IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE PARENTAL RIGHTS AS TO H. M.

FLORELA M.,
Appellant,
vs.
ROBERT M.,
Respondent.

No. 50045

FILED

FEB 20 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order terminating appellant's parental rights as to the minor child. Eighth Judicial District Court, Family Court Division, Clark County; N. Anthony Del Vecchio, Judge.

After appellant was convicted of soliciting the murder of respondent, the child's natural father, respondent petitioned the district court to terminate appellant's parental rights. Noting that the child had been separated from appellant for four years and was thriving in her current placement with respondent, where her medical needs had diminished, the district court determined that the child's best interest would be served by terminating appellant's parental rights. Concurrently, the district court concluded that parental fault existed, based largely on what was summarily described as "the nature of" appellant's criminal conviction. In so determining, the court also found that appellant refused to acknowledge culpability, that in the past, appellant had made unsubstantiated allegations of sexual abuse, and that the parties were unable to co-parent. Accordingly, the district court found that termination of appellant's parental rights was in the child's best interest and that

parental fault existed, and consequently, the court terminated appellant's parental rights. Appellant has appealed.

In order to terminate parental rights, respondent was required to prove, by clear and convincing evidence, both that termination is in the child's best interest and that parental fault exists. NRS 128.105; Matter of Parental Rights as to J.L.N., 118 Nev. 621, 625, 55 P.3d 955, 958 (2002). In determining whether respondent had so shown, the decisive considerations for the district court were "[t]he continuing needs of [the] child for proper physical, mental and emotional growth and development." NRS 128.005(2)(c). As "the parent-child relationship is a fundamental liberty interest," this court closely scrutinizes the district court's findings to determine whether the court properly terminated parental rights. Matter of Parental Rights as to N.J., 116 Nev. 790, 795, 801, 8 P.3d 126, 129, 133 (2000). We will uphold a district court's termination order only when the decision is supported by substantial evidence. Id. at 795, 8 P.3d at 129.

On appeal, appellant raises issues with respect to three aspects of the proceeding: the district court (1) failed to identify in its written order clear and convincing evidence showing that parental fault existed and abused its discretion in making that determination, since no such evidence exists, (2) erroneously considered evidence from prior proceedings not before the court, and (3) erroneously allowed expert testimony even though appellant was not notified in advance and the expert was not qualified to give opinions in certain areas.

Parental fault

Appellant argues that the district court failed to specify a ground for finding parental fault and that clear and convincing evidence of parental fault does not exist. NRS 128.105 requires, in pertinent part,

that the district court's termination order include a finding that the parent's conduct demonstrated one of the following enumerated parental fault grounds: abandonment, neglect, parental unfitness, risk of serious physical, mental, or emotional injury if the child was returned to the parent, or mere token efforts by the parent.

As appellant points out, here, the district court's order does not specify one of these grounds. Instead, the district court's order summarily states that parental fault existed due to the nature of appellant's criminal conviction and her refusal to acknowledge guilt. Moreover, while NRS 128.106(6) provides that a parent's criminal conviction can evidence parental unfitness "if the facts of the crime are of such a nature as to indicate the unfitness of the parent to provide adequate care and control to the extent necessary for the child's physical, mental or emotional health and development," even presuming that the court's parental fault finding was based on unfitness, the district court failed to make any findings as to how the facts of appellant's crime indicate that appellant is currently unable to provide adequate care and control with respect to the child, such that her parental rights should be terminated.

An unfit parent is one who "by reason of his fault or habit or conduct toward the child or other persons, fails to provide such child with proper care, guidance and support." NRS 128.018. Nothing in the district court's order or the record adequately explains why the court determined that appellant's fault, habit, or conduct resulted in her failure to provide her child with appropriate care, guidance, and support. Because the district court's order lacks specific factual findings connecting appellant's criminal actions to her ability to properly parent the child, we are unable

to determine from the record before us whether substantial evidence supports the district court's finding that clear and convincing evidence demonstrates appellant's parental fault.[1] Therefore, we reverse the district court's order and remand this matter for new proceedings. Nonetheless, because the remaining two issues raised by appellant, regarding prior evidence and expert testimony, are likely to reappear during the remanded proceedings, we briefly address those issues.

Evidence from prior proceedings

Appellant asserts that the district court improperly considered evidence that it had reviewed in prior proceedings but which was not currently before the court. In its order and during the hearing, the district court referred to and expressed concern regarding Chapman v. Chapman, 96 Nev. 290, 607 P.2d 1141 (1980), which explains that evidence presented during an earlier, separate guardianship matter could not be considered by the court in a later proceeding in which the court evaluated whether parental rights should be terminated. In so doing, the district court seemed to indicate that it relied on evidence not in the record before it in considering respondent's request to terminate appellant's parental rights. But appellant has not indicated what outside evidence the court considered and, as respondent points out, it appears that the evidence from prior proceedings considered by the court was admitted as evidence in the proceeding below, which Chapman does not preclude. 96 Nev. at 293, 607 P.2d at 1143. In any case, on remand, the district court may

[1]As it appears that the relevant transcripts and hearing recordings were included in the parties' appendices prepared by counsel, appellant's proper person request for transcripts is denied.

consider prior evidence only if it is properly admitted as evidence in this matter, in accordance with Chapman.

