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Matter of Parental Rights as to A.J.G., 122 Nev. Adv. Op. No. 117
(Dec. 28, 2006)¹

FAMILY LAW – TERMINATION OF PARENTAL RIGHTS

Summary

Appeal of a district court order terminating parental rights.

Disposition/Outcome

Affirmed. The Nevada Supreme Court first held that neither federal nor state law requires the State, or other party moving to terminate parental rights, to prove that an adoptive placement exists prior to the termination of parental rights. Second, when the State establishes a presumption under NRS 128.109(2) that it is in the child's best interest to terminate parental rights, the burden is on the parent to present evidence of the child's desires regarding termination under NRS 128.107(2). Finally, substantial evidence supported the district court's order to terminate parental rights.

Factual and Procedural History

Child Protective Services removed twelve-year-old A.J.G. and eleven-year-old A.C.W. from the home of their mother, Tammila G., and her boyfriend, George L., after reports that the children were duct taped, slapped, and kicked by friends of Tammila and George. Although the two children informed Tammila about these repeated incidents, which occurred when Tammila and George were not at home, Tammila failed to take the necessary steps to prevent future abuses.

After finding that residing with Tammila and George would be against the children's welfare, the district court ordered that A.J.G. and A.C.W. become wards of the State and placed in foster care. Initially, the Division of Child and Family Services (DCFS) created a case plan with the goal of uniting Tammila with her children. However, after Tammila made only minimal efforts to comply with this plan, DCFS changed the children's permanency plan from reunification to remaining in foster care until the age of majority or adoption. Finally, when the children's maternal aunt and uncle in Louisiana expressed interest in caring for the girls, DCFS changed the permanency plan to adoption by this couple and placed the children in their care.

Subsequently, after finding that the State had demonstrated by clear and convincing evidence that the termination of parental rights was in the children's best interests and that parental fault existed, the district court granted the State's petition to terminate Tammila's parental rights. Specifically, the court applied the presumption under NRS 128.109(2), which establishes that it is in the children's best interests to terminate parental rights, and the presumptions under NRS 128.109(1)(a) and (b), which establish parental fault. Finally, the court also found that Tammila did not rebut these presumptions, she failed to remedy those conditions that led to the children's removal, and she failed to comply significantly with her case plan.

¹ By Jenny Routheaux

Discussion

In this appeal, Tammila argued that the district court should not have terminated her parental rights because (1) the State did not prove that an adoptive placement existed for the children and (2) the State failed to demonstrate evidence of the children's desires regarding termination. However, the Nevada Supreme Court disagreed with both arguments and concluded that substantial evidence supports the district court's order terminating Tammila's parental rights.

A successful petition for the termination of parental rights must demonstrate, by clear and convincing evidence, both that the termination is in the child's best interests and that parental fault exists.² Because the termination of parental rights is "an exercise of awesome power," the Nevada Supreme Court closely scrutinizes the district court's order and reviews its factual findings for substantial evidence.³

Adoptive Placement

Tammila's first argued that both federal and state laws require the State to establish that an adoptive placement exists before the district court can terminate parental rights. Specifically, she claimed that the Federal Adoption and Safe Families Act of 1997 (ASFA) requires proof of an adoptive placement prior to terminating parental rights. Next, because Nevada complies with this law in order to receive federal funding, she also argued that state law requires proof of an adoptive placement.

However, the court disagreed with these arguments because a plain reading of the ASFA indicates that a state must only begin seeking an adoptive placement while pursuing termination of parental rights.⁴ Further, the federal statute even forgoes this requirement if a relative is caring for the child,⁵ as is the case with Tammila's children. Finally, Nevada law also does not require proof of an adoptive placement because nowhere in the Nevada Revised Statutes is there mention of a requirement for the State to prove an adoptive placement prior to the termination of parental rights. Thus, neither federal nor state law required that the State prove that an adoptive placement existed prior to the district court's termination of Tammila's parental rights.

The Children's Desires Regarding Termination of Parental Rights

Tammila's second argument is that NRS 128.107(2) requires the State to provide evidence of the children's desires about the termination of parental rights. On the contrary, the State argued that because it established the presumption that it was in the children's best interests to terminate parental rights under NRS 128.109(2), Tammila had the burden of providing evidence of the children's desires. The court, agreeing with the State's analysis, concluded that when the presumption under NRS 128.109(2) applies, the parent attempting to rebut the

² See NEV. REV. STAT. § 128.105 (2005).

