

NO. COA14-892

NORTH CAROLINA COURT OF APPEALS

Filed: 20 January 2015

In re:

A.N.S.,

A Minor Child.

Onslow County

No. 13 JT 276

Appeal by respondent from judgment entered 28 May 2014 by Judge Sarah C. Seaton in Onslow County District Court. Heard in the Court of Appeals 4 December 2014.

Ellis Family Law, P.L.L.C., by Gray Ellis, for petitioner-appellee.

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for respondent-appellant.

GEER, Judge.

Respondent father appeals from a judgment terminating his parental rights with respect to his daughter, "Angela."¹ Respondent's sole argument on appeal is that the trial court erred in failing to conduct a preliminary hearing pursuant to N.C. Gen Stat. § 7B-1105 (2013) in order to definitively determine the name or identity of Angela's father. However, we conclude that, under the circumstances of this case, the trial

¹The pseudonym "Angela" is used throughout this opinion to protect the privacy of the minor and for ease of reading.

court was not required by N.C. Gen. Stat. § 7B-1105 to conduct such a hearing. We, therefore, affirm.

Facts

Angela was born to petitioner mother on 23 September 2011 in Onslow County. On 12 December 2012, petitioner filed a complaint asking that respondent's paternity of Angela be "judicially established," that petitioner be granted "sole and exclusive legal and physical custody" of Angela, and that respondent be ordered to pay child support. Although respondent filed an answer to the complaint and received proper notice of the custody hearing, he did not appear. On 20 February 2013, the trial court ordered respondent to submit to paternity tests, but he never did so.

On 26 September 2013, petitioner filed a verified petition to terminate parental rights to Angela alleging that respondent was Angela's biological father or, "[i]n the alternative, the Respondent 'John Doe' is the father of [Angela]." On 28 May 2014, the trial court entered a "judgment" that found the following facts.

Although petitioner and respondent never married, at the time of the termination hearing petitioner was "married and her husband would like to adopt the minor child." Petitioner and respondent were 20 and 26 years old, respectively, when they had

an intimate relationship. Petitioner's "choice of [respondent] as a boyfriend did not show the best judgment."

During the relationship, respondent lived in a halfway house, had a criminal history, and was in a Drug Court program that had conditions on fathering a child during the program. Respondent lied to the judge in Drug Court "about fathering a child, prior to the birth [of Angela] because he did not want to be extended in the program another year[,]" and, ultimately, respondent was imprisoned for two weeks for lying to the judge.

The day that Angela was born, respondent informed petitioner that he wanted to break off their relationship, although the intimate relationship did continue. Respondent nonetheless showed up at the hospital the following day with his mother, which resulted in friction between petitioner's and respondent's families. Petitioner did not name respondent as the father in filling out Angela's birth certificate at the hospital.

After Angela was born, respondent made no effort to establish his paternity or have his name added to Angela's birth certificate. He never paid any money to petitioner to support Angela and only "help[ed] to purchase a few clothing items" for Angela, despite the fact that he had the means to provide more. Although respondent had occasional contact with Angela, he

relied exclusively on petitioner or his own mother to initiate any visitation. While petitioner and Angela were visiting respondent and his parents for Easter 2012, respondent's mother threw Angela's Easter gift at petitioner following an argument.

Respondent was able to see Angela on her first birthday in September 2012. However, in October 2012, respondent and petitioner broke off their relationship, which caused the relationship between their families to deteriorate. After the breakup, respondent and his mother, "the paternal grandmother," visited petitioner at her residence but petitioner told them to leave or else she would call the police.

Respondent and his family members also tried to contact petitioner after the breakup by phone, but "the phone was either not answered or if answered, would be hung up as soon as the party identified themselves." Petitioner filed criminal charges of harassing phone calls against respondent for which he was convicted. Although respondent bought Angela a Christmas gift in 2012, he never delivered it.

After petitioner filed her custody action on 12 December 2012, respondent "admitted the allegation of paternity 'upon paternity test' but made no counterclaim for custody or visitation." Although the trial court ordered respondent to submit to a paternity test, "the Respondent putative father

failed to comply with the Order of the court to submit to a paternity test to establish paternity."

While respondent was not in jail the six months preceding the filing of the termination of parental rights petition, he "has either been incarcerated, resided in three different half-way houses or his mother's house over the past several years; he has not maintained any independent residence." He has also "been unable to maintain steady employment."

The trial court also found, with respect to the potential "John Doe" father, that "John Doe has never had any contact with the minor child since birth"; "John Doe has never provided any support for the minor child since birth"; and "John Doe has never taken steps to establish paternity of the minor child."

Based on these findings, the trial court further found that it was in the "best interests of the minor child to terminate the parental rights of [respondent] or in the alternative John Doe[.]" These findings included that "[w]hile the paternal grandmother wants a relationship with the child, [respondent] has not shown any similar interest."

The trial court concluded that, "by clear, cogent and convincing evidence," respondent abandoned and neglected Angela as provided in N.C. Gen. Stat. §§ 7B-1111(a)(1) and (a)(7). It also concluded separately that, "by clear, cogent and convincing

evidence," John Doe abandoned and neglected Angela as provided in N.C. Gen. Stat. §§ 7B-1111(a)(1) and (a)(7). Further, the trial court concluded that "it is in the best interests of the minor child to terminate the parental rights of [respondent] or in the alternative John Doe" and ordered the termination of their parental rights with respect to Angela. Respondent timely appealed to this Court.

