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Matter of Guardianship of N.S., 122 Nev. Adv. Op. 27 (2006)¹

**FAMILY LAW – ABUSE AND NEGLECT STATUTE
FAMILY LAW – CUSTODY AND VISITATION**

Summary

Consolidated petitions for a writ of mandamus challenging an order of the Eighth Judicial District Court, State of Nevada, denying a grandmother’s petition for guardianship and an order denying the grandmother visitation with her minor granddaughter.

Disposition/Outcome

Petitions for writ of mandamus granted because the Eighth Judicial District Court failed to comply with NRS 432B, Nevada’s abuse and neglect statute, and NRS 125C.150, Nevada’s custody and visitation statute.

Factual and Procedural History

Petitioner Maria L. is the maternal grandmother of N.S., who was placed into the protective custody of the Division of Child and Family Services (“DCFS”) by the Eighth Judicial District Court upon the results of a toxicology report which found that both the mother, Y.S., and the child, N.S., tested positive for amphetamine and methamphetamine.

After the placement, Child Protective Services (“CPS”) contacted Maria in search of Y.S. Maria told CPS that she was currently caring for Y.S.’s other five children and that she wanted to keep her family together. The CPS caseworker believed that Maria was already taking care of too many children and thus recommended to DCFS that N.S. be placed elsewhere.

N.S. was made a ward of the state and the district court granted custody to DCFS. Later, the district court also made the other five children wards of the state; however, they granted custody to Maria. N.S. was placed with a foster family, who wants to adopt the child. DCFS allowed Maria unsupervised visitation of N.S. Maria and N.S.’s other siblings visited regularly.

In the interim, DCFS found Y.S. and created a case plan in hopes of reuniting N.S. with the child’s mother. The plan required Y.S. to complete a domestic violence program and drug treatment, while allowing supervised visitation of N.S. at the foster family’s home.

While Y.S. was beginning the plan, Maria petitioned the district court to be appointed guardian of N.S. The court concurrently terminated the State’s wardship of the five other children and Maria was awarded their legal guardianship. To arrange for N.S. to live with her, Maria moved into a bigger house. She was also working regularly and received Social Security benefits and food stamps. One of her adult daughters babysat the other children when Maria worked. However, DCFS was still concerned that Maria could not handle the extra responsibility. They were further worried that Maria could not protect N.S. from Y.S. and would permit unsupervised visits despite the fact that Y.S. was only entitled to supervised visits. DCFS also gave great weight to N.S.’s assimilation with the foster family.

¹ By Amy S. Scarborough

After a hearing regarding Maria's petition, the district court agreed that Maria would be overwhelmed with the responsibility of caring for a sixth child and could not provide the "time, emotional support, and financial resources"² necessary to care for N.S. Despite the preference to keep a child with family, the district court concluded that the familial preference was overcome because it was in the child's best interest to remain with the foster family, particularly since N.S. had already lived with them for eight months and the foster family was committed to N.S.'s care.

Subsequently, when Y.S. failed to comply with the case plan, DCFS filed a permanency and placement review report with the court recommending that it was not in the N.S.'s best interest to reunite with Y.S. Therefore, DCFS petitioned the court for a termination of Y.S.'s parental rights. The court ultimately terminated Y.S.'s parental rights pursuant to DCFS's petition.

Before the district court made a decision upon the petition regarding Y.S.'s parental rights, Maria filed a petition for visitation with N.S. During the hearing on the petition, Maria asserted that she could provide for N.S. with all necessities during visits and stressed that she was never arrested nor convicted of any crimes and regularly attended church. The foster mother testified of her concerns that Maria would tell Y.S. about the time and place of the visits, as she had once done in the past.

Despite Maria's love and affection for N.S., the district court denied Maria's visitation petition. The district court gave great weight to the desire of the foster family to adopt N.S. and felt that Maria was less committed to the foster family.

Maria filed an appeal of the district court's decision denying her petition for visitation. The Nevada Supreme Court directed Maria to file consolidated original petitions for writs of mandamus because the Court lacked jurisdiction to hear the appeals.

Discussion

The Nevada Supreme Court maintains the discretion to consider a petition for a writ of mandamus.³ However, the Court will not issue a writ of mandamus where "the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law."⁴ Here, the Nevada Supreme Court found it necessary to entertain the writ because Maria had no adequate remedy at law since she was unable to appeal the order denying her guardianship petition and the order denying her visitation. Further, the Court wanted to clarify Nevada's abuse and neglect statute, Chapter 432B, particularly with regard to family preference for placement. Public policy further supported their decision.

I. NRS Chapter 432B

A grandparent is a person with a special interest entitled to involvement in and notification of any plan for placement of the child.

Pursuant to Nevada's abuse and neglect statute, NRS Chapter 432B, after determining that protective custody is warranted, the district court may hold a hearing to determine who is

² Matter of Guardianship of N.S., 122 Nev. Adv. Op. 27, at 5-6 (2006).

³ State v. Dist. Ct. (Jackson), 121 Nev. ___, ___, 116 P.3d 834, 836 (2005).

