An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1210

Filed: 20 March 2018

Onslow County, No. 16 JT 79-80

IN RE: A.V.C. and A.D.C.

Appeal by respondent from order entered 27 July 2017 by Judge Paul A. Hardison in Onslow County District Court. Heard in the Court of Appeals 20 February 2018.

No brief for petitioner-appellee.

W. Michael Spivey for respondent-appellant.

TYSON, Judge.

Respondent appeals from an order terminating his parental rights. We vacate and remand.

I. Background

Respondent is the father of the juveniles, A.V.C. and A.D.C. Petitioner is their mother. Both juveniles were born in Arizona, where the Petitioner and Respondent resided at the time.

Petitioner testified at the termination of parental rights ("TPR") hearing. Her relationship with Respondent ended in 2011, when he was convicted of a crime and sent to prison. Respondent called Petitioner during this time and communicated with his children. After Respondent was released from prison in November 2013, he visited his children an average of about three times a week. Petitioner married her current husband in March 2014. Respondent's visits with the children decreased to once a week after Petitioner married.

Respondent was able to see and visit with his children in April 2014. In May 2014, Petitioner and her husband moved to North Carolina without telling Respondent. Petitioner testified she had told Respondent's family the children were living in North Carolina, and she had provided an address for them to mail gifts after the move. Petitioner further testified she only provided Respondent her husband's phone number after the move to North Carolina and her recollection was that Respondent had spoken to his children once since August 2014. Petitioner also testified Respondent had been incarcerated again since October 2015.

On 11 April 2016, Petitioner filed her petition to terminate Respondent's rights to his two children. At the time of filing Petitioner and the children were residents of North Carolina. In October of 2016 Petitioner moved back to Arizona, and now lives with both children in Illinois.

Court records indicate the trial court appointed Trey Carter, Esq., as Respondent's counsel. Respondent was served with the petition at the prison where he was incarcerated. On 19 May 2016, Respondent, through his appointed counsel, filed a response to Petitioner's petition to TPR. On 15 June 2016, the court appointed a guardian *ad litem* ("GAL") in this case.

On 2 June 2017, Petitioner's attorney filed notice of a hearing date for the TPR hearing. On 12 July 2017, Respondent's counsel filed a "Motion to Change Venue." The trial court denied the motion to transfer the venue and entered an order on 27 July 2017 terminating Respondent's parental rights to both children. Respondent appeals.

II. Jurisdiction

Jurisdiction lies in this Court from a final order of the district court pursuant to N.C. Gen. Stat. §§ 7B-1001(a) and 7A-27(b)(2) (2017).

III. Issues

Respondent asserts four issues on appeal: (1) he was denied effective assistance of counsel; (2) the court abused its discretion in its determination that North Carolina was the most convenient forum; (3) the court erred by failing to require the GAL to perform his statutory duties; and, (4) the court's conclusion that Respondent willfully abandoned his children is based upon insufficient findings of fact.

IV. Ineffective Assistance of Counsel

"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) (citations omitted).

Respondent argues he received ineffective assistance of counsel. In the case of *In re S.N.W.*, 204 N.C. App. 556, 558, 698 S.E.2d 76, 77 (2010), the respondent was not present at the DSS-initiated termination hearing. The respondent's counsel informed the court that he had no contact with the respondent other than one phone message. *Id.* No indication in the record or the opinion shows that this respondent was incarcerated. The court made no further inquiry into the counsel's efforts to reach the respondent. *Id.* The court indicated it would "allow [counsel] not to participate." *Id.*

The termination hearing in *S.N.W.* proceeded without the respondent counsel's participation. DSS presented the testimony of a foster care supervisor. "At DSS's request, the trial court took judicial notice of the termination petitions and the underlying adjudication order." *Id.* The court determined DSS had proven each of the grounds alleged in its petitions, and concluded termination of the respondent's parental rights was in the best interests of the children. The trial court ordered the respondent's parental rights be terminated. *Id.*

This Court has recognized a child's parent has a statutory right to counsel in all TPR proceedings, and that "[t]his statutory right includes the right to effective assistance of counsel." *Id.* at 559, 698 S.E.2d at 78 (citations omitted). This Court held

> the trial court should have inquired further about Respondent counsel's efforts: (1) to contact Respondent; (2) to protect Respondent's rights; and (3) to ably represent Respondent. After inquiry, if the trial court determined that counsel was indeed ineffective, the trial court should have appointed new counsel, despite the fact that no motion to withdraw was made.

