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In re Parental Rights as to A.P.M., 131 Nev. Adv. Op. 66 (Sept. 10, 2015)

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FAMILY LAW: TERMINATION OF PARENTAL RIGHTS

Summary

On appeal from an order for termination of parental rights, the Nevada Supreme Court held, by a vote of 4-2, that (1) the district court may terminate parental rights notwithstanding a completed case plan for reunification if the decision is otherwise warranted under NRS §128.105; that (2) the court need not wait a full 20 months to apply the statutory presumptions of NRS §128.109(1)(a) and NRS §128.109(2) if a child has been removed from his or her parents' home pursuant to Chapter 32B for at least 14 months of any consecutive 20-month period; and that (3) upon application of these rules there was substantial evidence supporting the district court's decision to terminate the appellant's parental rights based on neglect.

Background

In November 2011, the Clark County Department of Family Services (DFS) removed A.P.M. and E.M.M. from their parents' home pursuant to NRS Chapter 432B after seven incidents of the children swallowing foreign objects while their father was at work and they were under their mother's supervision, including one incident that required surgery. The Department was granted legal custody in July 2012 and placed the children in foster care, where they remained for approximately 17 months. Their parents, appellant Arli M. and his wife Abigail, were issued with case plans to complete as a condition of regaining custody. Arli's plan required him to participate in counseling and attend parenting classes. Arli completed the plan quickly but the juvenile court ultimately decided to keep the children in foster care.

In December 2012, DFS filed a petition for the district court to terminate Arli and Abigail's parental rights. Evidence during the termination hearing showed that Arli took no steps to protect his children after any of the swallowing incidents, which he attributed to Abigail simply "losing focus" while caring for them. The district court ruled in favor of DFS on the grounds that it had established parental fault from neglect and that termination would be in the children's best interest. In rendering its decision, the district court relied on presumptions in favor of termination from NRS §128.109(1)(a) and NRS §128.109(2) based on the length of time that the children had been removed from home. Both parents appealed, but after Abigail's apparent death her appeal was dismissed. Arli M.'s appeal claimed that (1) he could not be denied custody after completing his case plan; (2) that the district court erred in applying the statutory presumptions in favor of termination from NRS §128.109(1)(a) and NRS §128.109(2) after fewer than 20 consecutive months; and (3) that substantial evidence did not support the district court's ruling.

Discussion

Standard of review

¹ By Douglas H. Smith

Termination of parental rights requires proof by clear and convincing evidence that (1) termination would be in the best interests of the child and (2) that parental fault exists.² The Supreme Court applies close scrutiny to such orders and will uphold them when they are supported by substantial evidence.^{3 4} This case also involves the interpretation of state statutes. The Court reviews statutory construction *de novo* and when a statute is clear on its face the Court will generally not look beyond the plain language to determine legislative intent.⁵ Before reaching the merits of the decision to terminate Arli M.'s parental rights, the Court must consider (1) if the district court can terminate his rights after he has completed a case plan and (2) if the court erred applying the presumptions of NRS §128.109(1)(a) and NRS §128.109(2) before a full 20 months had elapsed.

Completing a case plan for reunification does not prohibit the district court from terminating parental rights.

The Nevada Supreme Court disagrees with Arli's contention that his parental rights cannot be terminated because he completed his case plan. A completed case plan "does not prohibit the district court from terminating parental rights if termination is otherwise warranted under NRS Chapter 128." Other than parental fault, the primary consideration in proceedings to terminate parental rights is whether such a termination would be in the child's best interest, which is determined by the "distinct facts of each case".^{6 7} A child's proper needs for growth and development are the decisive factors in these circumstances.⁸ Although a completed case plan may be persuasive that termination of parental rights is not in the child's best interest, the court may still consider additional factors and determine otherwise. Moreover, NRS §128.105 does not prohibit the court from finding evidence of parental fault even if parents have completed their case plans. Accordingly, the district court was not prohibited from terminating Arli's parental rights even after he completed his case plan.

The presumptions in NRS 128.109(1)(a) and NRS 128.109(2) do not require that a full 20 months elapse before they apply.

