

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE PARENTAL
RIGHTS AS TO N.B.W.

No. 38573

LORI C. A/K/A LORI W.,
Appellant,

vs.

THE STATE OF NEVADA DIVISION
OF CHILD AND FAMILY SERVICES,
DEPARTMENT OF HUMAN
RESOURCES,
Respondent.

FILED

FEB 04 2003

JANETTE S. JOCA
CLERK OF SUPREME COURT
J. Richards
CLERK OF SUPREME COURT

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting a petition to terminate parental rights.

Appellant Lori W. first argues that she should have been provided a case plan that was not impossible to complete, and that the district court erred by terminating her parental rights based on her failure to complete an impossible plan. We conclude that Lori's argument lacks merit as the district court did not terminate her parental rights based solely upon completion of an "impossible case plan."

"[T]his court closely scrutinizes whether the district court properly preserved or terminated the parental rights at issue."¹ Prior to

¹Matter of Parental Rights as to N.J., 116 Nev. 790, 795, 8 P.3d 126, 129 (2000).

terminating parental rights, due process requires clear and convincing evidence supporting such a decision.²

NRS 128.105 provides that “[t]he primary consideration in any proceeding to terminate parental rights must be whether the best interests of the child will be served by the termination.”

In the instant case, Lori has been incarcerated since the subject minor’s birth. Therefore, Lori has never provided care, guidance or support for the child. Moreover, Lori never made any arrangements for the care, custody, or support of her child in the months before the child’s birth. Lori testified that she believed the paternal grandparents would be an appropriate place for the subject minor to live long term. The grandparents have cared for the child since shortly after the child was born, and have provided safety, guidance and attention to all of the child’s needs. They have committed to adopt the child and provide a stable, permanent environment.

In addition, the paternal grandparents have provided the only home that the subject minor has ever known. NRS 128.108 provides that if a child in the custody of a public agency resides in a foster home and proceedings have been instituted with the goal of adoption by the foster parent, the district court shall consider whether the child has become fully integrated into the family. Here, the subject minor has been integrated into a foster home where the paternal grandparents are willing and able to permanently treat the child as a member of their own family. Therefore, we conclude that there is clear and convincing evidence that the best

²Id.

interests of the subject minor is served by the termination of Lori's parental rights.

Although the best interests of the child are the primary consideration in a decision to terminate parental rights, "the district court must [also] find at least one of the enumerated factors for parental fault."³ Among the factors enumerated in NRS 128.105(2) are failure of parental adjustment and unfitness of the parent.

NRS 128.0126 provides that when a parent is unable or unwilling to correct the circumstances, conduct or conditions that led to the placement of her child outside of their home, failure of parental adjustment is established. NRS 128.109(1)(b) provides that if a parent fails to comply substantially with the case plan within six months after being provided the plan, the parent is presumed to have failed to adjust. However, in Champagne v. Welfare Division,⁴ we held that a parent cannot be found unsuitable for "failure to comply with requirements and plans that are . . . impossible . . . to abide by."⁵

Here, the DCFS social worker testified that not all of the courses and counseling required by the case plan were available at the prison and, therefore, Lori could not complete the case plan while incarcerated. However, contrary to Lori's assertion that the district court relied on the presumption contained in NRS 128.109(1)(b) in finding a

³Matter of N.J., 116 Nev. at 801, 8 P.3d at 133.

⁴100 Nev. 640, 691 P.2d 849 (1984) (overruled by Matter of N.J., 116 Nev. 790, 8 P.3d 126, to the extent that it relied on the jurisdictional/dispositional analysis).

⁵Id. at 652, 691 P.2d at 857.

failure of parental adjustment, the record reflects that the district court specifically declined to apply the presumption. The district court rejected failure to complete the case plan within six months as grounds for failure of parental adjustment for exactly the same reasons recited in Champagne. The district court found that the case plan could not be completed while she was in prison, and her period of incarceration was short enough to warrant continuing the case plan until after her release from prison.

The district court, however, found a failure of adjustment based upon the totality of the evidence, including records from the State of Georgia, regarding Lori W.'s extensive history of mental instability and prescription drug addiction. The district court noted that her mental health and addiction problems were not just a thing of the past, but were active and present in Lori's life in the year or two prior to her incarceration. Because she had an extensive history of treatment and intervention, all of which were unsuccessful, the district court concluded that Lori's completion of some prison programs was insufficient to demonstrate that she would be able to correct her problems in a reasonable period of time after she was released from prison.

There is substantial evidence to support the district court's findings regarding the severity of Lori's addictions and mental health problems and the length of treatment that would be necessary before she would even have a chance at reunification. This was the basis for the district court's finding of failure of parental adjustment.

Because, to some extent, the district court's finding is a future prediction, it cannot, standing alone, support terminating Lori W.'s parental rights. The child's young age and short time period left on Lori's

sentence warrant allowing her a reasonable post-incarceration time period to complete the case plan and seek reunification. However, the district court did not rely on a finding of failure of parental adjustment alone. The district court also found that Lori W. was an unfit parent.

