that trial delays penalized her, and (4) that parental fault was not proved by clear and convincing evidence.[8]

Under NRS 128.106(7), when determining whether a parent is unfit, the court must consider an unexplained death of a sibling of a child

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[8]Christina contends that the evidence does not support that she has an "irremediable inability" to function as a parent. See Matter of Parental Rights as to Montgomery, 112 Nev. 719, 728, 917 P.2d 949, 955 (1996) (citation omitted) superseded by statute on other grounds as recognized by In the Matter of Parental Rights to N.J., 116 Nev. 790, 8 P.3d 126 (2000). There is no indication in the record that Christina raised this issue with the district court; thus, the issue is waived on appeal. See Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

who is the subject of a termination proceeding. Contrary to Christina's assertion, the record indicates that this was one of the district court's considerations, not the sole consideration.

As for the Division's effort to reunify Christina with the child, the Division provided Christina with a case plan, and ultimately decided to proceed with termination proceedings after Christina tested positive for drug use. NRS 432B.393(3)(c) provides that a child welfare agency is not required to make reasonable efforts toward reunification, if the court finds that the parent's parental rights have been terminated as to a sibling of a child who is the subject of a termination proceeding, as was the case here. Thus, that the Division provided Christina with a case plan and assisted her toward reunification, was more than the Division was required to provide under the law.

With regard to the trial delay, Christina has failed to demonstrate that a delay in the trial from April 2004 to July 2004 resulted in any prejudice toward her in the proceedings.

Finally, Christina contends that the district court erred when it concluded that she was an unfit parent, since she was providing adequate care for her fourth child. The record shows that the district court commended Christina's parental efforts and the fact that she has taken responsibility for her youngest child, but the court noted that the child in the present matter has been in foster care for approximately two years, "while she struggles with historic issues of drug abuse and instability."

Appellant Theodore C. H. contends on appeal (1) that he did not have proper notice of the case plan requirements so as to avoid termination, (2) that the "best interest of the child" standard is

ambiguous, (3) that the district court considered his incarceration to his detriment, and (4) that his constitutional rights were infringed upon by the ineffective assistance of his trial counsel.

With regard to Theodore's case plan, he testified during the termination hearing that he was given his case plan and understood its requirements. Thus, this argument lacks merit. And his argument that the "best interest of the child" standard is ambiguous also lacks merit, as a district court has discretion to determine each case based on the circumstances of the case. As for Theodore's incarceration, a district court must consider a parent's incarceration in determining whether termination is proper.[9] Incarceration alone does not establish parental fault as a matter of law.[10] Here, the district court did not rely solely on Theodore's incarceration, but considered his drug use and criminal history, and his struggles to comply with his case plan. Finally, even assuming that Theodore had a constitutional right to counsel, the basis on which Theodore asserts ineffective assistance of counsel is not supported by the appellate record. Without giving specifics, Theodore contends that his trial counsel permitted hearsay statements to be introduced into evidence during the trial from caseworkers. Our review of the record indicates that the testimony provided by caseworkers during trial were statements contained in the reports that the caseworkers were required to

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[9]Matter of Parental Rights as to J.L.N., 118 Nev. 621, 55 P.3d 955 (2002).

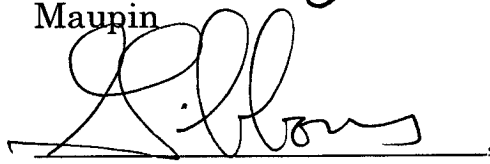
[10]Id. at 628, 55 P.3d at 959-60.

complete and that were submitted to the district court. Thus, we perceive no ineffective assistance of counsel claim.[11]

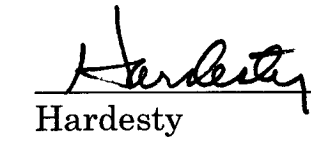
Having reviewed the parties' briefs and the record, and considered all arguments raised by the parties, we conclude that none of appellants' contentions warrant reversal of the district court's decision. Additionally, substantial evidence supports the district court's conclusion that termination is warranted. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Maupin



_____, J.
Gibbons



_____, J.
Hardesty

cc: Hon. Gerald W. Hardcastle, District Judge, Family Court Division
Mills & Mills
Special Public Defender David M. Schieck
Attorney General Brian Sandoval/Las Vegas
Law Offices of Kunin & Jones
Clark County Clerk

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[11]See Matter of Parental Rights as to N.D.O., 121 Nev. ___, ___, 115 P.3d 223, 226-27 (2005).