IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE PARENTAL RIGHTS AS TO S.R.

DAVID R.,
Appellant,
vs.
SCOTT G. AND SHAORU G.,
Respondents.

No. 47583

FILED

JAN 09 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order terminating appellant's parental rights as to the minor child. Eighth Judicial District Court, Family Court Division, Clark County; T. Arthur Ritchie Jr., Judge.

The district court determined that the child's best interest would be served by terminating appellant's parental rights and that parental fault existed based largely on appellant's criminal conviction and life-without-parole sentence for the following felonies: first degree kidnapping, third degree arson, and first degree murder of the child's natural mother. In so determining, the court noted that, while appellant participated daily in caring for the child for the first two years of the child's life, appellant thereafter had "little or no relationship" with the child for more than four years, albeit due to a court order.

In considering the child's best interest, the court also noted that the child had a stable placement with respondents, who are the child's maternal relatives and who intend to adopt the child, and the court found that the child's continuing physical, mental, and emotional needs would not be served by delaying the termination proceeding pending the resolution of appellant's appeal from his criminal conviction. With respect to parental fault, the court determined that (1) appellant was an unfit parent, based on the nature of the crimes for which he was convicted and

testimony regarding prior felony offenses, and (2) the child was at risk of serious physical, mental, or emotional injury if a relationship with appellant was maintained, as appellant had not taken any responsibility for his crimes and had a history of violence. Appellant has appealed.

In order to terminate parental rights, the petitioners must prove by clear and convincing evidence that termination is in the child's best interest and that parental fault exists. See Matter of Parental Rights as to J.L.N., 118 Nev. 621, 625, 55 P.3d 955, 958 (2002); NRS 128.105. In determining whether the petitioners have so shown, the decisive considerations for the court are "[t]he continuing needs of [the] child for proper physical, mental and emotional growth and development." NRS 128.005(2)(c). Parental fault may be established by demonstrating, among other things, a risk of serious physical, mental, or emotional injury if the child was returned to the parent or the parent's unfitness. NRS 128.105(2)(c) and (e). A parent's unfitness can be evidenced by the parent's criminal conviction, "if the facts of the crime[s] are of such a nature as to indicate the unfitness of the parent to provide adequate care and control to the extent necessary for the child's physical, mental or emotional health and development." NRS 128.106(6); see also Matter of Parental Rights as to K.D.L., 118 Nev. 737, 746, 58 P.3d 181, 187 (2002). This court will uphold a district court's termination order if substantial evidence supports the decision. Parental Rights as to J.L.N., 118 Nev. at 625, 55 P.3d at 958.

Appellant first argues that the district court prematurely terminated his parental rights based on his criminal conviction before his appeal from the criminal conviction was resolved. But on January 24, 2008, this court affirmed the conviction in appellant's criminal case. See R. v. State, Docket No. 46569 (Order of Affirmance, January 24, 2008).

Accordingly, appellant's arguments regarding the prematurity of the district court's findings based on his conviction do not warrant reversal.

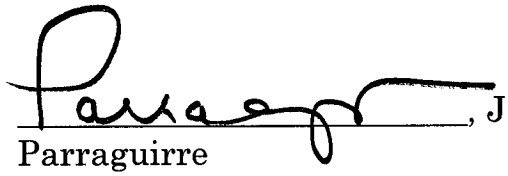
Moreover, the district court's findings as to the child's best interest are supported by substantial evidence, and the court did not improperly consider the length of appellant's incarceration in determining that issue. Parental Rights as to J.L.N., 118 Nev. at 628, 55 P.3d at 960. (noting that the court must consider, among other factors, the sentence imposed); cf. Matter of Parental Rights as to Q.L.R., 118 Nev. 602, 54 P.3d 56 (2002) (considering, primarily, whether time spent in prison necessarily counts towards a finding of abandonment). Finally, the district court, recognizing the serious nature of appellant's crimes, properly determined that appellant's criminal conviction evidenced parental unfitness and, more generally, fault. Parental Rights as to K.D.L., 118 Nev. at 746, 58 P.3d at 187; Parental Rights as to J.L.N., 118 Nev. at 628, 55 P.3d at 960.

Secondly, appellant argues that the Indian Child Welfare Act (ICWA) should have been applied to this matter because the child is eligible for membership in an Indian tribe. See NRS 128.023; 25 U.S.C. §§ 1901-1963 (2006). Under ICWA, § 1903(4), only those children who are either a member of an Indian tribe, or eligible for tribal membership and the biological child of a tribal member, are subject to ICWA's provisions. Here, although appellant's answer to the termination petition indicated that the child might be of Cherokee Indian heritage on the paternal side and his motion for appointment of counsel below stated that the child was eligible for membership in the Blackfoot Indian Tribe, appellant failed to provide any evidence supporting these assertions, to raise the ICWA applicability issue during the evidentiary hearing, and to allege and show that he himself is a tribal member. Accordingly, appellant has not shown that ICWA applies, and the district court was under no duty to notify any

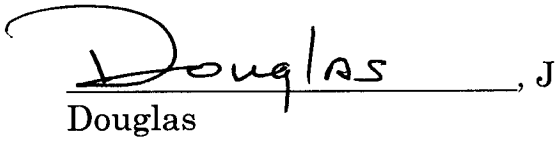
tribe of the proceedings. See In Interest of A.G.-G., 899 P.2d 319 (Colo. Ct. App. 1995) (explaining that the party asserting ICWA's applicability bears the burden to provide the necessary evidence for the trial court to determine whether the child is an "Indian child," citing In re Interest of J.L.M., 451 N.W.2d 377 (Neb. 1990), and concluding that the trial court did not err in refusing to apply ICWA when nothing in the record established the parents' or the child's membership or eligibility for membership in any tribe); Matter of Adoption of Baby Boy W., 831 P.2d 643 (Okla. 1992) (same).

As the district court's decision terminating appellant's parental rights is supported by substantial evidence, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Parraguirre



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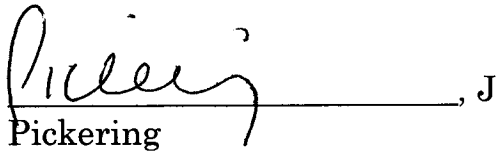
Douglas



_____, J.
Pickering

cc: Hon. T. Arthur Ritchie Jr., District Judge, Family Court Division
Black, Lobello & Sparks
Rhonda L. Mushkin, Chtd.
Eighth District Court Clerk