IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE PARENTAL RIGHTS AS TO J.B.J., A MINOR.

JOHNEY L.J.,
Appellant,
vs.
CLARK COUNTY DEPARTMENT OF FAMILY SERVICES; AND J.B.J., A MINOR,
Respondents.

No. 86116

FILED
MAY 14 2024
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This appeal challenges a district court order terminating parental rights. Eighth Judicial District Court, Clark County; Cynthia N. Giuliani, Judge.

To terminate parental rights, the district court must find clear and convincing evidence that (1) at least one ground of parental fault exists, and (2) termination is in the child's best interest. NRS 128.105(1); *In re Termination of Parental Rights as to N.J.*, 116 Nev. 790, 800-01, 8 P.3d 126, 132-33 (2000). On appeal, we review questions of law de novo and the district court's factual findings for substantial evidence. *In re Parental Rights as to A.L.*, 130 Nev. 914, 918, 337 P.3d 758, 761 (2014). Substantial evidence is that which "a reasonable person may accept as adequate" to support a conclusion. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007).

Appellant Johney L.J. argues that the district court's findings are not supported by substantial evidence. We disagree.



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Because we conclude that substantial evidence supports at least one ground of parental fault found by the district court, we need not address the other grounds found by the district court. *See* NRS 128.105(1)(b) (requiring a finding of at least one ground of parental fault). In particular, we conclude that substantial evidence supports the district court's findings that respondent Department of Family Services (DFS) proved unfitness by clear and convincing evidence. *See* NRS 128.105(1)(b)(3) (listing "[u]nfitness of the parent" as a parental fault ground); NRS 128.018 (defining an unfit parent as "any parent of a child who, by reason of the parent's fault or habit or conduct toward the child or other persons, fails to provide such child with proper care, guidance and support"); NRS 128.106(1)(h) (providing that in determining unfitness, "the court shall consider, without limitation, . . . "[i]nability of appropriate public or private agencies to reunite the family despite reasonable efforts on the part of the agencies").

Based on previous protective custody actions involving Johney's other children, which led to J.B.J.'s removal, DFS's primary concerns were Johney's parental abilities and his protective capacity. For example, because of Johney's history of leaving his other children in the care of their mother, despite her known inability to care for them, DFS had explicitly required Johney to submit names of individuals who would be in the home with J.B.J. But when DFS attempted to reunify Johney with J.B.J. on a trial basis, it had to terminate that trial reunification after finding individuals present in the home with Johney and J.B.J., who Johney had failed to first vet through DFS. Johney minimized the fact that he had gone against the DFS's requirements and could not articulate why it could be unsafe for J.B.J. to be around these strangers, indicating, as the district

court found, that Johney still did not understand his responsibilities to protect J.B.J., who was not quite three years old at the time of the termination trial.

The licensed psychologist who evaluated Johney upon a referral from DFS provided further support for the district court's finding that Johney is unfit. The psychologist opined that Johney is "not suited to be the primary child-care provider," Johney is functioning "at his absolute highest level," and that additional interventions would not increase his parental abilities and "his functioning beyond where it is now." The psychologist further testified that issues Johney exhibited regarding protective capacity in connection with the previous DFS petitions continued to be a problem, pointing out in particular that when asked about his plans for daycare, Johney said that he could have a girlfriend watch J.B.J. While Johney and his therapist may have offered contradictory testimony, we will not reweigh the credibility of these witnesses on appeal. *See Ellis v. Carucci*, 123 Nev. 145, 152, 161 P.3d 239, 244 (2007) ("[W]e leave witness credibility determinations to the district court and will not reweigh credibility on appeal.").

Johney's inability to explain how he would care for J.B.J. when Johney's job requires him to work nights further supports the overarching concern underlying the finding of unfitness—that Johney is not able to provide appropriate supervision for J.B.J. Johney never provided a satisfactory answer when asked to explain how he would get enough sleep if J.B.J., still a toddler, refused to sleep during the day. The district court's findings suggest that it did not find Johney's testimony that he was a "light sleeper," requiring only four hours per day of sleep, to be an adequate long-term strategy. And Johney never indicated that he would attempt to find a

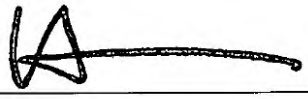
day job which would enable him to avoid possible issues with J.B.J.'s sleeping patterns.

