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NO. COA11-377
NORTH CAROLINA COURT OF APPEALS

Filed: 20 September 2011

IN THE MATTER OF:
T.O. and A.H.

Mecklenburg County
Nos. 08 JT 658 and 659

Appeal by respondent-father from orders entered 26 October 2010 and 30 December 2010 by Judge Louis A. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 15 August 2011.

*Kathleen Arundell Widelski, for petitioner-appellee
Mecklenburg County Department of Social Services.*

W. Michael Spivey, for respondent-appellant father.

Pamela Newell, for Guardian ad Litem.

THIGPEN, Judge.

Respondent-father appeals from an order terminating his parental rights to the minor children T.O. and A.H. arguing he received ineffective assistance of counsel. Based on evidence tending to show that while respondent-father was in prison, his counsel failed to secure respondent-father's presence at many of the hearings, failed to file a response on respondent-father's behalf to either of the petitions to terminate his parental rights, and ultimately withdrew on the basis that she had lost contact with

respondent-father and had no instructions from him on how to proceed, we remand for a determination by the trial court as to whether counsel's representation of respondent-father at the termination of parental rights hearing was ineffective and whether respondent-father is entitled to appointment of counsel in a new termination of parental rights proceeding.

On 16 September 2008, the Mecklenburg County Department of Social Services ("DSS") filed a petition alleging that T.O. and A.H. were neglected and dependent juveniles. At the time the petition was filed, the juveniles were residing with their mother, and respondent-father was in prison and "not involved" in the lives of his children. Jennifer Coulter was appointed as counsel for respondent-father. On 14 November 2008, the court adjudicated the children to be dependent juveniles. Respondent-father did not appear at the hearing.

On 2 July 2009, DSS filed a petition to terminate respondent-father's parental rights to A.H. DSS alleged that respondent-father was not involved in A.H.'s life, had shown no interest in A.H., and had failed to maintain contact with the juvenile. DSS claimed that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), (3), (5), and (7) to terminate respondent-father's parental rights. Jennifer Coulter was again appointed to represent respondent-father. Respondent-father filed

no response to the petition.

On 28 July 2009, respondent-father mailed a letter to the superior court. Respondent-father wrote:

I'm writing in [an] attempt to get help concerning my lawyer[,] a Mrs. Jennifer Coulter[,] in my DSS case with my boys case number 2008 JT 659. Mrs. Coulter has for the past 2 years? [sic] been on this case. She[] hasn't spoken on my behalf. She hasn't gotten me to any of my court dates concerning my kids. All it takes is a writ[]. She has never responded to any of the letters I've written her. [T]he states [sic] is trying to take my boys from me, I'm in prison[,] she knows that. [I]f she refuses to help or inform me of things I can do to prevent this or alternatives, what do I do? [T]ime is running out[.] [I]s there anything you can do to make sure she does a better job. A[t] least put forth some effort or reassign the case to someone who will. I know my issues may be of unimportance to her but if they take my boys I'd die literally! Thanks. [I]f she doesn't respond in 30 days I know they're gonna [sic] take my boys. [D]on't let this happen without even tryin[g] to fight for me. [T]here[']s gotta [sic] be some programs or somethin[g] I can do to better my chances of not losing them. I just need a chance to prove I can raise my boys. [H]elp me get that opportunity.

Shortly thereafter, on 4 August 2009, Coulter applied for and obtained a writ of *habeas corpus ad testificandum* to produce respondent-father for a permanency planning hearing scheduled for 12 August 2009. While at the courthouse for the hearing, respondent-father was served with the petition to terminate his parental rights to A.H.

On 11 March 2010, DSS filed a petition to terminate respondent-father's parental rights to T.O. DSS again alleged that respondent-father was not involved in his child's life. DSS claimed that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), (2), (3), and (7) to terminate respondent-father's parental rights. Jennifer Coulter was again appointed to represent respondent-father. Respondent-father filed no response to the petition.

Coulter filed an application for another *writ of habeas corpus ad testificandum* on 4 June 2010 and, pursuant to the writ, respondent-father was produced for a permanency planning hearing held on 8 June 2010. At the hearing, respondent-father expressed his interest in reunifying with the juveniles, and indicated he was scheduled to be released from prison to a halfway house in July 2010. The trial court ordered that respondent-father be provided with two hours per week of supervised visitation with the juveniles at a DSS facility. Respondent-father, however, failed to exercise his visitation rights.