Id.

We also noted *In re S.N.W.* that DSS had been able to communicate and meet with the respondent during the period after their TPR petition was filed and before the TPR hearing was held. *Id.* at 560, 698 S.E.2d at 78. The Court found the record raised questions of whether the respondent was accorded mandated procedures to ensure him the fundamental fairness required in TPR actions. *Id.* (citation omitted). We remanded to the trial court for a new TPR hearing. *Id.* at 561-62, 698 S.E.2d at 79.

Here, the record does not show whether Respondent was adequately provided with his constitutional and statutory right to counsel. The record only shows Respondent was served with the petition to terminate his parental rights, while he was an inmate in prison in Arizona. Counsel was able to file a response or answer to

the petition on Respondent's behalf on 19 May 2016. However, at the time of the 13 July 2017 hearing, Respondent's counsel informed the court that he had only spoken to Respondent for "about five minutes over a year [before]." Counsel indicated he had left a voicemail at the institution where Respondent was reportedly housed. On 11 July 2017, two days prior to the trial date, counsel sent a fax to the Arizona prison.

On 12 July 2017, the day before the hearing, counsel filed a motion to change the venue to Arizona where Respondent was imprisoned and to where Petitioner and the children had returned after the petition was filed. The trial court found Respondent's attorney had attempted to contact Respondent and had been unable to do so, that the matter had been pending for an "extended period of time" and denied the motion for change of venue. The court proceeded to terminate Respondent's rights to both of his children.

V. Fundamental Fairness

A parent is "entitled to procedures which provide him with fundamental fairness" in TPR proceedings. *Id.* at 561, 698 S.E.2d at 79. "[T]he record before us raises questions as to whether Respondent was afforded with the proper procedures to ensure that his rights were protected during the termination of his parental rights to the minor children." *Id.* As this Court did in *In re S.N.W.*, we vacate the order and remand this case to the district court. Before proceeding, the district court must inquire into and make findings of the current residency and status of Petitioner,

Respondent and the children to determine whether North Carolina remains a convenient forum or whether the court should relinquish jurisdiction. *See In re M.M.*, 230 N.C. App. 227, 227, 750 S.E.2d 50, 53-54; N.C. Gen. Stat. § 50A-207 (2017). The court must also enter findings and conclusions of Respondent's counsel's efforts to contact him, and whether counsel can adequately represent Respondent. *See In re S.N.W.*, 204 N.C. App. at 561, 698 S.E.2d at 79.

In light of our decision, we do not address Respondent's arguments regarding the alleged failure of the court-appointed GAL to fully investigate the case or to be present during the TPR hearing. *See In re J.L.S.*, 168 N.C. App. 721, 723, 608 S.E.2d 823, 825 (2005) ("in light of the nature of these proceedings where one natural parent is seeking to terminate the parental rights of the other natural parent . . . . a guardian ad litem is necessary to ensure that the best interests of [the child] are adequately represented").

Upon remand, if North Carolina remains the convenient forum, the trial court must also enter adequate findings supported by clear, cogent and convincing evidence to support its conclusions of law. *In re Oghenekevebe,* 123 N.C App. at 435-36, 473 S.E.2d at 395. Incarceration, standing alone, does not compel a finding of willfulness on the issue of abandonment. *In re D.M.O.*, __ N.C. App. __, __794 S.E.2d 858, 862-63 (2016) (citations omitted). "[T]he circumstances attendant to a parent's incarceration are relevant when determining whether a parent willfully abandoned

his or her child, and this Court has repeatedly acknowledged that the opportunities of an incarcerated parent to show affection for and associate with a child are limited." *Id.* Petitioner's purported actions to hide the whereabouts of the children and to limit Respondent's access to his children are also relevant upon remand.

VI. Conclusion

We vacate the order terminating Respondent's parental rights to A.V.C. and A.D.C. and remand this case for further proceedings consistent with this opinion and order. *It is so ordered.*

VACATED AND REMANDED.

Judges CALABRIA and DILLON concur.

Report per Rule 30(e).