

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE PARENTAL
RIGHTS AS TO S.M.S.J. AND
D.M.S.J.,

No. 36357

THERESA J.,

Appellant,

vs.

CLARK COUNTY, DIVISION OF CHILD
AND FAMILY SERVICES,

Respondent.

FILED

APR 06 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT

BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court terminating appellant's parental rights as to the minor children. We conclude that substantial evidence supports the district court's decision to terminate appellant's parental rights.

The district court entered an order terminating the parental rights of appellant Theresa J. as to her children. The district court cited various instances of concern relating to Theresa J.'s drug abuse and her continual periods of incarceration. Finding that Theresa J. had failed to comply with her case plan, the district court terminated her parental rights on numerous grounds of parental fault enumerated under NRS 128.105.

Theresa J. argues that there was not substantial evidence of parental fault and that she was not given proper notice of the termination proceedings against her.

Twins S.M.S.J. and D.M.S.J. were born premature in a Las Vegas alley on January 19, 1999, to Theresa J. Both children tested positive for cocaine at birth. The children were born at twenty-nine weeks of gestation and had a combined

birth weight of five pounds. No one has been named the father of these children, and there is no legally-presumed father.

Theresa J. has a long history of criminal activity and drug use. She has six children who are not in her care. Four of her children have been placed with their maternal great-grandmother, Ann C.

The twins were placed in protective custody on January 26, 1999. Because of their premature birth and drug addiction, they were placed in the Neo-natal Intensive Care Unit at University Medical Center. While still in the hospital, the children were placed in the custody of Ann C. The children were placed back into protective custody on March 9, 1999, because of "concerns reported to Child Protective Services regarding the conditions of Ann [C.'s] home environment and the possible maltreatment of the children already entrusted to her care." The decision to place the children back into protective custody was made by Peggy Rowe, the caseworker assigned to Theresa J.'s case.¹

Rowe did not know the whereabouts of Theresa J. for most of the time the children were in the Division's custody. According to the records of the Clark County Detention Center, Theresa J. was incarcerated for various reasons during the following periods:

February 11-12, 1999
March 22 - April 7, 1999
April 11 - May 5, 1999
May 18-24, 1999
June 10-28, 1999
September 1 - January 4, 2000
May 17, 2000 - June 6, 2000

¹The ultimate decision regarding placement of the children with Ann C. was determined by a home study that concluded placement with Ann C. was not in the best interests of the children.

It is unclear from the record whether Theresa J. also spent time in the Stewart-Mohave Detention Center during this same period.

A case plan was developed for Theresa J. and filed on May 2, 1999, which required her to do the following: (1) obtain an assessment for substance abuse and follow through with recommendations; (2) complete a drug treatment program and any aftercare programs recommended; (3) submit to random drug testing within eight hours of request; (4) maintain secure, appropriate housing for a minimum of six months and supply a copy of the lease or mortgage to caseworker; (5) secure legal, verifiable employment for a minimum of six months; (6) complete hands-on parenting classes; and (7) maintain bond with the children by visiting them at least once per month. The case plan was to be completed within six months to one year. Theresa J. was not present at the case plan meeting.

The first juvenile court review occurred August 31, 1999. Another social worker assigned to Theresa J.'s case, Christina Burns, reported at that time that she had had no contact with Theresa J. since the children were placed in the custody of the Division. Burns reported that she had sent the notice of the hearing to Theresa J.'s last known address. During this review, the court was informed about the continuing medical problems of the twins.

The juvenile court again considered this case on February 15, 2000. Burns reported that Theresa J. had made no progress on her case plan and that she had had no contact with the children. Burns further reported on the continuing medical problems of the children.

This case came before the district court for a trial on June 12, 2000. At trial, the witnesses identified above

testified in a substantially similar manner. Theresa J. testified that she desired to be reunited with her children and that she was willing to comply with the case plan. She also disputed that she had made no efforts to contact the caseworkers assigned to her case.

At the conclusion of the trial, the district court concluded that it would be in the best interests of the children to have Theresa J.'s parental rights terminated and to make the children available for adoption by their foster parent. The court's order terminating Theresa J.'s parental rights was filed June 14, 2000.

On appeal, Theresa J. argues that the Division failed to prove its case by clear and convincing evidence. The Division argues that substantial evidence supports the district court's decision to terminate Theresa J.'s parental rights as to her minor children. We conclude that the district court properly entered its order terminating Theresa J.'s parental rights.

Standard of review

"Termination of parental rights is a most serious matter, and is scrutinized closely on appeal."² This court recently abandoned the long-followed "jurisdictional/dispositional grounds" test outlined in Champagne v. Welfare Division.³ Persuaded that various amendments to NRS 128.105 passed after Champagne showed clear legislative intent to set the "best interests of the child" as the "primary consideration in any proceeding to terminate parental rights,"

²Kobinski v. State, 103 Nev. 293, 296, 738 P.2d 895, 897 (1987).

