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NO. COA12-593
NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2012

IN THE MATTER OF:

Union County
Nos. 07 JT 206-08

C.M.R., L.C.R., and B.G.R.

Appeal by respondent-father from order entered 27 February 2012 by Judge Hunt Gwyn in Union County District Court. Heard in the Court of Appeals 9 October 2012.

*Hucks & Regan, LLP, by Erin S. Hucks and Tracy Regan, for petitioner-appellee mother.*

*Mercedes O. Chut for respondent-appellant father.*

THIGPEN, Judge.

Respondent, the father of the juveniles, appeals from an order terminating his parental rights. After careful review, we affirm.

Petitioner, the mother of the juveniles, and respondent were married in December of 1994 and separated 1 March 2001. Three children were born of the marriage: C.M.R., L.C.R., and

B.G.R. On 16 September 2002, petitioner and respondent divorced and petitioner was granted custody of the juveniles.

On 19 November 2007, petitioner filed a petition for termination of parental rights alleging that respondent had neglected the children under N.C. Gen. Stat. § 7B-1111(a)(1); had willfully failed without justification to pay for the care of the juveniles, as required by the voluntary support agreement and order under N.C. Gen. Stat. § 7B-1111(a)(4); and had abandoned the children under N.C. Gen. Stat. § 7B-1111(a)(7). On 28 October 2008, the trial court concluded that grounds existed to terminate respondent's parental rights based upon its determinations that respondent willfully failed without justification to pay for the care of his children, as required by the voluntary support agreement, and that it was in the best interests of the children to terminate his parental rights. Respondent appealed.

After hearing the appeal, this Court vacated the trial court's order, in an unpublished opinion, due to concerns that respondent's right to due process was not properly observed. Specifically, this Court expressed reservations regarding respondent-father's capacity and the trial court's failure to appoint him a guardian *ad litem*. Accordingly, this Court

remanded the matter with instructions that the trial court should address the following "deficiencies" in the record:

> 1) The results of any psychological evaluation of respondent and a determination of whether he is competent to assist his counsel in the TPR proceedings; 2) The level of respondent's mental illness, if any, and whether the illness was debilitating to the extent that respondent's ability to hold a job and pay child support was affected; 3) If respondent's mental illness prevented him from gainful employment, what effect, if any, does this have on the allegations of willful non-support and abandonment determinations; 4) Whether respondent had a guardian *ad litem* separate from his appointed attorney at all times; 5) Who served as respondent's attorney and guardian *ad litem* prior to the TPR proceeding, their dates of appointment, and if applicable, the date of withdrawal from respondent's case; and 6) If Ms. Austin was appointed as respondent's guardian *ad litem*, was there adequate time for her to assist respondent in preparing for the TPR hearing.

*In re C.M.R.*, (No. COA09-117) (2009). This Court further stated that, on remand, the trial court should "reconsider this matter on the merits, to the extent necessary, and enter a new order addressing the issue of whether respondent's parental rights should be terminated." *Id.*

On remand, respondent filed a motion seeking funds for expert assistance, namely, Dr. Karen Shelton, a licensed psychologist. The trial court granted the request. Respondent

underwent a psychological evaluation on 10 January 2010. On 12 May 2010, the trial court determined that respondent was "competent to assist his counsel in the proceedings[.]"

On 17 June 2010, in accordance with this Court's instructions to reconsider the matter on the merits, the trial court entered an order denying the petition to terminate respondent's parental rights. The trial court found that respondent suffered from mental illness and a delusional disorder which prevented him from seeking or maintaining employment or obtaining and following through with medical treatment. The trial court therefore concluded that grounds did not exist to terminate respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(4), in that respondent's failure to pay for the care, support and education of the juveniles was not willful.

On 10 August 2010, petitioner filed a new petition to terminate respondent's parental rights. Petitioner alleged that respondent: (1) had neglected the juveniles under N.C. Gen. Stat. § 7B-1111(a)(1); (2) was incapable of providing for the proper care and supervision of the juveniles due to his mental illness and delusional disorder, and there was a reasonable probability that the incapability would continue for the

foreseeable future, under N.C. Gen. Stat. § 7B-1111(a)(6); and (3) had abandoned the juveniles under N.C. Gen. Stat. § 7B-1111(a)(7). On 27 September 2010, respondent filed a motion to dismiss and motion for summary judgment in which he argued that petitioner should be barred by the doctrines of *res judicata* and collateral estoppel from bringing forth the petition because the same factual matters and issues had previously been adjudicated on its merits. The motion was denied on the basis that petitioner's new petition "alleges grounds based on unadjudicated issues, facts and circumstances[.]" On 27 February 2012, the trial court terminated respondent's parental rights after concluding that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and (7). Respondent appeals.

