IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE PARENTAL RIGHTS AS TO K.K.W. AND R.A.T.C.

KARI A.S., F/K/A KARI A.C.,
Appellant,
vs.
THE STATE OF NEVADA DIVISION OF CHILD AND FAMILY SERVICES, DEPARTMENT OF HUMAN RESOURCES,
Respondent.

No. 41541

FILED

AUG 25 2004

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

ORDER OF AFFIRMANCE

This appeal is taken from a district court judgment terminating parental rights. Eighth Judicial District Court, Family Court Division, Clark County; Gerald W. Hardcastle, Judge.

Appellant Kari S. appeals from a district court order terminating her parental rights as to two of her minor children, K.W. and R.C. Kari first contends on appeal that the district court erred in terminating her parental rights because the Division of Child and Family Services (DCFS) failed to make reasonable efforts to reunite her with her children, and insufficient evidence supports the court's ruling that she is an unfit parent. Second, Kari argues that a due process violation occurred because the district court did not appoint counsel to assist her early in the termination proceedings. We affirm.

04-15409

FACTUAL AND PROCEDURAL HISTORY

Kari is the mother of four children. Over time, DCFS removed all of the children from her custody. This appeal deals with the termination of her parental rights as to her youngest children, K.W. and R.C. We will, however, discuss the prior removals to provide context to this order.

In 1996, Child Protective Services (CPS) took custody of Kari's first child, C.J., after receiving a report that Kari was threatening to kill the child and commit suicide. A later assessment report noted that Kari had problems bonding with C.J. and recommended she attend parental counseling. Thereafter, CPS filed a case plan to facilitate reunification. However, Kari ultimately agreed to transfer custody of C.J. to Kari's mother.

In 1998, doctors diagnosed Kari's second child, A.C., with several serious medical problems, including cerebral palsy and gastroesophageal reflux. CPS took A.C. into custody after receiving reports that Kari failed to properly care for A.C., and that Kari had expressed a desire to harm the child. CPS filed a case plan for the reunification of Kari and A.C., similar to the plan regarding C.J. Although Kari complied with the plan and regained custody of A.C. in January 1999, Kari later relinquished her parental rights as to A.C. to facilitate adoption by a family that was better suited to care for a special needs child.

CPS removed K.W. and R.C. from Kari's care in 2001. Thereafter, a district court ordered that they be placed into the protective

custody of Kari's mother.[1] In February 2002, Kari's mother found R.C. and K.W. unsupervised in Kari's home,[2] at which time both children were wearing soiled diapers and had smeared feces on themselves and around their rooms. The next day, a CPS employee confirmed the situation. In response, Kari informed CPS that her next-door neighbor had been watching the children and was supposed to take them to the home of one of Kari's friends, identified as "Trina."

CPS later found K.W. in a similar condition during a follow-up visit; she had a badly soiled diaper, which did not appear to have been changed for a prolonged period of time. At that point, due to the lack of food in her apartment, CPS gave Kari food vouchers. During a mid-March 2002 visit, CPS noted that the bedrooms were clean, but found K.W. shut up in a downstairs bedroom and the sink full of dirty dishes. CPS removed the children from Kari's care because of the lack of supervision and poor living conditions.

After a protective custody hearing, the district court found that K.W. and R.C.'s continued residence with Kari was contrary to their welfare and ordered the children held in protective custody. The court ordered Kari to submit to a psychological evaluation. The evaluator concluded that the toddlers were at risk of neglect in Kari's custody. On

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[1]The court's protective custody order related that CPS found K.W. with an extremely soiled diaper and found R.C. in a crib with a blanket that put him at risk of suffocation. The court also found that R.C.'s bottle was stale and that family members caring for him could not recall the last time he had eaten.

[2]It is unclear from the record how Kari regained custody of the children.

the occasions during their protective custody that Kari visited K.W. and R.C., supervisory staff observed Kari's lack of parenting skills.

In April 2002, CPS filed a "dispositional report," noting the similarities between the current situation and the previous removals of C.J. and A.C. from Kari's custody. Based upon Kari's detachment from the children's emotional and physical needs, her consistent poverty and lack of emotional maturity to provide for the welfare of small children, CPS recommended that K.W. and R.C. become wards of the court. The district court eventually awarded legal custody of K.W. and R.C. to DCFS.

