

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF BIANCA H. & ETERNITY H.

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IN RE INTEREST OF BIANCA H. AND ETERNITY H.,
CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE,

v.

ANTONIO H., APPELLANT.

Filed March 30, 2010. No. A-09-1057.

Appeal from the Separate Juvenile Court of Lancaster County: TONI G. THORSON, Judge.
Affirmed.

Jason L. Scott, of Scott Law Firm, for appellant.

Gary E. Lacey, Lancaster County Attorney, Shellie D. Sabata, and Michelle Clarke,
Senior Certified Law Student, for appellee.

IRWIN, CARLSON, and MOORE, Judges.

CARLSON, Judge.

INTRODUCTION

Antonio H. appeals from an order of the juvenile court for Lancaster County terminating his parental rights to his daughters, Bianca H. and Eternity H. On appeal, Antonio contends that the juvenile court violated his due process rights. For the reasons set forth below, we affirm.

BACKGROUND

Bianca was born in February 2003. Eternity was born in December 2004. Bianca and Eternity have two other siblings, who are not part of the present appeal. Antonio is the father of all four children. On June 20, 2005, the State filed a petition seeking to adjudicate Bianca and Eternity under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004). Subsequently, Antonio requested

court-appointed counsel and the trial court granted Antonio's request. The allegations of the State's petition were found to be true by the court on March 13, 2006.

The State filed an amended motion for termination of Antonio's parental rights on November 21, 2007. The State alleged that termination was in the children's best interests and that statutory conditions had been met pursuant to Neb. Rev. Stat. § 43-292(2), (6), and (7) (Reissue 2008). The State further alleged that active efforts had been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts had proved unsuccessful. The State stated that Antonio's custody of the children is likely to result in serious emotional or physical damage to the children.

Hearings on the State's motion to terminate Antonio's parental rights were held on April 23 and 30, 2009; May 4, 5, 7, and 15; and June 15 and 24. Prior to the first hearing, Antonio informed the court that although he knew he had a right to a court-appointed attorney, he wished to represent himself. The juvenile court found that Antonio had waived his counsel freely, voluntarily, intelligently, and knowingly, but directed Antonio's court-appointed counsel to continue as standby counsel.

On April 23, 2009, the first day of trial, Antonio was incarcerated in the Lancaster County jail in Lincoln, Nebraska. Despite Antonio's incarceration, he was present at the termination hearings on April 23 and 30. At the time of his arrest in February 2009, Antonio had a number of criminal charges pending and was currently serving 90 days for contempt of court for failing to pay child support.

On April 30, 2009, Antonio was scheduled to be released from his district court sentence at the Lancaster County jail. At that time, Antonio was aware of the fact that the U.S. Marshals Service would be taking him into custody on allegations of "conspiracy to distribute methamphetamine or Isonol salts or something." Antonio was unable to give the court any indication as to when he would be released from federal custody.

At the termination hearing on April 30, 2009, the juvenile court addressed Antonio regarding his pending federal indictment. Antonio stated that he understood that the juvenile court judge could not control whether or not he would be allowed to be present for the remainder of the termination proceedings. Antonio was also aware that it is often difficult for people to be present in juvenile court because the U.S. Marshals Service may or may not honor a request to bring them to court. Antonio did express a desire to be present at the hearings and indicated he would make efforts to be transported to the hearings. The following discussion was had on the record:

THE COURT: Okay, So, it may be pos- -- you know, I don't know, it's not up to me, but let's assume you are not able to be present because the - either the Magistrate will not allow it, or the U.S. Marshal will not transport you; in that event, do you want Mr. Ohs to act as your counsel at that point?

[Antonio]: No, ma'am.

THE COURT: You understand that the State may request to proceed and go ahead with the hearing even though you are not able to be here. Do you understand that?

[Antonio]: Yes, ma'am.

THE COURT: And if the Court allows that, is it still our position that you do not want Mr. Ohs to act as your lawyer?

[Antonio]: Yes, ma'am.

The termination hearings resumed on May 4 and 5, 2009. Antonio was not present. Antonio's standby counsel informed the juvenile court that Antonio was taken into federal custody on May 1. In granting Antonio's standby counsel's request to leave the hearing and remain on call if Antonio returned to participate in the termination proceedings, the following exchange was had on the record:

THE COURT: [Antonio] was aware of the circumstances of his indictment, and the probability that he would be in federal custody, and not able to be present. We did talk about what would happen in the interim, and he was given an opportunity to have counsel become the appointed representative, representing him in this hearing. He chose not to do that. He didn't request a continuance. I think at this point, it's necessary that we proceed, so we will go forward. Obviously, if [Antonio's] circumstances change, and he's put on some type of pretrial release, or he's available, then you know, you can alert us to that.

