NO. COA01-1291

NORTH CAROLINA COURT OF APPEALS

Filed: 20 August 2002

IN THE MATTER OF:

MADISON LEIGH TORRENCE

Guilford County
No. 99 J 8

Appeal by respondent-father from judgment entered 4 December 2000 by Judge Wendy Enochs in Guilford County District Court. Heard in the Court of Appeals 5 June 2002.

Guilford County Attorney's Office, by Deputy County Attorney Michael K. Newby, for petitioner appellee.

Gregory L. Gorham for respondent appellant.

McCULLOUGH, Judge.

Respondent Michael Torrence is the father of Madison Leigh Torrence. Respondent has had his parental rights terminated as to his previous four children. When Madison Torrence was born 29 January 1999, Guilford County Department of Social Services (DSS) filed a petition alleging that the child was dependent and neglected in that she "would be in an injurious environment if allowed to be discharged from the hospital to her parents' care." Madison went into the custody of DSS on 29 January 1999. The child was adjudicated neglected and dependent by an order filed 5 April 2000, *nunc pro tunc* 3 February 2000. The dispositional and

permanency planning hearing was held 2 March 2000. At this hearing, it was found that adoption was in the best interest of the child, in that the parents had made no progress toward reunification. Respondent was not present at this hearing. The dispositional order, also filed 5 April 2000, *nunc pro tunc* 2 March 2000, held the same.

The DSS filed a petition to terminate parental rights on 28 April 2000. The grounds alleged were neglect (the children had been willfully left in foster care for more than 12 months without showing reasonable progress towards rectifying the conditions which led to removal); the parents have willfully failed to pay a reasonable portion of the cost of care of the child while physically and financially able to do so; and willful abandonment (the parental rights of the parents with respect to four other children have been terminated previously by the courts, and the parents continue to lack willingness to establish a safe home for the child). Respondent was served personally with the summons to the proceeding for the termination of his parental rights on 2 June 2000. This summons apparently reflects that he was incarcerated at the time. The hearing for the petition to terminate parental rights was set for 16 October 2000. The notice of hearing, filed 25 September 2000, was sent to respondent Michael Torrence by depositing "a copy of the same in the United States mail, postage prepaid."

On 16 October 2000, the hearing was continued until 6 November 2000, per the request of DSS. This order was filed 25 October

2000. On 6 November 2000, the mother of the child appeared in court and requested appointment of counsel. The court granted this motion, and the hearing was continued again until 4 December 2000.

On 4 December 2000, the day of the hearing, respondent, although not personally present, filed via his attorney an answer to the petition of DSS. The transcript reveals, although it is incomplete because the court reporter had changed tapes, that respondent's attorney made a motion to continue the hearing apparently on the grounds that respondent was not present. Respondent's attorney stated that respondent was present when the hearing was continued on 6 November 2000. The trial court noted the fact that respondent was in the courtroom at that time, and then denied the motion. The hearing was held and the court terminated respondent's parental rights, the mother having voluntarily relinquished her parental rights the day of the hearing.

Respondent filed his notice of appeal on 13 December 2000. He brings forth the following arguments on appeal: The trial court committed reversible error (1) by hearing this matter without the respondent receiving proper notice of hearing date and time; and (2) concluding that it was in the best interest of the minor child to terminate the parental rights of respondent.

I.

Defendant's first assignment of error deals with his contention that he did not receive proper notice of the hearing held on 4 December 2000. He contends that he was not present at

the 6 November 2000 hearing because he was incarcerated at the time, despite what the transcript shows his attorney stated to the court. Because of this, he had no way of knowing that the hearing had been continued to 4 December 2000. Respondent admits that he received written notice mailed to him on 25 September 2000, apprising him of the 16 October 2000 hearing date, but that is all. Respondent argues that he was entitled to written notice of hearing, in accordance with N.C. Gen. Stat. § 7B-1108 (2001), notifying him of the continuances. Since he did not have notice of the continuances, he argues that he "was denied his right to defend himself in regards to the allegations made against him in the petition to terminate his parental rights and his attorney was not able to provide a sufficient defense . . . without respondent present."

Initially, we note that no documents in the record indicate that respondent was in fact incarcerated during the 6 November 2000 hearing date.

> Without question, our review is based "solely upon the record on appeal," N.C.R. App. P. 9(a), and we decline to accept as part of the record herein assertions of fact in the parties' briefs which are not sustained by record evidence, *see* N.C.R. App. 28(b)(4) (underlying facts set out in appellate brief must be supported by "references to pages in the . . . record on appeal"), and *Hudson v. Game World, Inc.*[,] 126 N.C. App. 139, 142, 484 S.E.2d 435, 437-38 (1997)(matters argued in brief but not contained in the record will not be considered on appeal)."

Mohamad v. Simmons, 139 N.C. App. 610, 613, 534 S.E.2d 616, 619 (2000). Respondent argues that the transcript and his own attorney

establish facts which are incorrect. However, we have no basis in which to review his contentions because the record is devoid of any notation or information of the dates of his incarceration.