In early June 2002, CPS filed a case plan for reunification of Kari with R.C. and K.W., which was similar to prior case plans. In early September 2002, Christina Burns, a social worker, filed a "report for permanency and placement review" regarding K.W. and R.C. with the district court. Mrs. Burns asserted that she made several reasonable efforts to reunify Kari with her children, including creating a case plan and providing Kari with financial assistance to complete the plan. After Kari failed to comply, the district court concluded that DCFS's efforts to return the children and assist Kari were reasonable and that returning the children to Kari was not in their best interests.

In October 2002, after Mrs. Burns had left employment with the division, DCFS filed a petition to terminate Kari's parental rights as to K.W. and R.C., alleging that Kari neglected the children, was an unfit parent, and failed to remedy the conditions that led to removal of the children. The district court conducted a non-jury trial on the petition to terminate in April 2003.

Timothy S. (Kari's new husband) testified via deposition that, on August 21, 2002, Kari received notice of an August 7, 2002, trial date

on the DCFS petition to terminate her parental rights. He stated that he observed Kari attempt to contact Mrs. Burns for two or three weeks through e-mail and telephone calls. However, after Kari received no response, she abandoned her attempts to make contact. Timothy also testified to complaints by Kari that she had received a case plan for reunification, but had received no contact regarding compliance with it.

Dr. Dorothy Howard testified at trial that Kari exhibited a continuing lack of attachment and bonding with her children, and that Kari's priorities did not involve them.

Mrs. Burns testified that Kari failed to make contact regarding the case plan, with the exception of leaving one telephone message for her in late August 2002.[3] Mrs. Burns testified that Kari was familiar with case-plan objectives, as Kari had undergone similar requirements to regain custody of A.C. Also, Mrs. Burns claimed to have discussed the case plan with Kari on several occasions, during which she explained to Kari how to comply with the plan, but that Kari's compliance was minimal at best.

Jean Standish, the DCFS social worker who took over the case from Mrs. Burns, testified that Kari failed to take any actions towards completing her case plan concerning K.W. and R.C. Mrs. Standish admitted that she did not attempt to contact Kari because the case had already been referred for termination.

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[3]Mrs. Burns stated that, during her numerous attempts to return Kari's call, she either received no answer or a busy signal. Mrs. Burns also stated that she did not give out her e-mail address and that she could not receive external e-mails.

Kari testified that she saw C.J. nearly every day and contended that it was her former husband's fault that C.J. was taken away. Kari testified that she had a bond with C.J. and could not "imagine anything without him, or the other two." She stated that she relinquished her parental rights in A.C. because it was very difficult to care for her, but that she had bonded with A.C. She stated that the reason she was unable to visit R.C. and K.W. more often when they were in CPS custody was that DCFS did not provide her with sufficient bus tokens.

While Kari recalled signing the case plan for K.W. and R.C., and remembered Mrs. Burns "flip[ing] through it," she did not remember receiving a copy. Kari also testified that she would have complied with the case plan objectives as to K.W. and R.C. if she had known about them and that she attended parenting classes, but that Mrs. Burns failed to "state exactly where [the classes] were, or anything like that." She claimed to have passed prior parenting classes "with flying colors."

Kari argued that the caseworkers failed to work with her to effect unification, failed to provide resources and that she was a fit parent. She also argued that the caseworkers unfairly stressed the removal of her two oldest children, essentially punishing her for taking measures in their best interest, to wit: tendering custody of C.J. to Kari's mother; and consenting to the adoption of A.C., a special needs child, by a family with the resources to care for her.

The district court found that DCFS provided clear and convincing evidence that Kari's irremediable lack of commitment made her an unfit parent for both K.W. and R.C. under NRS 128.105(2)(c). Additionally, the court found that DCFS presented clear and convincing evidence of parental fault under NRS 128.105(2)(d), i.e., failure of parental

adjustment, based upon Kari's failure to complete a case plan. The court further found that CPS and DCFS made numerous efforts to assist Kari in the past, such as providing referrals, in-home services, transportation and food. In summary, the court found (1) that Kari failed to make parental adjustments; and (2) that it was in the children's best interest to remain in the custody of their foster parents.

Thereafter, the district court filed its findings of fact and conclusions of law, and entered judgment terminating Kari's parental rights as to K.W. and R.C.[4] Kari appeals.

