

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 49616

ERICA A.,
Appellant,

vs.

THE STATE OF NEVADA DIVISION
OF CHILD AND FAMILY SERVICES,
DEPARTMENT OF HEALTH AND
HUMAN RESOURCES,
Respondent.

FILED

MAY 21 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order terminating appellant's parental rights as to the minor child. First Judicial District Court, Carson City; James Todd Russell, Judge.

Appellant Erica A. is the biological mother of A.C., born in April 2005.¹ A.C. has never lived with Erica and presently resides in foster care with a family that wishes to adopt her. Erica appeals a district court order terminating her parental rights as to A.C. Although Erica raises several issues on appeal,² the resolution of this matter is

¹Erica gave birth to three other children, but her parental rights were terminated by a California court as to those three children based on abandonment findings.

²On appeal, Erica raises the following eight issues: (1) whether the petition to terminate parental rights provided adequate notice of the facts that brought A.C. within the purview of NRS Chapter 128; (2) whether the presumptions in NRS 128.109 apply in this case; (3) whether it was established by clear and convincing evidence that Erica's conduct

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determined by whether there was substantial evidence supporting the district court's order to terminate parental rights. We conclude that there is substantial evidence to support the district court's order terminating Erica's parental rights. Accordingly, we affirm the district court's order. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

DISCUSSION

Standard of review

To terminate parental rights, a petitioner must prove by clear and convincing evidence that termination is in the child's best interest and parental fault exists. See NRS 128.105; Matter of Parental Rights as to D.R.H., 120 Nev. 422, 428, 92 P.3d 1230, 1234 (2004). This court will uphold a district court's order to terminate parental rights if substantial

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demonstrated that she is an unfit parent; (4) whether it was established by clear and convincing evidence that Erica's conduct demonstrated a risk of serious physical, mental, or emotional injury to A.C. if she were returned to Erica's home; (5) whether it was established by clear and convincing evidence that Erica's conduct demonstrated only token efforts to support or communicate with A.C.; (6) whether it was established by clear and convincing evidence that Erica's conduct demonstrated only token efforts to prevent neglect of A.C.; (7) whether it was established by clear and convincing evidence that Erica's conduct demonstrated only token efforts to avoid being an unfit parent; (8) whether it was established by clear and convincing evidence that Erica's conduct demonstrated only token efforts to eliminate the risk of serious physical, mental, or emotional injury to A.C. Because we determine that in addressing whether parental termination was in the best interest of the child and substantial evidence supported a finding of parental fault, we do not address each issue separately.

evidence supports the decision. Matter of Parental Rights as to D.R.H., 120 Nev. at 428, 92 P.3d at 1234.

Here, based upon the Division of Child and Family Services' (DCFS) petition, the district court terminated Erica's parental rights, finding that termination was in A.C.'s best interest. The district court further found that substantial evidence established parental fault on the grounds of serious physical, mental, or emotional injury to the child, unfitness, and token efforts. See NRS 128.105(2)(c), (e) and (f). We agree.

We first address whether the evidence established that the parental termination was in the best interest of the child and then determine whether the evidence supported a finding of parental fault.

Best interest of the child

Nevada's statutory scheme requires the district court to consider whether the best interest of the child would be served by termination of parental rights. NRS 128.105(1). In making its determination, the district court must consider the "continuing needs of a child for proper physical, mental, and emotional growth." NRS 128.005(2)(c). If a child is placed outside his home in accordance with NRS Chapter 432B³ and has "resided outside of his home pursuant to that placement for 14 months of any 20 consecutive months, the best interests of the child must be presumed to be served by the termination of parental rights." NRS 128.109(2). Once this presumption applies, "the parent has the burden to offer evidence to overcome the presumption that termination of his or her rights is in the child's best interest." Matter of Parental

³NRS Chapter 432B governs measures for protecting children from abuse and neglect.

Rights as to A.J.G., 122 Nev. 1418, 1426, 148 P.3d 759, 764 (2006). This court has held that “taken together NRS 128.109(2) and NRS 432B.533(2) express the general public policy to seek permanent placement for children rather than have them remain in foster care.” Matter of Parental Rights as to K.D.L., 118 Nev. 737, 745, 58 P.3d 181, 186 (2002) (quoting Matter of Parental Rights as to J.L.N., 118 Nev. 621, 625, 55 P.3d 955, 958 (2002)). In instances where the child has been placed in foster care, the district court must look at specific considerations, including whether the child has become integrated into the foster family “to the extent that his familial identity is with that family.” NRS 128.108. Other considerations include the length of time the child has lived in a stable foster home and the permanence as a family unit of the foster family. See NRS 128.108(4) and (5).

A.C.’s physical, mental, and emotional needs

Our review of the record shows that there is substantial evidence indicating that A.C.’s physical, mental, and emotional needs are best served by the termination of Erica’s parental rights. In its order terminating parental rights, the district court explained that it was specifically concerned with A.C.’s medical problems and the issue of “who can best provide for those needs and who can best understand those needs.” The court noted that it was impressed with the foster parent’s ability to handle A.C.’s developmental issues. It also observed that removing A.C. from the only home she has ever known since birth would have a negative emotional impact. We agree.

