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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-289

Filed: 19 September 2017

Wake County, Nos. 15 JT 167–68

IN THE MATTER OF: J.E.J.B., J.J.B.

Appeal by respondent-father from order entered 4 January 2017 by Judge Monica Bousman in Wake County District Court. Heard in the Court of Appeals 31 August 2017.

Office of the Wake County Attorney, by Senior Deputy County Attorney Roger Askew, for petitioner-appellee Wake County Human Services.

Mary McCullers Reece for respondent-appellant father.

The Opoku-Mensah Law Firm, by Gertrude Opoku-Mensah, for guardian ad litem.

DIETZ, Judge.

Respondent appeals the trial court’s order terminating his parental rights to his sons John and Jack.¹ Respondent contends that he received ineffective assistance of counsel at the termination hearing because his counsel failed to seek a continuance to ensure that he could attend the proceeding. Because this argument involves

¹ We use pseudonyms to protect the juveniles’ privacy.

questions of fact not resolved by the existing record, we remand this case to the trial court to conduct an appropriate evidentiary hearing and to rule on Respondent's claim.

Facts and Procedural History

On 2 May 2016, Wake County Human Services petitioned to terminate Respondent's parental rights to his sons John and Jack based on neglect and failure to legitimate paternity. *See* N.C. Gen. Stat. § 7B-1111(a)(1) and (5) (2015). A hearing was scheduled for 23 November 2016.

On 16 November 2016, Respondent called a social worker assigned to his case and explained that the children's mother had passed away from a drug overdose in the home. The mother's funeral was held on 22 November 2016, one day before the termination hearing.

Respondent did not show up for the hearing the following day. The trial court found that Respondent received notice of the hearing and had not contacted his counsel to explain why he was not present or to ask for the hearing to be rescheduled. In addition, Respondent's counsel did not move for a continuance. The court therefore proceeded with the termination hearing despite Respondent's absence.

Following the hearing, the trial court terminated Respondent's parental rights based on neglect. Respondent timely appealed.

Analysis

Respondent argues that his trial counsel was ineffective because counsel failed to move to continue the hearing and, in Respondent's absence, could not adequately defend against the allegations in the petition. As explained below, the record on appeal is insufficient to address this argument and we therefore remand this matter to the trial court for an evidentiary hearing.

"Parents have a statutory right to counsel in all proceedings dedicated to the termination of parental rights. This statutory right includes the right to effective assistance of counsel." *In re Dj.L.*, 184 N.C. App. 76, 84, 646 S.E.2d 134, 140 (2007) (citations omitted). "A claim of ineffective assistance of counsel requires the respondent to show that counsel's performance was deficient and the deficiency was so serious as to deprive the represented party of a fair hearing." *In re Oghenekevebe*, 123 N.C. App. 434, 436, 473 S.E.2d 393, 396 (1996).

Respondent argues that his trial counsel's failure to contact him and move for a continuance of the hearing was deficient performance. At the beginning of the termination hearing, the following exchange occurred between the trial court, Respondent's trial counsel, and the attorney for Wake County Human Services:

COURT: . . . We have conducted a pre-trial hearing in this matter on September the 27th, at which time [Respondent] was present and was personally served . . . with notice of hearing today. It is now 10:34. Mr. Bell, you represent [Respondent], and I know that I was in chambers with a child when we should have opened court at 9 o'clock. Was

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[Respondent] here then?

[RESPONDENT'S COUNSEL]: He was not here.

COURT: Has he been here at any time this morning?

[RESPONDENT'S COUNSEL]: He has not. I fully expected him, but he hasn't come nor has he called me.

COURT: You don't have any idea –

[RESPONDENT'S COUNSEL]: He's called me many times, so I have –

COURT: Okay.

[RESPONDENT'S COUNSEL]: – no idea.

.....

[WCHS ATTORNEY]: I guess – I don't – Judge, there was the issue with the mother, and we certainly noticed people about that issue last week.

COURT: Uh-huh. And just for the record, that issue is –

[WCHS ATTORNEY]: The mother passing away.

COURT: She passed away last week?

[WCHS ATTORNEY]: She passed away last week. We certainly put that out. The attorneys . . . came and, you know, we spoke to the Court and, you know, gave them an opportunity, if there was an issue about continuing it. [Respondent] had not contacted [his counsel] and I still don't believe he's done that.

COURT: Okay.

[WCHS ATTORNEY]: We had a concern – I think the

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funeral was yesterday – and wanted to, if there was a concern from any appearance about that to get down, but my understanding and when we met in chambers Monday, I believe, is there was no such contact made with the attorneys.

COURT: Okay.

[WCHS ATTORNEY]: I feel like that needs to be addressed in some way.

COURT: Okay. So Mr. Bell, has [Respondent] contacted you at any point?

(No audible answer.)

And I understand from our conversation Monday that she passed away the previous Monday; is that correct?

[RESPONDENT'S COUNSEL]: Wednesday.

COURT: Wednesday. So that would have been the 16th of November. Has he at any time contacted you to request that this case not move forward today?

[RESPONDENT'S COUNSEL]: No, he has not.

COURT: He has not; okay. And he has your phone number and your address?

[RESPONDENT'S COUNSEL]: He – oh, he certainly does.

COURT: And he has contacted you –

[RESPONDENT'S COUNSEL]: In the past.

COURT: – many times in the past. Okay. Well it – again, it's now 9 – 10:38 and this case was – he was properly noticed to be here on today's date, as I said, on September the 27th. And let me just double check the time that's on

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that notice of hearing. “Scheduled for November the 23rd at 9 o’clock.” So are there any other pre-trial issues?

[WCHS COUNSEL]: No, Judge.

.....

COURT: If there are no other pre-trial issues – and this is your last chance for a pre-trial issue. (No response from anyone.) If there are no other pre-trial issues, then I’m prepared for you to call your first witness.

Respondent asserts that this exchange demonstrates that his counsel should have moved to continue the proceeding or, at a minimum, attempted to contact Respondent to determine why he was absent. We hold that the record on appeal is insufficient to resolve this fact-intensive issue.

When a respondent in a termination case raises an ineffective assistance claim involving fact issues not resolved by the existing record, this Court will remand for the trial court to resolve those questions of fact. *In re S.N.W.*, 204 N.C. App. 556, 559–61, 698 S.E.2d 76, 78–79 (2010). Here, we cannot determine from the record whether Respondent’s failure to attend the termination hearing was supported by good cause that would have warranted a continuance had his counsel made that request. We note that, until the termination hearing, Respondent attended court proceedings in this matter and regularly communicated with his counsel. If Respondent failed to attend the hearing because of grief over the death of the children’s mother, or because of obligations related to her death, the trial court may have been willing to continue the

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proceeding. Moreover, in Respondent's absence, his counsel put on little evidence and made little argument on Respondent's behalf. Had the case been continued until Respondent was present, counsel may have been able to present a stronger case.

Simply put, "[t]he lack of information in the record or transcript . . . precludes us from determining whether Respondent received effective assistance of counsel, and if he was denied a fair hearing." *Id.* at 560, 698 S.E.2d at 78–79. Accordingly, we remand this case for the trial court to examine the questions of fact raised by Respondent and to determine, in light of those facts, if Respondent received ineffective assistance of counsel. Because we remand for an evidentiary hearing on this potentially dispositive issue, we do not address Respondent's remaining arguments.

REMANDED.

Chief Judge McGEE and Judge INMAN concur.

Report per Rule 30(e).