Lori contends that the district court erred by finding that she was an unfit parent. NRS 128.018 defines a parent as unfit if she, "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."

Although the child was never in Lori's physical custody, there is sufficient evidence to support a finding that she failed to provide her child with proper care, guidance or support. The district court considered several factors in reaching its conclusion that Lori W. was an unfit parent. First, the district court noted that her incarceration was the direct result of her drug addiction. The record also reflects, and the district court findings infer, that the drug addiction, combined with the mental health problems, caused Lori to have difficulty maintaining employment, shelter, or food without the support of a male companion.

The district court recognized that at the time of the child's birth, Lori W. was not abusing drugs because she was incarcerated. However, the record reflects that her past history made it highly probable that she would lapse into her abusive behavior when released. The record also reflects that Lori's emotional and mental instability problems persisted during her incarceration. She was verbally abusive and volatile in her dealings with the father and paternal grandparents during her pregnancy.

Besides her behavior, the district court heard testimony that, during her pregnancy, Lori had several months to create and implement a

custody arrangement for her child pending her release from prison but failed to take any action to provide for her child. In addition, she vacillated between suggesting the child's father, who also had a history of drug use and criminal problems, as a suitable custodian, and her own mother, although Lori herself was raised in foster homes. Lori knew neither person was a suitable guardian.


Thus, it was not just the incarceration that concerned the district court, but Lori's inability to take action to provide for her child that led the district court to conclude that her drug addiction and mental health problems caused her to fail to provide her child with proper care and support under NRS 128.018.


Finally, the district court considered Lori's history as a parent. Lori has four children from previous relationships. Although her parental rights were never terminated, she did lose custody of her children as a result of her failure to care for them and the intervention of child protective service agencies in Georgia. The records reflect sustained allegations of physical abuse and neglect. The district court noted that Lori currently has the same mental health and drug abuse problems that led to her losing custody of her other four children. This background was the last factor in the district court's finding that Lori was unfit.

We conclude that clear and convincing evidence supports the district court's finding of unfitness and failure of parental adjustment.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.
Shearing

 J.
Becker

cc: Hon. Gerald W. Hardcastle, District Judge, Family Court Division
Mathew P. Harter
Attorney General/Carson City
Attorney General/Las Vegas
Clark County Clerk

LEAVITT, J., dissenting:

Although the best interests of the child are the primary consideration in a decision to terminate parental rights, “the district court must [also] find at least one of the enumerated factors for parental fault.”¹ Among the factors enumerated in NRS 128.105(2) are failure of parental adjustment and unfitness of the parent.

NRS 128.0126 provides that when a parent is unable or unwilling to correct the circumstances, conduct or conditions which led to the placement of a child outside of their home, failure of parental adjustment is established. NRS 128.109(1)(b) provides that if a parent fails to comply substantially with the case plan within six months after being provided the plan, the parent is presumed to have failed to adjust. However, in Champagne v. Welfare Division,² we held that a parent cannot be found unsuitable for “failure to comply with requirements and plans that are . . . impossible . . . to abide by.”³

Here, the DCFS social worker testified that the courses and counseling required by the case plan were unavailable at the prison and there was nothing Lori could have done in prison to retain her parental rights. The district court acknowledged that Lori had done all that she could to retain her parental rights while incarcerated and that it was unfair to provide her with a case plan which could only be completed after

¹Matter of N.J., 116 Nev. at 801, 8 P.3d at 133.

²100 Nev. 640, 691 P.2d 849 (1984) (overruled by Matter of N.J., 116 Nev. 790, 8 P.3d 126, to the extent that it relied on the jurisdictional/dispositional analysis).


³Id. at 652, 691 P.2d at 857.

release from prison. In granting the termination petition, the district court expressed concern for the perception that Lori's parental rights were being terminated because she was incarcerated for more than six months. The record suggests this is precisely what occurred. There was no substantial evidence that Lori failed to adjust within a reasonable time to a case plan that was impossible to abide by. Under the holding of Champagne the district court erred in finding that Lori failed to adjust.

The district court also erred in finding that Lori was an unfit parent. NRS 128.018 defines a parent as unfit if "by reason of fault or habit or conduct toward the child or other persons, fails to provide such child with proper care, guidance and support." In this case, Lori has not cared for the subject minor since shortly after giving birth. At the time of the hearing in this matter Lori remained incarcerated and was unable to provide for the child. Her failure to comply with her case plan was caused by her incarceration alone.

The district court improperly relied on Lori's history with her other children to determine unfitness as to the subject minor. The record shows Lori progressed as much as possible while incarcerated. Her past failures do not permit the district court to ignore the statutory mandate that parental fault as to the minor child be proven by clear and convincing evidence. People do change and the prison offers opportunities for institutional treatment and education to enable inmates to succeed after completion of their prison terms. The effect of the district court's decision is to legally sterilize Lori from having any other children because the court will terminate her parental rights as to future children because of her past failures. To terminate parental rights based on past failures with other children ignores the statutory mandate to prove parental fault as to a

subject minor by clear and convincing evidence. Accordingly, I would order the judgment of the district court reversed.


_____, J.
Leavitt