The record indicates that removing A.C. from the only home and family she has ever known would be detrimental to her proper physical growth. We conclude that removing A.C. from the foster home

would be detrimental to her based on her medical problems, the domestic violence situation between her parents, and the fact that she considers the foster family her own.

A.C. has a number of serious medical problems, including sensory integration deficit and possibly autism. Erica suffers from Graves' disease, a serious illness of the thyroid gland. While pregnant with A.C., Erica only received three to four months of prenatal care and did not treat her medical condition properly. She failed to take the prescribed medication and admit herself into the hospital when directed to do so. Consequently, Erica fell seriously ill after giving birth. A.C. was born with a thyroid illness and depressed breathing and had to spend a week in intensive care.

Despite A.C.'s well established special needs, Erica testified that she did not believe there was anything wrong with her child. Erica did not offer evidence that she had researched her daughter's medical conditions—to the contrary, at trial, she testified that she believed A.C. was "normal." When asked how she would respond to her daughter's health needs, Erica stated that she would simply attend all of the doctor appointments. Yet, during a two-year period, Erica only managed to attend slightly more than half of A.C.'s doctor appointments. In direct contrast, the foster parents have educated themselves regarding A.C.'s numerous conditions and demonstrated that they can recognize and meet A.C.'s special and developmental needs. They have advocated on her behalf to ensure that she receives proper medical attention. Additionally, the record shows that the foster parents identified A.C.'s special needs early in her life, and took the initiative to properly diagnose and treat her conditions, while also working with her sensory issues. The foster parents

have demonstrated parental responsibility when it comes to A.C.'s continued physical needs.

Notwithstanding A.C.'s numerous medical conditions, there exist concerns regarding the child's physical safety and mental growth related to alleged instances of domestic violence associated with Erica and A.C.'s father. Erica testified that A.C.'s father, Daniel C.,⁴ threatened on multiple occasions to kill Erica. Further, DCFS presented evidence at trial that Erica made statements to the agency that Daniel had hit her, although she denied these statements when confronted with the evidence at trial. Erica did, however, attend months of domestic violence counseling. During these sessions, Erica told the counselor that she and Daniel were no longer living together and that they did not communicate. However, the record indicates otherwise: Daniel's employment records indicate that he shares the same address as Erica, Daniel's vehicle is registered to Erica's address, the loan-financing document for Daniel's vehicle denotes Erica's address, Erica wrote a letter to the financing company that she rents her apartment to Daniel, Erica had \$4,000 in cash in her purse during trial that jointly belonged to herself and Daniel, and Daniel was paying Erica's rent and support at the time of trial. We further note that Erica presented no evidence showing a resolution to the violent situation with Daniel. Rather, the record indicates that Erica cannot guarantee A.C.'s physical, mental, or emotional safety by ensuring that A.C. would not be exposed to domestic violence between herself and Daniel.

⁴Daniel's parental rights were also terminated in the underlying case, but he is not appealing the district court order.

As to A.C.'s emotional growth, the record indicates that the foster parents have been caring for A.C. since she was born and they wish to adopt her. Theirs is the only home that A.C. has ever known, and there are strong emotional ties between A.C. and the foster family. A.C. grew up with the foster parents' other children who feel that A.C. is their sister. A.C. has been integrated into the foster family to the extent that her familial identity is with that family.

Conversely, Erica and A.C. have spent only limited time together. Thus, Erica has been, at best, a temporary figure in A.C.'s life, whereas the foster family has been a permanent fixture and has bonded with A.C. We conclude that substantial evidence supports the district court's determination to terminate Erica's parental rights based on its findings of parental fault; specifically, that there exists a risk of serious physical, mental, or emotional injury to A.C. if she were returned to Erica's home.

Specific considerations where child is placed in foster home

As discussed above, the foster parents have continually demonstrated that they can properly and promptly handle A.C.'s numerous medical conditions. A.C. has been living outside Erica's home with her foster family since birth. The permanence as a family unit is apparent inasmuch as the foster parents want to adopt A.C. and the other children already consider her to be their sister. The record shows that the foster family has provided a stable, loving, and healthy environment for A.C.

Pursuant to NRS 128.109(2), A.C. has been outside Erica's home for 14 months of a 20 consecutive month period,⁵ and therefore the burden was on Erica to offer evidence to overcome the presumption that termination of her parental rights was in A.C.'s best interest. See, e.g., Matter of Parental Rights as to A.J.G., 122 Nev. 1418, 1426-27, 148 P.3d 759, 764-65 (2006). To overcome the presumption, Erica was required to provide independent evidence, aside from her own testimony, that she had addressed the problems articulated in the petition to terminate her parental rights. Id.

