IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE PARENTAL RIGHTS AS TO:
K. W. AND J. W., MINORS.

LORRI W.,
Appellant,
vs.
STATE OF NEVADA DEPARTMENT OF FAMILY SERVICES AND J. W.,
Respondents.

J. W.,
Appellant,
vs.
STATE OF NEVADA DEPARTMENT OF FAMILY SERVICES,
Respondent.

No. 54196

FILED

JUL 30 2010

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 parental rights. Eighth Judicial District Court, Family Division, Clark County, Nevada; Cynthia Dianne Steel, Judge.

Appellant Lorri W. is the natural mother of three children, K.W. (age 14),[1] L.W. (age 11),[2] and appellant J.W. (age 5). Due to Lorri's recurrent criminal activity and drug use, K.W. and J.W. have been placed

[1]Lorri's parental rights as to K.W. were not terminated and are not subject to this appeal.

[2]L.W. resides with her paternal grandmother pursuant to a guardianship order and is not a part of this action.

10-19726

in the custody of respondent State of Nevada Department of Family Services (DFS) several times. DFS has orchestrated several case plans to assist Lorri in being reunified with her children. The most recent case plan, and the one relevant to the facts of this case, was commenced in January 2007. Lorri was subsequently arrested in September 2007 and, while Lorri was incarcerated, DFS petitioned the district court to terminate her parental rights as to K.W. and J.W. After considering the circumstances of the case, the district court granted, in part, DFS's petition and terminated Lorri's parental rights as to J.W. but retained Lorri's parental rights as to K.W. Lorri and J.W. appeal the decision to terminate Lorri's parental rights, arguing that the district court inappropriately relied on statutory presumptions and Lorri's incarcerated status as the basis for finding parental fault, and that substantial evidence did not support the district court's determination that it was in J.W.'s best interests to terminate Lorri's parental rights. We reject these arguments and affirm the district court order terminating Lorri's parental rights to.

Termination of parental rights

The district court "must consider both the best interests of the child and parental fault" when determining whether to terminate parental rights. Matter of Parental Rights as to N.J., 116 Nev. 790, 800, 8 P.3d 126, 132 (2000). To uphold a termination order, the record must contain substantial evidence supporting the order, and this court "will not substitute its own judgment for that of the district court." Id. at 795, 8 P.3d at 129.

Parental fault

A termination analysis requires that the district court find at least one factor of parental fault. NRS 128.105(2); see also Matter of

Parental Rights as to K.D.L., 118 Nev. 737, 744-45, 58 P.3d 181, 186 (2002). Here, the district court expressly stated in its termination order that Lorri had failed to make necessary parental adjustments and had only made token efforts to care for J.W.

Parental adjustments

When determining whether a parent has failed to make parental adjustments, a 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 the home. NRS 128.0126. In support of its finding that Lorri had failed to comply with her case plan requirements, the district court cited NRS 128.109(1)(b). NRS 128.109(1)(b) establishes that failure to substantially comply with the case plan within six months of its commencement is evidence of failure to make parental adjustments. Analyzing NRS 128.109(1)(b), we previously stated that the failure to complete a case plan within six months is not by itself sufficient to uphold a finding of parental fault. Matter of Parental Rights as to J.L.N., 118 Nev. 621, 628, 55 P.3d 955, 960 (2002).

Lorri relies on Matter of Parental Rights as to J.L.N. to argue that it was improper for the district court to rely on NRS 128.109(1)(b) because she had completed the plan to the extent possible during her incarceration. Lorri's reliance on Matter of Parental Rights as to J.L.N. is misplaced. Unlike Matter of Parental Rights as to J.L.N., where the parent did not complete the plan solely because she was incarcerated for the duration of her case plan but had otherwise provided a stable living situation for her children, Lorri was not incarcerated until approximately nine months after the conception of her case plan, during which time she

failed to substantially complete any portion of the plan.[3] Therefore, we conclude that the district court did not err in relying on NRS 128.109(1)(b) as evidence of Lorri's failure to make parental adjustments.

Additionally, our review of the record indicates that substantial evidence supports the district court's determination that Lorri failed to make parental adjustments. The record demonstrates that during the nine months following the commencement of Lorri's case plan she was arrested on at least two occasions, refused to take several drug tests, and failed approximately four other drug tests. Accordingly, despite the progress Lorri achieved while incarcerated, we conclude that substantial evidence, including application of NRS 128.109(1)(b), supports the district court's determination that Lorri failed to make appropriate parental adjustments.

