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In re: Matter of E.R. C/W 73198, 134 Nev. Adv. Op. 29 (May 3, 2018)

Matthew J. McKissick

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FAMILY LAW: FAMILIAL PLACEMENT PREFERENCE

Summary

The Court held that once parental rights have been terminated, NRS 128.110(2) is the appropriate standard for applying the familial placement preference—not NRS 432B.550(5).

Background

In July 2015, Clark County Department of Family Services (DFS) removed one-month-old E.R. (the child) from the custody of her mother, Nellie S., because of neglect. The district court adopted a goal of reunification between Nellie and the child. DFS conducted a search for relatives with whom to place the child but was unsuccessful. By August 2016, Nellie had not maintained visitation with the child or contact with DFS. In response, the district court changed the permanency goal to termination of parental rights and adoption. DFS initiated a proceeding to terminate Nellie's parental rights, and in September 2016, the child was placed with Philip R. and Regina R. (the foster parents).

In October 2016, Nellie's first cousin, Stephanie R., contacted DFS and requested placement of the child with her and her husband in Georgia (the maternal relatives). DFS initiated the process for obtaining out-of-state placement approval for the maternal relatives, which was approved in March 2017.

Before the out-of-state placement was approved, however, the district court entered an order terminating Nellie's parental rights on February 18, 2017. The termination order vested the custody and control of the child in DFS with the authority to place the child for adoption. Subsequently, the foster parents initiated the process for adopting the child.

In April 2017, DFS allowed the maternal relatives to address the district court regarding placement of the child, and an evidentiary hearing was held before a court master. DFS testified about its search for relatives, explaining that DFS was unaware of the maternal relatives until they contacted DFS in October 2016. DFS also testified that the then-two-year-old child had become extremely bonded with the foster parents, and it was not in the child's best interest to be placed with the maternal relatives because it would delay permanency. Taryn Lamaison, a DFS supervisor and a national child trauma trainer, agreed that removing the child from foster care was not in the child's best interest. Lamaison explained that another move would likely cause long-term trauma, but a gradual transition to the new home accompanied by therapy could lessen the trauma.

The foster parents testified about the home, family, care, and educational development they provided the child since September 2016 and that they were committed to an open adoption. Stephanie testified that although she knew Nellie had given birth, she was unaware that the child was in protective custody until October 2016. Stephanie described the home and care she and Joey could provide the child and was willing to transition the child gradually to minimize trauma.

The hearing master found that (1) DFS should have located Stephanie sooner because DFS contacted another relative Stephanie knew, (2) the maternal relatives demonstrated a reasonable excuse for the delay in requesting placement, and (3) both couples would provide a good family and home for the child. The master concluded that although the child was incredibly bonded with

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the foster parents, the "family connection is the overriding consideration," and the child was likely to end up with one of her siblings if placed with the maternal relatives.[2] Accordingly, the master recommended that the child be placed with the maternal relatives if they comply with the trauma minimization transition as outlined by DFS. The foster parents and DFS filed objections to the hearing master's recommendation.

After hearing arguments on the objections, the district court found that the hearing master's findings were not clearly erroneous and affirmed the recommendation. The district court agreed that the maternal relatives had a reasonable excuse for the delay in seeking placement of the child, and thus, the familial placement preference under NRS 432B.550 applied. The court also found that the hearing master considered the child's best interests in making his decision and that the maternal relatives will likely end up with one of the child's siblings. The foster parents and DFS both filed petitions for a writ of mandamus with the Court, who consolidated the two cases.

Discussion

NRS 432B.550(5) governs placement of a child, which creates a presumption that placing the child with siblings is in the child's best interest and requires that family relatives be given preference over foster parents.[3] The foster parents and DFS argued that the familial placement preference no longer applied once the parental rights were terminated. The maternal relatives argued that the familial preference remains intact after termination of parental rights.

The Court concluded that although the placement decision was initially governed by NRS 432B.550(5), once Nellie's parental rights were terminated, a different placement preference provision under NRS 128.110(2) applied. Nellie's parental rights were terminated before the placement hearing that gave custody and control of the child to DFS. Thus, the district court erred in applying the familial placement preference under NRS 432B.550(5).

Delay in requesting placement

The foster parents and DFS asserted that Stephanie's 15-month delay in requesting placement, without a reasonable excuse, rendered the familial placement preference inapplicable. The Court disagreed. In *Clark County District Attorney v. Eighth Judicial District Court*, the Court held that "a family member's failure to timely. . . request custody of a child. . . when that family member knows of the protective custody placement, may ultimately. . . render the statutory familial preference inapplicable. . ."[4]

Here, the record supports the district court's decision that DFS should have located Stephanie earlier, and because she did not know the child was in protective custody, she had a reasonable excuse for the delay in seeking placement of the child. Therefore, the delay did not render the familial preference inapplicable.

[2] The record indicated that Nellie was pregnant at the time of the evidentiary hearing. A child was born on April 24, 2017 and placed in protective custody shortly thereafter.

[3] NEV. REV. STAT. §§ 432B.550(5)(a)–(b) (2017).

[4] Clark County District Attorney v. Eighth Judicial District Court, 123 Nev. 337, 347, 167 P.3d 922, 929 (2007).

The child's best interest

DFS and the foster parents argued that the district court misapplied the legal standard by relying too heavily on the familial preference and not adequately considering the child's best interest. The Court agreed. Following *Clark County*, the child's best interest necessarily is the main consideration in the placement decision.[5] The *Clark County* Court explained that "the statute creates a familial preference, not a presumption" and that the district court "must make written factual findings" supporting its ultimate conclusion regarding the child's best interest.[6]

Here, the hearing master's recommendation did not provide findings as to the child's best interest as required by *Clark County*, except for acknowledging that the removal will cause the child trauma and ordering a trauma-minimization transition. While the district court concluded that the hearing master did consider the child's best interest, the district court also did not include written findings regarding the child's best interest.

Discretion of the agency

Lastly, because the district court applied NRS 432B.550(5)(b), the district court did not consider the agency's discretion to determine placement under NRS 128.110(2). NRS 128.110(2)(a) states that the agency "[m]ay give preference to the placement of the child" to a suitable family member,[7] while NRS 432B.550(5)(b) states that "preference *must* be given" to the placement of the child with a suitable family member.[8] By applying the wrong statute, the district court erroneously failed to consider DFS's discretion in the matter. Further, since the younger sibling's placement was not clear at the time of the underlying proceeding, placing the siblings together required more factual development.

Conclusion

The Court concluded that the district court erroneously applied the familial placement preference under NRS 432B.550(5) because NRS 128.110(2) is the applicable standard once parental rights are terminated. The district court also failed to provide adequate factual findings concerning the child's best interest. Accordingly, the Court granted the petitions and issued a writ of mandamus directing the district court to vacate the order placing the child with the maternal relatives and to conduct a trial de novo consistent with this opinion.

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[5] *Id.* at 346.
[6] *Id.* at 348.
[7] NEV. REV. STAT. § 128.110(2)(a) (2017).
[8] NEV. REV. STAT. § 432B.550(5)(b) (2017) (emphasis added).