IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE PARENTAL RIGHTS AS TO M.S.

J.S.,
Appellant,
vs.
THE STATE OF NEVADA DIVISION OF CHILD AND FAMILY SERVICES, DEPARTMENT OF HUMAN RESOURCES,
Respondent.

No. 39850

FILED

NOV 04 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from the district court's order terminating J.S.'s parental rights to his child.[1]

J.S. argues that the district court erred by deciding the case based on the presumptions under NRS 128.109 rather than evidence.[2]

[1]The district court also terminated the biological mother's parental rights. The mother did not appeal.

[2]NRS 128.109 provides:

> 1. If a child has been placed outside of his home pursuant to chapter 432B of NRS, the following provisions must be applied to determine the conduct of the parent:
>
> (a) If the child has resided outside of his home pursuant to that placement for 14 months of any 20 consecutive months, it must be presumed that the parent or parents have demonstrated only token efforts to care for the child as set forth in paragraph (f) of subsection 2 of NRS 128.105.

continued on next page . . .

J.S. also contends that NRS 128.109 violates his substantive due process rights. We disagree.

On appeal, this court closely scrutinizes the termination of parental rights,[3] but will affirm parental termination decisions supported by substantial evidence.[4] In order to terminate parental rights, the State

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. . . *continued*

> (b) If the parent or parents fail to comply substantially with the terms and conditions of a plan to reunite the family within 6 months after the date on which the child was placed or the plan was commenced, whichever occurs later, that failure to comply is evidence of failure of parental adjustment as set forth in paragraph (d) of subsection 2 of NRS 128.105.
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> 2. If a child has been placed outside of his home pursuant to chapter 432B of NRS and has resided outside of his home pursuant to that placement for 14 months of any 20 consecutive months, the best interests of the child must be presumed to be served by the termination of parental rights.
>
> 3. The presumptions specified in subsections 1 and 2 must not be overcome or otherwise affected by evidence of failure of the state to provide services to the family.

[3]Matter of Parental Rights as to Bow, 113 Nev. 141, 148, 930 P.2d 1128, 1132 (1997), overruled on other grounds by Matter of N.J., 116 Nev. 790, 800, 8 P.3d 126, 132 (2000).

[4]Matter of Parental Rights as to J.L.N, 118 Nev. at ____, 55 P.3d 955, 958 (2002).

must prove, by clear and convincing evidence, that parental fault exists and termination is in the best interest of the child.[5]

The district court found that J.S. was parentally unfit,[6] had only made token efforts to be reunified with his child,[7] and had failed to adjust.[8] Each of these grounds alone is sufficient to make a determination of parental fault under NRS 128.105(2). These findings were based on evidence that J.S. was unable to control his drug addiction,[9] and that he was unable to substantially comply with his case plan within six months.[10] Further, there was evidence that although the Division of Child and Family Services attempted to help J.S. reunify with his child, this attempt was unsuccessful.[11]

In May of 2001, a case plan was developed for J.S.'s reunification with his child. The case plan required that he undergo counseling for substance abuse and lead a drug-free lifestyle; use age appropriate parenting skills; cooperate with early childhood services; complete a parenting class; maintain a stable and safe living environment;

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[5]Id.

[6]See NRS 128.105(2)(c); NRS 128.018.

[7]See NRS 128.105(2)(f).

[8]See NRS 128.105(2)(d).

[9]See NRS 128.106(4).

[10]See NRS 128.109(1)(b).

[11]See NRS 128.106(8).

obtain stable employment; complete domestic abuse classes; lead a lifestyle free of illegal activities; and establish paternity of the child.

J.S. failed to remain drug free. Evidence was admitted that J.S. failed to consistently visit his child when given the opportunity for eight months in 2001. When J.S. actually visited his child, he did not stay for the full one-hour visit, even though there were offers to adjust visitation to a more convenient time. J.S. also failed to complete parenting and domestic violence classes, and only intermittently attended counseling classes. He occasionally failed to obtain injections necessary for a medical condition. J.S. also has not paid child support.

Contrary to J.S.'s allegations, the district court's decision was not based on presumptions, but on substantial evidence regarding J.S.'s conduct. The district court found, by clear and convincing evidence, that there was parental fault and that termination was in the best interest of the child.[12]

J.S. argues that NRS 128.109 violates his substantive due process rights. Although he failed to argue this issue below, this court may address constitutional issues raised for the first time on appeal.[13] When considering the constitutional validity of a Nevada statute, this court has held that a statute is "constitutional absent a clear showing to the contrary" by the party attacking it.[14]

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[12]See NRS 128.105.

[13]McCullough v. State, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983).

[14]Universal Electric v. Labor Comm'r, 109 Nev. 127, 129, 847 P.2d 1372, 1373-74 (1993).

Moreover, NRS 128.109 is subject to strict scrutiny as it potentially infringes upon the fundamental right to the parent-child relationship.[15] To survive strict scrutiny, the statute must be necessary to achieve a compelling state interest and narrowly tailored to attain that interest.[16] The parties agree that Nevada has a compelling interest in protecting children from harm. However, they disagree as to whether NRS 128.109 is narrowly tailored to attain that interest.

J.S. relies on In re H.G.,[17] an Illinois case, to support his argument that NRS 128.109 violates his substantive due process rights. J.S.'s reliance on this case is misplaced. The facts in H.G. are distinguishable from this case. The Illinois statute was held unconstitutional because it presumed parental unfitness merely based on the passage of time a child spent in foster care.[18]

Nevada's statutory scheme requires more than the mere passage of time to trigger the presumptions of parental unfitness. The NRS 128.109 presumptions are not triggered unless a child has been both removed from the child's home because of abuse and neglect[19] and has remained outside the home for fourteen out of twenty consecutive months. Thus, the Nevada statutory scheme is clearly distinguishable from the

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[15]See J.L.N., 118 Nev. at ___, 55 P.3d at 958.

[16]Id.

[17]757 N.E.2d 864 (Ill. 2001).

[18]H.G., 757 N.E.2d at 873.

[19]NRS Chapter 432B governs the protection of children from abuse and neglect.

Illinois statute, and is narrowly tailored to achieve Nevada's compelling interest in protecting children from harm.

The remaining arguments J.S. raised are without merit. Accordingly, after a careful review of the record, we affirm the district court's order terminating J.S.'s parental rights.

ORDER the judgment of the district court AFFIRMED.

Becker, J.
Becker

Shearing, J.
Shearing

Gibbons, J.
Gibbons

cc: Hon. Gerald W. Hardcastle, District Judge
Family Court Division
Special Public Defender
Attorney General Brian Sandoval/Las Vegas
Clark County Clerk