

Scholarly Commons @ UNLV Boyd Law

Nevada Supreme Court Summaries

Law Journals

6-12-2024

In the Matter of J.B v. Eighth Jud. Dist., 140 Nev. Adv. Op. 39 (June 12, 2024)

Aaron Kempf

Follow this and additional works at: <https://scholars.law.unlv.edu/nvscs>

This Case Summary is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.

IN MINOR PLACEMENT PROCEEDINGS, NEVADA LAW DOES NOT PRIORITIZE
PLACING A CHILD WITH EXTENDED BIOLOGICAL FAMILY OVER FICTIVE KIN;
INSTEAD, THE DECISION IS MADE BASED ON THE BEST INTEREST OF THE CHILD.

Summary

The Nevada Supreme Court clarified that blood relatives alone are not the only persons considered for child placement. In 2021, NRS 432B.0657 was introduced to expand statutory placement preference to include fictive kin, persons who are not related to the child by blood but have “a significant emotional and positive relationship with the child.” The Court explained that “fictive kin” requires evaluating the relationship from the perspective of both the child and the adult, emphasizing that blood relatives do not have legal placement preference over fictive kin.” Further, the Court stressed that “placement decisions must be based on a child’s best interest” and that the “child must be meaningfully represented in all stages of a placement proceeding.”

Background

The parents of J.B., Lindsey B., and Miles Stano Jr. were arrested for the homicide of J.B.’s older sibling. Nine months later, J.B. was born while both parents were incarcerated. At the initial protective custody hearing, the district court inquired about possible relative or fictive kin placement. The court ordered the Department of Family Services (“DFS”) to provide placement, care, and supervision of J.B. A few days later, DFS placed J.B. with Becky and Jay Whipple, who were friends of J.B.’s grandmother but were not licensed foster parents at that time. The district court later ordered J.B.’s placement with the Whipples and described them as “Unlicensed Fictive Kin” in the order. No party objected to this arrangement.

Several months later, Miles Stano Jr.’s paternity was officially established. Then, Stano Jr. requested J.B.’s placement with Miles Stano Sr. in Illinois. To this end, DFS submitted an Interstate Compact on the Placement of Children (“ICPC”) request. Approval for J.B.’s placement with Stano Sr. was completed nearly nine months after J.B. was placed with the Whipples. But by that point, the Whipples had become licensed foster parents.

After the ICPC request was completed, the district court scheduled a placement hearing. In this, the court did not consider evidence concerning J.B.’s placement and best interest at the hearing. Instead, the court held as a matter of law that Stano Sr. enjoyed statutory preference over the Whipples because Stano Sr. was a blood relative. The district court concluded that “fictive kin cannot be created through placement” and that even if the Whipples were fictive kin, they would still be “secondary to a blood relative.”

J.B. stated issues with his legal representation, either having no counsel or counsel failing to appear for the placement hearings. There were over five hearings where J.B. was unrepresented. At the hearing on DFS’s motion for reconsideration, J.B.’s counsel once more failed to appear. The district court did not find this a compelling reason for reconsideration. During the that hearing, the court was frustrated with DFS for arguing that the Whipples were

¹ By Aaron Kempf, J.D. Candidate, University of Nevada, Las Vegas William S. Boyd School of Law.

fictive kin. The court emphasized that fictive kin were not on the same equal footing as blood relatives for placement purposes and denied the motion for reconsideration. Subsequently, DFS and the Clark County District Attorney filed a petition for a writ of mandamus challenging the district court's decision placing J.B. with Stano Sr.

Discussion

The Whipples are J.B.'s fictive kin

The Court held that given the district court's original uncontested determination at placement, the Whipples are J.B.'s fictive kin, and the district court arbitrarily and capriciously abused its discretion in later finding otherwise.² DFS identified the Whipples as J.B.'s fictive kin in the preliminary protective hearing report filed before the original protection hearing. Stano Jr., nor any other party, contested J.B.'s initial placement with the Whipples. The district court placed J.B. with the Whipples and cannot change the settled legal designation of a placement when no new relevant facts are before it and no party has challenged the designation. The category of fictive kin cannot be used to temporarily place children with unlicensed, unrelated custodians until a "better option" comes along. Doing so runs contrary to the state's paramount obligation of placing a child outside the homes: the child's best interests.³

When deciding whether a nonrelated party can be designated as a child's fictive kin, the court should look for manifestations of care from the perspectives of both the prospective custodian and the child. In the cases of an infant, analysis of fictive kin may be guided heavily or entirely by the bond the prospective custodian has with the child. Prospective custodians who have a connection with the family and demonstrate a commitment and willingness to care for the infant can qualify as fictive kin even though the newborn is not yet able to have developed a reciprocal bond.