COUNSEL: I will do so, Your Honor. And I did discuss with him the possibility of me not being present for the rest of the trial if he was not. He was aware of that. He knew that had happened in the last trial.

THE COURT: Okay. And he did not request - He didn't - I know he didn't ask the Court in the hearing that you become his representative as counsel for the hearings, and that was his same position when you discussed it further with him?

COUNSEL: That was his same position. It has not changed. When we last discussed it on Thursday, he did not want me to be his counsel anymore.

THE COURT: And, so as I understand it, you're asking to be excused? I basically see no reason you should not be. I don't think you can do anything on his behalf at this point, so at this point, you're excused. But I will - if he does return, then, obviously, you're on call to come back and be standby counsel. But at this point you're excused.

On May 14, 2009, Antonio filed a request for a continuance with the juvenile court. On May 15, a continuance was granted off the record until June 15. When the hearings resumed on June 15, Antonio filed a motion to continue due to his detention by the U.S. Marshals Service pending federal charges. Antonio's standby counsel expressed Antonio's hope that he could come back for the hearings. However, there was still no indication as to when Antonio would be released from federal custody. The State and the children's guardian ad litem objected to Antonio's motion. The juvenile court overruled Antonio's motion because of the uncertainty as to "whether or not [Antonio] will ever be able to - in a timely way, return back to participate in the proceedings." The juvenile court did not find good cause to continue the matter and instead proceeded with the hearing.

On the same day, Antonio provided a letter that he wished to be entered into evidence. Again, the juvenile court questioned Antonio's standby counsel as to whether Antonio had requested anything else of him.

COUNSEL: Your Honor, the only thing that he has - he had informed me about these letters that he wanted to send them. I know that's been on his - he spoke to me about them several times. He also just was - did want to be present and testify as he had testified in this last time he was in court, and, hence, his motion to continue. But there is nothing further besides these letters that - and his own testimony that he had instructed me that he was planning on, or told me he was planning to do.

The juvenile court judge then excused Antonio's standby counsel from the hearing.

On June 22, 2009, Antonio filed another motion to continue the hearing scheduled for June 24. Antonio again cited his detention by the U.S. Marshals Service pending federal charges. Antonio included documentation of the U.S. Marshals Service's denial to transport him to the juvenile court hearings. Antonio did not provide his standby counsel with anything else or request that he put anything on the record. The State and guardian ad litem both objected to Antonio's second motion to continue.

The juvenile court did not find any change in circumstances from Antonio's previous request and found a continuance to be contrary to the children's best interests. The juvenile court specifically found no good cause to continue the hearing because there was no indication that Antonio would be able to be present in the future if a continuance was granted. Antonio's motion was denied.

The juvenile court judge questioned Antonio's standby counsel again as to his role: "THE COURT: . . . [A]s far as your continued participation, I don't know what [Antonio] has asked that you now act as his counsel, or if you're still just standby? COUNSEL: I am still standby, Your Honor."

Antonio's standby counsel was excused by the juvenile court thereafter.

On September 23, 2009, the juvenile court entered an order terminating Antonio's parental rights to Bianca and Eternity under § 43-292(2), (6), and (7). The juvenile court found that active efforts had been made to provide remedial services and rehabilitative programs designed to present the breakup of the Indian family and that those efforts were unsuccessful. The juvenile court further found that continued custody by Antonio would likely result in serious emotional or physical damage to the children. Finally, the juvenile court found that the termination of Antonio's parental rights to Bianca and Eternity was in the children's best interests. Antonio appeals.

ASSIGNMENT OF ERROR

On appeal, Antonio's sole assignment of error is that the juvenile court violated his due process rights.

ANALYSIS

Antonio argues that the juvenile court infringed upon his due process rights by conducting a hearing to terminate his parental rights without providing him with any opportunity to cross-examine witnesses, object to exhibits, or call witnesses to testify on his behalf.

The parent-child relationship is afforded due process protection, and consequently, procedural due process is applicable to a proceeding for termination of parental rights. *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992); *In re Interest of Joseph L.*, 8 Neb. App.

