

Matter of A.A.
2015 NY Slip Op 32655(U)
May 6, 2015
Surrogate's Court, Wayne County
Docket Number: X2014-38
Judge: Daniel G. Barrett
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At a Term of the Surrogate Court held in and for the County of Wayne at the Hall of Justice in the Village of Lyons, New York on the 14th and 22nd day of April, 2015.

PRESENT: Honorable Daniel G. Barrett
Surrogate Court Judge

SURROGATE COURT OF THE STATE OF NEW YORK
COUNTY OF WAYNE

In the Matter of the Adoption of
A Child Whose First Name is

DECISION
File No. X2014-38

A.A.

Appearance - Petitioner - Victor B. Chambers, Esq.
Respondent - Roy G. Franks, Esq.

This matter is pursuant to a Petition for Adoption filed by M.B. regarding the minor child A.A.. M.B. is the husband of S.B., natural mother of A.A.

The natural father of A.A., A.I. refused to sign the consent to the adoption and requested a hearing on the issue of abandonment.

A.I. and S.T. were married on April 8, 2009 and were subsequently divorced by order of the Wayne County Supreme Court on April 26, 2011.

A. I. having pleaded guilty to two counts of Indictment 10-165 as follows: Count 2- Assault in the Second Degree in violation of PL 120.05(9) and Count 4 - Endangering the Welfare of a Child in violation of PL 260.10 (1). Respondent allocuted to Count 2 that on or about November 30, 2010 in the County of Wayne being eighteen years of age or more and with the intent to cause physical injury to a person less than seventeen years old caused such injury to ten month old A.A. by squeezing her feet and biting her ear. Respondent allocuted to Count 4 that on or about November 30, 2010 in the County of Wayne that he knowingly acted in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old, to wit, ten month old A.A. by striking and biting her and putting her face under running cold water. Pursuant to the above, Respondent was sentenced to 3 years determinate with the New York State Department of Corrections and 3 years post release supervision, with one year incarceration on the misdemeanor of Endangering the Welfare of a Child which ran concurrently. In addition an eight year Order of Protection in favor of A.A. against the Respondent requiring him to stay away from and refrain from any communication with A.A.. Said Order of Protection is in effect until April 21, 2019.

Pursuant to Respondent's plea to the above two counts of the Indictment, the Wayne County Family Court issued an Order of Disposition on the Neglect, Docket Number B-00382-12 found neglect against the Respondent with a finding of severe abuse.

The issue before the Court is pursuant to DRL 111(2)(a) that is that a consent is not required of a parent who evinces an intent to forego his parental or custodial rights and obligations as manifested by his failure for a period of six months to visit the child and communicate with the child or person having custody of the child, although able to do so. Petitioner in such proceedings is required to meet his burden by clear and convincing evidence.

The minor child A.A. was removed from the custody of Respondent and S.B. on or about December 2, 2010 pursuant to a neglect proceeding filed against both parents on the acts that the Respondent pleaded guilty to pursuant to the above Indictment. The minor child was later returned to the natural mother and the neglect proceeding against her was disposed of on or about April 4, 2011 by a 6 month ACD, Docket Number NA-01857-10. The Respondent has not seen nor had any contact with the child since on or about December 2, 2010.

The first witness on behalf of the Petitioner was John Castor, parole officer at the Rochester, New York office. He has been a parole officer for ten years and previous to that was a probation officer for ten years. It is his job to observe and supervise parolees. Respondent is under his supervision. He enforces the terms and conditions of the parolee's release and advises the terms and conditions can be changed from time to time by the parole officer.

Officer Castor testifies to Exhibit 3 which is the release sheet that Respondent received upon his release from prison and Exhibit 4 which are the terms and conditions personally drawn up by himself as parole officer. These conditions are in addition to the general conditions of the New York State Division of Parole.

He meets with A.I. approximately twice a month at the Newark Municipal Building and approximately twice a month at his residence. A.I. is not employed and is receiving Social Security Disability or SSI for mental health issues. Respondent is to receive mental health treatment and take prescribed medication.

As part of Exhibit 3 Respondent is not to associate or communicate with A.A. or S.B.. He testified that any visitation with A.A. would be considered a violation of parole.

As a further condition under Exhibit 4, paragraph 37, Respondent is not to have any contact with anyone under 18 unless approved of by the parole officer. Officer Castor is aware that Respondent has recently gotten married and that his wife has two children. Respondent has been advised that he cannot have any contact or communication with those two children. And also as part of his parole release conditions he is not to have any contact with S.B..