Discussion

When reviewing a trial court's order terminating parental rights, this Court must determine

whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law. Findings of fact supported by competent evidence are binding on appeal even though there may be evidence to the contrary. However, [t]he trial court's conclusions of law are fully reviewable *de novo* by the appellate court.

In re D.T.L., 219 N.C. App. 219, 220-21, 722 S.E.2d 516, 517 (2012) (internal citations and quotation marks omitted).

Respondent does not contend that any of the trial court's findings are inadequately supported by the evidence. Rather, respondent argues that the trial court erred in terminating his "parental rights" as a "putative father" because no preliminary hearing was conducted pursuant to N.C. Gen. Stat. § 7B-1105 to determine the actual identity of the biological father. He

further contends that the trial court was not authorized to enter an order terminating his "parental rights" because the trial court did not specifically find that he was Angela's father, as it was required to do after conducting a preliminary hearing under N.C. Gen. Stat. § 7B-1105.

N.C. Gen. Stat. § 7B-1105(a) sets out the procedure for the trial court to follow when "the name or identity of any parent whose parental rights the petitioner seeks to terminate is not known to the petitioner" When this provision is triggered, a trial court is required to conduct a preliminary hearing, generally within 10 days of the filing of the petition to "ascertain the name or identity of [the unknown] parent." *Id.* Additionally, "[s]hould the court ascertain the name or identity of the parent, it shall enter a finding to that effect[.]" N.C. Gen. Stat. § 7B-1105(b).

We note initially that, given the language "not known to the petitioner," and because N.C. Gen. Stat. § 7B-1105 contemplates a preliminary hearing to be conducted prior to the expiration of the 30-day time period for a respondent to file an answer to the petition, see N.C. Gen. Stat. §§ 7B-1106(a) and 7B-1107 (2013), the legislature intended the preliminary hearing described in N.C. Gen. Stat. § 7B-1105 to apply only when the petition demonstrates that the petitioner is unaware of "the

name or identity" of a parent, regardless of the respondent's answer.

Here, the petition alleges that "the Respondent is the putative father," that "the Petitioner did not have an intimate relationship with anyone else during the relevant period that could be the father of [Angela]," and that "the Petitioner is informed and believes that the Respondent putative father is the biological father of the minor child." These allegations unquestionably indicate that petitioner knew that respondent was Angela's father.

Respondent, however, contends that "[t]he petition in this case plainly alleged that the petitioner did not know who Angela's father was" because it alleged "[i]n the alternative, the Respondent 'John Doe' is the father of [Angela]." (Emphasis added.) However, this allegation is contingent, and there are no factual allegations actually suggesting John Doe's paternity of Angela. Further, the contingency of the allegation that "John Doe" is Angela's father appears to be consistent with the other allegations that respondent "is not named on the birth certificate and paternity has not been judicially established." See *In re J.S.L.*, 218 N.C. App. 610, 610, 723 S.E.2d 542, 542 (2012) ("Because no father was named on the birth certificate, petitioner also sought to terminate the parental rights of any

possible unknown father."). The allegations regarding "John Doe," we conclude, provide no reason to suppose that petitioner did not know the identity of Angela's father when she filed the petition. Thus, the trial court was not required to conduct a preliminary hearing under N.C. Gen. Stat. § 7B-1105.

Respondent cites *In re M.M.*, 200 N.C. App. 248, 684 S.E.2d 463 (2009), in support of his position that the trial court did not comply with N.C. Gen. Stat. § 7B-1105 and, therefore, erred. However, in *In re M.M.*, the preliminary hearing under N.C. Gen. Stat. § 7B-1105 was triggered when the petitioner Department of Social Services alleged that although the juvenile had a "legal father," the juvenile's "biological father was unknown." 200 N.C. App. at 250, 684 S.E.2d at 465.

Respondent also contends that the trial court's findings "did not identify Angela's father." Rather, the petition "variously referred to [respondent] as the 'putative father,' the 'father,' and 'Mr. [respondent's last name]'." Respondent further points out that the order "included findings regarding John Doe's complete absence from Angela's life" and "it found that both [respondent] and John Doe neglected and abandoned [Angela]."

"Section 7B-1111 of our statutes, which establishes grounds for terminating parental rights, is used to determine a *putative*

father's commitment to his child." *In re Williams*, 149 N.C. App. 951, 958, 563 S.E.2d 202, 206 (2002) (emphasis added). While respondent's putative status was sufficient to terminate his putative parental rights, nonetheless, we find that the trial court made findings positively identifying respondent as Angela's father: the judgment found that respondent lied to Drug Court about fathering Angela, and it also referred to respondent's mother as Angela's "paternal grandmother."

Although the order references "John Doe" in its findings, these findings contingently refer to "John Doe" as Angela's father, which is consistent with findings of respondent's paternity. The "John Doe" findings, in turn, supported the termination of John Doe's parental rights and not respondent's. This is also consistent with respondent's paternity. See *In re R.R.*, 180 N.C. App. 628, 633, 638 S.E.2d 502, 505 (2006) (holding that inclusion of grounds for terminating parental rights of "unknown father" was consistent with terminating parental rights of father identified in order). Further, the uncontradicted evidence at the hearing affirmatively established respondent as Angela's father; there was no evidence suggesting that "John Doe" was Angela's father.

Affirmed.

Judges STEELMAN and STEPHENS concur.