Nevada law does not privilege blood relatives over all nonrelated parties in child placement matters

The mere existence of a suitable blood relative does not relieve the district court of its obligations to the child's best interests.⁴ The Nevada Supreme Court has previously held that if a nonfamily placement is made and a relative later comes before the court, the district court must "determine whether the familial preference exists and, if so, consider placing the child with the relatives, if this placement serves the child's best interest."⁵

Nevada's statutory placement preference scheme shows no difference between a child's blood relative and fictive kin.⁶ Instead, the district court decided to place J.B. based solely on the bare assertion of biological superiority. Nevada law does not support a court in doing so. The

² See Div. of Child & Fam. Servs. v. Eighth Jud. Dist. Ct., 120 Nev. 445, 449 (2004) (noting writs of mandamus serve "to control an arbitrary or capricious exercise of discretions" (internal quotation marks omitted)).

³ See NEV. REV. STAT. § 432B.390(6); 432B.550(6) (allowing placement for children in need of protective custody with hospitals, kin, or licensed shelters).

⁴ See Clark Cnty. Dist. Att'y v. Eighth Jud. Dist. Ct., 123 Nev. 337, 346 (2007) (noting "suitable relatives are not necessarily entitled to custody" and clarified that the primary focus of a placement proceeding should be on the child's best interest).

⁵ *Id.*

⁶ See Chandra v. Shulte, 135 Nev. 499, 501 (2019) ("Where a statute is clear and unambiguous, this court gives effect to the ordinary meaning of the plain language of the text without turning to other rules of construction.").

district court's order is vacated. On further proceedings to determine the child's placement, the Court directs the district court to hear evidence, make express findings regarding J.B.'s best interests, and place J.B. accordingly.

The district court abused its discretion in placing J.B. when J.B.'s counsel was absent

Nevada law requires that a child subject to protectionary proceedings “must be represented by an attorney at all stages of any proceeding held pursuant to NRS 432B.410 to 432B.500.”⁷ Even though the district court appointed a Children's Attorney Project (“CAP”) attorney, the Court was troubled by several instances where the district court disregarded J.B.'s statutory right to representation. The failure of J.B.'s counsels to appear does not relieve the district court of its responsibility to ensure statutory compliance in the proceedings. The Court concluded that the Legislature clearly intended children to have a voice in placement determinations and effectuated that intent by enacting mandatory provisions requiring children be represented in placement hearings.

This matter must be heard by a different district court judge

The Nevada Supreme Court decided a different district court judge should hear the case. The Court cited several inappropriate statements the district court judge made on the record. The district court judge stated it was a real convenient argument to make,” after DFS claimed that allegations of abuse exist against Stano Sr. Further, the judge disparaged the Whipples by calling them mere “placeholder[s].” Moreover, the judge, in referring to DFS's motion for reconsideration, stated he “wasn't going to reconsider that order.”

In determining whether a case should be reassigned, the Nevada Supreme Court considers, among other things, “whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of [the judge's] mind previously-expressed views or findings determined to be erroneous.”⁸ The district court here expressed an unwillingness to reconsider DFS's arguments regarding fictive kin and manifested a fundamental misunderstanding of the Whipples' legal status.

Conclusion.

The legislature's inclusion of fictive kin as an alternative placement to relatives recognizes the significant role certain unrelated people can play in a child's life and indicates an intent for children to be placed, when possible, into a home uniquely interested in the best interests of the child. Nevada law does not recognize a preference between extended biological family over fictive kin. Accordingly, the Court granted the petition and directed the Court clerk to issue a writ of mandamus compelling the chief judge of the Eighth Judicial District to reassign the case to a different judge to hold further proceedings, and to determine placement based on J.B.'s best interest. The Court also noted that J.B. needs to be represented by counsel at future proceedings. Additionally, the Court vacated their November 30, 2023, stay.

⁷ NEV. REV. STAT. § 432B.420(2).

⁸ *Roe v. Roe*, 139 Nev., Adv. Op. 21, 535 P.3d 274, 291 (Ct. App. 2023) (Quoting *Smith v. Mulvaney*, 827 F.2d 558, 662 (9th Cir. 1987)).