

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE
PARENTAL RIGHTS AS TO M.M.L.,
JR., A MINOR

Supreme Court No. 69210
District Court No. D-14-19739-1
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APPELLANT'S OPENING BRIEF

Appeal from an Order Terminating the Parental Rights After a Trial, Eighth
Judicial District Court, Honorable Frank Sullivan, Clark County

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IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE
PARENTAL RIGHTS AS TO M.M.L.,
JR., A MINOR

Supreme Court No. 69210

District Court No. D-14-497399-R

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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ROUTING STATEMENT

Nevada Rules of Appellate Procedure 17(a)(12) states that the Nevada Supreme Court shall hear and decide cases involving termination of parental rights. The underlying district court action was a termination of parental rights action originating under chapter 128 of the Nevada Revised Statutes.

STATEMENT OF ISSUES

- I. WHETHER THE DISTRICT COURT ERRED IN PROCEEDING TO TRIAL IN A TERMINATION OF PARENTAL RIGHTS ACTION AGAINST A PARENT WHO HAD PREVIOUSLY BEEN RULED TO BE INCOMPETENT TO STAND TRIAL IN A CRIMINAL MATTER
 - A. IS THE PARENT CHILD RELATIONSHIP ENTITLED TO DUE PROCESS PROTECTION
 - B. IF A PARENT IS INCOMPETENT FOR PURPOSES OF A CRIMINAL TRIAL ARE THEY ALSO INCOMPETENT FOR PURPOSES OF A TERMINATION OF PARENTAL RIGHTS ACTION
 - C. DID THE DISTRICT COURT USE THE WRONG STANDARD IN DENYING THE REQUEST TO CONTINUE THE TERMINATION TRIAL UNTIL THE PARENT WAS COMPETENT
 - D. WHAT STANDARD SHOULD THE DISTRICT COURT HAVE USED IN DETERMINING WHETHER TO GRANT THE REQUEST TO CONTINUE THE TRIAL
- II. DID THE DISTRICT COURT LACK PERSONAL JURISDICTION OVER THE PARENT DUE TO A LACK OF PROPER SERVICE

PRELIMINARY STATEMENT REGARDING THE REFERENCES TO
THE RECORD ON APPEAL

The citations in the following Statement of Facts and Argument, will be made by referencing matters in the pleadings and papers on appeal in form of AA,XX;LL “AA” represents the “Appellant’s Appendix”, “XX” represents the date stamped page number within the Appellants Appendix upon which the relied upon matter may be found, and “LL” references the lines containing the relied upon matter. Similarly, references to matters in the transcript on appeal shall be in the form above as the transcript is included in the Appellant’s Appendix.

STATEMENT OF FACTS

The facts which will be set forth herein will be set forth as they appear and were presented in case number D-14-497399-R, in the Eighth Judicial District, before the district court judge Frank Sullivan, during the trial on September 10, 2015, as well as the Appellant’s Appendix filed herewith.

The Petition was filed on May 22, 2014¹. An Affidavit for Service by Publication was filed on May 23, 2014². The district court granted an Order

¹ AA00001-8

² AA000009-16

allowing service by publication on June 2, 2014³. A termination of parental rights (TPR) trial was conducted for Natural Father Myreon L on April 28, 2015⁴.

The trial was continued for Natural Mother Mistie P. to May 13, 2015⁵. On May 13, 2015, Mistie P. was found to be not competent and was sent to Lakes Crossing⁶. On the date of the trial Mistie P. was at Lakes Crossing without a definite release date⁷. Trial counsel raised the issue that proceeding to trial without Mistie P. was a violation of due process⁸.

All parties agreed that TPR statute does not explicitly address incompetent parents and that there are no cases in Nevada directly on point⁹. The district court stated that its primary concern was the best interest of the child¹⁰. The district court essentially was concerned with the amount of time that the child had been in the system and did not properly balance the competing constitutional interests¹¹.

SUMMARY OF ARGUMENT

³ AA000017-18

⁴ AA000033-4;24,1

⁵ AA000034;1

⁶ AA000034;2-4

⁷ AA000034;13-24

⁸ AA000038;16-17

⁹ AA000035;20-24

¹⁰ AA000039;12-15

¹¹ AA000041;1-15

Mistie P. has standing to file this Appeal. The Nevada Rules of Appellate Procedure Rule 3A provides in pertinent part:

- (a) Standing to Appeal. A party who is aggrieved by an appealable judgment or order may appeal from that judgment or order, with or without first moving for a new trial;
- (b) Appealable Determinations. An appeal may be taken from the following judgments and orders of a district court in a civil action:
 - (1) A final judgment entered in an action or proceeding commenced in the court which the judgment is rendered.

