

In re Interest of Gabriella H.

Caselaw No.

22 Neb. App. 70

Filed on

Tuesday, June 3, 2014

SUMMARY: There was not clear and convincing evidence that the father knew or believed he was the child's father so there was insufficient evidence to prove abandonment and, in any event, his incarceration was a circumstance beyond his control that would also preclude a finding of abandonment. Incarceration of a parent prior to trial is a circumstance beyond the parent's control that may satisfy just cause to preclude a finding of abandonment.

Gabriella, DOB 11/11, was removed from her mother, Dorothy, on November 28, 2011. The father was listed as unknown in the petition but Dorothy indicated at a hearing on December 6th that Ricardo was a potential father. The caseworker attempted to contact Ricardo but could not reach him. Gabriella was adjudicated on December 13th. DHHS continued to try to contact Ricardo on a monthly basis between December 2011 and September 2012, leaving messages. Ricardo does not speak English and there was no evidence he received the messages. In July 2012, Ricardo was arrested on a separate criminal matter. He submitted to DNA testing which determined him to be Gabriella's father. On November 20, 2012, the court recognized Ricardo as the father and appointed counsel. DHHS sent Ricardo a letter in jail informing him of the paternity and indicating he could contact the caseworker. Ricardo never contacted the caseworker or foster parents. Dorothy relinquished on January 31, 2013. On May 3, 2013, the State filed a petition against Ricardo for adjudication and to terminate his parental rights. The State filed an amended petition on June 18, which added allegations against Dorothy's husband but made no changes to Ricardo. The TPR trial was held on July 30th. Testimony from Dorothy indicated that Ricardo was one of three men who might have been the father but he was not present at her birth and not listed on the birth certificate. He did attend four visits with Gabriella and Dorothy in late 2011 and early 2012, and Dorothy referred to him as Gabriella's dad during those visits. After trial, the court determined that Ricardo had abandoned Gabriella for 6 months or more, and terminated his parental rights. Ricardo appealed.

The Nebraska Court of Appeals reversed the termination of parental rights. It focused on whether Ricardo pursuant to 43-292(1) had abandoned Gabriella, first determining that the time period to look at is November 3, 2012, to May 3, 2013. As to abandonment, the Court distinguished intent to withhold parental care from actual failure to provide care based on impediments not caused by the parent. It referenced *In re Interest of Dylan Z.*, 13 Neb. App. 586, 697 N.W.2d 707 (2005), which held that with a child born out-of-wedlock, when a father's lack of contact was due to his lack of knowledge that he is the father, abandonment cannot be considered intentional. In this case, the Court noted that although Ricardo knew he could be Gabriella's father and attended four visits with Dorothy, his paternity was not confirmed until November 12, 2012, which was within the 6-month abandonment timeframe prior to the petition being filed. The Court of Appeals further noted that even if Ricardo had the knowledge that he was Gabriella's father that his incarceration was a circumstance beyond his control because it was while he was awaiting trial, not after he was convicted. And there

was no evidence that Ricardo had the ability to contact or parent Gabriella while incarcerated. Therefore, it would preclude a finding of abandonment. The Court of Appeals concluded that there was not clear and convincing evidence of Ricardo's intent to abandon Gabriella and therefore termination under N.R.S. 43-292(1) was in error.

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