

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF PARENTAL
RIGHTS AS TO H. H.-B. AND L. H.

No. 50300

NICOLASA B.,
Appellant,
vs.
WASHOE COUNTY DEPARTMENT OF
SOCIAL SERVICES,
Respondent.

FILED

DEC 31 2008
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY: *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order terminating appellant's parental rights as to two minor children. Second Judicial District Court, Family Court Division, Washoe County; Deborah Schumacher, Judge.

Facts

Appellant is the natural mother of three children, who were born in 1997, 2003, and 2005. The children were found to be in need of protection and removed from the home in March 2006, after an unrelated three-year-old-child left in appellant's care was found to have second- and third-degree burns to his feet. The oldest child, who is not involved in this appeal, was placed in a guardianship with her paternal grandparents; the younger two children were placed in foster care with maternal relatives.

In May and July 2006, respectively, appellant pleaded guilty to and was criminally convicted of child neglect causing substantial bodily harm; she was sentenced to two to five years' imprisonment for the felony. Although appellant was initially given a case plan for reunification with the children, respondent Washoe County Department of Social Services

modified the case plan to termination of parental rights with respect to the two younger children around the time she was sentenced in the criminal proceeding.

Ultimately, a petition for termination of parental rights was filed, and in September 2007, the district court found by clear and convincing evidence that the two children's best interests would be served by terminating appellant's parental rights, as well as parental fault. Regarding the children's best interests, the court noted that, because the children had resided out of the home for more than 14 consecutive months, it was presumed under NRS 128.109(2) that the termination of parental rights was in the children's best interests. Further, the court found that, while appellant expressed love for the children and maintained a strong bond with the older of the two children, she would be unable to care for them for at least two years while in prison, and it was unclear whether the younger child, who was four months old when removed from the home, had a strong bond with appellant.

The court also pointed to appellant's long-term, documented inability to extract herself and the children from a domestic violence situation despite counseling and noted that, while appellant's presence in the children's lives was important, her chronically inappropriate choices jeopardized their safety. Thus, the court determined that appellant had failed to rebut the presumption that termination of parental rights was in the children's best interests. Additionally, the court noted that while the maternal relatives did not believe that termination of parental rights was necessary, they were willing to adopt the children if appellant's rights were terminated, would be able to provide the children with the protection

required, and appropriately would allow them to maintain a connection with appellant.

As for parental fault, the court determined that the circumstances surrounding appellant's criminal conviction demonstrated parental unfitness. Pointing out that the criminal conviction related to inaction causing substantial bodily harm to a child in appellant's care, the court found that appellant was aware of the child's serious injuries, failed to seek help for over one and a half days, failed to notify the child's father even after any threat of immediate danger to herself was eliminated, and did not check on the child for over three hours, all of which delayed medical treatment and resulted in worsened injuries. Also, the court specifically noted that the parental unfitness finding was made after having considered evidence that the child had other, older injuries of which appellant should have been aware and evidence that, despite appellant's past participation in domestic violence counseling, she had lied to protect, and showed a "troubling attitude" toward, the alleged domestic violence perpetrator.¹

Based on these findings, the court terminated appellant's parental rights to the two younger children. Appellant has appealed.

Discussion

In order to terminate parental rights, the petitioner must prove by clear and convincing evidence that termination is in the

¹The alleged domestic violence perpetrator, the two younger children's natural father, apparently caused the unrelated child's injuries and was criminally convicted therefor.

children's best interests and that parental fault exists.² This court will uphold a district court's termination order if substantial evidence supports the decision.³

On appeal, appellant contends that substantial evidence does not support the district court's termination order. Appellant maintains that the only evidence relating to the children's best interests was the passage of time, which alone, she asserts, is insufficient. She also points out that she complied with her case plan by completing several relevant courses while in prison and maintained contact with the children to the extent possible, arguing that she originally was told that she would be reunified with her children and that, together, these facts rebut the NRS 128.109(2) presumption. Further, insisting that the only explanation for modifying the case plan from reunification to termination of parental rights was appellant's criminal conviction, appellant asserts that the parental fault finding impermissibly was based solely on her prison sentence; according to appellant, termination of parental rights is justified only in the face of a history of neglect and a substantial likelihood of future neglect,⁴ which she asserts was not shown here.

