IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE PARENTAL RIGHTS AS TO T.A.M.G.,

JULIE M.L. L.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51428

FILED

OCT 20 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; Cynthia Dianne Steel, Judge.

FACTS AND PROCEDURAL BACKGROUND

In the underlying termination case, appellant's child, who was born in Las Vegas, was removed from appellant's care as a result of a positive drug test that was taken while appellant was in a Utah hospital, before the child's birth. Although the child was born drug-free, Clark County Department of Family Services (DFS) contacted appellant and she admitted to using drugs. Subsequently, the child was made a ward of the State and a case plan was devised for appellant. In that case plan, DFS provided appellant with referrals for drug treatment, housing assistance, and parenting classes.

Pursuant to the case plan, appellant began attending drug therapy, but she could not maintain stable housing and did not enroll in parenting classes. She later admitted to using drugs while in Las Vegas. Thereafter, appellant moved to New Mexico. While in New Mexico, she participated in a drug treatment program that was later deemed

inadequate by the district court because the treatment facility allowed appellant to check in and attend counseling by phone and the facility did not conduct drug testing. Consequently, the district court ordered appellant to continue drug therapy with a different facility, and the record shows that appellant did not begin the process to enter a new treatment program until six months later, even though, four months earlier, DFS had provided her with a list of facilities. During the six-month lapse in treatment, appellant twice tested positive for drugs. After 12 months, when appellant had not completed her case plan, DFS petitioned the district court to terminate appellant's parental rights.

Following a bench trial on DFS's termination petition, the district court determined that termination of appellant's parental rights was in the child's best interest and found four grounds of parental fault by clear and convincing evidence. First, the district court found that appellant's excessive drug use demonstrated that appellant was consistently unable to care for her child, thereby rendering her unfit. Second, the district court found that appellant had failed to make parental adjustments, since she did not substantially comply with the terms and conditions of her case plan to reunite the family. Third, the district court concluded that she demonstrated only token efforts to regain custody of her child. Finally, the district court determined that appellant had abandoned her child. Based on these findings, the district court terminated appellant's parental rights. Appellant has appealed, contending that DFS failed to make reasonable efforts to reunite the family so that the district court's findings of parental fault were improper, that she successfully rebutted the statutory presumptions, and that substantial evidence does not support the district court's order.

DISCUSSION

Standard of review

"In order to terminate parental rights, a petitioner 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 D.R.H., 120 Nev. 422, 428, 92 P.3d 1230, 1234 (2004); NRS 128.105. This court will uphold a district court's termination order if substantial evidence supports the decision. D.R.H., 120 Nev. at 428, 92 P.3d at 1234.

We conclude that substantial evidence supports the district court's finding that termination of appellant's parental rights was in the child's best interest. We also determine that the district court's parental fault findings should not be disturbed due to an alleged lack of reasonable efforts made by DFS to reunite the family. In light of that conclusion, we considered the district court's parental fault findings and resolve that substantial evidence supports the district court's findings of parental fault; thus, we affirm the district court's termination of appellant's parental rights.

Child's best interest

When determining what is in the child's best interest, the district court must consider the child's continuing need for "proper physical, mental and emotional growth and development." NRS 128.005(2)(c). If a child has been in foster care for 14 of any 20 consecutive months, it is presumed that the termination of parental rights is in the child's best interest. NRS 128.109(2). Once this statutory presumption arises, the parent has the burden to present evidence to overcome the presumption, Matter of Parental Rights as to A.J.G., 122 Nev. 1418, 1426, 148 P.3d 759, 764 (2006), and it cannot be overcome by evidence that the State failed to provide services to the family. NRS 128.109(3).

In the underlying matter, the record shows that the child was in foster care for 22 months; thus, the district court properly found that the statutory presumption applied. Once the presumption applied, it was appellant's burden to present evidence to overcome that presumption. A.J.G., 122 Nev. at 1426, 148 P.3d at 764. In concluding that appellant had not rebutted the presumption, the district court found that appellant had squandered an opportunity to bond with the child when appellant moved from Nevada. Appellant's move essentially ensured that no bond with the child would be established. The record also shows that appellant failed to maintain sufficient contact with the child. The child is in a stable foster home, and the foster family is willing to adopt the child and accept the child as their own.

