

NEBRASKA SUPREME COURT & NEBRASKA COURT OF APPEALS CASE LAW 2013 TO 2014

Brittani Lewit, J.D.

Legal Aid of Nebraska

**In re Interest of Landon H.
287 Neb. 206 (Neb. 2013)**

Juvenile court cannot allow an attorney to withdraw without showing the attorney made diligent efforts to notify the parent of his/her intent to withdraw.

Analysis

“When a Court knows a parent is incarcerated or confined nearby, it should take steps, without request, to afford the parent due process before adjudicating a child or terminating the parent’s parental rights.” p. 112

Bonnie would have had a reasonable belief that her attorney would continue to represent her in her absence, as counsel had done so multiple times before. Referring to Neb. Ct. R. of Prof. Cond. §3-501.3, the Supreme Court concluded “a juvenile court should not permit an attorney withdraw from representing a parent at a termination hearing for lack of communication unless the attorney shows that he or she has provided notice of an intent to withdraw or made diligent efforts to do so.” p. 114

Holding

“Absent circumstances showing that a parent has avoided contact with his or her attorney, a juvenile court must respect the parent’s due process right to representation by an attorney.” p. 115

Supreme Court reversed TPR finding that denial of due process when mom’s attorney was permitted to withdraw, constituting plain error.

In re Interest of Mya C. & Sunday C. 286 Neb. 1008 (Neb. 2013)

Changing a mother's reunification plan from continuing high school when she was under 19 to actively pursuing a GED after she turned 19 was a material change in her reunification plan, and thus appealable.

Analysis

An order imposing a rehabilitation plan affects a parent's substantial right, and is thus appealable. But, when the order merely extends the time of the requirements of a previous order a substantial right is not affected, and the amount of time a party has to appeal the original order is not extended.

Holding

“An order that adopts a case plan with a material change in the conditions for reunification with a parent's child is a crucial step in proceedings that could possibly lead to the termination of parental rights.” p. 1017 Thus such a change in orders affects a parent's substantial right and are appealable.

Reversed Court of Appeals finding that this was a material change to mom's reunification plan, and thus was appealable.

In re Interest of Violet T. 286 Neb. 949 (Neb. 2013)

Nebraska juvenile court does not have subject matter jurisdiction of a newborn born in Nebraska that immediately moved to relatives in Iowa prior to the petition being filed.

Analysis

Authority to regulate the custody of infants “comes from the power of the state “as *parens patriae* to every child born within its borders to determine its status, the custody that will best meet its needs and wants, and residence within the state suffices even though the domicile may be in another jurisdiction.” p. 953

Holding

Juvenile court lacked subject matter jurisdiction due to Violet not residing in Nebraska. Affirmed dismissal.

In re Petition of Anonymous 5 286 Neb. 640 (Neb. 2013)

A state ward minor was not sufficiently mature enough to have an abortion because she showed neither that she understood the consequences of having an abortion nor that she had sufficient experience and judgment. The statutory language of §71-6903 permitting a court to allow an abortion by a minor if there is evidence of abuse or neglect by a parent does not apply when a minor no longer has legal ties to the parent who caused the abuse or neglect. Issues of whether foster parents can consent, or whether a ward can get an abortion without Department consent are irrelevant under §71-6903.

Victim of Abuse or Neglect

Analysis

§71-6903(3) does not say when the abuse/neglect must have occurred or if it must be related to the woman's pregnancy

Legislature clearly intended for a pregnant woman to avoid obtaining consent from a parent/guardian who has abuse/neglected her.

Holding

Under §71-6903(3) the pregnant woman must establish abuse or neglect by a parent/guardian “who occupies that role in relation to her at the time she files her petition for waiver of parental consent.” p.647

Mature and Well Informed

Analysis

Maturity may be “measured by examining the minor’s experience, perspective, and judgment.” p. 648

Holding

Petitioner failed to show by clear and convincing evidence that she was sufficiently mature and well-informed to decide to have an abortion. Affirmed district court’s ruling.

