NO. COA06-93

NORTH CAROLINA COURT OF APPEALS

Filed: 21 November 2006

IN THE MATTER OF:

B.D.C.,
Minor Child.

Moore County
No. 04 J 131

Appeal by Respondent from order entered 9 March 2005 by Judge Scott Etheridge in District Court, Moore County. Heard in the Court of Appeals 10 October 2006.

Staton, Doster, Post & Silverman, by Jonathan Silverman, for Petitioner-Appellee.

Robert T. Newman, Sr. for Respondent-Appellant.

McGEE, Judge.

Aubrey Lynn Cheek (Petitioner) is the biological mother of B.D.C., a minor child. Petitioner filed a petition to terminate the parental rights of Adrian Lawrence Lee (Respondent) to B.D.C. on 1 November 2004. Petitioner alleged that Respondent is the biological father of B.D.C., that B.D.C. had been born out of wedlock, and that B.D.C. had never been legitimated by Respondent. Petitioner alleged she has had continuous custody of B.D.C. since the child's birth, and that she has had custody of B.D.C. with Respondent's consent since the child was six months old.

Petitioner further alleged Respondent "has not provided substantial financial support or consistent care with respect to [B.D.C.] and [Petitioner]."

Respondent did not file an answer or any responsive pleadings. The petition was first scheduled for hearing on 13 December 2004 but was continued until 19 January 2005. Respondent did not appear on 19 January 2005, and Respondent's counsel moved to continue. The trial court continued the hearing until 23 February 2005. Respondent's counsel again moved to continue the hearing on 23 February 2005, arguing as follows:

> [Respondent] has been out of state working. The correspondence caught up with him. I tried numerous times to call; I was unsuccessful. [Respondent] did call my office, Your Honor, too, and I never had an opportunity to speak to him; it's the first time today. [Respondent] would like to contest the termination. I haven't had time to adequately . . . prepare, Your Honor, and that would be my motion.

The trial court denied Respondent's motion to continue but recessed court to allow Respondent to consult with his counsel.

Robert Alley was appointed as guardian ad litem (the GAL) for B.D.C. The GAL testified that he met with Petitioner and Petitioner's family but that he had not spoken with Respondent "due to [Respondent's] lack of contact through his attorney[.]" The GAL testified "that it would be in the best interest [of B.D.C.] to terminate the parental rights [of Respondent]."

The trial court entered an order terminating Respondent's parental rights on 9 March 2005. In the adjudication portion of the order, the trial court concluded

> [t]hat pursuant to N.C.G.S. § 7B-1111(a)(5)(d), grounds exist to terminate . . . Respondent's parental rights in that [B.D.C.] was born out of wedlock and that prior to the filing of this Petition to Terminate Parental Rights, . . . Respondent has failed to provide substantial financial support or consistent care with respect to [B.D.C.] or [Petitioner].

In the dispositional section of the order, the trial court concluded that "[it] is in the best interests of [B.D.C.] to terminate the parental rights of . . . Respondent." The trial court ordered that Respondent's parental rights be terminated. Respondent appeals.

I.

Respondent first argues the trial court committed reversible error by denying Respondent's motion to continue the 23 February 2005 termination of parental rights hearing. "'Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review.'" *In re D.Q.W.*, 167 N.C. App. 38, 40, 604 S.E.2d 675, 676 (2004) (quoting *State v. Taylor*, 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001), *cert. denied*, *Taylor v. North Carolina*, 535 U.S. 934, 152 L. Ed. 2d 221 (2002)). "If, however, a motion to continue is based on a constitutional right, then the motion presents a question of law which is fully reviewable on appeal." *State v. Smith*, 310 N.C. 108, 112, 310 S.E.2d 320, 323 (1984). "To establish that the trial court's failure to give additional time to prepare constituted a constitutional violation, [the] defendant must show 'how his case

would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion.'" *State v. McCullers*, 341 N.C. 19, 31, 460 S.E.2d 163, 170 (1995) (quoting *State v. Covington*, 317 N.C. 127, 130, 343 S.E.2d 524, 526 (1986)).