DISCUSSION

A district court must make its determination to terminate parental rights in light of the considerations set forth in NRS 128.105 through NRS 128.109, and include findings that: (1) the best interests of the child would be served by the termination of parental rights; and (2) the parent's conduct falls within NRS 423B.393(3), or the petitioner has demonstrated at least one of the components of NRS 128.105(2)(a)-(g), to wit: abandonment; neglect; parental unfitness; failure of parental adjustment; risk of injury; token efforts by the parent or parents to support or communicate with the child, prevent neglect of the child, avoid being an unfit parent, or to eliminate the risk of serious physical, mental or emotional injury to the child; and, with respect to termination of the parental rights of one parent, the abandonment by that parent.[5] Thus, as

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[4]The court also concluded that DCFS proved by clear and convincing evidence that those claiming to be K.W.'s or R.C.'s father were unsuitable parents based upon abandonment. No appeal has been taken from that decision.

[5]NRS 128.105.

a general matter, to justify termination of parental rights, the district court must resolve two separate considerations: (1) best interests of the child and (2) parental fault.[6] "'Termination of parental rights is "an exercise of awesome power"'"[7] and "is tantamount to a civil death penalty."[8] Consequently, this court closely scrutinizes actions of this nature.[9] "On appeal, this court will uphold an order terminating parental rights if substantial evidence supports the district court's finding that both . . . grounds have been established by clear and convincing evidence."[10]

Central to this controversy are the parental fault issues set forth in NRS 128.105(2)(c) and (d), unfitness and failure of parental adjustment. An "unfit parent" is one who, by his or her own fault, habit, or conduct toward the child, fails to provide the child with proper care, guidance, and support.[11] "Failure of parental adjustment" occurs when a parent fails, within a reasonable time, to substantially correct the circumstances that led to removal of the child from the home,

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[6]Matter of Parental Rights as to N.J., 116 Nev. 790, 800, 8 P.3d 126, 132 (2000).

[7]Matter of Parental Rights as to K.D.L., 118 Nev. 737, 744, 58 P.3d 181, 185 (2002) (quoting Matter of N.J., 116 Nev. at 795, 8 P.3d at 129) (quoting Smith v. Smith, 102 Nev. 263, 266, 720 P.2d 1219, 1220 (1986))).

[8]Matter of Montgomery, 112 Nev. 719, 726, 917 P.2d 949, 954 (1996).

[9]Matter of N.J., 116 Nev. at 795, 8 P.3d at 129.

[10]See, e.g., Greeson v. Barnes, 111 Nev. 1198, 1201, 900 P.2d 943, 945 (1995).

[11]NRS 128.018.

notwithstanding appropriate efforts made by the State or agency to return the child.[12]

Under NRS 128.106, the district court shall consider, as part of any fitness or neglect determination, the "[e]motional illness, mental illness or mental deficiency of the parent which renders the parent consistently unable to care for the immediate and continuing physical or psychological needs of the child for extended periods of time,"[13] and "[r]epeated or continuous failure by the parent, although physically and financially able, to provide the child with adequate food, clothing, shelter, education or other care and control necessary for his physical, mental and emotional health and development . . . ."[14]

We conclude that substantial evidence supports the district court's conclusion of parental fault and that termination of Kari's parental rights was in the best interest of these children. In particular, her unfitness as a parent was proved by clear and convincing evidence. To explain, the State removed each of Kari's children because of her failure to provide them with adequate care and supervision. Kari was unable to bond with her children, and expressed only intermittent interest in them. Psychological analyses performed in 1996, 1998 and 2002 contained comments concerning her lack of parenting skills. And numerous case plans attempted to address this issue by requiring that Kari attend parenting classes. That Kari's skills never appeared to improve demonstrates that Kari was an unfit parent under NRS 128.105(2)(c).

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[12]NRS 128.0126.

[13]NRS 128.106(1).

[14]NRS 128.106(5).

While the district court concluded that Kari exhibited a failure of parental adjustment pursuant to NRS 128.105(2)(d), this was an unnecessary conclusion for parental rights termination given the court's determination of parental unfitness. NRS 128.105(2) provides that the parent's conduct need only evidence one of the fault grounds under 128.105(2)(a)-(g). We conclude, however, that the division met this parental fault prong.

NRS 128.109(1)(b) establishes a presumption of failure of parental adjustment if a child is removed from parental custody and the parents fail to substantially comply with a reunification plan within six months after the child is placed or the plan is filed, whichever occurs later. Here, DCFS filed a reunification plan on June 5, 2002. The parental termination hearing occurred nearly 10 months after the plan was filed. Thus, NRS 128.109(1)(b)'s presumption applies.