Having considered the appellate record, we conclude that substantial evidence supports the district court's finding that appellant failed to rebut the statutory presumption that termination of appellant's parental rights was in the child's best interest.

Parental fault

The district court found four parental fault grounds: unfitness, failure of parental adjustment, token efforts, and abandonment.[1] Appellant contends that DFS's failure to make reasonable efforts at reunification and the lack of substantial evidence to support the district court's decision precludes termination.

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[1]We note that the record contains no evidence that appellant evinced a settled purpose to forego custody and relinquish her rights, and thus, the district court's finding of abandonment is not supported by substantial evidence. NRS 128.012.

Reasonable efforts

Appellant argues that DFS failed to make reasonable efforts to reunite the family, so that the district court improperly found parental fault based on unfitness, failure to make parental adjustment, and token efforts to avoid being an unfit parent, or to eliminate the risk of serious physical, mental, or emotional injury to the child.

Parental fault may be established by demonstrating a parent's unfitness, failure of parental adjustment, and only token efforts to communicate or support a child. NRS 128.105(2). An order terminating parental rights "must be made in light of the considerations set forth in [NRS 128.105] and NRS 128.106 to 128.109, inclusive." NRS 128.105. Under NRS 128.106, in determining whether a parent is unfit, the court "shall consider, without limitation," the "[i]nability of appropriate public or private agencies to reunite the family despite reasonable efforts on the part of the agencies," which may diminish one's suitability as a parent. NRS 128.106(8). As part of the analysis, the court must consider the services provided or offered to a parent to facilitate reunification, the child's needs, the efforts made by the parent to adjust his or her circumstances, conduct or conditions, including maintaining regular visitation or contact with the child and with the child's custodian, and whether additional services would likely bring about lasting parental adjustment so that the child could be returned home within a predictable period. NRS 128.107.

While the district court generally must consider the services offered to the parent, NRS 128.107, no specific termination statute requires "reasonable efforts" by the State as a condition for termination. That term arises in Nevada's abuse and neglect statute, NRS 432B.393(1), which generally mandates that a child welfare agency

"make reasonable efforts to preserve and reunify the family of a child" to make it possible for the child's safe return home. "In determining the reasonable efforts required by subsection 1, the health and safety of the child must be the paramount concern." NRS 432B.393(2). Thus, an analysis of reasonable efforts requires both a subjective and objective evaluation that should be made on a case-by-case basis. See, e.g. NRS 128.107 (requiring the district court to consider the efforts by a child welfare agency as well as the parent's cooperation in completing his or her case plan objectives).

Here, the district court found that appellant knew what was expected of her to have the child returned to her custody and that DFS did not ignore appellant. The district court also noted that appellant's attempts to complete drug treatment were "too little, too late," that she failed to complete parenting classes, and that she had several positive drug tests, and thus, the district court found that appellant did not substantially comply with her case plan. The record also reveals that DFS provided services to the child, pursuant to NRS 432B.393(2), and requested a home study to determine if the child could be placed with appellant. Although the home study was conditionally approved by New Mexico's child welfare agency, DFS denied placement of the child with appellant due to outstanding concerns regarding, among other things, appellant's noncompliance with her case plan.

Having considered the parties' appellate arguments in light of the district court record, we conclude that substantial evidence supports the district court's determination that the parental fault findings, discussed more fully below, should not be disturbed due to an alleged lack of reasonable efforts on the part of DFS. Thus, we now consider whether

substantial evidence supports the district court's findings that parental fault existed due to appellant's alleged excessive use of drugs and resulting unfitness, her failure to make parental adjustment, and her token efforts to care for the child or avoid being an unfit parent.

Unfitness

An unfit parent is one who because of her fault, habit, or conduct toward the child or others fails to provide the child with proper care, guidance, and support. NRS 128.018; NRS 128.105(2)(c). In determining whether a parent is unfit, the court must consider a parent's excessive use of dangerous drugs that renders the parent consistently unable to care for the child. NRS 128.106(4).