Although Respondent now contends the trial court's denial of his motion to continue denied him his "constitutionally protected parental rights[,]" Respondent did not make this argument to the trial court. Even assuming, *arguendo*, that Respondent had preserved a constitutional challenge to the denial of his motion to continue, Respondent has not demonstrated prejudice. Respondent appears to argue that he was prejudiced because he did not have an opportunity to speak with his attorney prior to the hearing. However, any inability to consult with counsel was caused by Respondent. Respondent does not offer any excuse for his inability to consult with his counsel other than the Christmas and New Year's holidays and a trip to Atlanta in January 2005. Respondent had already failed to appear for the 19 January 2005 hearing and Respondent's counsel had made a motion to continue, which the trial court granted. Moreover, at the beginning of the 23 February 2005 hearing, the trial court allowed a recess for Respondent to consult with his counsel.

Respondent also appears to argue he was prejudiced because "[a] continuance would also have allowed the [GAL] the opportunity to obtain more information." The GAL testified that he might have changed his opinion regarding termination of Respondent's parental

rights had Respondent met with him. However, Respondent failed to contact the GAL prior to the hearing. As was the case with Respondent's failure to contact his counsel, Respondent is responsible for the inability of the GAL to meet with Respondent. For the reasons stated above, the trial court did not abuse its discretion by denying Respondent's motion to continue the termination of parental rights hearing.

II.

Respondent next argues the trial court erred by admitting hearsay testimony during the dispositional phase of the termination hearing. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2005). "'However, out of court statements offered for purposes other than to prove the truth of the matter asserted are not considered hearsay.'" *In re Mashburn*, 162 N.C. App. 386, 390, 591 S.E.2d 584, 588 (2004) (quoting *State v. Carroll*, 356 N.C. 526, 542, 573 S.E.2d 899, 910 (2002), *cert. denied*, *Carroll v. North Carolina*, 539 U.S. 949, 156 L. Ed. 2d 640 (2003)).

In the present case, B.D.C.'s maternal grandmother was asked on direct examination whether B.D.C was "aware that [Respondent] [was] not in her life consistently[.]" Respondent objected and the trial court stated: "Okay. I'm gonna . . . allow it, if she can lay the foundation for that. And if she can't, renew your objection and I'll strike it. So at this time, overruled. Go

ahead. If you can lay the foundation, perhaps she can testify to that." Petitioner's counsel then pursued the following line of questioning:

> Q. . . . Does [B.D.C.] ever ask about [Respondent]?
>
> A. No, she doesn't. She doesn't ask about [Respondent]. She makes comments about [Respondent].
>
> Q. What kind of comments does she make about [Respondent]?
>
> A. She says he's a mean man.
>
> [RESPONDENT'S COUNSEL]: Objection, your Honor.
>
> THE COURT: Okay. Overruled. Go ahead.
>
> Q. . . . What else does she say?
>
> A. She says she wants a new daddy; [Respondent is] mean to her mommy.
>
> [RESPONDENT'S COUNSEL]: Objection, Your Honor.
>
> THE COURT: Thank you very kindly. Overruled. I'm allowing this . . . not for the truth of the matter asserted, but the reason for her opinion. Thank you. Go ahead.

These statements are not hearsay because they were not admitted for the truth of the statements. The statements were admitted instead to explain the maternal grandmother's opinion that B.D.C. was aware that Respondent was not consistently involved in the child's life.

Even assuming, *arguendo*, that these statements were inadmissible hearsay, any error was harmless. The rules of evidence are not as strictly enforced in a bench trial as they are

in a jury trial, and the trial court is presumed to disregard any incompetent evidence unless it appears the trial court was influenced by the incompetent evidence. *In re L.O.K.*, ___ N.C. App. ___, ___, 621 S.E.2d 236, 241 (2005). "'Where there is competent evidence to support the [trial] court's findings, the admission of incompetent evidence is not prejudicial.'" *Id.* at ___, 621 S.E.2d at 241 (quoting *In re McMillon*, 143 N.C. App. 402, 411, 546 S.E.2d 169, 175, *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001)). The party challenging the admission of evidence bears the burden of demonstrating that the trial court relied upon the incompetent evidence in formulating its findings of fact. *Id.* at ___, 621 S.E.2d at 241.

In the present case, Respondent has not met his burden of demonstrating prejudice. The trial court did not make any findings of fact regarding the statements and therefore did not rely upon the challenged evidence in formulating its findings of fact or conclusions of law. We overrule this assignment of error.

III.

Respondent next argues that findings of fact twenty-one and thirty-four in the adjudication order were not supported by clear and convincing evidence. The standard for appellate review of a trial court's determination that grounds exist for termination of parental rights is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence, and whether its conclusions of law are supported by those findings. *In re McMillon*, 143 N.C. App. at 408, 546 S.E.2d at 174. When reviewing

a record on appeal, a trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if there was conflicting evidence before the trial court. *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988).