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

⁴ 42 U.S.C. § 675(5)(E) (2000) (stating that a "State shall file a petition to terminate the parental rights of the child's parents (or, if such a petition has been filed by another party, seek to be joined as a party to the petition), and, concurrently, to identify, recruit, process, and approve a qualified family for an adoption . . .").

⁵ § 675(5)(E)(i).

presumption has the burden of providing evidence of the children's desires under NRS 128.107(2).

NRS 128.107(2) provides that the district court shall consider evidence of the child's "desires regarding termination, if the court determines he is of sufficient capacity to express his desires"⁶ but does not specify what party has the burden of establishing these desires. NRS 128.109(2) provides that the termination of parental rights is presumed to be in the child's best interests when the "child has been placed outside of his home pursuant to chapter 432B of NRS and has resided outside of his home pursuant to that placement for 14 months of any 20 consecutive months."⁷ If the presumption applies, the parent then has the burden of overcoming the presumption.⁸

Because NRS 128.109(2) shifts the burden to the parent to show that terminating parental rights is not in the child's best interests, the court concluded that the burden to show the child's desires under NRS 128.107(2) lies with the parent when NRS 128.109(2) applies. If the parent then provided evidence that the child did not desire the parent's rights to be terminated, the district court could then consider this in deciding whether the parent has overcome the NRS 128.109(2) presumption.

Here, the court concluded that substantial evidence existed that the NRS 128.109(2) presumption applies because the children were removed from their home for abuse and neglect under NRS Chapter 432B, and they have not returned home for over forty months. Further, Tammila failed to provide evidence of the children's desires that could possibly rebut this presumption. Finally, the district court did consider a report indicating the children did not wish to be adopted, written before they lived with their aunt and uncle, but still terminated Tammila's parental rights.

Substantial Evidence Supports the District Court's Order to Terminate Parental Rights

The court concluded that the substantial evidence supports that district court's findings that it was in the children's best interests to terminate Tammila's parental rights and that Tammila demonstrated parental fault. First, because Tammila did not submit to drug counseling, she did not support her children after they left her home, nothing changed in her home situation since the abuse, she did not present evidence of the children's desires, and the children are flourishing in their new home, the court held that substantial evidence supported the district court's finding that terminating Tammila's parental rights was in the children's best interest.

Second, the court also concluded that the district court established parental fault under the presumptions in NRS 128.109(1)(a) and (b). NRS 128.109(1)(a) provides a presumption of parental fault when the child has resided outside of the home for 14 of 20 consecutive months,⁹ which is established here as the children did just that. Further, NRS 128.109(1)(b) also provides a presumption of parental fault when the parent fails to comply with a reunification plan within six months of the child's removal from the home or the commencement of the case plan.¹⁰ Because Tammila failed to comply substantially with her case plan over three years, the court

⁶ NEV. REV. STAT. § 128.107(2) (2005).

⁷ § 128.109(2).

⁸ See *In re Parental Rights as to D.R.H.*, 120 Nev. 422, 427-28, 92 P.3d 1230, 1234 (2004).

⁹ § 128.109(1)(a)

¹⁰ § 128.190(1)(b)

found that substantial evidence also supported the district court's finding of this presumption of parental fault.

Thus, because the district court did not err in finding presumptions of both the child's best interests and parental fault, the Nevada Supreme Court affirmed the order terminating Tammila's parental rights.

Conclusion

In affirming the district court's order to terminate Tammila's parental rights as to A.J.G. and A.C.W., the Nevada Supreme Court held that the party moving to terminate parental rights does not need to provide evidence of an adoptive placement under either federal or state law. Further, when the NRS 128.109(2) presumption applies, which indicates that it is in the child's best interest to terminate parental rights, the parent has the burden to establish evidence of the child's desires regarding termination under NRS 128.107(2). If so established, this evidence of the child's desires can be a consideration in possibly rebutting the presumption under NRS 128.109(2). Finally, the court concluded that substantial evidence supported the district court's findings that it is in the children's best interests to terminate parental rights and that parental fault exists. Thus, the court affirmed the district court's order terminating parental rights.