Here, the district court determined that appellant failed to successfully complete a drug-treatment program or remain drug-free, as appellant still had cocaine in her system some 18 months after the child's removal. The district court also found that appellant's attempt to complete a second drug program was "too little, too late," and appellant should have taken decisive action much sooner. Further, in her trial testimony, appellant minimized her drug use as "just now and then," when her case plan required that she completely refrain from drug use. Thus, the district court determined that appellant's excessive use of drugs rendered her consistently unable to care for the child and rendered appellant an unfit parent. See Matter of Parental Rights as to D.R.H., 120 Nev. 422, 92 P.3d 1230 (2004) (determining that substantial evidence supported the district court's finding that the mother was an unfit parent due to her continued use of drugs, which rendered her consistently unable to care for her children); Matter of Parental Rights of Weinper, 112 Nev. 710, 715, 918 P.2d 325, 329 (1996) (upholding the district court's finding that the father was unfit due to his recurring positive drug tests and

criminal activity), reversed on other grounds by Matter of Parental Rights as to N.J., 116 Nev. 790, 8 P.3d 126 (2000) and superseded by statute on other grounds as stated in Matter of Parental Rights as to N.D.O., 121 Nev. 379, 115 P.3d 223 (2005).

Failure of parental adjustment

When determining whether a parent has failed to make parental adjustments, NRS 128.105(2)(d), the court evaluates whether the parent is unwilling or unable within a reasonable time to substantially correct the conduct that led to the child being placed outside of the home. NRS 128.0126. A parent's failure to adjust may be presumed when the parent fails to substantially comply with the reunification case plan within six months after the child has been placed outside of the home. NRS 128.109(1)(b).

The district court noted that appellant failed to substantially comply with the reunification plan when she failed to complete parenting classes within a reasonable time period and, 22 months after the child was removed from appellant's care, appellant had failed to complete a drug-treatment program or to address the issues raised in the drug assessment. Thus, the district court concluded that appellant failed to make the necessary parental adjustments to preserve her parental rights as to this child.

Appellant asserts that similar to the scenario in Matter of Parental Rights of Montgomery, 112 Nev. 719, 917 P.2d 949 (1996), superseded by statute on other grounds as stated in Matter of Parental Rights as to N.J., 116 Nev. 790, 8 P.3d 126 (2000), substantial evidence does not support the district court's finding that appellant failed to make the necessary parental adjustments because, according to appellant, she proved her condition was remediable and she should have been given a

second opportunity to remedy the condition that led to her child's placement with the State.

In Montgomery, the district court gave the mother, who was an alcoholic, additional time to prove her suitability as a parent. A new case plan was devised for the mother and she complied with the case plan and demonstrated that her alcoholism was remediable. Id. at 724-25, 917 P.2d at 953-54. Despite the mother's compliance, however, the district court terminated her parental rights. Id. On appeal, the Montgomery court considered NRS 128.105's definition of an "unfit parent" and the suitability conditions outlined in NRS 128.106(4) and (8). 112 Nev. at 727-28, 917 P.2d at 955. In doing so, the court concluded that the mother had established that her condition was remediable, that she could function as a proper and acceptable parent, and that she made this showing within the predictable period given to her by the district court. Id. at 728-29, 917 P.2d at 955-56. Thus, the court concluded that termination of the mother's parental rights on the basis of unfitness was not supported by substantial evidence. Id. at 729, 917 P.2d at 956.

Here, appellant had several relapses over a 21-month period, the last relapse only 4 months before the termination hearing. Further, the record demonstrates that appellant minimized her relapses and offered no explanation for why the last relapse occurred. Thus, we conclude that the district court did not abuse its discretion by not providing appellant more time to prove that additional services would likely have brought about the lasting parental adjustment that would have enabled her child's return home within a predictable period. See id.; NRS 128.107(4) (providing in conjunction with other statutory provisions, when determining whether to terminate parental rights, a district court

must consider whether additional services would likely bring about lasting parental adjustment enabling the child's return home within a predictable period). Moreover, we note that, as recognized in N.J., 116 Nev. 790, 8 P.3d 126, the Montgomery analysis is not entirely reliable, as the Legislature has since amended NRS 128.105 to provide that the child's best interest, not the parent's conduct, is the primary consideration in determining whether to terminate parental rights. 116 Nev. at 798-99, 8 P.3d at 131-32.