Respondent challenges the following findings of fact:

> 21. . . . Respondent has never paid cash to . . . Petitioner since [B.D.C.'s] birth to present.
>
> 34. . . . Respondent has had the ability to pay his reasonable portion of child care expenses based upon his various sources of income and lack of bills.

For the reasons stated below, we conclude these findings of fact are supported by clear, cogent and convincing evidence.

While Respondent testified that he gave Petitioner approximately forty dollars in early 2004, Petitioner testified that she had "never received cash from [Respondent.]" Respondent also testified that he had "never actually given [Petitioner] a set -- I mean, a set amount of money on -- you know, on a day like every week. I've never done that." "In a nonjury trial, it is the duty of the trial [court] to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000). We conclude finding twenty-one is supported by clear, cogent and convincing evidence and therefore overrule this assignment of error.

With respect to finding thirty-four, Respondent testified that he worked for a Ruby Tuesday's restaurant and Gold Kist poultry in

2004. Respondent also testified he earned $7,000.00 cleaning up storm damage in Florida in October and November of 2004. Further, Respondent testified he received $1,500.00 from Atlantic Records in February 2005; however, he testified this payment was a loan. Respondent also testified that he lived with his mother. Based upon this testimony, the trial court's finding of fact that Respondent had the ability to support B.D.C. was shown by clear, cogent and convincing evidence and we overrule this assignment of error.

IV.

Respondent next challenges the trial court's following conclusion of law in the adjudication order:

> That pursuant to N.C.G.S. § 7B-1111(a)(5)(d), grounds exist to terminate . . . Respondent's parental rights in that [B.D.C.] was born out of wedlock and that prior to the filing of this Petition to Terminate Parental Rights, . . . Respondent has failed to provide substantial financial support or consistent care with respect to [B.D.C.] or [Petitioner].

Respondent's only argument in support of this assignment of error is that because the challenged findings of fact were not supported by competent evidence, the findings do not support the conclusion of law. However, we have already determined that the challenged findings of fact were supported by clear, cogent, and convincing evidence. Those findings, along with the unchallenged findings of fact, clearly support the trial court's conclusion of law that grounds existed to terminate Respondent's parental rights. *See* N.C. Gen. Stat. § 7B-1111(a)(5)(d) (stating that a trial court may terminate parental rights upon a finding that "[t]he father of a

juvenile born out of wedlock has not, prior to the filing of a petition or motion to terminate parental rights: . . . d. Provided substantial financial support or consistent care with respect to the juvenile and mother."). Therefore, we overrule this assignment of error.

V.

Respondent next assigns error to disposition findings of fact four and sixteen on the ground that they are not supported by the evidence. Respondent also assigns error to disposition conclusion of law one on the ground that it is not supported by the findings of fact. However, Respondent did not set forth any argument pertaining to these assignments of error in his brief and we deem them abandoned. N.C.R. App. P. 28(b)(6). Respondent appears to argue that the trial court abused its discretion by terminating Respondent's parental rights because "[g]rounds to terminate [Respondent's] parental rights were not proven by clear, cogent and convincing evidence[.]"

Termination of parental rights proceedings are conducted in two phases: adjudication and disposition. *See generally, In re Brim*, 139 N.C. App. 733, 741, 535 S.E.2d 367, 371 (2000). During the adjudication phase, a petitioner has the burden of proving by clear, cogent and convincing evidence that one or more of the statutory grounds for termination exist. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). If, in the adjudication phase, a petitioner meets the burden of proving that there is at least one statutory ground on which to terminate parental rights,

the trial court then moves to the disposition phase and must consider whether termination is in the best interests of the child. *Id.* A trial court's decision to terminate parental rights is reviewed by an abuse of discretion standard. *In re Brim*, 139 N.C. App. at 745, 535 S.E.2d at 374.

Respondent argues the present case is similar to *In re Young*, 346 N.C. 244, 485 S.E.2d 612 (1997), where our Supreme Court reversed an order terminating the respondent's parental rights where there was insufficient clear and convincing evidence to support the grounds for termination. *Id.* at 253, 485 S.E.2d at 618. However, in the present case, we have already determined that the trial court's adjudicatory findings were supported by clear, cogent and convincing evidence and that the trial court's adjudicatory conclusion of law was supported by the findings. Therefore, we have determined that grounds existed to terminate Respondent's parental rights.

