IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE PARENTAL RIGHTS AS TO J.H. AND T.V., MINORS.

TAMMY H.,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35164

FILED

JAN 26 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court terminating parental rights.

Because termination of parental rights is an exercise of enormous power, equivalent to imposing a civil death penalty, "this court closely scrutinizes whether the district court properly preserved or terminated the parental rights at issue." Matter of Parental Rights as to N.J., 116 Nev. ___, ___, 8 P.3d 126, 129 (2000) (citations omitted). While "due process requires that clear and convincing evidence be established before terminating parental rights," we will uphold a termination order which is based on substantial evidence, without substituting our own judgment for that of the district court. Id.

"NRS 128.105 sets forth the basic considerations relevant in determining whether to terminate parental rights: the best interests of the child and parental fault." Id. NRS 128.105 provides as follows:

> The primary consideration in any proceeding to terminate parental rights must be whether the best interests of the child will be served by the termination. An order of the court for the termination of parental rights must be made in light

01-00786

of the considerations set forth in this section and 128.106 to 128.109, inclusive, and based on evidence and include a finding that:

1. The best interests of the child would be served by the termination of parental rights; and

2. The conduct of the parent or parents was the basis for a finding made pursuant to subsection 3 of NRS 432B.393 or demonstrated at least one of the following:

(a) Abandonment of the child;
(b) Neglect of the child;
(c) Unfitness of the parent;
(d) Failure of parental adjustment;
(e) Risk of serious physical, mental or emotional injury to the child if he were returned to, or remains in, the home of his parent or parents;
(f) Only token efforts by the parent or parents:
(1) To support or communicate with the child;
(2) To prevent neglect of the child;
(3) To avoid being an unfit parent; or
(4) To eliminate the risk of serious physical, mental or emotional injury to the child; or
(g) With respect to termination of the parental rights of one parent, the abandonment by that parent.

This court recently abandoned prior caselaw which required a "strict adherence to finding of parental fault to terminate parental rights before the district court considers the best interests of the child." Parental Rights as to N.J., 116 Nev. at ___, 8 P.3d at 132. Therefore, the district court must now consider the best interests of the child in determining parental fault, rather than "rigidly and formulaically" considering "the conduct of the parents in a vacuum, without considering the best interests of the child." Id.

Appellant first contends that parental fault for termination of her parental rights was not established by clear and convincing evidence. We disagree. Because appellant's argument is based primarily on conflicting expert

testimony, appellant is, in essence, asking this court to improperly substitute its own judgment for that of the trial court. See Parental Rights as to N.J., 116 Nev. at ___, 8 P.3d at 129. The State's expert testified that the situation would not improve, while appellant's expert testified that appellant could resume the role of a parent after continued therapy. The district court simply gave greater weight to the State's expert than to appellant's in determining that parental fault was established in four respects, namely, subsections (b), (c), (e), and (f) of NRS 128.105(2).

We conclude that the evidence of appellant's criminal conviction for felony child abuse and child neglect, the evidence of appellant's conviction in 1989 for felony cruelty to a child, the evidence that appellant's parenting had not improved over a considerable period of time, and the evidence that appellant had only made token efforts to improve the situation, constitutes substantial evidence to support the district court's decision. See NRS 128.105(2). Accordingly, we affirm the district court's determination that parental fault was established by clear and convincing evidence.

Appellant argues that terminating her parental rights so that the children could be adopted by their uncle was not in the children's best interest. In making this argument, appellant again asks this court to improperly substitute its own judgment for that of the trial court.

The district court heard all of the evidence pertaining to the children's situation, including the purported drawbacks of living with the uncle, which are cited by appellant. The district court also heard evidence that the uncle provided a decent home for the boys, that the boys were doing well in school while living with him and that the boys

desired to be adopted by him. The district court also based its decision on the fact that holding the children in limbo for four or more years of appellant's prison term was not in their best interest. The district court further noted that appellant's parenting had not improved since 1989 when she fractured her four-month old daughter's head by dropping the infant and that living with appellant was an environment of fear for both boys. The court concluded that it was "[w]ith all of this in mind" that termination was in the children's best interest.

Because the factors cited by the district court in making the best interest determination are supported by substantial evidence in the record, we affirm the district court's determination that termination of appellant's parental rights was in the best interests of the children.

Appellant next contends that the State failed to prove that her parental rights as to T.V. should have been terminated, even if this court concludes that sufficient evidence was presented to justify termination of rights as to J.H. Appellant asserts that the bulk of the evidence was directed at appellant's relationship with J.H. and clearly failed to establish that her rights as to T.V. should have also been terminated. This argument lacks merit because the State established by clear and convincing evidence that both children were subjected to an environment of fear when with appellant. The evidence at trial showed that T.V. witnessed the burning of his brother's hand by appellant and that T.V. suffered emotionally from this incident. Evidence was also presented that T.V. was developmentally delayed and suffered considerable emotional and behavioral problems. Accordingly,

we conclude that the district court properly terminated appellant's parental rights as to T.V.

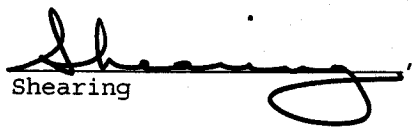
Next, appellant argues that the district court erred in allowing expert testimony regarding the ultimate question of whether it would be in the children's best interest to have appellant's parental rights terminated. Appellant never objected to the expert opinions, and therefore this issue has not been preserved for appeal. See Fick v. Fick, 109 Nev. 458, 462, 851 P.2d 445, 448 (1993) (stating that "failure to object in the trial court bars the subsequent review of the objection"). In any event, expert testimony "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." NRS 50.295.

Appellant also contends that the district court erred in allowing hearsay testimony regarding appellant's prior conduct. Because appellant did not object to this testimony, the issue has not been preserved for review by this court. See Fick at 462, 851 P.2d at 448.

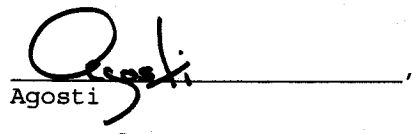
Finally, appellant asserts in a footnote that the district court erred in failing to enforce the rule of exclusion under NRS 50.155 by allowing the children's social worker to remain in the courtroom during the testimony of appellant's expert. This issue has not been preserved for review by this court because appellant failed to object to the social worker's presence in the courtroom. See Fick at 462, 851 P.2d at 448. In any event, NRS 50.155(2)(c) does not authorize the exclusion of "[a] person whose presence is shown by a party to be essential to the presentation of his cause." Because the social worker's presence could arguably be shown to be essential to the presentation of the State's cause, the

district court would not necessarily have excluded her, even if appellant had objected.

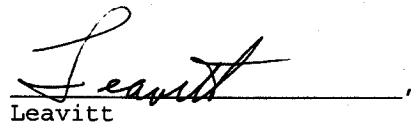
Having reviewed all of appellant's arguments and concluded that they lack merit, we affirm the order of the district court terminating appellant's parental rights.



Shearing, J.



Agosti, J.



Leavitt, J.

cc: Hon. Merlyn H. Hoyt, District Judge
Attorney General
State Public Defender
Lockie & Macfarlan, Ltd.
White Pine County Clerk