NRS §128.109 sets forth presumptions that apply to both the "parental fault" and "best interests" factors when the child has been outside of the home. Per the plain language of the statute, if the child has been out of the home pursuant to removal under Chapter 432B for at least 14 months out of any consecutive 20-month period, it is presumed that the parents have "undertaken only token efforts to care for the child" and that terminating parental rights would be in the child's best interest.^{9 10} Arli argues that the court must wait a full 20 months before applying these presumptions. The Nevada Supreme Court disagrees. If the 14-month threshold has been met, the district court need not wait for the full 20 months to elapse. Here, the children

² *In re* Parental Rights as to A.J.G., 122 Nev. 1418, 1423, 148 P.3d 759, 762 (2006).

³ *In re* Parental Rights as to N.J., 116 Nev. 790, 795, 8 P.3d 126, 129 (2000).

⁴ *In re* Parental Rights as to C.C.A., 128 Nev. Adv. Op. 15, 273 P.3d 852, 854 (2012).

⁵ *Matter of* Petition of Phillip A.C., 122 Nev. 1284, 1293, 149 P.3d 51, 57 (2006).

⁶ NEV. REV. STAT. § 128.105 (2015).

⁷ *N.J.*, 116 Nev. at 800, 8 P.3d at 133.

⁸ NEV. REV. STAT. §128.005(2)(C).

⁹ NEV. REV. STAT. §128.109(1)(A).

¹⁰ NEV. REV. STAT. §128.109(2).

were removed for at least 17 months, which satisfies the threshold. The court does not need to wait any longer. Accordingly, the district court correctly applied the statutory presumptions of NRS §128.109(1)(a) and NRS §128.109(2).

The district court correctly found parental fault based on neglect.

Substantial evidence supports the district court's finding of parental fault based on neglect in this case. Arli argues that he could not have been neglectful because neglect is based on how the child is treated while in the custody of the parent and is not established when the parent "leaves the child in an environment where the child is known to be receiving proper care."¹¹ Yet by statute, a child is considered neglected when his or her parent refuses to provide care that is necessary for the child's "health, morals, or well-being."¹² Testimony indicates that Arli took almost no action to protect his children after repeated swallowing incidents, some of which required hospital visits. Arli's argument fails because, despite his absence from the scene, he did not leave his children in an environment where the child is known to be receiving proper care.

The district court correctly found that termination of Arli's parental rights was in the best interests of the children.

Arli failed to rebut the statutory presumption that terminating his parental rights was in the best interests of his children. Extensive testimony proves Arli's limited relationship with his children. Moreover, it proves that he failed to take protective action for them after seven increasingly serious swallowing incidents, incidents that have not reoccurred since the children were placed in foster care. The children's foster parent testified to having a close relationship with them after living together for several months and expressed a desire to adopt them. All of this evidence together supports the conclusion that it is in the children's best interest to terminate Arli's parental rights and that Arli is unable to protect his children from danger even after his wife's death. The judgment of the district court is affirmed.

DISSENT by Justice Douglas joined by Justice Cherry: The district court's original termination decision was based primarily on the actions of the children's mother. In light of her death, this case should be remanded for a new hearing as to the children's best interests and Arli's parental rights

Conclusion

Because it is only one factor in the ultimate decision, completing a case plan does not prohibit the district court from terminating parental rights. The district court was also correct to apply the presumptions of NRS §128.109 in favor of termination after fewer than 20 months because the children had been out of their parents' home for approximately 17 months and the threshold is 14 months. Arli M. failed to overcome these presumptions because he failed to take action to protect his children after repeated incidents involving swallowing foreign objects. The judgment of the district court is affirmed.

¹¹ Chapman v. Chapman, 96 Nev. 290, 294, 607 P.2d 1141, 1144 (1980).

¹² NEV. REV. STAT. §128.014(2) (2015).

TWITTER info:

Nev.Sup.Crt, 4-2, says complete case plans won't bar axing parental rights. Stat. presumes token effort and child's best interests after 14 months. #InreAPM