IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE PARENTAL RIGHTS AS TO K.C.D.

MARCELLA J.,
Appellant,
vs.
STATE OF NEVADA DEPARTMENT OF FAMILY SERVICES AND K.C.D.,
Respondents.

No. 49381

FILED

MAY 08 2008

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; Gerald W. Hardcastle, Judge.

The minor child, K.C.D., was made a ward of the court following allegations of abuse against appellant, his natural mother, to which appellant admitted. Appellant retained physical custody of K.C.D. and a case plan was developed to assist her in regaining full custody. A few months later, however, in May 2004, K.C.D. was placed into protective custody after appellant was arrested on charges of murder with a deadly weapon and child endangerment in connection with the death of K.C.D.'s infant sibling. Upon an Alford[1] plea, appellant was convicted of involuntary manslaughter for the infant's death, and upon a guilty plea,

[1]North Carolina v. Alford, 400 U.S. 25 (1970).

she was convicted of attempt to commit child abuse and neglect with substantial bodily harm related to the physical abuse of K.C.D. Appellant presently is incarcerated, having been sentenced to 16 to 48 months' imprisonment on the manslaughter conviction and 16 to 96 months' imprisonment on the attempted child abuse conviction.

Due to appellant's incarceration and K.C.D.'s abandonment by his putative father, K.C.D. has been in foster care since July 2004; he has been fostered in his present potential adoptive home since March 2006. In March 2007, respondent the State of Nevada, Department of Family Services (DFS) petitioned to terminate appellant's and the putative father's parental rights as to K.C.D.[2] The district court granted the petition, finding that the child's best interests would be served by terminating appellant's parental rights and that parental fault existed.[3] Appellant has timely appealed from the district court's termination order.

To terminate parental rights, a petitioner must prove by clear and convincing evidence that termination is in the child's best interests

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[2]An earlier termination petition was denied because (1) appellant only had been arrested at that point, thus the circumstances underlying her infant's death had not been proven, and (2) at that point, an adoptive home had not yet been identified.

[3]The court also terminated the putative father's parental rights as to the child based on abandonment under NRS 128.012, and the putative father has not appealed that determination.

and that parental fault exists.[4] This court will uphold a district court's termination order if substantial evidence supports the decision.[5]

Parental fault may be established by demonstrating, among other things, the parent's unfitness and that the child would be at risk for serious injury if he were returned to the parent's home.[6] A parent is unfit when, by her own fault, habit, or conduct toward the child, she fails to provide the child with proper care, guidance, and support.[7] In determining unfitness, the district court considers, among other factors, (1) the parent's abusive conduct toward the child, (2) the parent's felony conviction, if the facts of the crime are of such a nature as to indicate the parent's unfitness to adequately provide for the child's care, and (3) the unexplained death of the child's sibling.[8] While incarceration cannot be the sole basis for terminating parental rights, it is a factor appropriate for the court to consider in making a termination decision.[9] Under NRS 128.109(2), if a child has been placed outside of the parent's care for 14 of any 20 consecutive months, it is presumed that termination is in the child's best interests. When a child has been placed and resides in a foster

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

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

[6]NRS 128.105(2)(e).

[7]NRS 128.018; NRS 128.105(2)(c).

[8]NRS 128.106.

[9]Matter of Parental Rights as to J.L.N., 118 Nev. 621, 628, 55 P.3d 955, 959-60 (2002).

home and DFS petitions for termination of parental rights with the ultimate goal of having the child's foster parent adopt him, the court must consider whether the child has become integrated into the foster family and whether the foster parent is willing to adopt the child.[10]

Here, the district court found by clear and convincing evidence that appellant was an unfit parent based on her physically abusive conduct toward the child, her felony conviction for conduct indicative of parental unfitness, and the unexplained death of the child's sibling. The court also found that the child could be exposed to serious risk of injury if returned to appellant's custody. Finally, the court found that the child had been integrated into a foster home in which his foster parent was willing to adopt him, that termination was presumed to be in the child's best interests, given that he had been residing outside of his home for 32 consecutive months, and that appellant failed to rebut the presumption.[11]

On appeal, appellant argues that evidence in the record supports that she did not commit the crime leading to her involuntary manslaughter conviction, and that termination of her parental rights was not appropriate because DFS failed to prove by clear and convincing evidence the facts underlying that conviction. We cannot agree with appellant's reasoning, as it is not an appropriate application of the parental unfitness statute, under which the district court must consider the parent's felony conviction, if the crime is of such a nature as to

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[10]NRS 128.108.

[11]Appellant's brief fails to address the NRS 128.109(2) presumption in favor of termination that applies to the facts presented here.

indicate that the parent is not fit to meet the child's physical, mental or emotional health and development needs.[12] Here, appellant pleaded no contest to the manslaughter charge on belief that it was in her best interest to waive her right to a jury trial, knowing that the court would adjudicate her guilty and knowing the elements of the charged crime and what the state would have to prove in order to support a conviction.[13] Thus, while she maintains her innocence, her conviction, based upon her Alford plea,[14] for involuntary manslaughter caused by striking the infant with her hands or an unknown object or by throwing his body against a

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[12]NRS 128.106(6).