<u>Token efforts</u>

After finding that Lorri failed to make parental adjustments, the district court also found parental fault based on Lorri's token efforts to care for the children.

> Pursuant to NRS 128.105(2)(f), parental fault may be established when a parent engages in only token efforts to (1) 'support or communicate with the child'; (2) 'prevent neglect of the child'; (3) 'avoid being an unfit parent'; or (4) 'eliminate the risk of serious physical, mental or emotional [harm] to the child.'

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[3]The only evidence within the record demonstrating Lorri's attempt to comply with the case plan requirements during periods when she was not incarcerated is that she completed the first part of a two-part drug assessment program only to again test positive for methamphetamine and cocaine eight days later.

In re Parental Rights as to N.J., 125 Nev. ___, ___, 221 P.3d 1255, 1262 (2009) (alteration in original) (quoting NRS 128.105(2)(f)). Moreover, the Legislature has established a presumption that parents have only demonstrated token efforts to care for the child "[i]f the child has resided outside of his or her home pursuant to that placement for 14 months of any 20 consecutive months." NRS 128.109(1)(a).

There is no dispute that the presumption is triggered in this case since, at the time of the termination hearing, J.W. had been removed from Lorri's home for approximately 29 consecutive months. However, Lorri attempts to rebut this presumption by demonstrating that, while incarcerated, she developed and maintained relationships with her children, established regular and routine contact and communication with them, had consistent contact with DFS, and had taken all possible steps to correct her parental deficiencies including regularly attending self-help programs and graduating from high school.

We conclude that, despite Lorri's efforts while incarcerated, substantial evidence supports the district court's finding that when not incarcerated Lorri made only token efforts to care for her children. Lorri has frequently been involved with DFS because her children have repeatedly been placed in DFS custody, she made little to no progress on her case plan, she was routinely incarcerated for various criminal activities and violations, and was unable to demonstrate that she could remain drug-free. Consequently, when the children were placed in her care, Lorri neglected to enroll the school-aged children in school and acknowledged her inability to provide or care for their needs. Moreover, at the time of the termination hearing, Lorri could not demonstrate any post-incarceration employment prospects or familial support upon her expected

release. Therefore, we conclude that Lorri has failed to overcome the presumption of NRS 128.109(1)(a) and that substantial evidence supports the district court's determination that Lorri has made only token efforts to care for J.W.[4]

Best interests of the child

Along with finding parental fault, the district court must determine whether it is in the child's best interests to terminate the parental rights. Matter of Parental Rights as to N.J., 116 Nev. at 800, 8 P.3d at 132. Despite the presumption in NRS 128.109(2) that it is in the best interests of the child to terminate parental rights if the child has lived outside the home for 14 of any 20 consecutive months, J.W. argues that substantial evidence does not support the district court's decision that it is in his best interest to terminate Lorri's parental rights and that the district court did not properly evaluate the impact of potentially severing the bond between K.W. and himself in light of the sibling presumption in NRS 432B.550(5)(a).

In any termination of parental rights proceeding, the primary concern is the best interests of the child. The test for determining the best interests of the child focuses on "[t]he continuing needs of a child for proper physical, mental and emotional growth and development." NRS 128.005(2)(c). As necessary, the district court must balance several factors and their consequences when evaluating the child's best interests. See

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[4]Lorri also argues that DFS did not provide reasonable services to assist her in progressing toward reunification with her children. We conclude that this argument is meritless. The record illustrates that DFS provided Lorri with numerous opportunities for reunification and expended enormous amounts of time, energy, and resources assisting her.

Rico v. Rodriguez, 121 Nev. 695, 701, 120 P.3d 812, 816 (2005). This court "presume[s] that the district court properly exercised its discretion in determining the best interests of the child," Flynn v. Flynn, 120 Nev. 436, 440, 92 P.3d 1224, 1226-27 (2004), and "will not substitute its own judgment for that of the district court" when the district court's order is supported by substantial evidence. Matter of Parental Rights as to N.J., 116 Nev. at 795, 8 P.3d at 129.