The Findings of Fact, Conclusions of Law and Order Terminating Parental Rights of Mistie Lee Peterson was filed on October 8, 2015. According to the Nevada Rules of Appellate procedure¹², the Order is a final judgment entered in a proceeding commenced in the court in which the judgment is rendered.

ARGUMENT

- I. WHETHER THE DISTRICT COURT ERRED IN PROCEEDING TO TRIAL IN A TERMINATION OF PARENTAL RIGHTS ACTION AGAINST A PARENT WHO HAD PREVIOUSLY BEEN RULED TO BE INCOMPETENT TO STAND TRIAL IN A CRIMINAL MATTER

¹² NRAP 3A(1)

The constitutional guarantee of due process of law, found in the Fifth and Fourteenth Amendments to the U.S. Constitution, prohibits all levels of government from arbitrarily or unfairly depriving individuals of their basic constitutional rights to life, liberty, and property. Procedural due process limits the exercise of power by the state and federal governments, by requiring that they follow certain procedures in criminal and civil matters. "[T]he parent-child relationship is a fundamental liberty interest" and the Due Process Clause of the Fourteenth Amendment protects parents' fundamental right to care for and control their children. Statutes that infringe upon this interest are thus subject to strict scrutiny and must be narrowly tailored to serve a compelling interest¹³.

The test in criminal proceedings for competency of a defendant is "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him"¹⁴." If a criminal defendant is incompetent, proceedings must be halted until the defendant is restored to competency. Given that the Nevada Supreme Court has "characterized the severance of the parent-child relationship as tantamount to imposition of a civil

¹³ In the Matter of Parental Rights as to JLN, 118 Nev. 621, 55 P.3d 955 (2002)

¹⁴ Dusky v. United States, 362 U.S. 402 (1960)

death penalty”¹⁵. Should a parent in a termination of parental rights action have the same protection as a defendant in a criminal proceeding?

A. IS THE PARENT CHILD RELATIONSHIP ENTITLED TO DUE PROCESS PROTECTION

The United States Constitution, through the Due Process Clauses of the Fifth and Fourteenth Amendments, recognizes a presumption that a child’s parents are fit. As Justice O’Connor explained in Troxel v. Granville, there is “a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions¹⁶.” The Constitution further recognizes “a presumption that fit parents act in the best interest of their children¹⁷.” These are fundamental principles undergirding our constitutional system.

In cases where an individual has claimed a violation of due process rights, the courts must determine whether a citizen is being deprived of "life, liberty, or property," and what procedural protections are "due" that individual. The specific contours that these due process protections take must be considered not in the abstract but, rather with due regard for “the precise nature of the government

¹⁵ In the Matter of N.J., 116 Nev. 790, 8 P.3d 126 (2000)

¹⁶ Troxel v. Granville, 530 US 57, 68; 120 S. Ct 2054; 147 Ed 2d 49 (2000)

¹⁷ Id.

function involved as well as the private interest that has been affected by governmental action¹⁸.”

The rights of minor children and parents are protected by the Due Process Clause of the Fourteenth Amendment¹⁹. “Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment²⁰.” Accordingly, a review of “first principles” as to a child’s best interest, a parent’s interests, and the government’s role in furthering those and society’s interests is instructive.

A minor child is a vulnerable member of society and, as such, is deserving of special protection²¹. Courts have recognized this by noting that the best interests of a child are of paramount importance to society²². The State has an interest in the welfare of the child.

The interests of a child and the interest of a fit parent are perfectly aligned under the law. To suggest the opposite, that a child’s interests diverge from those of a fit parent is a constitutional paradox. Both the Fifth Amendment and the

¹⁸ Stanley v. Illinois, 405 US 645, 650-51; 92 S. Ct 1208 (1972)

¹⁹ Santosky v. Kramer, 455 US 745, 752-54 &n7; 102 S Ct 1388 (1982)

²⁰ Mathews v. Eldridge, 424 US 319, 332; 96 S Ct 893 (1976)

²¹ Id at 652

²² Lassiter v. Dep’t of Social Servs, 452 US 18, 28; 101 S Ct 2153 (1981)

Fourteenth Amendment recognize and provide “heightened protection against governmental interference” in [t]he liberty...interest of parents in the care, custody and control of their children²³.” The U.S. Supreme Court has “recognized on numerous occasions that the relationship between parent and child is constitutionally protected²⁴.” The liberty interest “is perhaps the oldest of the fundamental liberty interests recognized by this Court²⁵” and “is an interest far more precious than any property right²⁶.”