Thus, substantial evidence supports the district court's findings of unfitness based on the inability to reunify the family because of Johney's continued lack of protective capacity. *See* NRS 432B.393(5)(f)-(g) (providing that "[i]n determining whether reasonable efforts have been made . . . , the court shall . . . [b]ase its determination on the circumstances and facts concerning the particular family or plan for the permanent placement of the child at issue," as well as "any other matters the court deems relevant"). We are satisfied that the district court properly considered the services offered to Johney and the efforts that Johney made to adjust his circumstances, though it found that reunification was unlikely given Johney's lack of understanding of safe parenting. *See* NRS 128.107 (providing that the district court must consider "[t]he services offered to and the efforts made by the parents," and "[w]hether additional services would bring about lasting change" when determining whether to terminate parental rights).

The record further supports the district court's finding that DFS demonstrated by clear and convincing evidence that termination of Johney's parental rights was in J.B.J.'s best interest. NRS 128.109(2) creates a rebuttable presumption that termination is in a child's best interest when that child has been placed outside of his or her home pursuant to chapter 432B of NRS and has resided outside of his or her home pursuant to that placement for 14 months of any 20 consecutive months." This presumption applies in this case, where J.B.J. had been in a protective placement outside of Johney's home for almost three years (basically J.B.J.'s entire life) at the time of trial. And Johney did not rebut the presumption.

Instead, the evidence relevant to J.B.J.'s best interest supports the district court's determination. J.B.J. is bonded and integrated into his foster placement with a maternal relative, where J.B.J. has resided since shortly after birth. J.B.J.'s developmental, cognitive, and psychological needs have been met by the current placement. And four of J.B.J.'s siblings reside in the same home and have been adopted by the maternal relative, who is willing to be a permanent placement for J.B.J. Thus, substantial evidence supports the district court's finding that termination of Johney's parental rights was in J.B.J.'s best interests. We therefore

ORDER the judgment of the district court AFFIRMED.



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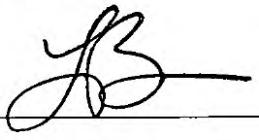
Herndon



_____, J.
Bell

LEE, J., dissenting:

I respectfully dissent, as I would reverse the district court's order because substantial evidence does not support the district court's findings as to any of the parental fault grounds alleged in the petition to terminate Johney's parental rights. We have previously recognized that termination of parental rights is "an exercise of awesome power that is tantamount to imposition of a civil death penalty." *In re Parental Rts. as to A.J.G.*, 122 Nev. 1418, 1423, 148 P.3d 759, 762-63 (2006) (internal quotation marks omitted). Thus, we "closely scrutinize[ ] whether the district court properly preserved or terminated the parental rights at issue." *In re*

*Termination of Parental Rts. as to N.J.*, 116 Nev. 790, 795, 8 P.3d 126, 129 (2000). Here, the district court found parental fault on the grounds of unfitness, token efforts, failure of parental adjustment, neglect, and risk of serious injury to the child.

To terminate parental rights due to unfitness, the petition must demonstrate that the parent is one "who, by reason of the parent's fault or habit or conduct toward the child or other persons, fails to provide a child with proper care, guidance and support." NRS 128.018 (defining unfitness); NRS 128.105(1)(b)(3) (listing unfitness as a basis for terminating parental rights). We have held that "all parents are guilty of failure to provide proper care on occasion," but this should not result in a parent "forfeit[ing] the sacred liberty right of parenthood unless such unfitness is shown to be severe and persistent and such as to render the parent *unsuitable* to maintain the parental relationship." *Champagne v. Welfare Div. of Nevada State Dep't of Hum. Res.*, 100 Nev. 640, 648, 691 P.2d 849, 855 (1984), *superseded by statute on other grounds as stated in In re Termination of Parental Rights as to N.J.*, 116 Nev. 790, 8 P.3d 126 (2000).