539, 598 N.W.2d 464 (1999). The concept of due process embodies the notion of fundamental fairness and defies precise definition. *Id.* When a person has a right to be heard, procedural due process includes notice to the person whose right is affected by a proceeding, that is, timely notice reasonably calculated to inform the person concerning the subject and issues involved in the proceeding; a reasonable opportunity to refute or defend against a charge or accusation; a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by constitution or statute; and a hearing before an impartial decisionmaker. *Id.*

In Nebraska, parents have a statutory right to be represented by counsel during proceedings to terminate parental rights. See Neb. Rev. Stat. § 43-279.01(b) (Reissue 2008). The determination of whether the procedures afforded an individual comport with the constitutional requirements for procedural due process presents a question of law. *In re Interest of Joseph L., supra.*

Antonio states that his case is similar to *In re Interest of Joseph L., supra.* In that case, a termination hearing was held while the mother was involved in counseling and unable to attend the hearing. The mother contacted her attorney, who sent an associate attorney to the termination hearing. At the hearing, the associate attorney asked to be excused because of the mother's absence and the trial court agreed. The attorney did not request a continuance, and the court then proceeded to conduct the hearing.

No witnesses were called on the mother's behalf, and no cross-examination was conducted or evidence offered on her behalf during that day. The hearing continued for two additional days, during which the mother and her attorney were present. The mother moved for a new trial due to her and her attorney's absence on the first day of the proceedings. The juvenile court overruled the mother's motion, and on appeal, we reversed. We concluded that the absence of both the mother and her attorney compelled a finding that the mother's due process rights were violated.

In the instant case, when the termination hearings began, Antonio was incarcerated in the Lancaster County jail. The record shows that despite his incarceration, Antonio was present at the first 2 days of termination hearings on April 23 and 30, 2009. At that time, Antonio had requested to proceed pro se and the court appointed standby counsel for Antonio.

At the first two hearings, the parties knew that upon Antonio's release from the Lancaster County jail, Antonio would be immediately taken into federal custody because of a federal indictment related to the distribution of methamphetamine. The trial court discussed the effects of Antonio's indictment with him and asked Antonio whether he wanted his standby counsel to represent him in his absence. Antonio stated that he did not.

When the termination hearings resumed in Antonio's absence, the trial court repeatedly asked Antonio's standby counsel whether Antonio had requested that he act as his counsel and whether Antonio had requested that evidence be offered on his behalf. There is nothing in the record to show that Antonio was prevented from offering evidence at the termination hearings. In fact, Antonio sent letters in his own behalf to the juvenile court that were entered into evidence.

Antonio clearly elected not to have his standby counsel represent him when he was incarcerated and unable to attend the termination hearings. The record shows that Antonio had a reasonable opportunity to refute or defend the accusations against him and confront and

cross-examine adverse witnesses. Antonio also had a reasonable opportunity to present evidence on the charges or accusations against him. The fact that Antonio chose not to take advantage of these opportunities by having his standby counsel represent him does not mean that Antonio can now complain that his due process rights were violated.

Additionally, the trial court did not abuse its discretion in denying Antonio's motions to continue the termination hearings so that Antonio could attend. See *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992).

In deciding whether to allow a parent's attendance at a hearing to terminate parental rights, notwithstanding the parent's incarceration or other confinement, a court may consider the delay resulting from the prospective parental attendance, the need for disposition of the proceeding within the immediate future, the elapsed time during which the proceeding has been pending before the juvenile court, the expense to the State if the State will be required to provide transportation for the parent, the inconvenience or detriment to parties or witnesses, the potential danger or security risk which may occur as a result of the parent's release from custody or confinement to attend the hearing, the reasonable availability of the parent's testimony through a means other than parental attendance at the hearing, and the best interests of the parent's child or children in reference to the parent's prospective physical attendance at the termination hearing. *Id.*

Antonio filed two motions to continue the termination hearings because of his detention. The juvenile court found that without any indication from Antonio regarding when he would be released or able to participate in the termination hearings, it was in Bianca's and Eternity's best interests to move forward with the termination hearings in order to achieve permanency for the children. The record shows that Bianca and Eternity had been removed from their parent's home in July 2005. Both children have been in foster care since their removal.

On this record, we find that the juvenile court did not abuse its discretion in continuing to hold the termination hearings in Antonio's absence. Furthermore, as a matter of law, we conclude that Antonio's due process rights were not violated.

CONCLUSION

After reviewing the record, we conclude that Antonio's due process rights were not violated, and therefore, we affirm the termination of Antonio's parental rights to Bianca and Eternity.

AFFIRMED.