The Constitution protects not only the parent’s right to be a parent, but also the right to custody of his child. “It is cardinal with us that the custody, care and nature of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder²⁷.” A parent’s “interest in retaining custody of his children is cognizable and substantial²⁸.” Decisions in both the United States Supreme Court and this Court “establish that the Constitution protects the sanctity of the family precisely because

²³ Troxel, at 65 (quoting Washington v. Glucksberg, 521 US 702, 720; 117 S Ct 2258 (1997))

²⁴ Quilloin v. Walcott, 434 US 246, 255; 98 S Ct 549 (1978)

²⁵ Troxel, at 65

²⁶ Santosky, at 745

²⁷ Stanley, at 651

²⁸ Id at 652

the institution of the family is deeply rooted in this Nation's history and tradition²⁹.”

B. IF A PARENT IS INCOMPETENT FOR PURPOSES OF A CRIMINAL TRIAL ARE THEY ALSO INCOMPETENT FOR PURPOSES OF A TERMINATION OF PARENTAL RIGHTS ACTION

"Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so³⁰. By definition, a mentally incompetent person is one who is unable to understand the nature of the termination proceeding and unable to assist in the presentation of his or her case³¹.

“A lawyer who reasonably determines that his client has become incompetent to handle his own affairs may take protective action on behalf of his client, including petitioning for the appointment of a guardian. The protective action should be the least restrictive under the circumstances. The appointment of a guardian is a serious deprivation of the client's rights and ought not to be

²⁹ Michael H v. Gerald D, 491 US 110, 123-124; 109 S Ct 2333 (1989)

³⁰ Drope v. Missouri, 420 U.S. 162, 171-172, 95 S. Ct. 896 (1975). Riggins v. Nevada, 504 U.S. 127, 112 S. Ct. 1810 (1992)

³¹ Dusky v. United States, 362 U.S. 402, 80 S. Ct 788 (1960)

undertaken if other, less drastic, solutions are available. With proper disclosure to the court of the lawyer's self-interest, the lawyer may recommend or support the appointment of a guardian who the lawyer reasonably believes would be a fit guardian³²...

Simply appointing a guardian ad litem for a parent in such a condition might well fail to protect the parent sufficiently against an unreliable adjudication terminating parental rights. A parent unable to understand the proceedings and unable to assist his or her attorney would likely be similarly unable to assist a guardian ad litem, and could be at a severe disadvantage in a termination proceeding because of his or her incapacity³³.

“[T]he principles of effective assistance of counsel developed in the context of criminal law apply by analogy in child protective proceedings³⁴.” Trying a dependency or termination of parental rights case against a parent who is incompetent to direct and assist his or her attorney violates due process, just as trying an incompetent criminal defendant does³⁵. Mistie P. was found to be incompetent to stand trial in her criminal case. A certified copy of the Order of

³² American Bar Association Formal Opinion 404 (1996)

³³ In re Alexander V., 223 Conn 557; 613 A.2d 780 (1992)

³⁴ In re EP, 234 Mich App 582, 598; 595 NW 2d 168 (1999), overruled in part on other grounds by In re Trejo, 462 Mich 341, 353, n 10; 612 NW 2d 407 (2000)

³⁵ State ex rel Juv. Dept. v. Evjen, 107 Or App 659 (1991)

Commitment was admitted as exhibit 2³⁶ in the TPR case. As such, she should be incompetent for purposes of a TPR action.

C. DID THE DISTRICT COURT USE THE WRONG STANDARD IN
DENYING THE REQUEST TO CONTINUE THE TERMINATION
TRIAL UNTIL THE PARENT WAS COMPETENT

The district court used the amount of time that the child had been in the system as the deciding factor in denying the continuance was a violation of Mistie P's due process rights³⁷. In determining the contours of the process due a parent in a particular circumstance is the impact on the public purse. In general, "the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a fact that must be weighed³⁸." Yet, "speed and efficiency" cannot trump either a fit parent's interest in raising his or her child or his or her child's interest in being raised by a fit parent:

[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that

³⁶ AA000082,84;2,5

³⁷ AA000041;1-15

³⁸ Mathews, at 348

may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones³⁹. The district court only used the length of time since the filing of the TPR petition to decide whether to go forward without the presence of Mistie P.

D. WHAT STANDARD SHOULD THE DISTRICT COURT HAVE USED
IN DETERMINING WHETHER TO GRANT THE REQUEST TO
CONTINUE THE TRIAL

Under what circumstances does the due process clause of the United States constitution require a determination of parental competency as a prerequisite to a proceeding for the termination of parental rights? The required standard of review in termination proceedings (strict scrutiny) and the high burden of proof (clear and convincing evidence) point to the enormity of the liberty interest at stake in any termination proceeding.