In any event, N.C. Gen. Stat. § 7B-1108(b) requires a special hearing to be held "after notice of not less than 10 days nor more than 30 days" is given to respondent to determine the issues raised by the petition. However, our case law holds that N.C. Gen. Stat. § 7B-1108 does not prescribe the rules for notice when a hearing is continued. *In re Taylor*, 97 N.C. App. 57, 60, 387 S.E.2d 230, 231 (1990) (referring to § 7A-289.29(b) (1986), the predecessor to § 7B-1108).

In *Taylor*, the initial hearing was set for 1 August 1988. *Id.* The matter was continued on 1 August, with everyone present, until 29 August 1988. *Id.* The special hearing and termination hearing took place on 7 October 1998. *Id.* The Taylors received notice on 3 October 1988 pursuant to a juvenile summons. *Id.* They argued that they should have gotten at least 10 days' notice pursuant to the statute. *Id.* This Court held that the notice requirement was met when the judge scheduled the hearing for 29 August 1988 on 1 August 1988:

> We do not read Section 7A-289.29(b) as prescribing the rules for notice when a hearing is continued. Given that all parties had notice on 1 August that a hearing would be held, we see no possibility in this case that the Taylors were unfairly surprised or that their ability to contest DSS' petition at the 7 October hearing was in any way prejudiced by their receipt of notice on 3 October.

Id.

Thus, there is no requirement in the statute that a party receive written notice of the continuance date. Respondent was served with a "Summons in Proceeding for Termination of Parental Rights" on 2 June 2000. On 25 September 2000, respondent received a notice of hearing in the same matter, stating that the hearing was set for 16 October 2000. Respondent knew that the hearing would be held given the fact that he does not contest receiving notice of the original hearing. *See In re Mitchell*, 148 N.C. App. 483, 484, 559 S.E.2d 237, 237-38 (2002).

Regardless of the reason respondent was not present on 4 December 2000, he was not unfairly surprised nor was his ability to contest the petition prejudiced since he had notice that the hearing would be held. Therefore, we cannot hold that it was an abuse of discretion for the trial court to deny respondent's motion to continue. This assignment of error is overruled.

II.

Termination of parental rights proceedings are conducted in two phases: adjudication and disposition. *See In re Brim*, 139 N.C. App. 733, 535 S.E.2d 367 (2000); N.C. Gen. Stat. § 7B-1109 (2001); N.C. Gen. Stat. § 7B-1110 (2001). During adjudication, the petitioner has the burden of proof to demonstrate by clear, cogent, and convincing evidence that one or more of the statutory grounds set forth in N.C. Gen. Stat. § 7B-1111(a) for termination exist. N.C. Gen. Stat. § 7B-1109(e)-(f) (2001); *In re Nolen*, 117 N.C. App. 693, 453 S.E.2d 220 (1995). The standard of appellate review of the trial court's conclusion that grounds exist for termination of

parental rights is whether the trial judge's findings of fact are supported by clear, cogent, and convincing evidence, and whether these findings support its conclusions of law. *In re Huff*, 140 N.C. App. 288, 536 S.E.2d 838 (2000), *appeals dismissed, disc. reviews denied*, 353 N.C. 374, 547 S.E.2d 9 (2001).

If the petitioner meets its burden of proof that there are grounds to terminate parental rights, the trial court then moves to the disposition phase and must consider whether termination is in the best interest of the child. *See* N.C. Gen. Stat. § 7B-1110(a) (2001); *In re Blackburn*, 142 N.C. App. 607, 543 S.E.2d 906 (2001). The trial court does not automatically terminate parental rights in every case that presents statutory grounds to do so. *In re Leftwich*, 135 N.C. App. 67, 518 S.E.2d 799 (1999). The trial court has discretion if it finds that at least one of the statutory grounds exists, to terminate parental rights upon a finding that it would be in the child's best interests. *Id.* The trial court's decision to terminate parental rights is reviewed under an abuse of discretion standard. *Brim*, 139 N.C. App. at 744, 535 S.E.2d at 373.

Respondent argues that he was not allowed an opportunity to demonstrate his parenting skills since Madison Torrence was taken into custody by DSS when she was only one day old, and thus never actually resided with respondent. This, he contends, deprived him of the opportunity to show the court that he could provide a safe and proper home for the child. Respondent further contends that it was the actions of the mother, not his, that caused DSS to take the

child.

The statute presumes that it is in the best interest of the child to terminate the parental rights of a parent once the grounds are found for such an action are found by the court "unless the court shall further determine that the best interests of the juvenile require that the parental rights of the parent not be terminated." N.C. Gen. Stat. § 7B-1110(a) (2001). All the reports from DSS show he did not comply with their requirements to better himself or the situation which the child would encounter if she were to be placed in his custody. Respondent's rights had been previously terminated as to four other children, and the conditions had not improved. Madison had lived with her pre-adoptive family her entire life and had bonded with them. This assignment of error is overruled.

Affirmed.

Judges WALKER and BRYANT concur.

Report per Rule 30(e).