Applying this principle, we reversed the termination of a mother's parental rights where the mother was an alcoholic, but during the protective custody proceeding, she had obtained a stable job; demonstrated months of sobriety; and married a man with a stable job, with no criminal history, and who did not drink. *In re Parental Rights as to Montgomery*, 112 Nev. 719, 728, 917 P.2d 949, 956 (1996), *superseded by statute on other grounds as recognized by In re N.J.*, 116 Nev. at 798-801, 8 P.3d at 131-33. We concluded that clear and convincing evidence did not show that the mother's alcoholism was irremediable or prevented her from adequately

caring for the child, especially in light of the mother's significant progress in addressing her alcoholism. *Id.*

Here, the majority relies on Johney's supposed inability to reunify despite reasonable efforts by DFS as the basis for finding that DFS had demonstrated that termination of Johney's parental rights was warranted by clear and convincing evidence on unfitness grounds. The majority's reliance on the incident where individuals whom DFS had not vetted were found in Johney's home during an unannounced visit, along with testimony from a licensed psychologist, ignores DFS's heavy burden and the ample evidence that Johney provided to rebut DFS's evidence. *See In re Termination of Parental Rts. as to N.J.*, 116 Nev. 790, 801, 8 P.3d 126, 133 (2000) ("[T]he best interests of the child and parental fault must both be shown by clear and convincing evidence.").

As to the three individuals present in Johney's home while J.B.J. was there, Johney testified that he gave the name of one of those individuals (the mother of the other two individuals) to the permanency specialist without response and thus believed the individual had cleared DFS's vetting process. Testimony from the permanency specialist as to her significant caseload tended to support this possibility, and DFS did not cross-examine or otherwise contradict Johney on this issue. More importantly, DFS introduced no evidence that the individuals at Johney's house were, indeed, a threat or safety risk or that Johney left J.B.J. alone in their care. Thus, DFS failed to demonstrate by clear and convincing evidence that this instance demonstrated Johney's lack of protective capacity or his parental unfitness.

To the extent that DFS and the court were concerned with Johney leaving J.B.J. in these individuals' care based on his history with

DFS as to his other children, the circumstances in the previous petitions were significantly different. DFS's concerns regarding Johney's other children largely related to Johney leaving them in the care of their mother, who was determined to lack the capacity to care for children during the previous proceedings. But after J.B.J.'s birth, it was uncontested that Johney separated from the mother. Notably, during a previous petition, DFS recommended closing the case after Johney resigned from his job to care for the children. While DFS proceeded with the case after several medical incidents requiring continued medical supervision, it is unclear whether Johney had returned to work at that time and it is undisputed that, unlike his siblings, J.B.J. is a healthy child with no specialized medical needs.

As to his protective and parental capacity, Johney's therapist, to whom he was referred by DFS and who saw Johney over the course of several months, testified to Johney's progress with protective capacity and metacognitive skills, which the therapist defined as being able to process what J.B.J. needs without someone else's involvement in those decisions. Johney also complied with the case plan requirement to complete parenting classes and his progress with his therapist led to DFS moving Johney from video visits with J.B.J., to supervised visitations with J.B.J., and then an unsupervised at-home placement, with unannounced visits from DFS. Even the licensed psychologist testified to Johney's "willingness to modify his behavior to his ability."

