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FAMILY LAW – PARENTAL TERMINATION PROCEEDINGS

Summary

An appeal from a district court order denying a petition for termination of parental rights.

Disposition/Outcome

Where a non-offending parent has been denied due process in a dependency proceeding, and the constitutional violation triggers statutory presumptions in favor of terminating parental rights, the statutory presumptions cannot be relied upon in a termination proceeding. Absent the statutory presumptions, Social Services failed to establish by clear and convincing evidence that termination of parental rights was warranted in this case.

Facts and Procedural History

In May 2009, two year old A.G. was found at a campsite at Pyramid Lake with her mother, Rachel L. (“Rachel”) who was extremely intoxicated. A.G. was immediately placed in protective custody under the care of Washoe County Social Services (“Social Services”). Rachel had a long history of drug and alcohol abuse, and her drug screen tested positive for methamphetamine and marijuana. Rachel was unemployed, her food stamps had run out, and she was having suicidal thoughts. In the past, A.G.’s father, Kory L.G. (“Kory”) had been A.G.’s primary caregiver, and during that time A.G. was well cared for. Approximately one month prior to the incident, however, Rachel obtained a temporary protective order (“TPO”) for herself and A.G. against Kory, preventing him from exercising his custody of A.G.²

Despite Kory’s lack of involvement in the events leading to A.G.’s removal from Rachel, and before the appointment of counsel for Kory, Social Services required Kory to submit to a drug test. He complied and tested positive for methamphetamine and marijuana.

An initial protective custody hearing determined that A.G. was a child in need of protection and that the child could not be placed with Kory because of the TPO. Thus, A.G. was placed in foster care under the supervision of Social Services. Subsequently Social Services filed a petition for a hearing against both parents alleging that A.G. was in need of protection from neglect under NRS Chapter 432B. Rachel submitted to the allegations against her,³ while Kory, through counsel, denied the allegations against him. Prior to the evidentiary hearing, Kory and Social Services reached an agreement to dismiss the petition as to Kory. Nevertheless, Social Services filed a case plan and service agreement, which Kory did not sign. The case plan included requirements that Kory submit to random drug testing and a substance abuse evaluation.

¹ By David H. Rigdon.

² The TPO was later dismissed based on insufficient evidence.

³ At the termination hearing Rachel testified that she was willing to relinquish her parental rights.

Following the stipulation to dismiss the petition with respect to Kory, the Juvenile Court adopted a Juvenile Master's recommendation denying A.G.'s placement with Kory, and requiring Kory's compliance with Social Service's case plan. Subsequently Kory filed a motion in Juvenile Court to terminate Social Service's custody and return A.G. to him or, in the alternative, begin reunification with unsupervised home visits. After a hearing the Juvenile Master denied the motion on the basis of his inability to determine the extent of Kory's drug use and whether Kory could abstain from substance abuse while caring for A.G.

Six months later a permanency hearing was held, at which the Juvenile Master approved a permanency plan of reunification of A.G. with Kory together with a concurrent plan of termination of parental rights. The Juvenile Master ordered Kory to enter into and comply with a revised case plan with Social Services. Six months after the first hearing a second permanency hearing was held at which the Juvenile Master found that Kory had not been in compliance with his case plan. Accordingly, the Juvenile Master approved a permanency plan of termination of parental rights followed by adoption. Kory objected, however, the Juvenile Court affirmed the Juvenile Master's recommendation.

Social Services then filed a petition in the District Court to terminate Kory's parental rights. At that time A.G. had been in the custody of Social Services for 18 months and Kory had not substantially complied with his case plan thus triggering the presumptions of token efforts and parental adjustment under NRS 128.109. Following a three-day bench trial, the District Court denied the petition, finding that the presumptions did not apply and that Social Services had otherwise failed to demonstrate parental fault or that termination was in A.G.'s best interest. Social Services appealed.

Discussion

Justice Douglas delivered the opinion on behalf of a unanimous court.