Consent for State Ward by Department

Analysis

Under the Nebraska Administrative Code if a minor ward decides to have an abortion DHHS' consent is not required, but parental notification may still be required. There is no evidence that provision has been amended or suspended in light of change from parental notification to parental consent, but Court found no reason to rely on it.

Holding

Court only has to consider three factors when determining whether to grant authorization: 1-if petition if sufficiently mature and well-informed 2-whether there is evidence of abuse or neglect or 3-whether it is in the minor's best interest to have an abortion without the consent of a parent/guardian. Whether the Department will provide consent is irrelevant.

Guardian

Analysis

Judicial bypass proceedings are special statutory proceedings, and are limited to the power specially granted by the legislature.

Holding

“Whether petitioner’s foster parents are her guardians is...a matter outside the scope of this special statutory proceeding.” p. 654 Thus issue was not discussed further by the Court.

Dissent

Trial court lacked subject matter jurisdiction to consider request for a judicial bypass.” p. 656 Based on §71-6903(2) the district court only has the authority to hear matters when the petitioner has elected not to obtain the consent of her parent/guardian. In this case petitioner did not have a guardian from which to obtain consent.

Michael E. v. State 286 Neb. 532 (Neb. 2013)

In a juvenile proceeding alleging abuse, neglect, or dependency, due process requires the State to provide notice and an opportunity to be heard to a child's known, financially supportive adjudicated or biological father pursuant prior to the dispositional phase pursuant to §43-263 and §43-265. In this case DHHS and its employees are protected by sovereign and qualified immunity as they did not violate a clearly established right.

Notice

Analysis

There is a concern that if a biological or adjudicated father does not have an opportunity to be heard, the juvenile court may lack information for determining the constitutional protection to be afforded to him. “This lack of information also creates a substantial risk that the State will erroneously deprive an unmarried father of a protected liberty interest in a relationship with his child. Conversely, the burden on the State to notify a known adjudicated biological father is low when compared to the parental rights potentially at stake.” p. 546

Holding

In an abuse, neglect, or dependency juvenile proceeding due process requires the State to provide notice and opportunity to be heard to a known biological or adjudicated father who is providing substantial and regular financial support for his child. This does not mean the father will automatically be given custody of the child.

§43-263 and §43-265 are facially constitutional. If the State shows an unmarried, biological father's whereabouts are not known, and he has not supported his child, he is not entitled to notice and an opportunity to be heard. Reversed district court ruling.

§1983 Claim

Analysis

Caseworkers followed through with what they believed was constitutional law, and their interpretation of DHHS regulations regarding notice did not rise to the level of a constitutional violation.

Holding

“Qualified immunity shielded the Department’s employees from liability in their individual capacities because they did not violate a clearly established right.” p. 535 Affirmed district court’s ruling

In re Interest Joseph S. 21 Neb. App. 706 (Neb.App. 2014) & 288 Neb. 463 (Neb. 2014)

Court of Appeals: Evidence stemming from a voluntary agreement between the parent and DHHS cannot be used against the parent in support of termination of parental rights.

Nebraska Supreme Court: Evidence from voluntary case is relevant to termination proceedings and should be considered by trial court when there is no evidence of coercion during parent's voluntary participation with DHHS.

Court of Appeals

Analysis

No evidence that mom was afforded due process in her voluntary case. No evidence that mom was advised to consult an attorney, unclear if told that could request return of children before 180 days and that this could trigger a filing, no hearing to address or refute allegations in front of impartial decision maker.

Holding

Mom was denied due process, and thus the evidence of her voluntary case should not have been used at trial. Affirmed juvenile court's ruling.

Supreme Court

Analysis

“Use of coercive tactics could trigger due process requirements prior to the formal filing of a petition in court.” p. 469

Holding

Mom’s prior court and voluntary cases were relevant to the TPR, and all of the evidence should be considered on remand. Due process was not violated due to lack of coercion. Reversed Court of Appeals.

In re Interest of Keisha G. 21 Neb. App. 472 (Neb. App. 2013)

Since advisement of rights at adjudication did not include termination of parental rights as a possible consequence, §43-292(6) cannot be used as a basis for termination. The evidence presented at trial did not support the remaining TPR ground as there was no showing as to how the father's prior drug use made him unfit to parent.