The Legislature mandates that, when placing children outside of the home, "[i]t must be presumed to be in the best interests of the child to be placed together with the siblings of the child." NRS 432B.550(5)(a). Also, within the statutory scheme relevant to the termination of parental rights, when a child must be placed outside of his parent's custody, DFS "[s]hall, if practicable, give preference to the placement of the child together with his or her siblings." NRS 128.110(2)(b). Although J.W. places great emphasis on the presumption that it is in the child's best interests to be placed together with siblings, we conclude that the presumption of NRS 432B.550(5)(a) and the preference of NRS 128.110(2)(b), albeit significant, are but two of several factors that the district court considers when determining the best interests of the child. See; In re Marriage of Jones, 309 N.W.2d 457, 461 (Iowa 1981) (stating that the rule of keeping siblings together "is not ironclad . . . and circumstances may arise which demonstrate that separation may better promote the long-range interests of children"); In re Davis, 465 A.2d 614, 621 (Pa. 1983) (concluding that the separation of siblings "cannot be automatically elevated above all other[ ] [factors], but must be weighed in conjunction with the other[ ] [factors]"); Crouse v. Crouse, 552 N.W.2d 413, 419 (S.D. 1996) ("Keeping siblings together is a splendid aspiration, but it

cannot override the controlling question of their best interests."); Hughes v. Gentry, 443 S.E.2d 448, 451-52 (Va. Ct. App. 1994) (recognizing that separation of siblings should be consider by the court but it is not considered paramount to other factors); Pace v. Pace, 22 P.3d 861, 867-68 (Wyo. 2001) ("[T]he effect of separating siblings from each other is just one of several factors courts consider in determining the best interests of the children.").

Although the district court did not expressly reference the presumption or the preference of keeping siblings united, we conclude that the district court effectively recognized and considered the importance of the bond between siblings. In its termination order, the district court stated that it was "mindful of the trauma that is visited on siblings that are separated" and that "the separation of siblings is not ideal." Regardless of the bond between J.W. and K.W., the district court reasoned that because of the circumstances of this case, J.W. and K.W.'s ages, and that J.W. had been placed outside of his mother's custody for the majority of his young life, it was in J.W.'s best interests to terminate Lorri's parental rights and afford him the ability to be adopted into a stable home. Therefore, we conclude that the district court properly evaluated the importance of keeping siblings united when determining whether to terminate parental rights.

However, evaluating the effect of keeping siblings united is only one of several factors in considering the best interests of the child. J.W. also argues that the district court did not properly consider his best interests pursuant to NRS 128.108. When considering placement of the child in a foster home, NRS 128.108 instructs the district court to compare: (1) the love and emotional ties between the child and his natural

parents with that of the child and his foster parents; (2) the ability of the natural parents with the ability of the foster parents to care for the child's emotional needs, give guidance, and support the child's education; (3) the ability of the natural parents with the ability of the foster parents to provide for the child's physical needs; (4) the length of time the child has lived in a stable foster home; (5) the permanence of the foster familial unit, (6) the moral and mental health of the natural parents with that of the foster parents; (7) the child's experiences when with the natural parents with those when with the foster parents; and (8) any other relevant factors.

Although the termination order lacks specificity, we conclude that the district court properly evaluated J.W.'s best interests and that substantial evidence supports its determination to terminate Lorri's parental rights. The record illustrates that Lorri has been repeatedly arrested, has continued to use drugs, and the one year of his life that J.W. lived with Lorri was spent in an unstable transient lifestyle without basic resources to care for his emotional or physical needs. In comparison to Lorri's parental history, evidence from the record demonstrates that J.W. has bonded with his foster parents, refers to them as "mom" and "dad," and the foster parents are able to provide the necessary love, nurturing, and stable environment necessary to promote J.W.'s educational, physical, and social development. Recognizing Lorri's parental faults and J.W.'s stable relationship with his foster parents, we conclude that the district court properly considered the relevant factors of NRS 128.108 and substantial evidence supports the district court's order terminating Lorri's parental rights as to J.W.

Having considered Lorri's and J.W.'s contentions, and concluded that they do not warrant reversal, we

ORDER the judgment of the district court AFFIRMED.

_______________, J.
Hardesty

_______________, J.
Douglas

_______________, J.
Pickering

cc: Hon. Cynthia Dianne Steel, District Judge
Lewis and Roca, LLP
CGP Law Group
Clark County District Attorney
Nevada Attorney General
Eighth District Court Clerk, Family Division