In reviewing the dispositional order, we only determine whether the trial court abused its discretion. The following unchallenged findings of fact support the trial court's conclusion of law that it was in the best interests of B.D.C. to terminate Respondent's parental rights:

> 13. Respondent has provided no evidence of any relationship between himself and [B.D.C.].
>
> 14. Respondent has no evidence of spending time with [B.D.C.] or any correspondence with [B.D.C.].
>
> 15. No evidence exists that there is any kind of a relationship between . . . Respondent and [B.D.C.] at all.

> . . .
>
> 17. Respondent's lack of interest is best exhibited by the following:
>
> a. That even when . . . Respondent was employed full time and earning income at a "side job" he failed to pay any child support whatsoever.
>
> b. That Respondent is now essentially unemployed and making no attempt to obtain regular employment in order to support . . . [B.D.C.].
>
> c. . . . Respondent's lack of contact with [B.D.C.].
>
> 18. [B.D.C.] has a close bond with . . . Petitioner and . . . Petitioner's family.
>
> 19. [B.D.C.] has a healthy, stable relationship with the maternal grandparents who have provided much of the care that . . . Respondent should have provided to [B.D.C.].
>
> 20. The best evidence in front of the [trial court] indicates that [B.D.C.] has a happy and healthy life with . . . Petitioner and the maternal side of the family.
>
> . . .
>
> 26. The [GAL] provided a recommendation to the [trial court] that it was in the best interests of [B.D.C.] that . . . Respondent's parental rights be terminated.

Accordingly, we conclude the trial court did not abuse its discretion by concluding that it was in B.D.C.'s best interests to terminate Respondent's parental rights.

Respondent also relies upon *Bost v. Van Nortwick*, 117 N.C. App. 1, 449 S.E.2d 911 (1994), where our Court held that the trial court abused its discretion by concluding it was in the best

interests of the children to terminate the respondent's parental rights. *Id.* at 13, 449 S.E.2d at 918. Specifically, in the present case, Respondent argues that "although [B.D.C.] appears to be well settled with [Petitioner] in [B.D.C.'s] grandmother's home, as in Bost[,] . . . this is not grounds to terminate . . . [R]espondent['s] . . . parental rights." (Brief at 21).

Bost is distinguishable from the present case for several reasons. First, while our Court did hold in *Bost* that "a finding that the children are well settled in their new family unit . . . does not alone support a finding that it is in the best interest of the children to terminate [the] respondent's parental rights[,]" *Bost*, 117 N.C. App. at 8, 449 S.E.2d at 915, this was not the sole basis for the trial court's determination in the present case. Although the trial court in the present case found that B.D.C. had a "happy and healthy life with . . . Petitioner and the maternal side of the family[,]" the trial court also made several findings that Respondent did not have any relationship with B.D.C. The combination of these facts support the trial court's determination that termination was in B.D.C.'s best interests.

Second, while the respondent in *Bost* had once been unable to maintain employment or relationships with the children because of his alcoholism, the evidence showed that the respondent had ceased using alcohol a few years prior to the filing of the termination petition, had paid large sums of back child support, and had begun visiting the children. *Bost*, 117 N.C. App. at 5-6, 449 S.E.2d at 913-14. Unlike in *Bost*, Respondent in the present case has never

had a relationship with B.D.C. Respondent has not demonstrated a willingness or ability to be involved in B.D.C.'s life. Rather, as Respondent's counsel argued, Respondent "wants to be a father now. He wants to do whatever it takes to be a father. Yes, it is late, Your Honor, but to terminate now without giving [Respondent] an opportunity, although it would be late, . . . it would be the end of . . . everything for him." Finally, while the guardian ad litem and a court appointed psychologist in *Bost* thought it would be in the best interests of the children not to terminate the respondent's parental rights, *Bost*, 117 N.C. App. at 9, 449 S.E.2d at 916, the GAL in the present case testified that termination of Respondent's parental rights would be in B.D.C.'s best interests. For the reasons stated above, we overrule the assignments of error grouped under this argument.

Respondent fails to set forth arguments pertaining to his remaining assignments of error and we deem them abandoned pursuant to N.C.R. App. P. 28(b)(6).

Affirmed.

Judges WYNN and McCULLOUGH concur.

Report per Rule 30(e).