Notwithstanding Kari's testimony at the hearing that she did not know the contents of the plan, the district court could have rationally discounted this testimony. For example, Timothy testified that Kari told him about the case plan, and Mrs. Burns indicated that she reviewed the case plan with Kari on several occasions. Further, Kari signed the case plan, indicating that she read and understood it. Finally, the June 2002 plan was most explicit, requiring that Kari:

> 1) Obtain a neuropsychological evaluation and follow the recommendations; 2) Engage in individual counseling; 3) Maintain a safe, sanitary and stable living environment for at least five consecutive months; 4) Maintain legal and verifiable means of employment for at least five consecutive months; 5) Demonstrate appropriate parenting skills, attend parenting classes and upon reunification, attend Early childhood

> Services with the children; and 6) visit the children regularly.

Thus, despite her claim that she never received a copy of the plan document, the district court could also reasonably conclude that Kari was aware of the case plan and that DCFS made reasonable efforts to reunify Kari with her family.

In light of the above, we conclude that the district court acted within its discretion in its rejection of Kari's primary arguments, that DCFS failed to make reasonable efforts towards reunification with her children and that insufficient evidence supports the district court's conclusion that she is an unfit parent. We recognize, however, Kari's argument that her case was literally "tracked" for termination early on, and that the division negligently handled the matter. Again, based upon the evidence before it, the district court could reasonably conclude that it was Kari, rather than the division, that was responsible for the outcome.

Finally, as Kari does not contest the district court's determination that termination of her parental rights was in the best interest of the children, we need not reach this issue.[15] Therefore, as substantial evidence supports the district court's parental rights termination, we affirm the district court's termination order.

Right to counsel

Kari contends that the district court committed error in its failure to appoint counsel during the early investigatory stages of the termination proceedings. In this, she asserts that counsel could have

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[15]We note, however, that evidence elicited from the foster parents documented serious emotional and physical issues that still exist, and that the foster parents were willing to adopt these children.

monitored the caseworkers' conduct to prevent their negligence from affecting her compliance with DCFS's recommendations. Although conceding that NRS 432B.420 gives a district court broad discretion in determining when and whether to appoint counsel to represent an indigent parent, Kari argues that due process notions of fundamental fairness require that the district court appoint counsel for indigent defendants in connection with pre-termination investigations. We disagree.

NRS 432B.420(1) and NRS 128.100(2) vest the district court with discretion to appoint counsel at any stage of parental termination proceedings.[16] And due process considerations do not require the

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[16]NRS 432B.420(1) states in relevant part:

> A parent or other person responsible for the welfare of a child who is alleged to have abused or neglected the child may be represented by an attorney at all stages of any proceedings under NRS 432B.410 to 432B.590, inclusive. Except as otherwise provided in subsection 2, if the person is indigent, the court may appoint an attorney to represent him.

(Emphasis added.)

NRS 128.100 states in relevant part:

> In any proceeding for terminating parental rights, or any rehearing or appeal thereon . . . [i]f the parent or parents of the child desire to be represented by counsel, but are indigent, the court may appoint an attorney for them.

(Emphasis added.)

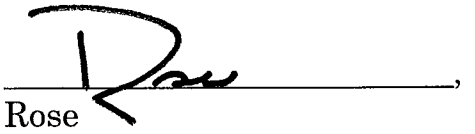
appointment of counsel with regard to pre-termination proceedings.[17] We have examined the record in this matter and cannot conclude that the district court committed any abuse of discretion along these lines. Many of Kari's arguments assert that counsel could have stopped the systemic abuses she encountered. We are satisfied that the district court reached the primary issues below and that the termination occurred, not because of lack of representation, but because the Nevada termination statutes mandated it.

In light of the above, we reject Kari's due process argument concerning the timing of the appointment of counsel.

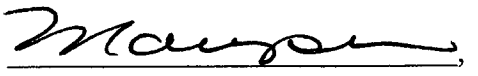
CONCLUSION

The division proved parental fault and that termination was in the best interest of the children. Also, the requirements for termination under NRS 128.105 were met by clear and convincing evidence. Finally, no due process violation has occurred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Rose



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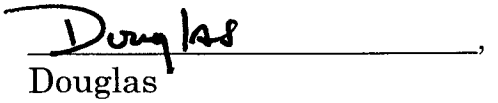

_____, J.
Douglas

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[17]See Matter of Parental Rights as to Daniels, 114 Nev. 81, 953 P.2d 1 (1998) (overruled in part on other grounds by Matter of N.J., 116 Nev. 790, 8 P.3d 126); Matter of Parental Rights as to Bow, 113 Nev. 141, 930 P.2d 1128 (1997) (overruled in part on other grounds by Matter of N.J., 116 Nev. 790, 8 P.3d 126).

cc: Hon. Gerald W. Hardcastle, District Judge, Family Court Division
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