Analysis

Pursuant to §43-279.01 when a 3a petition is filed the juvenile court must advise the parent of the nature of the proceedings and possible consequences or dispositions including possible termination of parental rights.

The state must show a nexus between the conduct and risk of harm to the child.

Holding

“The deficiency of the adjudication proceeding (failure to properly advise of potential consequences) renders that proceeding the functional equivalent of ‘no prior adjudication,’ which eliminates consideration of §43-292(6) as a ground for termination.”

Insufficient evidenced was presented at trial to support termination pursuant to §430292(4).

Reversed termination.

In re Interest of Sarah H. 21 Neb. App. 441 (Neb.App. 2013)

A person who held himself out to be the child's biological father for 15 years, and had the child placed with him as a potential long-term placement has a sufficient interest for intervention. Filing a petition to intervene after adjudication was not untimely. Placement of the child with the mother's former husband who treated the child as his own for 15 years was not improper.

Petition to Intervene

Analysis

§25-328 provides a right to intervene before trial has commenced, however the language of this provision “does not absolutely bar an otherwise entitled applicant from seeking to intervene after trial has commenced.” p. 448 “The Nebraska Supreme Court has recognized intervention may be proper after the adjudication in a juvenile proceeding.” p. 449

“Certain rights and responsibilities may arise where a husband,” with no biological or adoptive relationship to his wife’s child, “elects to stand in loco parentis.” p. 451 This is a question of intention. “As a corollary, the termination of the in loco parentis relationship also terminates the corresponding rights and responsibilities afforded there by.” p. 452

Holding

Allowed Brian to intervene was not reversible error. Affirmed juvenile court’s ruling.

Placement

Analysis

A situation such as this, in which a person stands in loco parentis to the child, is not contemplated under §71-1902.

Holding

Continued placement with Brian not reversible error. Affirmed juvenile court's ruling.

In re Interest of Montana S. 21 Neb.App. 315 (Neb.App. 2013)

A foster parent has standing to appeal a juvenile court order approving a placement change out of that foster parent's home. Such an order is final and appealable.

Standing

Analysis

“The Nebraska Supreme Court has previously held that foster parents of children who have been adjudicated as being without proper support have standing to object to the Department’s plan to change foster care placement of the children.” p. 322

Under §43-2,106.01(2)(c) an appeal from a juvenile court order may be taken by, amongst others, “an individual to whose care the juvenile has been awarded pursuant to the Nebraska Juvenile Code.” p. 323

Holding

Grandmother had been awarded Montana’s care, and thus has standing to appeal

Final Appealable Order

Analysis

Nebraska Supreme Court and Court of Appeals have previously regarded a placement change order as final and appealable.

A juvenile court proceeding is considered a special proceeding for appellate purposes, thus the question is whether the placement change affected a substantial right.

Holding

The placement change order was final and appealable.

In re Interest of Shayla H. 22 Neb.App.1 (Neb.App. 2014)

In juvenile court cases in which ICWA applies, the active efforts requirement should be applied throughout the proceeding when DHHS has legal custody, even when children are in their parent's home. A court ordered rehabilitative plan must be reasonably related to the reason for adjudication.

Active Efforts

Analysis

“Should the case progress to one in which foster care placement or termination of parental rights is sought, the failure to show that active efforts have been made throughout the duration of the case to prevent such an occurrence would be problematic.” p. 13

Holding

Active efforts standard applies during periods when the children are placed with their parents. The juvenile court should have applied the active efforts standard at disposition.

Materiality of Disposition Plan

Analysis

The rehabilitative plan “must be reasonably related to the plan’s objective of reuniting parent with child.” p.15

Question of whether the plan tends “to correct, eliminate, or ameliorate the situation or condition on which adjudication has been obtained.” p.15 If yes – the provision is materially necessary to the parent’s plan. This should be examined on a case-by-case basis.

Holding

Certain provisions of David’s plan were overturned as they did not relate to the goal of address the specific adjudication.