NO. COA09-628

NORTH CAROLINA COURT OF APPEALS

Filed: 20 October 2009

IN THE MATTER OF:
W.L.A. and O.C.A.

Graham County
Nos. 08 JT 9-10

Appeal by Respondent from order entered 29 July 2008 by Judge Steven J. Bryant in Graham County District Court. Heard in the Court of Appeals 14 September 2009.

*No brief filed for Petitioner-Appellee Graham County Department of Social Services.*

*Annick Lenoir-Peek, for Respondent-Appellant Mother.*

*Pamela Newell Williams, for Guardian ad Litem.*

BEASLEY, Judge.

Respondent appeals from the trial court's order terminating her parental rights to her two daughters, W.L.A. and O.C.A. After careful review, we reverse and remand.

On 4 February 2004, the trial court adjudicated W.L.A. and O.C.A. neglected and dependent.

Department of Social Services (DSS) filed petitions to terminate Respondent's parental rights to W.L.A. and O.C.A. on 19 May 2008.[1] DSS alleged the following grounds for termination of

[1] The biological father was not served with the petition to terminate his parental rights to W.L.A. and O.C.A., because he relinquished parental rights to the children on 9 June 2007.

Respondent's parental rights: (1) neglect and; (2) willfully leaving the children in foster care for more than twelve months without showing reasonable progress to correct the conditions that led to removal. *See* N.C. Gen. Stat. § 7B-1111(a)(1) and (a)(2) (2007). On 30 May 2008, DSS served Respondent by mail with a notice of hearing, which stated that the termination of parental rights hearing was scheduled for 30 June 2008 at 9:30 a.m. A review and permanency planning hearing in the underlying juvenile action was also scheduled for 30 June 2008 at 9:30 a.m.

On 30 June 2008, Respondent and her attorney appeared at the review and permanency planning hearing. Respondent's attorney had been appointed to represent Respondent in the underlying juvenile action on 29 April 2008, after Respondent's prior attorney moved out of state. However, the trial court had not appointed either this new attorney, or any other attorney, to represent Respondent at the termination proceeding. At the review and permanency planning hearing, Respondent moved to hold a witness in criminal contempt for failure to appear. The trial court denied Respondent's motion, but continued the review and permanency planning hearing to 13 August 2008.

The trial court conducted the termination proceeding later that day. The transcript indicates that the hearing was commenced at 2:24 p.m. Neither Respondent nor her attorney attended this hearing. At the hearing the trial court concluded that the grounds alleged by DSS existed to terminate Respondent's parental rights and that termination was in the best interests of W.L.A. and O.C.A.

The trial court entered its written order on 29 July 2008, and Respondent gave timely notice of appeal on 13 August 2008. Because trial counsel had not been appointed to represent her at the termination proceeding, Respondent filed the notice of appeal *pro se*.

Respondent raises two issues on appeal. She contends that (1) the trial court erred by terminating her parental rights without inquiring about whether she had received notice of the hearing, and (2) the trial court abused its discretion in terminating the parental rights of Respondent where termination was not in the children's best interests. We agree that the trial court's failure to inquire of Respondent of her wishes to be represented by counsel, whether she qualified for court-appointed counsel at the termination proceeding and the trial court's failure to provide proper notice to Respondent of the termination proceeding were error. Therefore, we reverse and remand the trial court's order terminating Respondent's parental rights as to W.L.A. and O.C.A.

In support of her argument, Respondent relies on *In re K.N.*, 181 N.C. App. 736, 640 S.E.2d 813 (2007), in which this Court recognized the following:

> "When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures," which in North Carolina has been achieved in part through statutory provisions that ensure a parent's right to counsel and right to adequate notice of such proceedings.

*Id.* at 737, 640 S.E.2d at 814 (quoting *Santosky v. Kramer*, 455 U.S. 745, 753, 71 L. Ed. 2d 599, 606 (1982) and citing N.C. Gen. Stat.