Officer Castor was made aware of the fact that Respondent petitioned the Wayne County Family Court in October, 2014 for contact and/or visitation with A.A.. He became aware of that after the fact and that is technically a violation of his parole. Family Court dismissed the Petition and it was determined that he would take no further action against the Respondent. However Officer Castor testified that even if he was granted visitation by any court he would not be allowed that visitation pursuant to his terms and conditions of release. And in fact if he had any contact with A.A. that would be considered a violation of parole even if that contact was allowed pursuant to the court Order. Even if the court allowed Respondent to send letters, photos or anything else to A.A. that would still not be allowed by his parole release conditions.

S.B. testified. She is from Russia. She came to the United States in March, 2009 pursuant to a Green Card. She was a Morman and wanted to visit Salt Lake City, Utah. She had been communicating with Respondent online prior to that and she agreed to meet him.

They met at Respondent's father's house. He made a marriage proposal shortly after she arrived. She testified that he threatened to kill himself if she left. They were married on April 8, 2009. She became pregnant with A.A. two weeks after they were married. A.A. was born in January , 2010.

She testifies that shortly after they were married that she noticed there was something not right with the Respondent. He would have unexplained and unexpected anger outbursts and his behavior would change without reason. He became physically and sexually violent towards her on a daily basis. After A.A. was born Respondent became even more angry and violent.

She testified that when the child would cry the Respondent would get angry. He would slap the child, pinch her, bite her, strike her on her back and legs, bottom and face. She testified she tried to stop him but he would be physically violent towards her.

Approximately four months after they were married Respondent and she moved to California for approximately four months. She had to leave the house to go to work because Respondent refused to. Respondent continued to physically abuse A.A.. One day she came home and found the child in the clothes dryer. Respondent stated he couldn't stand hearing the child cry so he put her in the dryer so he couldn't hear her anymore. He would complain to her that the child was spoiled, disobedient, was stubborn and had to be taught a lesson.

Respondent threatened her that if she told the authorities about what he did to the child that he would take her out to woods and throw her out of the car and leave her there. Respondent told her if she ever did anything she would never see A.A. again. While in California she went to the Department of Social Services to get a babysitter during the day so that the abuse would stop.

She and the Respondent moved to New York in 2010 to an apartment in Sodus, New York. Approximately two months later they were going to move to Lyons. While in the process of moving on or about November 30, 2010 the child began to cry. It was late at night and she was tired and hungry. Respondent got mad and took the child, who was wearing a snowsuit and pajamas underneath, and put her in a tub of cold water. He turned the faucet on and put cold water on her especially in her face. He kept doing it until A.A. stomach was filled with water. He also beat her. She states she tried to stop him but he pushed her away and choked her. Eventually she was able to get the child and get her clothes off. The child was completely soaked, shivering and frightened. The child became ill, threw up and then had diarrhea. Respondent took the child from her, bit the child, slapped her and threw her on the floor.

Eventually they left for the apartment in Lyons and Respondent went to sleep. She got up the next day on December 1, 2010 and called a friend from church. That friend picked she and A.A. up and she never was with Respondent again. She went to the State Police, the Victim's Resource Center and also to CPS. Respondent was arrested a few days later. Respondent has not been in the presence of the child since December 1, 2010.

She also testifies that despite the Order of Protection, Respondent has violated that by sending letters to a friend of hers while he was in prison and had that friend deliver the letters to her. Since he has been out of prison he sent a letter to another friend to deliver the letter to her husband M.B.. She reiterated that she is afraid of Respondent.

Respondent then testified. He lives in Newark, New York. He doesn't work because of a mental illness and receives SSI, approximately \$840.00 a month. He states he claims he is optimistic about obtaining employment in the future and wants to take care of his daughter.

He states that since he has been out of prison he has tried to reach out to Petitioner M.B. but has had no response. In addition he has sought help from the various members of the Mormon Church in Palmyra to seek their advice about providing support for his child and eventually obtaining contact with her.

As far as the violence through the marriage he states his wife was also physical with him. He states that he is very remorseful for what he did. He spent two years and ten months in prison and has been on parole as of October 30, 2013. He states he saves money each month for his child from his SSI. He has a savings account at ESL in the approximate amount of \$840.00 for her.

He tried to file a Visitation Petition in October, 2014 to try to get updates regarding his daughter such as photos or letters. That Petition was dismissed and he has appealed that dismissal.

He states he wrote a letter to Kevin Carlson at DSS while in prison to try to seek contact with his daughter pursuant to Exhibit P.

He acknowledges his guilty pleas of April 21, 2011. He acknowledges that he was taken to the psychiatric unit at Newark Wayne Hospital on December 1, 2010. He cannot remember in detail the specific things that he did against his daughter. He states he has mental health issues and could not handle his daughter crying. He says he cannot control himself. He acknowledges that he does not pay support but he states that he is willing to.