When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures⁴⁰." This Court should look to and weigh the factors set out in Mathews⁴¹ to determine if the termination proceeding in this case afforded Mistie P. the measure of procedural due process to which she

³⁹ Stanley, at 656 (footnote omitted)

⁴⁰ Santosky, at 753-54

⁴¹ Mathews, at 329

was entitled. In conducting a Mathews due process analysis, the district court should weigh three factors; (1) the private interests at stake (2) the government's interest in the proceeding and (3) the risk of erroneous deprivation of parental rights⁴²

The district court should first consider the importance of the private interest that is jeopardized by the termination proceeding. The private interest at stake here, that of a father in his children, “undeniably warrants deference and absent a powerful countervailing interest, protection⁴³.” Second the district court should consider the government’s interest. It has been long held that one of the most fundamental objectives of any government is to ensure that the best interests of children are protected⁴⁴. The first two interests must also be balanced with the risk of erroneous deprivation. A parent, who is deprived of custody of his or her child, even though temporarily, suffers thereby grievous loss and such loss deserves extensive due process protection⁴⁵. The district court should have applied the analysis from Mathews in determining whether to grant Mistie P. request for a continuance.

⁴² Id.

⁴³ Stanley, at 651

⁴⁴ Santosky, at 766

⁴⁵ Interest of Cooper, 621 P. 2d 437

II. DID THE DISTRICT COURT LACK PERSONAL JURISDICTION OVER THE PARENT DUE TO A LACK OF PROPER SERVICE

Procedural due process limits the exercise of power by the state and federal governments by requiring that they follow certain procedures in criminal and civil cases. Any attempts to deprive a person a liberty interest, must meet due process requirements. Due process consists of having reasonable notice and an opportunity to be heard⁴⁶. “Although Nevada is a notice pleading jurisdiction, a party must be given reasonable notice of an issue to be raised and an opportunity to respond⁴⁷.” The due process clauses in the United States Constitution prohibit courts from exercising personal jurisdiction over a defendant, unless the defendant has proper notice of the court’s proceedings.

On May 23, 2014, an Affidavit for Service by Publication was filed on behalf of the Department⁴⁸. An Order permitting service by publication was filed on June 2, 2014. The testimony from the Department at the trial made it clear that the Department was aware of Mistie P’s location sometime in May 2014, and that she was in the State’s custody⁴⁹. The testimony offered by the Department

⁴⁶ Las Vegas Downtown Redev. Agency v. Pappas, 119 Nev. 429, 76 P. 3d 1, 15 (2003).

⁴⁷ Anastassatos v. Anastassatos, 112 Nev. 317, 320, 913 P. 2d 652, 653 (1996).

⁴⁸ AA000009-16

⁴⁹ AA000059-60;17-18, 7-12

established that from May 2014, until early 2015, Mistie was at Lakes Crossing⁵⁰.

As such, the State was aware of Mistie P's location sometime in May 2014, and prior to the filing of the Order for Publication. As the Order for service by publication was obtained by fraud the district court did not properly acquire personal jurisdiction over Mistie P. Additionally, the record is devoid of any other evidence regarding service.

“A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially⁵¹.” “A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to the law⁵².” The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed⁵³. On the face of the record, it appears that Mistie P. was denied proper notice of the proceedings. As such, the district court lacked jurisdiction to terminate her parental rights due to the defective notice and lack of proper service⁵⁴. Although, the order terminating parental rights states “[t]he Court has jurisdiction of the subject matter involved

⁵⁰ AA000063;8-11

⁵¹ Judicial Cannon Rule 2.2

⁵² Judicial Cannon Rule 2.6

⁵³ Id at comment 1

⁵⁴ NRS 128.060(2)

and of the parties⁵⁵”, a finding of personal jurisdiction is not supported by the record.

“The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society⁵⁶.” The guardian ad litem was reluctant to proceed due to concerns that Mistie P did not understand what was going on⁵⁷. If Mistie P. was properly served with the termination action, she would have been on notice of the termination action and personal jurisdiction would properly attach.

CONCLUSION

As the United States Supreme Court explained, the right “to raise one’s children ha[s] been deemed essential, [a] basic civil right[] of man, and [a] right[] far more precious than property rights⁵⁸.” Mistie P. was stripped of a fundamentally protected constitutional right without proper notice and while incompetent to understand the proceedings or assist her counsel. In making its determinations, the district court applied the wrong constitutional standards. For these reasons, Mistie P. respectfully requests that this Court remand the matter to

⁵⁵ AA000122

⁵⁶ Mathews, at 333

⁵⁷ AA000038; 6-10

⁵⁸ Stanley, at 651

the trial court for a determination of personal jurisdiction and for further proceedings consistent with the factors from Mathews v. Eldridge.

DATED this 17th day of May, 2016.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(0)(5) and the type style requirements of NRAP 32(0)(6) because this brief has been prepared in a proportionally spaced typeface using 14 point font of the Times New Roman style.
2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(0)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points containing 3,195 words.
3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 17th day of May, 2016.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 17th day of May 2016, a copy of the foregoing Appellant's Opening Brief was served as follows:

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