§§ 7B-1101.1, -1106 (2005)). In *K.N.*, the trial court conducted a termination hearing after relieving the mother's attorney. The mother was not at the hearing initially, but arrived a few moments after the conclusion of the twenty minute hearing. *Id.* at 737-38, 640 S.E.2d at 814-15. The mother appealed the termination order, arguing that the trial court erred (1) by relieving the mother's attorney and then conducting the hearing and (2) by conducting the hearing when the mother had not been properly notified. *Id.* at 738, 640 S.E.2d at 815. DSS filed an affidavit of service swearing that a copy of the summons and petition had been sent by certified mail, return receipt requested, and also provided certificates of service of notice of the hearing. *Id.* at 739, 640 S.E.2d at 816. However, our Court found that a discrepancy between addresses, the mother's failure to appear, and questions related to the certified mail receipt were sufficient to rebut the presumption of valid service. *Id.* at 740-41, 640 S.E.2d at 816. We held that "the issues as to valid service, as well as a hearing lasting only twenty minutes with no counsel present for [the mother], raise questions as to the fundamental fairness of the procedures that led to the termination of [the mother's] parental rights." *Id.* at 741, 640 S.E.2d at 817.

The circumstances surrounding the proceedings in the instant case are different from those surrounding the proceedings in *K.N.* Nonetheless, we believe that the holding from *K.N.* governs our review of the instant case. As explained below, we conclude that the procedural irregularities in the instant case abridged the

rights to fundamentally fair procedures that led to the termination of Respondent's parental rights.

First, in our review of the record, we have discovered a discrepancy between the time of the termination hearing listed in Respondent's notices of hearing and the actual time that the hearing occurred. Respondent's notices of hearing in the termination action indicated that the termination hearing was scheduled for 9:30 a.m. on 30 June 2008. However, the hearing actually occurred in the afternoon, and nothing in the record indicates that Respondent had notice of the new time. Additionally, we are reminded that Respondent did attend the review and permanency planning hearing, which was also scheduled for 9:30 a.m. on 30 June 2008. Thus, it appears that Respondent was actually present in court on the correct date and at the correct time of the termination hearing, based on the information available to her.

Moreover, we note that Respondent would not necessarily have had access to the trial court's daily calendar, based on the North Carolina Rules of Recordkeeping.[2] Rule 12.10 provides that "[t]he clerk shall tightly control the distribution of juvenile calendars to insure confidentiality of the proceedings." Pursuant to this rule, the calendars are provided to the presiding judge, the courtroom clerk, the DSS attorney, and the GAL coordinator, but

[2] The North Carolina Rules of Recordkeeping are issued by the Administrative Office of the Courts. The Rules of Recordkeeping provide the clerks of court of this State with uniform rules for maintaining records in superior and district court.

"shall never be provided to the juvenile, his or her parents, or their attorneys." Therefore, Respondent would not have known that the hearing was calendared for a later time, unless the trial court, the clerk, DSS, or the GAL made her aware of the rescheduling. Indeed, the trial court proceeded with the permanency planning hearing, but it is not apparent that any of the parties discussed the termination hearing scheduled for later that day. We find this lack of coordination peculiar, given that the need for a permanency planning hearing would have been obviated by the termination of Respondent's parental rights.

We also find it curious that Respondent and her attorney would appear at a permanency planning hearing in the morning, but not appear at the more crucial termination hearing in the afternoon. Indeed, this peculiarity was recognized by the trial court at the conclusion of the hearing:

> THE COURT: In all candor . . . I kind of expect that there's going to be a motion filed in this case to set this all aside. I say that, [] clearly because [] she's here today in defense of her underlying juvenile case and walks out the door on a termination of parental rights. It just doesn't make any sense, and I suspect at some point in time in the not too distant future -- and, again, why argue about -- about Mr. Rhodes and his non-appearance here in a hearing in August if there's going to be an intervening termination. I have a feeling [counsel] probably wasn't aware that the termination had been served. I don't know whether she's really got a good reason why she didn't [] do what she was supposed to do, but I just -- it just -- the inconsistency there is striking. I just figured there was going to be a motion to set all this aside at some point.

Thus, we question whether Respondent had notice of the hearing.

