IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 42161

BILLY D. P.,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE GLORIA S. SANCHEZ, DISTRICT JUDGE, FAMILY COURT DIVISION,
Respondents,
and
TISHA C.; CATHOLIC CHARITIES OF SOUTHERN NEVADA; JAMES H.; AND SONYA H.,
Real Parties in Interest.

FILED

MAR 29 2004

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

ORDER GRANTING IN PART AND DENYING IN PART PETITION FOR WRIT OF MANDAMUS

This is an original petition for a writ of mandamus challenging district court orders in a termination of parental rights proceeding.[1]

Petitioner Billy D. P. is the biological father of a baby girl born out of wedlock in December 2002. Three days after the child was born, the

[1]Petitioner entitles his writ petition, in part, a "Petition for Writ of Prohibition," but in his petition he seeks mandamus and certiorari review. In the interest of judicial economy, we construe the petition as one for mandamus relief. See Koza v. District Court, 99 Nev. 535, 665 P.2d 244 (1983).

mother, real party in interest Tisha C., consented to place the child for adoption with real party in interest Catholic Charities of Southern Nevada. According to Billy, he was not given notice of the child's birth and was not aware that Tisha intended to relinquish her parental rights.[2] Tisha had allegedly told Billy that she had a miscarriage.

After taking custody of the child, Catholic Charities placed the child with real parties in interest James H. and Sonya H., the prospective adoptive parents. The child has lived with James and Sonya ever since.

According to Billy, in January 2003, he discovered that the child was alive and had been placed with Catholic Charities. In February 2003, proceeding in proper person, Billy moved the district court to establish paternity and for child custody. Thereafter, Catholic Charities and James and Sonya filed separate petitions to terminate Billy's parental rights. In its termination petition, Catholic Charities contended that Billy had neglected the child, refused to provide support for the child, and failed to communicate with the child. James and Sonya contended, in their petition to terminate Billy's parental rights, that Billy had abandoned and neglected the child. The cases were consolidated. By this point, Billy was represented by counsel.

The paternity lab test results established that Billy is the child's biological father. The district court then ordered a custody evaluation of Billy by a family therapist. In the interim, the district court entered an order that granted Billy supervised visitation with the child

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[2]Billy does not challenge the initial lack of notice by Catholic Charities regarding the child's whereabouts or the consent for adoption.

two days a week. The district court did not rule on Billy's motion for custody.

In July 2003, the district court received the custody evaluation result. Thereafter, the court ordered that Billy undergo a psychological evaluation and ordered a custody evaluation of Billy's mother. This writ petition followed. On January 28, 2004, this court granted a stay of the district court proceedings pending resolution of this petition.

A writ of mandamus may be issued to compel the performance of an act that the law requires as a duty resulting from an office, trust or station, or to control an arbitrary or capricious exercise of discretion.[3] Generally, a writ will issue only when there is no "plain, speedy and adequate remedy in the ordinary course of law."[4] An appeal may be an adequate remedy at law,[5] and an order establishing child custody is an appealable judgment.[6] Even so, writ relief is discretionary and in cases of urgency, strong necessity, or if public policy or important issues are at stake, this court may deem it appropriate to intervene.[7]

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[3]See NRS 34.160; Smith v. District Court, 107 Nev. 674, 818 P.2d 849 (1991); Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

[4]NRS 34.170.

[5]See Guerin v. Guerin, 114 Nev. 127, 131, 953 P.2d 716, 719 (1998) (recognizing that an appeal is an adequate legal remedy), abrogated on other grounds by Pengilly v. Rancho Santa Fe Homeowners, 116 Nev. 646, 5 P.3d 569 (2000).

[6]NRAP 3A(b)(2).

[7]See Jeep Corp. v. District Court, 98 Nev. 440, 652 P.2d 1183 (1982); Business Computer Rentals v. State Treas., 114 Nev. 63, 67, 953 P.2d 13, 15 (1998) (observing that "where an important issue of law needs

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In the present matter, the district court has not ruled on Billy's motion for child custody. The delay in ruling on Billy's motion for custody runs counter to the need for expedition in child custody cases.[8] Because the child has been in James and Sonya's care since December 2002, every day that passes causes harm to all concerned by continuing the uncertainty regarding the child's future.

It is well settled in Nevada that in a child custody contest between a child's natural parent and a third party, the parental preference doctrine applies.[9] Nevada's parental preference/child custody statute provides that before a district court makes a child custody award to someone other than a parent, it must determine whether the parent is

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. . . *continued*
clarification and public policy is served by this court's invocation of its original jurisdiction, . . . consideration of a petition for extraordinary relief may be justified").

[8]See Sims v. Sims, 109 Nev. 1146, 1150, 865 P.2d 328, 331 (1993) (recognizing the need to expedite child custody matters by observing that "[t]ime is more of the essence in these cases involving children than in any other cases and decisions should be made promptly after the close of evidence").