⁴ N.S., 122 Nev. Adv. Op. 27, at 8.

most qualified and suitable to take temporary or permanent custody of the child.⁵ Any person with a special interest in the placement of the child must, except for good cause, be “involved in and notified of any plan for the temporary or permanent placement of the child and is allowed to offer recommendations regarding the plan” and further must be permitted to testify at any hearing conducted for the purpose of determining any temporary or permanent placement of the child.⁶ Indeed, “a parent or other relative of the child is a person who ‘has a special interest in a child,’” pursuant to NRS 432B.457(2)(a)(1).⁷

Additionally, after receiving the required child welfare services report, the district court may place the child in the custody of a relative or other suitable person, or, alternatively, in the custody of a public agency or institution.⁸ Further, pursuant to NRS 432B.550(5) as written when Maria filed her petition, when determining placement, the district court *must* give preference to placing the child with a relative who is suitable and able to provide care and, if practicable, the court must place the child with his siblings.⁹ It must be noted that NRS 432B.550(5) was amended “in 2005 to create a presumption, rather than just a preference, that it is in a child’s best interest to be placed together with his or her siblings.”¹⁰ In light of Chapter 432B, the Nevada Supreme Court held that Maria was entitled to make recommendations and be involved in and notified of the placement of N.S. because Maria was related to N.S. and was further a person with “a special interest in the child.”

Maria’s petition challenged the order of the district court denying her petition for guardianship, contending that in doing so, the district court failed to comply with the family preference standard provided by NRS 432B.550(5). The Nevada Supreme Court agreed that the district court erred. Citing the purpose of the preference for placement with relatives to facilitate reunification, the Court noted that the best interest of the child “does not turn on whether the foster home is a ‘better’ home, or the foster parents are ‘better’ parents than the alternative home or family setting.”¹¹ Rather, the district court’s duty is to ensure that the placement provides “a stable, safe and healthy environment for the child considering all of the circumstances surrounding the placement.”¹² Indeed, the party who desires to avoid the preference of placement with relatives has the burden of showing that such placement would be detrimental to that child.¹³

The Nevada Supreme Court found that Maria was entitled to preferential consideration for placement of N.S., yet the district court declined to consider Maria’s views and instead solely relied on the recommendations provided in the CPS report. The Court noted that the district court further erred when it denied Maria’s guardianship petition rather than dismissing it without prejudice so as to maintain the temporary nature of the proceedings. The district court could have temporarily placed N.S. with Maria, and then later reviewed the placement to assess whether Maria was able to care for the six children; however, the court never gave Maria such an

⁵ NEV. REV. STAT. § 432B.455(1) (2005).

⁶ NEV. REV. STAT. § 432B.457(1) (2005).

⁷ *N.S.*, 122 Nev. Adv. Op. 27, at 9.

⁸ NEV. REV. STAT. § 432B.550(1) (2005).

⁹ *Id.* at 432B.550(5).

¹⁰ *N.S.*, 122 Nev. Adv. Op. 27, at 10 citing NEV. REV. STAT. § 432B.550(5)(a).

¹¹ *Youth & Family Serv. v. M.F.*, 815 A.2d 1029, 1038 (N.J. Super. 2003) (quoting *State in Interest of L.L.*, 625 A.2d 559, 564 (N.J. Super. 1993)).

¹² *N.S.*, 122 Nev. Adv. Op. 27, at 11.

¹³ *Alicia B. v. Superior Court*, 11 Cal. Rptr. 3d 1, 5 (Cal. Ct. App. 2004).

opportunity. Instead, the district court disregarded the familial preference for placement. Thus, the court granted Maria's petition for writ of mandamus.

II. NRS Chapter 125C

The foster parent's testimony was improperly determinative of the district court's decision to deny Maria's petition for visitation.

When the district court terminates parental rights, they may grant the child's natural grandparents visitation rights upon petition to the court before the termination.¹⁴ Here, Maria properly filed her petition for visitation prior to the termination of Y.S.'s parental rights.

To grant the petition, the district court must find that the visits would be in the best interests of the child, while considering NRS 125C.050(6)(a)-(i) for guidance in their determination.¹⁵ While it is permissible for the district court to hear and consider testimony by foster parents, in the current case, the Court concluded that "the district court gave undue weight to the foster parents' desires to raise N.S. without attachment to her natural family."¹⁶ Indeed, the testimony of the foster mother was improperly determinative of the court's decision, despite that the court found Maria able to meet N.S.'s needs during visitation. Courts must remember that the rights of a foster parent are to be distinguished from those of a natural parent.¹⁷

The Court further concluded that the district court may not consider NRS 125C.050(6)(j), relating to "the need for granting a right to visitation ... against the wishes of a parent of the child,"¹⁸ in its determination because the wishes of the natural parents are no longer relevant once the court terminates their parental rights.

Conclusion

Pursuant to NRS 432B, a grandmother, as a relative with a "special interest in the child," is entitled to make recommendations and be involved in and notified of the placement of her grandchild. It is further a preference that the child be placed with suitable and able family, even though a foster home might be "better" and the foster parents may be "better." Under current Nevada law, there is further a presumption that a child be placed with its siblings.

Pursuant to NRS 125C, a court may consider testimony of the foster parents; however, their testimony and wishes cannot determine the outcome of the decision to deny visitation to the child's natural family.

The Court granted the grandmother's consolidated petitions and issued a writ of mandamus directing the district court to vacate its order denying Maria's petition for guardianship and to reconsider upon examination of familial preference for placement. The Court further directed the district court to vacate its order denying Maria's petition for visitation and to reconsider the issue in a manner consistent with the Court's opinion.

¹⁴ NEV. REV. STAT. § 125C.050(7) (2005).

¹⁵ *Id.* at 125C.050(6)(a)-(i).

¹⁶ *N.S.*, 122 Nev. Adv. Op. 27, at 16.

¹⁷ *Smith v. Org. of Foster Families*, 431 U.S. 816, 844 (1977).

¹⁸ NEV. REV. STAT. § 125C.050(6)(j).