

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE INTEREST OF JADE S. ET AL.

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
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IN RE INTEREST OF JADE S. ET AL., CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE,

V.

LINDA S., APPELLANT.

Filed September 29, 2009. No. A-09-344.

Appeal from the Separate Juvenile Court of Lancaster County: ROGER J. HEIDEMAN,
Judge. Reversed and remanded for further proceedings.

Franklin E. Miner for appellant.

No appearance for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1), this case was ordered submitted without oral argument. Linda S. appeals an order of the separate juvenile court of Lancaster County, Nebraska, in which order the court denied Linda's motion to withdraw a voluntary relinquishment of parental rights with respect to the minor children. We find that the court erred in denying the motion without affording Linda the opportunity to be heard on the motion, and we reverse, and remand for further proceedings.

II. BACKGROUND

On July 6, 2007, the State filed a petition in juvenile court concerning the minor children. The juvenile court entered an adjudication order on September 18.

According to the Department of Health and Human Services (Department) court report in the record, Linda “relinquished her parental rights . . . on January 8, 2009” and the Department “accepted this relinquishment.” The record does not include the actual relinquishment or any paperwork of the Department concerning acceptance of the relinquishment.

On February 27, 2009, Linda filed a motion in which she sought to withdraw her voluntary relinquishment of parental rights. In the motion, Linda alleged that she had been induced to sign the relinquishment in exchange for a contractual agreement with the minor children’s prospective adoptive parents and that the prospective adoptive parents had since refused to follow through. Linda alleged that the refusal was a breach of contract and an act of bad faith. Attached to the motion was a notice setting the motion for hearing on April 9.

On March 4, 2009, the juvenile court held a dispositional review hearing. Neither Linda nor her counsel were present or involved in the hearing. The transcription of the hearing in the bill of exceptions is less than two pages in length and includes no discussion or reference to Linda’s motion. The court received various exhibits, including the Department’s court report.

On March 6, 2009, the juvenile court entered a dispositional order. The order primarily concerns the court’s findings and rulings concerning the dispositional review hearing. However, the court also made a specific finding that the Department “has accepted the relinquishment of parental rights of [Linda]. Therefore the Court overrules the Motion to Withdraw Voluntary Relinquishment of Parental Rights filed by [Linda].” The court specifically “ordered that the Motion to Withdraw Voluntary Relinquishment of Parental Rights is overruled.” This appeal followed.

III. ASSIGNMENTS OF ERROR

Linda has assigned two errors on appeal, in which she challenges the juvenile court’s order denying her motion without conducting an evidentiary hearing.

IV. ANALYSIS

1. STATE’S MOTION FOR SUMMARY DISMISSAL

Before addressing the merits of Linda’s appeal, we address a motion for summary dismissal filed by the State. In its motion, the State alleges that the juvenile court was without jurisdiction to rule on Linda’s motion to withdraw her voluntary relinquishment of parental rights, because once the voluntary relinquishment was accepted by the Department, the court lost jurisdiction concerning Linda. We reject this assertion.

First, the State specifically argues to this court that Linda’s voluntary relinquishment of parental rights was accepted by the Department on January 12, 2009. The State then specifically recognizes that “this date is absent from the record.” As discussed below, the juvenile court’s ruling on Linda’s motion was done without a proper hearing and without proper evidence being adduced to allow consideration of the motion; the same is true of the State’s assertion that the juvenile court lacked jurisdiction to hear Linda’s motion.

We note that the record presented to us does not include any challenge to the juvenile court’s jurisdiction to hear Linda’s motion. The motion was overruled a month prior to the date scheduled for hearing on the motion, after a dispositional review hearing at which the motion was not discussed. Regardless of whether the State may be correct in asserting that the

Department's acceptance of the voluntary relinquishment of parental rights prevents the juvenile court from having jurisdiction to hear a motion to withdraw the relinquishment, the State's own argument is dependent on a finding that the Department did properly accept the relinquishment and the State's own argument concedes that this occurred on a date not reflected in the record.

We overrule the State's motion to summarily dismiss, because on the record presented, there is no way to resolve the State's assertion that the lower court lacked jurisdiction. For the same reasons that we conclude below that the juvenile court's order must be reversed and the matter remanded for further proceedings, the record is insufficient for us to address the merits of the State's jurisdictional challenge.

2. LINDA'S APPEAL

Linda asserts that the juvenile court had insufficient evidence to find that the Department had accepted her voluntary relinquishment of parental rights and to deny her motion to withdraw the voluntary relinquishment. Linda asserts that the court erred in denying her motion without affording her notice and an opportunity to be heard on the motion. We agree.

Linda acknowledges that a voluntarily entered relinquishment of parental rights is not revocable. See, *Gomez v. Savage*, 254 Neb. 836, 580 N.W.2d 523 (1998); *Yopp v. Batt*, 237 Neb. 779, 467 N.W.2d 868 (1991). However, Linda points to *Gaughan v. Gilliam*, 224 Neb. 836, 401 N.W.2d 687 (1987), for the proposition that if a relinquishment is procured by threats, coercion, fraud, or duress, it may be vacated.

In *Gaughan v. Gilliam*, *supra*, a parent brought a habeas corpus proceeding seeking to withdraw a voluntary relinquishment of parental rights. In that case, habeas corpus was the only vehicle for bringing the motion because the adoption of the minor children had already been finalized, as recognized by the State in its motion for summary dismissal; such is not the situation in the present case. In *Gaughan v. Gilliam*, *supra*, the Nebraska Supreme Court held that a parent can challenge the voluntariness of a relinquishment of parental rights by asserting that the relinquishment was procured by threats, coercion, fraud, or duress, or was not signed knowingly, intelligently, and voluntarily. The State also concedes this point in its motion for summary dismissal.

In the present case, Linda filed a motion in juvenile court while the juvenile court still maintained jurisdiction over the minor children. Linda's motion includes allegations that are tantamount to asserting that her relinquishment of parental rights was procured by coercion or fraud and was not signed intelligently and voluntarily. These assertions cannot be resolved without an evidentiary hearing.

The evidence before the juvenile court when ruling on the motion--a month before the motion was scheduled for hearing--include only passing references to the relinquishment in the Department's court report. The actual relinquishment is not in the record, nor is any evidence to substantiate the Department's court report indication that the relinquishment was accepted. More importantly, there was no argument or evidence yet before the court to allow resolution of Linda's assertions that the relinquishment was not voluntary and could be set aside. Because the court ruled on the motion a month before it was scheduled for hearing, without notice or opportunity for Linda to be heard, the record does not support the court's denial of the motion.

V. CONCLUSION

We find that the record was insufficient to allow the juvenile court to rule on Linda's motion because the court ruled on the motion prior to the scheduled hearing on the motion, without any evidence concerning the relinquishment, its acceptance, or the allegations that it was not voluntary. These same matters make it impossible to address the merits of the State's assertion, raised for the first time on appeal, that the juvenile court lacked jurisdiction to address the merits of the motion. As such, we reverse the juvenile court's order and remand the matter to the juvenile court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.