Jeffrey Clark President of the Palmyra Stake from the Mormon Church testified. He is in charge of ten congregations. He is actually an attorney who specializes in corporate law. He states he has spoken with Respondent on many occasions. Mainly he has just listened. Respondent has told him about his efforts to see his child and looking forward to seeing his child again.

Gary Bennett, DSS attorney for Wayne County DSS testified that he received a letter from Respondent on or about April 5, 2012. That he responded to that letter as shown by Exhibit W, basically advising Respondent to get an attorney.

James Arena mental health therapist at Wayne Behavioral Health Network testified. He has seen Respondent on and off going back to 2010. A psycho/social assessment was done and found that Respondent had PTSD and a panic disorder. Mr. Arena advises that Respondent acknowledged that he felt uncomfortable in caring for his child. Upon release from prison Respondent came back to him in October, 2013, for services. He advised Respondent has been compliant with treatment and taking his medication. He believes that Respondent has cognitive difficulties when stressed.

Bishop Gary Wildey of the Mormon Church in Lyons testified. He testified about many conversation with Respondent including before and after he assaulted his daughter. He has continued to have conversations and see him since his release from prison. He believes that Respondent is sincere in his remorse and that he has a sincere desire to see and take care of his daughter.

Brother Tristan Baier of the Lyons Ward of the Mormon Church testified. He testified about conversations with the Respondent about his actions and that Respondent has expressed remorse. He believes that Respondent is sincere in his efforts to be a positive influence on his daughter.

In summation, attorney for Respondent points out that Respondent is unable to contact his daughter due to the Order of Protection or otherwise he would see his daughter. That he has made efforts while in prison by contacting DSS to see his daughter. That he has been saving money for his daughter. That he suffers from mental illness and that affects his ability to care for his daughter.

In summation, attorney for Petitioners states that Respondent by his very actions created the conditions that resulted in the abandonment of the child. That he cannot use the conditions of the Order of Protection as a shield since he did the very acts that resulted in the issuance of the Order of Protection. That he committed deliberate criminal acts of abuse and neglect against the child and those acts evince an intent to forego his parental rights and obligations. That Respondent has never filed a Petition in County Court to modify the Order of Protection. That even if he were successful in doing that his parole conditions do not allow him to have contact with his child.

The Court finds that Petitioner has met his burden of proof by clear and convincing evidence. That Respondent pursuant to DRL 111(2)(a) did evince an intent to forego his parental or custodial rights and obligation as manifested by his failure for a period of six months to visit the child and communicate with the child or the person having legal custody of the child, although able to do so.

Respondent last saw the child on December 1, 2010. Respondent has had no contact or communication with the child since then. Respondent has never financially supported the child. Respondent physically and severely abused the minor child pursuant to his plea of guilty to Assault 2nd Degree and Endangering the Welfare of a Child. Respondent cannot see the child pursuant to a permanent Order of Protection issued from the Wayne County Court on April 21, 2011 preventing any contact between Respondent and the minor child until April 21, 2019. That even if Respondent were somehow able to modify that County Court Order of Protection and receive an Order of Visitation from the Family Court, his parole conditions do not allow him to have contact with the child under any conditions.

Respondent argues that he cannot have contact with the child because of the Order of Protection and therefore his lack of contact is excused. Case law has clearly held to the contrary. In the Matter of Julia P., 306 A.D. 2d 937 held that where the biological parent's inability to visit with the child results from his own deliberate acts, the underlying circumstances need not preclude a finding of lack of contact with the child evincing an intent to abandon the child. In the Matter of Joshua, 296 A.D. 2d 646, the court held in a case such as this one where the biological parent's inability to visit the child results from his own deliberate acts, the underlying circumstances need not preclude a finding of abandonment. See also Matter of Krysheena, 265 A.D. 2d 816. In the case of Matter of Ashton, 254 A.D. 2d 773 the court held that neither the Respondent's incarceration nor his fugitive status excused the failure of Respondent to contact or communicate with his daughter, see also Matter of Kianna C., 29 A.D. 2d 380.

Respondent also argues that he filed a Petition for Visitation that was dismissed. He alleges his filing is an indication he did not evince an intent to forego his parental rights and/or obligations. However the filing of a Petition in Family Court does not negate a finding of abandonment, on its own, in the Matter of Kira O.O., 45 A.D., 3d 933.

Therefore the Court finds that the Respondent did abandon the minor child and that the father's consent for adoption is not required. Therefore the adoption of A.A. by Petitioner is allowed to proceed.

This constitutes the Decision of the Court.

Dated: May 6, 2015
Lyons, New York



Daniel G. Barrett
Surrogate Court Judge