The record indicates that Erica did not overcome the presumption of NRS 128.109(2). While A.C. had been living with the foster family and receiving the love and care of a stable family home, in addition to proper medical attention, Erica continued living in an unsafe, violent arrangement with Daniel. Erica denied there is anything physically wrong with A.C., despite diagnoses of several medical conditions. Additionally, Erica lacked financial stability and has held a number of jobs, but only for short periods of time. At the time of trial, Erica was unemployed and offered no evidence of stable employment. Accordingly, we conclude that there is substantial evidence supporting the

⁵On appeal, Erica argues that the presumption does not apply to her case because A.C. was not taken out of Erica's home due to abuse or neglect, but rather, because Erica was in a coma. This argument is without merit. Erica's failure to properly take care of her own health and follow doctor's orders resulted in her leaving her newborn daughter without care, supervision, shelter, or medical care, which required "removal" due to neglect.

district court's determination that it was in A.C.'s best interest to terminate Erica's parental rights.

Parental fault

Parental fault may be established by demonstrating, among other things, (1) the parent's unfitness, (2) that the child would be at risk of serious physical, mental, or emotional injury if the child were returned to the parent's home, and (3) by showing that the parent has only made token efforts to communicate with the child, to prevent neglect, to avoid being an unfit parent, or to eliminate the risk of serious physical, mental, or emotional injury to the child. NRS 128.105(2)(c), (e) and (f). 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. NRS 128.018; NRS 128.105(2)(c).

In its order terminating parental rights, the district court found that parental fault rested with Erica because she failed to provide proper care, guidance, and support for A.C. We conclude that substantial evidence supports the district court's decision to terminate Erica's parental rights based on these findings of parental fault.

Unfitness

What constitutes being unfit can vary from case to case, but generally includes continued drug use, criminal activity, domestic violence, and an overall inability to provide for the child's physical, mental, and emotional health and development. See Matter of Parental Rights as to D.R.H., 120 Nev. 422, 430, 92 P.3d 1230, 1235 (2004); Matter of Parental Rights as to K.D.L., 118 Nev. 737, 746-47, 58 P.3d 181, 187 (2002).

The record indicates that Erica was an unfit parent to A.C. Beginning with the pregnancy, Erica failed to take care of herself, while being aware that her own health impacted her child. While it is unclear whether Erica's failure to seek proper medical care for herself directly contributed to A.C.'s medical problems, we determine that it shows recklessness on behalf of the mother. Her failure to afford proper care for herself caused Erica to become so sick after labor that she could not provide proper care or support to her newborn. Further, since then she has maintained a relationship with an allegedly abusive man. Moreover, the record indicates that she has not been forthcoming regarding the extent of their involvement. Not only has she failed to address concerns about her domestic life, she has also failed to address issues about her professional life. Although Erica has held a number of jobs for short periods of time, she offered no evidence that she had been able to maintain a job or meet her responsibility to pay child support. Erica failed to offer any evidence regarding how she planned to provide support and guidance to A.C. as the child continues to struggle and confront ongoing medical, developmental, and social problems. Therefore, we conclude that there was substantial evidence in the record showing parental fault due to Erica being an unfit parent.

Token efforts

We have observed that communicating with one's children and giving gifts, absent an attempt to support them financially, does not amount to evidence sufficient to rebut [the presumption in NRS 128.109(1)(a)]. Matter of Parental Rights as to A.J.G., 122 Nev. 1418, 1428, 148 P.3d 759, 766 (2006).

We conclude that substantial evidence supports the district court's finding that Erica only made token efforts to reunite with A.C. Erica's failure to adequately address the domestic violence situation with Daniel demonstrated only a token effort on her part to address a situation that put both her and her daughter at serious risk of physical and emotional harm. In addition, Erica did not complete domestic violence sessions as recommended by a DCFS social worker. Further, Erica did not offer any evidence to show that she understood A.C.'s medical problems or the ramifications of such problems, beyond the token effort of expressing willingness to attend all doctor's visits in the future. Erica also failed to show how she planned to support herself and A.C. if she were to regain custody. Evidence presented at trial also indicated that Erica did not buy her daughter birthday or Christmas presents for two years. While we note that a lack of gift giving does not qualify one as an unfit parent, in this case we consider it as one fact among many that show a lack of accountability on Erica's behalf to care for A.C. beyond token efforts. Therefore, we conclude that the record establishes a finding of parental fault.

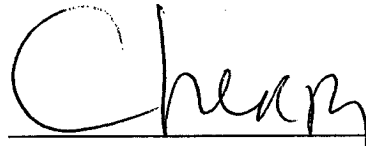
Accordingly, we conclude that there is substantial evidence on the record supporting a finding that there was parental fault on Erica's behalf. Here, the record indicates that Erica is unfit to be a parent and only made token efforts to reunite with her daughter.


CONCLUSION


We conclude that DCFS proved by clear and convincing evidence that termination of Erica's parental rights was in A.C.'s best interest and that parental fault existed. Therefore, because we find that

there was substantial evidence in the record supporting a termination of parental rights, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. James Todd Russell, District Judge
Robert B. Walker
Attorney General Catherine Cortez Masto/Carson City
Carson City Clerk