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In re Parental Rights as to M.M.L., 133 Nev. Adv. Op. 21 (May 11, 2017)

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COMPETENCY REQUIREMENTS: TERMINATION OF PARENTAL RIGHTS

Summary

The Court determined that (1) when a parent is deemed incompetent to stand a criminal trial, there is no statutory authority requiring the district court to continue a parallel parental rights termination trial so that the parent can regain competence; and (2) when a litigant fails to object to the State's method of service in initial pleadings or during trial, the litigant waives all challenges to the service of a parental rights termination by publication.

Background

In 2014, the State filed a petition to terminate the mother's parental rights regarding M.M.L. Jr. after numerous concerns over the mother's mental health. Because the State's family division attorneys could not determine the mother's location, the State attorneys sought and received permission to serve the mother by publication. The mother's counsel never objected to the State's method of service. After the State filed its termination petition, police arrested the mother and took her into custody on kidnapping charges. During the mother's criminal proceedings, the district court deemed the mother incompetent to stand trial.

When setting a date for her termination trial, and in response to the district court's incompetence ruling, the mother's counsel requested that the court appoint the mother a guardian ad litem. In September of 2015, the mother's parental rights trial began and with the mother still incompetent, the mother's guardian ad litem was present. The district court granted the State's petition to terminate the mother's parental rights.

Discussion

Nevada law does not require that a parent be deemed competent before a district court may proceed in a termination of parental rights matter

According to NRS 128.090(2), the district court is not required to wait for a litigant in a civil action to gain competence prior to trial. In the context of a civil action determining parental rights, "[t]he continuing needs of a child for proper physical, mental and emotional growth and development are the decisive considerations in proceedings for termination of parental rights."² Because parents have a fundamental liberty interest in the care of their children, the court must preserve a parent's due process rights in a termination proceeding. In determining whether due process rights require the continuance of a trial until a parent is deemed competent, courts apply the *Mathews v. Eldridge* balancing test, which balances the parent's interest and the risk of erroneous deprivation against the government's interest.³

Here, the district court did not abuse its discretion in denying the mother's request for a continuance. First, while the district court did not explicitly reference the *Mathews* test, the district

¹ By Hayley J. Cummings.

² NEV. REV. STAT. § 128.005(2)(c).

³ 424 U.S. 319, 334–35 (1976).

court considered the mother's interests, the State's interest in a speedy trial and in protecting the child's best interests, and the risk of erroneous deprivation of the mother and State's interest should the case continue until the child reached eighteen. Second, because Nevada law allows courts to consider mental illness when determining parental fault in a termination case, using a parent's mental illness as grounds to terminate the parent's rights, and to indefinitely delay that termination, would be both logically and legally inconsistent. Third, by appointing the mother a guardian ad litem, the district court did not abuse its discretion in refusing to grant a continuance.

The district court had personal jurisdiction over the mother despite allegations of insufficient service because she failed to object below and thus has waived the issue

In a proceeding to terminate parental rights, according to NRS 128.060(2)(a), if the State knows the parent's place of residence, then the state must serve the parent with notice of the hearing. However, if a parent's place of residence is unknown, then the State must serve notice on the nearest known relative. If the parent's location is unknown and due diligence does not reveal the parent's location, then the State may petition the court by affidavit for permission to serve the parent through publication. "Objections to personal jurisdiction, process, or service of process are waived, however, if not made in a timely motion or not included in a responsive pleading such as an answer."⁴ Here, the mother's counsel never objected to the issue of service at the district court level. Thus, without an objection, the mother waived the issue, and the court had personal jurisdiction over her.

Conclusion

In a parental rights termination trial, the law does not require the district court to grant a continuance until the challenged parent regains competence. Additionally, here, the district court considered the due process interests of the mother by appointing a guardian ad litem prior to trial. Finally, because the mother's counsel failed to raise the issue of service at the trial level, she waived the issue on appeal. Thus, the Court affirmed the district court's order of termination of parental rights.

⁴ Hansen v. Eighth Judicial Dist. Court, 116 Nev. 650, 656, 6 P.3d 982, 986 (2000).