Expert testimony

Appellant contends that her due process rights were violated when Dr. Shirley Emerson, a marriage and family therapist, unexpectedly testified as an expert witness and as to information that she was not qualified to assess and which was not identified in her earlier reports or respondent's pretrial memorandum. In so arguing, appellant asserts that the general rules of civil procedure, rather than the family court rules, should apply to this matter.

But the record shows that Dr. Emerson is qualified to make psychological assessments, including an opinion regarding whether appellant suffered from Munchausen's Syndrome by Proxy. Respondent's pretrial memorandum listed Dr. Emerson as a witness and indicated that, if called, she was expected to testify regarding the evaluation and assessment of appellant during the parties' 2003 divorce proceedings, whether any co-parenting possibilities existed,[2] and "her observations and . . . events within her knowledge regarding relevant considerations of [the] Court with respect to terminating [appellant's] parental rights." This information meets the requirements of NRCP 16.2 and EDCR 5.36, which were properly applied in this matter. Accordingly, appellant's arguments as to expert testimony lack merit.

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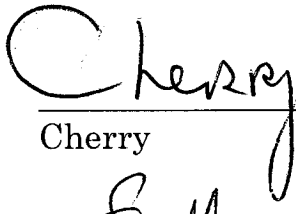
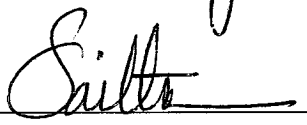
[2]We note that it is unclear whether and why the parties' inability to co-parent would support terminating appellant's parental rights. It does not appear that the district court considered any alternatives to terminating appellant's parental rights. If appropriate, alternatives should be considered on remand.

Regardless, because the district court failed to make the findings necessary for us to adequately review this matter, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for new proceedings consistent with this order.



Cherry, J.



Saitta, J.

GIBBONS, J., dissenting:

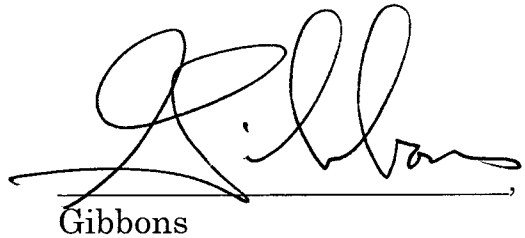
While the majority correctly explains that appellant's concerns with prior evidence and expert testimony do not warrant reversal in this matter, the majority's analysis regarding the district court's finding of parental fault ignores the obvious.

Although the district court's order does not specify a ground for parental fault, the district court clearly found that appellant was unfit to parent the child based on her criminal conviction for soliciting the murder of the child's father and corresponding denial of such act, despite her guilty plea. A parent's criminal conviction statutorily demonstrates parental unfitness when the facts underlying the crime show that the parent cannot adequately provide for the child's health and developmental needs. NRS 128.106(6); Matter of Parental Rights as to K.D.L., 118 Nev. 737, 746, 58 P.3d 181, 187 (2002). Thus, here, as the district court's decision referred to the nature of appellant's crime, the court adequately

denoted a finding of parental unfitness and the failure to specify the term unfitness does not constitute reversible error.

Further, the district court's findings that clear and convincing evidence established parental unfitness are supported by substantial evidence. As the majority points out, an unfit parent is one who "by reason of his fault or habit or conduct toward the child or other persons, fails to provide such child with proper care, guidance and support." NRS 128.018. And as noted, conviction for a crime can automatically demonstrate such fault, depending on the nature of the crime's factual background. NRS 128.106(6); K.D.L., 118 Nev. at 746-47, 58 P.3d at 187; Matter of Parental Rights as to J.L.N., 118 Nev. 621, 628, 55 P.3d 955, 960 (2002). Certainly, here, the nature of appellant's crime—illegally attempting to terminally deprive the child of the father—and her continued failure to take responsibility for it, demonstrate her inability to provide the child with proper guidance, at the least. See, e.g., Heath v. McGuire, 306 S.E.2d 741, 743 (Ga. Ct. App. 1983) (recognizing that "[t]he requisite malice necessarily shown by guilt of the murder of one's spouse is sufficient to imply a moral unfitness to terminate the parental relationship, an unfitness which is likely to continue with resultant harm to the innocent child").

Consequently, as substantial evidence supports the district court's parental fault finding, I would affirm the court's order terminating appellant's parental rights.



Gibbons, J.

cc: Eighth Judicial District Court Dept. K, District Judge, Family Court Division
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