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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-83

Filed: 19 June 2018

Harnett County, No. 16 JT 58

IN RE: P.B.

Appeal by respondent-father from order entered 13 October 2017 by Judge Paul A. Holcombe, III in District Court, Harnett County. Heard in the Court of Appeals 4 June 2018.

Mobley Law Office, P.A., by Marie H. Mobley, for guardian ad litem, and Harnett County Department of Social Services, by Staff Attorney Duncan B. McCormick, for Harnett County Department of Social Services.

J. Thomas Diepenbrock, for respondent-father.

STROUD, Judge.

Respondent-father appeals order terminating his parental rights and argues that the trial court erred in denying his motion to continue. Respondent-father raised no constitutional argument at trial, so that argument was waived. The trial court did not abuse its discretion by denying continuance of the hearing, nor can

Respondent-father show any prejudice since he had never seen the child or attempted to participate in his life in any way. We affirm.

I. Background

While much of the background of Patrick's[1] tragic mistreatment concerns his mother, this appeal concerns only his father. On 6 June 2016, Harnett County Department of Social Services ("DSS") filed a juvenile petition alleging that Patrick was an abused and neglected juvenile. The petition alleged that DSS became involved in 2015 when Patrick's mother tried to avoid a deputy at a traffic check; the deputy found that she was breastfeeding the baby as she was driving and obviously the baby was not in a car seat. Drug paraphernalia was also discovered in the car. The putative father, respondent-father, was contacted "and he admitted he had never seen the baby, has not provided support to the baby but that he is interested in retaining an attorney to get custody of his child."

In June of 2016, mother's home was found to be infested with roaches and the child was emaciated. Patrick's mother refused to seek medical treatment for Patrick. Patrick was eventually taken to the hospital where he was diagnosed as malnourished and dehydrated. He weighed only 7 pounds and 9 ounces at six months old. DSS was unable to reach respondent-father. On 6 June 2016, DSS took nonsecure custody of Patrick.

[1] Pseudonyms will be used to protect the identity of the minors involved.

On 10 June 2016, the district court entered an order for DNA testing to establish paternity. On 13 January 2017, Patrick was adjudicated neglected. On 3 February 2017, paternity was established, Patrick was placed in DSS's custody, and reunification efforts with Patrick's mother were ceased. Patrick's mother eventually relinquished her parental rights.

On 21 April 2017, a permanency planning order was entered ceasing reunification efforts with respondent-father and setting the permanent plan for Patrick as adoption. On 22 June 2017, DSS moved to terminate respondent-father's parental rights. In August of 2017, an order was entered continuing the termination hearing. On 13 October 2017, the trial court terminated respondent-father's parental rights. Respondent-father appeals.

II. Motion to Continue

Before the hearing on termination of respondent-father's parental rights, his attorney moved to continue the hearing. Respondent-father was not present at the hearing and his attorney noted that respondent-father told him his leg was broken, though he did not have any documentation "of the injury, or the-- his inability to travel." He also acknowledged that the broken leg was not something that had happened just before the hearing; the problem had existed for some period of time. DSS's attorney opposed the motion, arguing there was no indication respondent-

father was likely to begin to participate in the proceedings even if the matter were continued. Respondent-father's attorney then acknowledged his lack of participation,

> To follow up on what Ms. Mobley said, he missed— he hasn't appeared for any of the critical court hearings. He didn't appear for the adjudication hearing, for the separate adjudication date— excuse me, separate disposition date, and then the permanency planning review hearing. All three of those hearings this year he missed. I believe he appeared earlier when we— at some point in the process at some of the non-secure, probably when he was in jail and was writted here, but he really hadn't participated in the hearings a great deal.

The trial court then denied the motion noting,

> It's already been continued once. The extension was not taken advantage of, apparently, in any way, either to file an answer or to make arrangements to appear. It appears that the Defendant knew because his leg -- to the extent it truly is broken, and the Court has no documentation of that -- that he knew about that all the way back at the beginning of August. So arrangements could have been made for him to appear electronically or by phone if he was truly unable to travel here for this hearing.
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> Apparently, he has not appeared at any of the previous hearings subsequent to the adjudication, and it just does not appear any more likely that, if he's given additional time at this point, that he's going to be any more available or any more cooperative in his defense.
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> So Mr. Wunsch, you are certainly encouraged then, to the extent that you believe that he would want you to, to contest this, to vigorously cross-examine any of these witnesses on behalf of your client. And I will certainly give you a few more moments to try and reach him to explain to him that the continuance is not being granted in case he does want to appear by phone or in case you want to attempt to get additional instructions from him about how to proceed.