Hearings were held on the petition to terminate respondent-father's parental rights as to both juveniles on 12 October 2010. Respondent-father did not appear at the hearing. At the beginning of the hearing, Coulter moved to withdraw as respondent-father's counsel on the grounds that she had "lost contact with him" and had not received "any instructions" from

respondent-father as to his wishes in the matter. The court granted the motion and allowed Coulter to withdraw. The court thereafter concluded that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), (2), (3) and (7) to terminate respondent-father's parental rights and that termination of respondent-father's parental rights was in the best interest of the juveniles. On 30 December 2010, the court entered an amended termination order.

Respondent-father's sole argument on appeal is that he received ineffective assistance of counsel. After careful review, we remand for further findings of fact regarding counsel's representation in this matter.

"Parents have a 'right to counsel in all proceedings dedicated to the termination of parental rights.'" *In re L.C.*, 181 N.C. App. 278, 282, 638 S.E.2d 638, 641 (quoting *In re Oghenekevebe*, 123 N.C. App. 434, 436, 473 S.E.2d 393, 396 (1996)), *disc. review denied*, 361 N.C. 354, 646 S.E.2d 114 (2007); *see also* N.C. Gen. Stat. § 7B-1101.1 (2009). "This statutory right includes the right to effective assistance of counsel." *In re Dj.L., D.L., & S.L.*, 184 N.C. App. 76, 84, 646 S.E.2d 134, 140 (2007) (citations omitted). "To prevail in a claim for ineffective assistance of counsel, respondent must show: (1) [the] counsel's performance was deficient or fell below an objective standard of reasonableness; and (2) [the] attorney's performance was so deficient [he] was denied a fair hearing." *In*

re J.A.A. & S.A.A., 175 N.C. App. 66, 74, 623 S.E.2d 45, 50 (2005) (citation omitted).

Here, upon review of the record and transcript, we are unable to determine whether Coulter made sufficient efforts to communicate with and consult with respondent-father. The trial court made no extended inquiry into trial counsel's efforts to communicate with and locate respondent-father, simply relying on counsel's statement that she had lost contact with respondent-father and had received no instructions on how to proceed. In *In re S.N.W. & A.Z.W.*, ___ N.C. App. ___, 698 S.E.2d 76 (2010), under similar circumstances, this Court stated that "the trial court should have inquired further about Respondent counsels' efforts: (1) to contact Respondent; (2) to protect Respondent's rights; and (3) to ably represent Respondent." *Id.* at ___, 698 S.E.2d at 78.

We further note that the record raises questions regarding whether counsel provided respondent-father with effective representation during the entirety of the matter. Respondent-father claims that counsel failed to "advise, act and advocate" on his behalf. In *In re S.N.W.*, we recognized that "a lawyer cannot properly represent a client with whom he has no contact." *Id.* at ___, 698 S.E.2d at 79 (quoting *Dunkley v. Shoemate*, 350 N.C. 573, 578, 515 S.E.2d 442, 445 (1999)). This Court thus stated that "a finding of ineffective assistance of counsel will

generally not be made where the purported shortcomings of counsel were caused by the party." *Id.* (citation omitted). "However, procedural safeguards, including the right to counsel, must be followed to ensure the 'fundamental fairness' of termination proceedings." *Id.* (citation omitted).

The record before us "raises questions as to whether Respondent was afforded with the proper procedures to ensure that his rights were protected during the termination of his parental rights to the minor children." *Id.* We reiterate the statement of this Court in *In re S.N.W* that the record contains evidence "which casts doubt on [r]espondent[-father]'s ability to parent[;] [n]onetheless, [r]espondent[-father] is entitled to procedures which provide him with fundamental fairness in this type of action." *Id.* at ___, 698 S.E.2d at 79 (2010). Accordingly, we remand for a determination by the trial court regarding efforts by respondent-father's counsel to contact and adequately represent respondent-father during the proceedings to terminate his parental rights.

REMANDED.

Chief Judge MARTIN and Judge ERVIN concur.

Report per Rule 30(e).