Legal Presumptions

If a parental termination proceeding is instituted against a parent, the petitioner must establish by clear and convincing evidence that parental fault exists and that the child's best interests would be served by termination of parental rights.⁴ In addition to any affirmative findings made by clear and convincing evidence, certain statutory presumptions can arise to establish both parental fault and that the child's best interests would be served by termination.

One such presumption is that when a child has been placed outside his or her home under NRS Chapter 432B for 14 of any 20 consecutive months, "it must be presumed that the parent or parents have demonstrated only token efforts to care for the child."⁵ Another presumption arises when the parent fails to substantially comply "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

⁴ NEV. REV. STAT. § 128.105 (2011).

⁵ NEV. REV. STAT. § 128.109(1)(a) (2011).

commenced, whichever occurs later.”⁶ These presumptions are rebuttable. However, once established, the burden shifts to the parent to overcome them.⁷

Social Services argued that Kory failed to comply with his case plan triggering the presumptions for termination under NRS 128.109. Kory argued that the presumptions should not apply to a non-offending parent and that Social Services failed to demonstrate either parental fault or that termination was in A.G.’s best interest. The Court took the opportunity to clarify the constitutional rights of a parent whose child is the subject of a dependency proceeding based on the conduct of the other parent, and against whom no allegations of abuse or neglect have been sustained.

A Parent’s Constitutionally Protected Rights

Termination of parental rights implicates fundamental liberty interests of a parent’s relationship with his or her child.⁸ This liberty interest is protected by the Due Process Clause of the Fourteenth Amendment.⁹ These due process rights prohibit the government from depriving parents of the custody of their children without a finding of parental unfitness.¹⁰ In addition, other courts have recognized a preference for placing the child with a fit parent, where the child was removed from the home based on the conduct of the other parent.¹¹

The Court determined that while the juvenile court properly removed A.G. after finding him neglected by his mother, they erred in both requiring Kory to comply with a case plan for reunification after the petition for neglect had been dismissed as to him, and denying his request to have the child returned to his care. These decisions are directly responsible for triggering the two statutory presumptions relied upon by Social Services in their petition to terminate parental rights. The Court held that “[w]hile NRS 432B.560 may allow the juvenile court to order services for a parent, it does not allow the court to require the noncustodial parent to complete a case plan for reunification under the circumstances presented here.” The Court determined that if Social Services had concerns over Kory’s drug use and its effect on his ability to care for A.G., Social Services should have maintained a petition for neglect as to Kory and sought to substantiate allegations of Kory’s neglect.

Termination Was Not Established by Clear and Convincing Evidence

Due to the constitutional due process violations in the dependency proceedings, the Court concluded that the presumptions of token efforts and failure of parental adjustment under NRS 128.109 cannot apply against Kory in the parental termination case. Without the presumptions, the Court held that Social Services failed to establish by clear and convincing evidence that

⁶ NEV. REV. STAT. § 128.109(1)(b) (2011); NEV. REV. STAT. § 128.105(2)(d) (2011).

⁷ Matter of Parental Rights as to J.L.N., 55 P.3d 955, 958 (Nev. 2002).

⁸ Parental Rights of D.R.H., 92 P.3d 1230, 1233 (Nev. 2004); *See also* Troxel v. Granville, 530 U.S. 57, 65 (2000); Stanley v. Illinois, 405 U.S. 645, 651 (1972).

⁹ *Troxel*, 530 U.S. at 65.

¹⁰ *Stanley*, 405 U.S. at 645.

¹¹ *See e.g.*, In re D.S., 52 A.3d 887 (D.C. 2012); In Interest of M.M.L., 900 P.2d 813 (Kan. 1995); Matter of Cheryl K., 484 N.Y.S.2d 476 (N.Y. Fam. Ct. 1985).

termination of Kory's parental rights was warranted. Accordingly the Court affirmed the District Court's order denying the petition.

Conclusion

The Court affirmed the order of the District Court and held that because of constitutional due process violations in the dependency proceeding, the presumptions of token efforts and failure of parental adjustment under N.R.S. 128.109 cannot apply in the instant parental termination case. Furthermore, the Court concluded that absent the legal presumptions, Social Services failed to establish by clear and convincing evidence that termination of Kory's parental rights was warranted.