[13]Even if we were to accept appellant's reading of the statute, the record contains substantial evidence supporting the crime of conviction's facts. In particular, the autopsy report revealed that the infant's death resulted from blunt head trauma due to child abuse, and the manner of death was ruled a homicide. Other evidence in the record supports that the infant likely was in appellant's care at the time when the injuries leading to his death occurred and that, before his death, appellant shook the infant and threw him against a wall. While contrary evidence also exists, this court does not reweigh evidence or witness credibility, but rather limits itself to determination of whether substantial evidence in the record supports a parental termination order. See Castle v. Simmons, 120 Nev. 98, 86 P.3d 1042 (2004).

[14]In North Carolina v. Alford, 400 U.S. 25 (1970), the U.S. Supreme Court held that a defendant claiming innocence could nevertheless enter a binding guilty plea, when the defendant understood what the government had to prove and feared that a jury would find her guilty, despite her proclamation of innocence, and that the court would impose a longer sentence on jury conviction than on one based on a plea agreement.

hard surface resulting in his death, is sufficient for the district court to make a finding of parental fault.[15]

Regardless, the record contains substantial evidence to support parental fault on other grounds and to support that termination was in the child's best interests. In particular, the nature of the felony crime to which appellant pleaded guilty, attempted child abuse with substantial bodily harm, demonstrates parental unfitness.[16] Additionally, the unexplained death of the child's sibling is a factor that the court must consider in determining unfitness,[17] and here, appellant failed to explain K.C.D.'s infant sibling's death, other than to claim that he fell off of a sofa, which the court found implausible and which likewise was contrary to the coroner's report. Finally, the court found that risk of serious harm to the child if he were returned to appellant rendered appellant unfit, and appellant fails to challenge that finding on appeal. Given the unexplained death of the infant child and appellant's admission to physically abusing K.C.D., substantial evidence supports the district court's finding.[18]

Although, on appeal, appellant also argues that a guardianship with out-of-state relatives was a reasonable alternative to the termination of her parental rights and, therefore, the petition should

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[15]NRS 128.106(6).

[16]See Matter of Parental Rights as to K.D.L., 118 Nev. 737, 746-47, 58 P.3d 181, 187 (2002) (recognizing that violent crimes, including acts of domestic violence against close family members, are crimes of the nature contemplated under the parental unfitness statute).

[17]See NRS 128.106(7).

[18]See NRS 128.105(2)(e).

have been denied, in termination proceedings, DFS is not required to give a preference to placing a child with a relative.[19] Instead, petitions to terminate parental rights are evaluated under the best interests of the child and parental fault standard.[20] Nevertheless, DFS attempted, during the abuse and neglect proceedings, to place the child with two different relatives, both of whom reside in California. California, however, did not approve of either of the proposed placements. Therefore, DFS could not legally—under the Interstate Compact on the Placement of Children (ICPC), codified at NRS 127.330—place the child with those relatives.[21]

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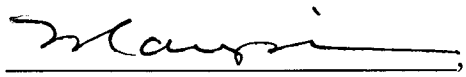
[19]Compare NRS 432B.550(5)(b) (setting forth a mandatory familial placement preference in abuse and neglect proceedings), with NRS 128.110(2)(a) (setting forth a permissive familial preference in termination proceedings, when DFS finds a family member who is suitable and able to provide proper care and guidance for the child).

[20]NRS 128.105; see Matter of Parental Rights as to N.J., 116 Nev. 790, 799, 8 P.3d 126, 132 (2000).

[21]See NRS 127.330 Art. III(d) (providing that a child must not be sent into the receiving state until the appropriate public authorities in the receiving state notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child). Appellant maintains that, had the relatives been informed of the reasons California rejected them for placement, they could have challenged the denials and requested that the ICPC requests be resubmitted. The record, however, supports that the placements were denied after being deemed unsuitable or because the California agency was unable to complete a background check due to lack of cooperation from the potential placement. Regardless, as noted above, DFS is not required to pursue such placements in termination proceedings. See NRS 128.110(2)(a).

Thus, since DFS is not required to pursue a familial placement in a termination proceeding, and in light of the court's parental fault findings, its finding that the child had become integrated into a foster home in which the foster parent was able to meet his needs and was willing to adopt him, and the presumption in favor of termination under NRS 128.109(2), all of which were supported by substantial evidence in the record, we conclude that the district court properly concluded that termination was in the child's best interests. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
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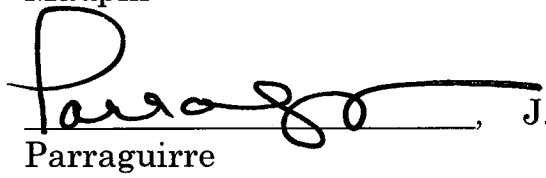

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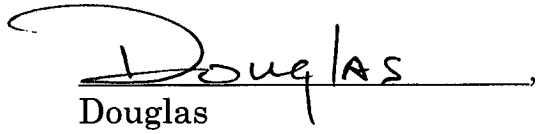

_____, J.
Douglas

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