[9]See NRS 125.500(1) (providing that court must find the award of child custody to a parent detrimental to the child and that the award to a nonparent is in the child's best interest); see also Russo v. Gardner, 114 Nev. 283, 956 P.2d 98 (1998); Locklin v. Duka, 112 Nev. 1489, 929 P.2d 930 (1996); Litz v. Bennum, 111 Nev. 35, 888 P.2d 438 (1995); Hesse v. Ashurst, 86 Nev. 326, 468 P.2d 343 (1970). We note that the parental preference statutory provision is set forth in the marriage dissolution statute, under a subcategory entitled "Child Custody." Although the underlying proceeding involves termination of parental rights, because Billy has sought child custody, the parental preference doctrine applies by analogy.

unfit or whether extraordinary circumstances warrant placing the child with a nonparent.[10] Thus, under the parental preference doctrine, when a contest between a parent and a third party exists, there is a custodial preference for a "fit parent," unless "it clearly appears that the child's welfare requires a change of custody."[11] And while a grandparent's status does not automatically confer any inherent right to custody of a grandchild,[12] the district court may find relevant that Billy's mother and other extended family members have expressed their desire to help Billy raise his child. Whether Catholic Charities and James and Sonya can overcome the parental preference doctrine and establish that Billy is an unfit parent has not been determined. Accordingly, the district court must conduct a child custody hearing before the underlying termination proceeding may go forward.

Also in his petition, Billy challenges the district court's order that he undergo a psychological evaluation and that his mother submit to a custody evaluation. Since the district court must resolve the child custody issue under the parental preference doctrine, an additional evaluation does not appear unwarranted, in order for the court to

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[10]See NRS 125.500(1); Litz, 111 Nev. at 38, 888 P.2d at 940-91 (concluding that grandparents' temporary guardianship was not extraordinary circumstance where mother was a fit parent); see also Troxel v. Granville, 530 U.S. 57 (2000) (holding a statute unconstitutional that allowed a state court to infringe upon a parent's fundamental right to make child-rearing decisions by ordering visitation to a nonparent).

[11]Litz, 111 Nev. at 38, 888 P.2d at 440.

[12]See Matter of W.E.G., 710 P.2d 410, 413 (Alaska 1985) (recognizing that a blood relative does not necessarily have preferential child custody status of children over a third party nonrelative).

determine Billy's fitness. As for evaluating Billy's mother for custody, an evaluation may be warranted if the district court is contemplating a joint custody arrangement, or if Billy's mother has also expressed an intent to seek custody. It is unclear from the documents before this court whether any family members, including Billy's mother, have petitioned the district court for custody of the child.

Billy also challenges who may file a petition to terminate a parent's parental rights. Specifically, NRS 128.040 sets forth, in relevant part, that "[t]he agency which provides child welfare services, the probation officer, or any other person, including the mother of an unborn child, may file with the clerk of the court a petition under the terms of this chapter."[13] Billy contends that the statute's language is "unconstitutionally overbroad" because it allows anyone to petition to terminate his parental rights. He insists that there must be a "threshold requirement before an individual can challenge whether or not a person is fit to be a parent."

For a statute to be overbroad on its face, it must reach a substantial amount of constitutionally protected conduct.[14] NRS 128.040 does not reach a substantial amount of constitutionally protected conduct; rather, the provision simply sets forth who may file a petition to terminate a parent's parental rights. Moreover, this provision is a starting point

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[13](Emphasis added.)

[14]Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 494 (1982); see also North Nevada Co. v. Menicucci, 96 Nev. 533, 611 P.2d 1068 (1980) (recognizing that whether a statute is overbroad depends upon the extent to which it lends itself to improper application to constitutionally protected conduct).

from which a termination proceeding may go forward. Thus, an overbreadth analysis does not apply here.

Further, contrary to Billy's assertion that a threshold requirement is needed before an individual can challenge a person's parental rights, the termination statute sets forth what must be established before a parent's rights are terminated.[15] The statutory language is clear, and a parent's rights will not be terminated unless it is in the child's best interest and parental fault is established by clear and convincing evidence.[16] Thus, the need for a threshold requirement is unnecessary.

Additionally, Billy contends that the statute erroneously confers standing to Catholic Charities and James and Sonya to challenge his parental rights. "Standing to initiate or maintain an action may be granted by statute."[17] Here, the legislature, in enacting this provision, has conferred standing on Catholic Charities and James and Sonya. Thus, either Catholic Charities and/or James and Sonya has standing to file a termination petition.

Although we deny the specific relief requested by Billy in his petition, we have determined that some relief is warranted, given the unique procedural posture of this case. We direct the clerk of this court to issue a writ of mandamus compelling the district court to determine child

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[15]See NRS 128.105.

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

[17]Horner v. Merit Systems Protection Bd., 815 F.2d 668, 671 (Fed. Cir. 1987).

custody as soon as possible and to delay any consideration of the termination petitions until the custody issue is resolved.[18]

It is so ORDERED.[19]

_____, C.J.
Shearing

_____, J.
Agosti

_____, J.
Rose

_____, J.
Becker

_____, J.
Maupin

_____, J.
Gibbons

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[18]See NRAP 21(b).

[19]In light of this petition's disposition, we vacate the stay imposed by our January 28, 2004 order.

Justice Leavitt having died in office on January 9, 2004, this matter was decided by a six-justice court.

cc: Hon. Gloria S. Sanchez, District Judge, Family Court Division
Cuthbert E.A. Mack
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