Token efforts

Parental fault may be based on only token efforts by the parent to support or communicate with the child, prevent neglect of the child, avoid being an unfit parent, or to eliminate the risk of serious physical, mental, or emotional injury to the child. NRS 128.105(2)(f)(1)-(4). When a child resides in foster care for 14 of any 20 consecutive 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. NRS 128.109(1) and (2). When this presumption arises, the parent cannot overcome the presumption by evidence that the child welfare agency failed to provide reasonable efforts to reunite the family. NRS 128.109(3). A child welfare agency's failure to provide reasonable efforts to reunite the family cannot be used to rebut the presumption that only token efforts were made because states have a compelling interest to ensure that children do not remain in foster care for an indefinite amount of time without permanency. See generally Matter of Parental Rights as to D.R.H., 120 Nev. 422, 427-28, 92 P.3d 1230, 1233-34 (2004) (holding that NRS 128.109 is narrowly tailored to serve a compelling state interest to promote the public policy that, after the requisite time has passed, the

district court may determine that continuing efforts to reunite the family is not in the child's best interest).

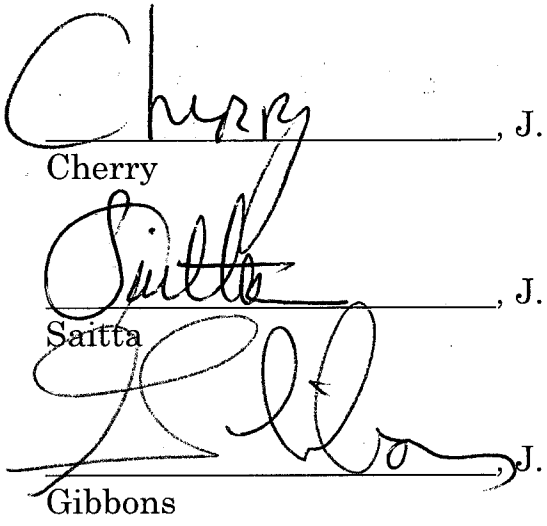
Here, in its oral findings from the bench, the district court found that appellant had made only token efforts, in part because of her relapses and the fact that appellant attempted to minimize her drug problem. The district court also noted that appellant's enrollment in the second drug treatment program was "too little, too late" and that appellant needed to take aggressive action much sooner. Indeed, the district court advised appellant that had she taken drastic action immediately after being directed to find a new drug treatment program, she might not be facing the loss of her parental rights. Thus, the district court concluded that appellant had failed to rebut the presumption. We agree.

CONCLUSION

As stated earlier, we determine that substantial evidence supports the district court's findings that termination of appellant's parental rights was in the child's best interest and that the parental fault findings should not be disturbed based on alleged lack of reasonable efforts by DFS to reunite the family. Concerning the district court's parental fault findings, we conclude that substantial evidence supports the district court's findings that appellant's continued use of drugs was excessive, which rendered her consistently unable to care for the child. Though only one finding of parental fault is required under NRS 128.105, we further determine that substantial evidence supports the district court's findings that appellant failed to make the necessary parental adjustment to have the child returned to her care, the district court did not abuse its discretion by not providing appellant more time to prove that additional services may have brought about the lasting parental

adjustment that would have enabled her child's return home within a predictable period, and that the statutory presumption of token efforts applied and was not rebutted by appellant. Because we conclude that substantial evidence supports the district court's finding that termination of appellant's parental rights was in the child's best interests and that parental fault existed, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

cc: Hon. Cynthia Dianne Steel, District Judge, Family Court Division
Special Public Defender David M. Schieck
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger/Civil Division
Eighth District Court Clerk