Next, it appears that the notices of hearing were not served upon Respondent in a timely fashion. When DSS files a petition to terminate parental rights, the respondent parent is given thirty days after service of the petition and summons to file a written answer. N.C. Gen. Stat. § 7B-1106(a)(5) (2007). The clerk of court may send the respondent parent notice of the time, date, and place of hearing upon the filing of written answer, or after thirty days from the date of service, if no answer is filed. Here, the summonses and petitions were served on 20 May 2008, and Respondent did not file an answer. Therefore, the clerk of court should have mailed a notice of hearing no earlier than 20 June 2008, which is thirty days from the date of service of the summons and petition. Instead, the notices of hearing were served via mail on 30 May 2008, twenty-one days too early.

Finally, we have discovered several issues related to Respondent's right to counsel, as guaranteed by N.C. Gen. Stat. § 7B-1101.1 (2007). Based on our review of the record, it appears that Respondent was not afforded the right to counsel in the termination action. When DSS initiates a proceeding for termination of parent rights by filing a petition to terminate parental rights, rather than by filing a motion, a "new case" is commenced and summonses are issued to the parties. *See* N.C. Gen. Stat. § 7B-1106 (2007). Even if the respondent parent had an attorney previously appointed in a different case, such as an underlying neglect, dependency, or abuse proceeding, the previously appointed attorney does not automatically represent the respondent

parent in the new termination case. Indeed, N.C. Gen. Stat. § 7B-1106(b)(4) (2007) provides that the summons "shall" include:

> Notice that this is a new case. Any attorney appointed previously will not represent the parents in this proceeding unless ordered by the court[.]

Here, Respondent's attorney was appointed on 29 April 2008 to represent her in the underlying neglect and dependency action (03 JA 26-27). This attorney was not re-appointed to represent Respondent in the termination action (08 JT 09-10).[3] Therefore, Respondent's attorney was not served with the summonses, petitions, or notices of hearing in the termination case. Indeed, Respondent is listed as "*pro se*" on the hearing transcript from the termination hearing. Even though Respondent was responsible for contacting the clerk of court to obtain appointed counsel, she was given little opportunity to do so and the trial court made no inquiry into whether Respondent desired counsel. *See* N.C. Gen. Stat. § 7B-1109(b) (2007). We are aware that a trial court may terminate a parent's parental rights, after a hearing, even if the parent failed to answer the petition and is not present at the hearing. *See* N.C. Gen. Stat. § 7B-1107 (2007). However, we find that the swift time line, brief hearing, and unusual circumstances

---

[3] The difference in the case file numbers is another procedural irregularity. Pursuant to Rule 12.1 of the Rules of Recordkeeping, the termination actions should have received the same case file numbers as the original neglect cases. Rule 12.1 provides that "the clerk shall establish and maintain one case file for each juvenile." The different types of proceedings are then divided into subfolders. Here, the clerk should have used file numbers 03 JA 26-27 for the termination actions instead of opening new files (08 J 09-10).

surrounding the instant case raise questions as to whether Respondent's right to counsel was assured. *See K.N.*, 181 N.C. App. at 741, 640 S.E.2d at 817.

We conclude that Respondent's lack of notice of the termination hearing and failure of the trial court to inquire about Respondent's desire for counsel obviated her rights during the hearing for termination of her parental rights to W.L.A. and O.C.A. We are mindful that the record is replete with evidence which casts doubt on Respondent's ability to parent. Nonetheless, Respondent is entitled to procedural safeguards which provide fundamental fairness in a termination proceeding to include proper notice of the hearing and right to counsel. *See K.N.*, 181 N.C. App. at 737, 640 S.E.2d at 814. Accordingly, we reverse the order terminating Respondent's parental rights to W.L.A. and O.C.A. and remand for a new hearing on the termination of parental rights subsequent to a determination by the trial court on Respondent's desire to be represented by counsel and if so, whether she is entitled to appointment of counsel in the termination proceeding. Given our disposition of this appeal , we need not address Respondent's best interests argument.

Reversed.

Judges GEER and HUNTER, JR. concur.

Report per Rule 30(e).