NO. COA10-356

NORTH CAROLINA COURT OF APPEALS

Filed: 16 November 2010

IN THE MATTER OF:

Stanly County V.L.J.
No. 09 J 30

Appeal by respondent from order entered 14 December 2009 by Judge Lisa Thacker in Stanly County District Court. Heard in the Court of Appeals 3 November 2010.

No brief filed on behalf of petitioner-appellee.

Appellate Defender Staples Hughes, by Assistant Appellate Defender J. Lee Gilliam, for respondent-appellant.

HUNTER, Robert C., Judge.

Respondent father appeals from an order denying his motion for a new trial or, in the alternative, to set aside an order terminating his parental rights to his daughter, V.L.J. (born November 1999).[1] Respondent and V.L.J.'s mother ("petitioner") are divorced and V.L.J. resides with petitioner. On 1 June 2009, petitioner filed a petition to terminate respondent's parental rights. Respondent, proceeding *pro se*, filed an answer on 7 July 2009. He requested appointment of counsel, and moved to disqualify

[1] The initials V.L.J. will be used to protect the identity of the minor child.

petitioner's counsel. The trial court scheduled the hearing for 9 July 2009. Respondent transmitted a fax message to the clerk of superior court on 9 July 2009 in which he requested a continuance of the hearing. He attached to the fax message a discharge summary of his visit to Kings Mountain Emergency Department in Kings Mountain, North Carolina, on 2 July 2009, which indicated he had been diagnosed with a skin infection known as cellulitis. The fax message does not indicate at which time it was transmitted or received.

At the call of the petition for hearing at 10:31 a.m. on 9 July 2009, petitioner's attorney noted the absence of respondent and the guardian *ad litem* from the hearing, and stated that "in light of the fact neither one of them [is] here, I think it would be appropriate for [the hearing] to be continued." Judge William Tucker continued the hearing until 6 August 2009 and commented that since respondent had not made an official appearance in the case, he would have to be notified of the continuance of the hearing.

Neither respondent nor any attorney on respondent's behalf appeared at the call of the case for hearing on 6 August 2009. Petitioner's attorney commented that the attorney upon whom he had been serving papers in this matter was representing respondent in a criminal matter. During discussion of respondent's pending motions for appointment of an attorney and to disqualify petitioner's attorney, petitioner's attorney acknowledged that an attorney had not been appointed to represent respondent in the termination of parental rights action. He further conceded that

notice of the 6 August 2009 hearing had not been given to respondent, but he questioned whether notice was required to be given to respondent. Petitioner's counsel argued that even if notice were required, as a practical matter notice could not be given because respondent failed to provide an address or telephone number. The presiding judge, the Honorable Lisa Thacker, immediately corrected counsel by reading the mailing address provided by respondent in his answer to the petition. Petitioner then argued to the court that the hearing was "continued for [respondent]" and that respondent, acting as his own attorney, was "required to police his own case."

After hearing the arguments of petitioner's counsel and reviewing the file, Judge Thacker dictated findings of fact whereby she found, *inter alia*, that respondent requested a continuance for medical reasons, that respondent failed to communicate to the court after making his motions, and that respondent failed to appear for the hearing on respondent's motions and the petition. The court dismissed respondent's motion to disqualify petitioner's counsel because respondent failed to appear for the hearing to prosecute the motion. The court also dismissed respondent's motion for appointment of counsel because he failed to appear and show that he is indigent. The court thereafter heard testimony in the termination of parental rights proceeding and entered an order on 6 August 2009 terminating respondent's parental rights to the child.

On 2 November 2009, respondent filed a motion for relief from, or to set aside, the order terminating his parental rights pursuant to Rules 59 and 60 of the North Carolina Rules of Civil Procedure. He asserted that the order was void because he was not given notice of the termination hearing scheduled on 6 August 2009.

Respondent appeared at the hearing on the motion to set aside the order on 3 December 2009. He stated that he knew about the original hearing date but not the continued hearing date. He stated that he called the clerk's office and left messages and that no one returned his calls to let him know the date of the rescheduled hearing. He stated that the only information he received was that the hearing had been continued. Judge Thacker ruled that respondent failed to show reason for setting aside the order. Judge Thacker denied the motion.

Discussion

Respondent contends the court erred by failing to set aside the order terminating his parental rights when he had no notice of the 6 August 2009 hearing. For the following reasons, we agree with respondent.

"[A] trial judge's *discretionary* order pursuant to G.S. 1A-1, Rule 59 for or against a new trial upon *any* ground may be reversed on appeal only in those exceptional cases where an abuse of discretion is clearly shown." *Worthington v. Bynum*, 305 N.C. 478, 484, 290 S.E.2d 599, 603 (1982). We thus review a trial court's ruling upon a Rule 59 motion to determine whether the trial judge abused his discretion. *In re Buck*, 350 N.C. 621, 629, 516 S.E.2d

858, 863 (1999). Similarly, "[a]s is recognized in many cases, a motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975).

"It is clear that the court may give relief from a judgment pursuant to Rule 60(b)(6) if the party making the motion has not had notice that the case was duly calendared." *Windley v. Dockery*, 95 N.C. App. 771, 773, 383 S.E.2d 682, 683 (1989). A party is generally considered to have constructive notice of all motions made and orders entered during a regularly scheduled court date. *Wood v. Wood*, 297 N.C. 1, 6, 252 S.E.2d 799, 802 (1979). "This rule with reference to constructive notice, however, bends to embrace common sense and fundamental fairness." *Hagins v. Redevelopment Comm.*, 275 N.C. 90, 98, 165 S.E.2d 490, 495 (1969). This Court has held that a Rule 60(b) motion should have been granted where the only evidence before the trial court was that the moving party did not have notice of the date trial was scheduled to commence. *Windley*, 95 N.C. App. at 773, 383 S.E.2d at 683.

In the case at bar, all of the evidence at the hearing upon respondent's motion to set aside the order shows that respondent did not have notice of the 6 August 2009 termination of parental rights hearing. At best, respondent knew that the hearing had been continued, but nothing in the record shows that respondent ever received notice of the actual date of the rescheduled hearing. Judge Tucker acknowledged the need for notice to be given to

respondent of the new hearing date when he granted the continuance. Notice of the new hearing date was never given to respondent. Respondent claims that he attempted to contact the court to find out the date of the rescheduled hearing, but his calls were not returned. Despite the fact that Judge Tucker stated that defendant needed to be informed of the rescheduled hearing date, neither the court nor petitioner's attorney took action to notify defendant.[2]

Common sense and fundamental fairness require us to hold that defendant's motion for relief or to set aside the trial court's order terminating his parental rights should have been granted because he was not given notice of the rescheduled hearing date. The United States Supreme Court has stated:

> [P]ersons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

Santosky v. Kramer, 455 U.S. 745, 753-54, 71 L. Ed. 2d 599, 606 (1982).

The order denying respondent's motion to set aside the judgment is hereby reversed and the matter remanded to the trial court for further proceedings not inconsistent with this opinion.

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[2] We note that the trial court rescheduled the initial hearing, in part, because defendant was not present and requested a continuance; however, the guardian *ad litem* also did not appear at the hearing and petitioner's attorney stated that it would "appropriate" for the hearing to be rescheduled. Accordingly, defendant was not the sole cause of the rescheduling.

Reversed and remanded.

Judges ELMORE and JACKSON concur.

Report per Rule 30(e).