The permanency specialist also testified that Johney provided a proposed daily schedule for when he was reunified with J.B.J. Johney and his therapist both testified to his efforts at securing daycare for J.B.J. at a nearby daycare with flexible hours, with assistance through the Urban

League. Johney did state to the licensed psychologist that he could have his girlfriend watch J.B.J. when asked about what he would do about daycare, but he testified that he also told the psychologist that he would take J.B.J. to daycare, and that he was hesitant to provide too much information because he was concerned with his words being misconstrued. The fact that he had previously given DFS his plans as to enroll J.B.J. at a 24-hour day care, along with a proposed daily schedule; that the psychologist conceded that there was no evidence that Johney lived with a woman that could watch J.B.J.; and Johney's testimony that he had family members who were willing to help him once he was reunified with J.B.J., supports that DFS did not prove *by clear and convincing evidence* that this statement demonstrated Johney's continued lack of protective capacity. As the mother in *In re Montgomery,* the record further reflects that Johney has no criminal history, has never tested positive for illegal substances, and has maintained stable housing and employment throughout the entire proceedings. 112 Nev. 719, 728, 917 P.2d 949, 956 (1996). In fact, DFS appeared concerned with Johney maintaining two different jobs and how that would impact his ability to spend time with J.B.J., but Johney testified that he would quit one job once he was reunified with J.B.J.

Thus, I do not believe that the totality of the circumstances demonstrates that DFS was unable to reunify J.B.J. with Johney despite reasonable efforts; indeed, at one point it had reunified them through unsupervised visitation. Given the contradictory evidence as to Johney's parental capacity and the nature of the rights at issue, I believe that DFS failed to meet its heavy burden of demonstrating by clear and convincing evidence that Johney's unfitness is so "severe and persistent" such that it "render[s] [Johney] *unsuitable* to maintain the parental relationship."

*Champagne*, 100 Nev. at 648, 691 P.2d at 855. I further believe that this is not an issue of reweighing the credibility of any of the witnesses; rather, the issue is limited to the evidence that was presented below and whether DFS met its heavy burden.

As to token efforts, I would hold that the record reflects Johney's significant efforts made to care for and prevent neglect of J.B.J., such that he overcame the presumption of token efforts based on the amount of time J.B.J. had been in a protective placement. *See* NRS 128.109(1)(a) (providing a presumption of token efforts where "the child has resided outside of his or her home . . . for 14 months of any 20 consecutive months"); NRS 128.105(1)(b)(6)(II), (III) (listing token efforts "[t]o prevent neglect of the child" or "[t]o avoid being an unfit parent" as appropriate bases for terminating parental rights); *In re Parental Rts. as to A.D.L.*, 133 Nev. 561, 568-69, 402 P.3d 1280, 1287 (2017) (explaining that a parent must rebut the token efforts presumption by a preponderance of the evidence). As to a failure of parental adjustment, no presumption applies because DFS's permanency specialist conceded that Johney substantially complied with his case plan. The licensed psychologist on whose testimony the district court largely relied similarly testified that it was her understanding that Johney had substantially complied with the case plan. *See* NRS 128.109(1)(b) (providing for a presumption of a failure of parental adjustment where the parent fails "to comply substantially with the terms and conditions of a plan to reunite the family"). Johney's therapist's testimony, combined with DFS moving Johney from video visits with J.B.J. to unsupervised at-home placement, with unannounced visits from DFS, suggest that DFS did not meet its burden of demonstrating a failure of parental adjustment by clear and convincing evidence.

I further believe that substantial evidence does not support the district court's conclusion that DFS demonstrated by clear and convincing evidence the parental fault grounds of neglect or a risk of serious injury to the child. Because J.B.J. was removed at birth, there was no evidence Johney neglected or ever abused J.B.J. To the contrary, Johney's therapist, who had seen various interactions between Johney and J.B.J., testified to the bond between Johney and J.B.J. Johney's lack of any criminal or drug abuse history further supports that DFS did not meet its burden. Ultimately, because I do not believe the record supports the district court's findings that DFS met its heavy burden of establishing parental fault by clear and convincing evidence, I would reverse the district court's order terminating Johney's parental rights as to J.B.J.

_____, J.
Lee

cc: Hon. Cynthia N. Giuliani, District Judge
Valarie I. Fujii & Associates
Clark County District Attorney/Juvenile Division
Legal Aid Center of Southern Nevada, Inc.
Eighth District Court Clerk