Having considered appellant's arguments in light of the record, we conclude that substantial evidence supports the district court's order terminating appellant's parental rights. With respect to the

²See Matter of Parental Rights as to J.L.N., 118 Nev. 621, 625, 55 P.3d 955, 958 (2002); NRS 128.105.

³Matter of J.L.N., 118 Nev. at 625, 55 P.3d at 958.

⁴See In re People in Interest of M. M., 520 P.2d 128 (Colo. 1974).

children's best interests, under NRS 128.109(2), if children have been in foster care for 14 of any 20 consecutive months, it is presumed that the termination of parental rights is in their best interests. Once this statutory presumption arises, the parent has the burden to present evidence to overcome the presumption.⁵

NRS 128.109(2)'s presumption is derived solely from the passage of time; accordingly, here, even though appellant was incarcerated during the months giving rise to the statutory presumption, the district court properly applied the presumption and considered whether appellant had rebutted it.⁶ In finding that appellant had not rebutted the presumption despite recognizing her efforts to maintain a relationship with the children and her completion of case plan items while incarcerated, the court considered appellant's past and current care of, and relationship with, the children. In the end, the court, noting the circumstances of appellant's crime, the children's young ages, and appellant's history of exposing them to situations involving domestic violence, determined that their interests were best served through the

⁵Matter of Parental Rights as to A.J.G., 122 Nev. 1418, 1426, 148 P.3d 759, 764 (2006).

⁶See, e.g., Matter of J.L.N., 118 Nev. at 628; 55 P.3d at 959-60 (applying a time-based rebuttable presumption despite appellant's incarceration).

While appellant was incarcerated during the months giving rise to the NRS 128.109(2) presumption, the children were not removed from the home solely because of her incarceration, and whether they would have been reunified if appellant had not been incarcerated is unknowable.

termination of appellant's parental rights. The court's findings regarding the children's best interests are supported by substantial evidence.

Parental fault may be established by demonstrating, among other things, the parent's unfitness.⁷ When determining whether a parent is unfit,⁸ the court evaluates whether the parent, "by reason of [her] fault or habit or conduct toward the child or other persons, fails to provide such child with proper care, guidance and support."⁹ A parent's unfitness can be evidenced by, among other things, the parent's criminal conviction, "if the facts of the crime 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[ren]'s physical, mental or emotional health and development."¹⁰ Here, the district court concluded that the facts of appellant's crime against another minor child and the circumstances surrounding that crime, along with appellant's long-term inability to remove herself and her

⁷NRS 128.105(2)(c).

⁸Id.

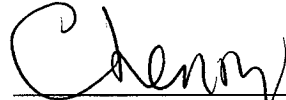
⁹NRS 128.018; see also Champagne v. Welfare Division, 100 Nev. 640, 648, 648 n.5, 691 P.2d 849, 854-55, 855 n.5 (1984) (recognizing that a parent generally is considered unfit when failure to provide proper care is severe and persistent, such as to render the parent unsuitable), overruled on other grounds by Matter of Parental Rights as to N.J., 116 Nev. 790, 8 P.3d 126 (2000); Champagne, 100 Nev. at 648 n.5, 691 P.2d at 855 n.5 (explaining that a parent generally is considered unsuitable when, among other things, the parent has an "irremedial inability to function as a proper and acceptable parent").

¹⁰NRS 128.106(6); Matter of Parental Rights as to K.D.L., 118 Nev. 737, 746, 58 P.3d 181, 187 (2002).

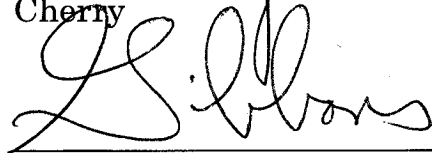
children from a domestic violence situation, demonstrated parental unfitness. Those findings are supported by substantial evidence.

Accordingly, as the district court's findings regarding the children's best interests and parental fault are supported by substantial evidence, we


ORDER the judgment of the district court AFFIRMED.

 _____, J.

Cherry

 _____, J.

Gibbons

 _____, J.

Saitta

cc: Hon. Deborah Schumacher, District Judge, Family Court Division
Washoe County Public Defender
Washoe County District Attorney Richard A. Gammick/Civil
Division
Washoe District Court Clerk