³100 Nev. 640, 647, 691 P.2d 849, 854 (1984); see Matter of Parental Rights as to N.J., 116 Nev. ___, 8 P.3d 126 (2000).

this court adopted the "best interest/parental fault standard for termination cases."⁴ Similar in essence to the former standard, this new standard looks first to the best interests of the child but also requires that at least one element of parental fault be shown, as enumerated in NRS 128.105(2)(a)-(f), by clear and convincing evidence before termination can be ordered.⁵ This court will uphold a termination order if supported by substantial evidence.⁶

Best interests of the children

In analyzing the best interests of the child, the court is guided by the factors outlined in NRS 128.005(2)(c) and considers each matter on a case-by-case basis.⁷ The "decisive considerations in proceeding for termination of parental rights" are the "continuing needs of a child for proper physical, mental and emotional growth and development."⁸

Although the district court did not make findings following the N.J. emphasis on the children's best interests, the district court appears to have considered the best interests of the children in terminating Theresa J.'s parental rights. Specifically, in addition to the facts indicating parental fault discussed herein, the district court concluded, "The children are in a loving home. I'm convinced that the foster parent loves these children and will move Heaven and Earth in order to try and get the kind of services these

⁴N.J., 116 Nev. at ___, 8 P.3d at 131.

⁵Id. at ___, 8 P.3d at 133.

⁶Id. at ___, 8 P.3d at 129.

⁷See id. at ___, 8 P.3d at 132-33.

⁸Id.

children need in order to adjust to their disabilities they inherited because of drugs."

In contrast to the quality of care offered by the children's would-be adoptive parent, Theresa J. was found unfit as discussed below. The district court concluded, "[I]t is in their best interest that the natural mother's rights to them, parental rights, be terminated and they be shown and made available for adoption."

Parental fault

"In addition to considerations of the best interests of the child, the district court must find at least one of the enumerated factors for parental fault: abandonment of the child; neglect of the child; unfitness of the parent; failure of parental adjustment; risk of injury to the child if returned to, or if left remaining in, the home of the parents; and finally, only token efforts by the parents."⁹

Here, the district court found the following statutory grounds or instances of parental fault:

1. Abandonment

The district court found that Theresa J. had abandoned the children as described in NRS 128.012. The term "abandonment of a child" is defined as "any conduct of one or both parents of a child which evinces a settled purpose on the part of one or both parents to forego all parental custody and relinquish all claims to the child."¹⁰ Intent is the decisive factor in abandonment and may be shown by the facts and circumstances.¹¹ However, a presumption of abandonment arises

⁹N.J., 116 Nev. at ___, 8 P.3d at 133 (citing NRS 128.105(2)(a)-(f)).

¹⁰NRS 128.012(1).

¹¹Smith v. Smith, 102 Nev. 263, 266, 720 P.2d 1219, 1121 (1986).

when "a parent . . . leave[s] the child in the care and custody of another without provision for his support and without communication for a period of 6 months."¹² The application of the statutory presumption of abandonment contained in NRS 128.012(2) is not discretionary.¹³

Regarding the issue of abandonment, the district court concluded that Theresa J. made no efforts in between her incarcerations to contact her children or the caseworker assigned to her. In addition, the record indicates that Theresa J. failed to comply with her court-ordered child support obligations.

2. Failure of parental adjustment

The district court found that Theresa J. had "failed to adjust to become a proper parent within a reasonable period of time as defined by NRS 128.126." Pursuant to NRS 128.105(2)(d), parental rights may be terminated based on "[f]ailure of parental adjustment." NRS 128.0126 defines failure of parental adjustment:

"Failure of parental adjustment" occurs when a parent or parents are unable or unwilling within a reasonable time to correct substantially the circumstances, conduct or conditions which led to the placement of their child outside of their home, notwithstanding reasonable and appropriate efforts made by the state or a private person or agency to return the child to his home.

Especially relevant to this ground of parental fault is the judge's conclusion after reviewing the evidence that Theresa J. made no effort to contact her caseworker or seek to see her children after they were released from the hospital and during the periods of time she was not incarcerated.

¹²NRS 128.012(2).

¹³See N.J., 116 Nev. at ___, 8 P.3d at 135.

Regarding the Division's efforts to return the children to Theresa J., the Division intervened with the family, working toward the goal of reunification for more than seventeen months at the time of trial. Specifically, the court had before it evidence that the Division had prepared a case plan outlining the steps toward reunification. The Division had also attempted to provide the information and assistance necessary to implement the case plan and to enroll Theresa J. in Healthy Families, a program to assist drug users to get clean.