The trial court then considered other cases for the next two hours, giving respondent-father's attorney additional time to try to contact father and perhaps to arrange for him to appear by phone. His attorney was still unable to contact father. When the trial court resumed the hearing, respondent-father's attorney renewed his motion to continue, stating no new grounds, and the trial court denied the motion.

The *only* argument respondent-father makes on appeal is that the trial court erred when it denied his motion to continue. Respondent-father contends that the denial of his motion to continue violated his constitutional rights to effective assistance of counsel, and alternatively, constituted an abuse of discretion. Our Court has addressed a similar case, same argument, and the standard of review in *In re C.M.P.:*

> A trial court's decision regarding a motion to continue is discretionary and will not be disturbed on appeal absent a showing of abuse of discretion. Continuances are generally disfavored, and the burden of demonstrating sufficient grounds for continuation is placed upon the party seeking the continuation. However, if a motion to continue is based on a constitutional right, then the motion presents a question of law which is fully reviewable on appeal.
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> Respondent argues that the trial court's denial of her motion to continue implicates her due process right to effective assistance of counsel, including the right of a client and counsel to have adequate time to prepare a defense, and thus the issue presents a question of law which is fully reviewable on appeal. Respondent, however, presents this constitutional argument for the first time on appeal.

> To determine whether a failure to grant a continuance implicates constitutional rights, the reasons presented for the requested continuance are of particular importance. In the instant case, respondent's counsel raised only one ground to support the motion to continue at the hearing: that respondent was absent from the hearing. As previously noted, respondent raises for the first time on appeal the issues of effective assistance of counsel and adequate time to prepare a defense. In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. Therefore, respondent failed to preserve the issue of whether the denial of the motion violated her constitutional right to effective assistance of counsel.
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> Further, this Court has held that a parent's due process rights are not violated when parental rights are terminated at a hearing at which the parent is not present. Thus, respondent's motion to continue was not based on a constitutional right, and we review the trial court's denial of the motion for abuse of discretion.

In re C.M.P., ___ N.C. App. ___, ___, 803 S.E.2d 853, 857 (2017) (citations and quotation marks omitted).

Respondent-father seeks to distinguish *C.M.P.* from this case by his contention that the parent's absence in *C.M.P.* was unexplained, while his absence was explained by his alleged broken leg, but this does not make the case inapposite. Despite respondent-father's contentions, like *C.M.P.*, the reason for his motion to continue was that he was not present for the hearing, and no constitutional issues were raised. *See id.* at ___, 803 S.E.2d at 857. Thus, we will consider only whether

the trial court abused its discretion. *See id.* at ___, 803 S.E.2d at 857. Furthermore, "[w]hen a parent is absent from a termination proceeding and the trial court preserves the adversarial nature of the proceeding by allowing the parent's counsel to cross examine witnesses, with the questions and answers being recorded, the parent must demonstrate some actual prejudice in order to prevail on appeal." *Id.* at ___, 803 S.E.2d at 857 (citation, quotation marks, and ellipses omitted).

As the trial court found as an unchallenged and thus binding finding of fact, *see In re C.B.*, 245 N.C. App. 197, 199, 783 S.E.2d 206, 208 (2016) ("Unchallenged findings are binding on appeal."):

> The court denied the motion. This matter was continued from the August 4, 2017 session. The father obtained an extension of time to file an answer. The father did not take advantage of these extensions to file an answer or to appear in court. The father did not appear at the January 2017 adjudication hearing, the February 2017 disposition hearing or the March 2017 permanency planning review hearing. It is not likely that the father will be available to the court if given additional time. The court did give counsel for the father time to try to contact the father before starting the evidentiary hearing.

The binding findings of fact and the evidence at the hearing also show that respondent-father has never seen Patrick. He has never sent letters, cards, Christmas or birthday gifts; provided any support, care, or supervision; entered into a family services agreement; cooperated with a mental health evaluation; showed that he obtained stable housing or employment; or participated in reunification

services. Ultimately, respondent-father failed "to take any steps to put himself in a position to parent." The trial court did not abuse its discretion in denying respondent-father's motion to continue.

III. Conclusion

Because the trial court properly denied respondent-father's motion to continue, we affirm.

AFFIRMED.

Chief Judge McGEE and Judge BRYANT concur.

Report per Rule 30(e).