We conclude that the district court did not abuse its discretion in finding that Theresa J. had failed, within a reasonable time, to overcome the issues for which the children were removed from her care. Likewise, we conclude that the court did not abuse its discretion in finding that the Division had afforded Theresa J. reasonable opportunity to regain custody of the children.

3. Neglect

The district court also found that Theresa J. had neglected the children. Pursuant to NRS 128.105(2)(b), parental rights may be terminated for "[n]eglect of the child." NRS 128.014 defines "[n]eglected child" as follows:

"Neglected child" includes a child:

1. Who lacks the proper parental care by reason of the fault or habits of his parent, guardian or custodian;

2. Whose parent, guardian or custodian neglects or refuses to provide proper or necessary subsistence, education, medical or surgical care, or other care necessary for his health, morals or well-being;

5. Who engages or is in a situation dangerous to life or limb, or injurious to health or morals of himself or others, and the parent's neglect need not be willful.

Regarding the first two factors, the district court was clearly concerned with Theresa J.'s criminal activity both

before and after the children were born. In addition, the district court considered testimony that the children, because of having been born addicted to drugs, have special medical needs that Theresa J. has not attended to nor helped to support financially. In addition, the court heard testimony of the adoptive parent that the children's medical needs were being provided for by their foster parent.

Accordingly, we conclude that the district court did not abuse its discretion in finding that Theresa J. had neglected her children.

4. Unfit parent

The district court found Theresa J. to be an unfit parent. Pursuant to NRS 128.105(2)(c), parental rights may be terminated based on "[u]nfitness of the parent." NRS 128.018 defines an "unfit parent" as "any parent of a child who, by reason of his fault or habit or conduct toward the child or other persons, fails to provide such child with proper care, guidance and support."

Facts specifically relevant to this ground of parental fault include Theresa J.'s repeated incarceration for a period of almost eighteen months, her drug abuse, and the fact that she failed to maintain a stable residence.

5. Token efforts

The district court found that Theresa J., "at the very most, has made only token efforts to support or communicate with" the children. NRS 128.105(f) provides that parental rights may be terminated if the parent demonstrates

(f) [o]nly token efforts by the parent or parents:

(1) To support or communicate with the child;

(2) To prevent neglect of the child;

(3) To avoid being an unfit parent;

or

(4) To eliminate the risk of serious physical, mental or emotional injury to the child.

Again, because drug abuse contributes significantly to the problems of neglect, unfitness, and risk of injury, drug abuse was likely the overriding concern on this ground as well.

On this ground, it is important to note that Theresa J. was ordered to pay child support, but has never contributed financially to the care of her children.

Nevertheless, there exists a presumption that Theresa J.'s efforts were only token efforts due to the fact that the children had been out of the home for approximately seventeen months at the time of trial.¹⁴

Based on the statutory presumption, therefore, the district court did not abuse its discretion in finding that Theresa J. made only token efforts.

Theresa J. argues that she was not given proper notification of the termination proceedings and that the Division should have been more diligent in attempting to notify her of the status of her case. Specifically, she argues that she was never served with the petition to terminate her rights or with the case plan she needed to comply with to avoid the termination of her parental rights.

We conclude that this argument lacks merit and that no due process violation has occurred.

The record indicates that the Division made repeated efforts to locate and serve Theresa J. Personal service was attempted at her last known address. The caseworker attempted to locate her through the use of a parent-locator. On

¹⁴See NRS 128.109(1)(a) (creating the presumption where the child has been out of the home for fourteen of twenty consecutive months).

December 9, 1999, the Division filed an affidavit for service by publication, which described in detail the efforts that had been made to locate Theresa J. The affidavit of publication was filed on February 8, 2000.

There is conflicting evidence over what efforts were made by the social workers to locate and notify Theresa J. about the status of her case. Theresa J. argues that she made diligent efforts to call her caseworker, but that those collect calls were refused. However, the record reveals that the calls were not "refused"; rather, the calls were made to an answering machine, which could neither accept nor decline the calls. Thus, there is substantial evidence to support the district court's finding that Teresa J.'s efforts were insufficient.

More important with regard to this issue is the fact that Theresa J. had actual notice of the termination hearing, she was represented by counsel at the hearing, and she testified and was able to cross-examine witnesses at the hearing.

Based on the foregoing reasons, we conclude that substantial evidence supports the district court's finding of clear and convincing evidence of parental fault and that the termination of Theresa J.'s parental rights would be in the best interests of the minor children. Accordingly, as the district court did not abuse its discretion in terminating Theresa J.'s parental rights, we

ORDER the judgment of the district court AFFIRMED.

<u>Young</u>	J.
Young	
<u>Leavitt</u>	J.
Leavitt	
<u>Becker</u>	J.
Becker	

cc: Hon. Robert E. Gaston, District Judge,
Family Court Division
Kossack Law Offices
Attorney General
Clark County Legal Services Program, Inc.
Clark County Clerk