Respondent first argues that trial court erred by failing to dismiss the second petition on the basis that it was barred by the doctrines of *res judicata* and collateral estoppel. We disagree. This Court has stated:

> Under the doctrine of *res judicata*, a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them. Generally, in order that the judgment in a former action may be held to constitute an estoppel as *res judicata* in a subsequent action there must be identity of parties, of subject matter and of issues.

*In re I.J.*, 186 N.C. App. 298, 300, 650 S.E.2d 671, 672 (2007) (citation and quotation marks omitted). "A new petition, based on circumstances arising subsequent" to the original hearing is considered a new action, and is not "barred by the doctrine of *res judicata*." *In re S.R.G.*, 200 N.C. App. 594, 599, 684 S.E.2d 902, 905 (2009), *disc. review and cert. denied*, 363 N.C. 804, 691 S.E.2d 19 (2010). "The doctrine of collateral estoppel operates to preclude parties 'from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination.'" *In re Wheeler*, 87 N.C. App. 189, 194, 360 S.E.2d 458, 461 (1987) (*quoting King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973)).

Here, petitioner alleged in both petitions that respondent abandoned the juveniles. Pursuant to N.C. Gen. Stat. § 7B-1111(a)(7), parental rights may be terminated when a "parent has willfully abandoned the juvenile *for at least six consecutive months immediately preceding the filing of the petition* or motion[.] . . ." N.C. Gen. Stat. § 7B-1111(a)(7) (2011) (emphasis added). The first petition, however, alleged grounds arising from facts and circumstances occurring prior to the 19 November 2007 filing date, whereas the second petition concerned the period of time preceding the 10 August 2010 filing date.

Thus, the two petitions concerned wholly different statutory time periods. Consequently, there was no common identity of issues in the two petitions. Accordingly, we conclude the doctrines of *res judicata* and collateral estoppel do not apply to bar petitioner's new petition to terminate respondent's parental rights.

We next consider whether the trial court erred by concluding that grounds existed to terminate respondent's parental rights. N.C. Gen. Stat. § 7B-1111 sets out the statutory grounds for terminating parental rights. A finding of any one of the separately enumerated grounds is sufficient to support termination. *In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990). "The standard of appellate review is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law." *In re D.J.D.*, 171 N.C. App. 230, 238, 615 S.E.2d 26, 32 (2005) (citing *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *disc. review denied, appeal dismissed,* 353 N.C. 374, 547 S.E.2d 9 (2001)). The trial court's findings of fact are conclusive even when there is evidence supporting contrary findings. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997).

In the case *sub judice*, the trial court concluded there were grounds to support termination of respondent's parental rights due to abandonment. N.C. Gen. Stat. § 7B-1111(a)(7). As noted previously herein, the new petition to terminate respondent-father's parental rights was filed on 10 August 2010. Thus, the relevant six month statutory period was from 10 February 2010 to 10 August 2010.

This Court has defined abandonment as follows:

> [W]ilful neglect and refusal to perform the natural and legal obligations of parental care and support. . . . [I]f a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wilfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child.

*In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 427 (2003) (quoting *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962)). In support of its conclusion that respondent abandoned the juveniles, the trial court found that:

> 33. Respondent-Father has a delusional disorder as was testified to by an expert, Dr. Karen Shelton.
>
> 34. Independent of that delusional disorder, the Respondent-Father has not been involved with the minor children since the year 2002. There have been no gifts, cards, birthday presents or even phone calls to the minor children for almost an entire decade.

35. At most, in the light most favorable to the Respondent, there were two letters to the minor children. One letter was sent to the Petitioner-Mother's current address in 2008 and was directed to her with copies to the minor children.

36. One letter independent of the letter addressed to [petitioner-mother] was address[ed] specifically to the minor children that are the subject of this action.

37. The Court finds specifically by clear, cogent and convincing evidence that the Respondent-Father's purported reason for having lack of contact with his own minor children by cards, gifts, or letters, was that, presumably, [petitioner-mother] would thwart his efforts. The Court finds this to be more of an afterthought and an excuse for his inability to maintain any relationship with his minor children.

38. The Respondent's mere supposition that the Petitioner would thwart his efforts is not nearly a sufficient reason to excuse the complete lack of contact with his own three children for an entire ten year period.

39. The crux of the matter is whether or not Respondent's delusional disorder was such that it would render him unfit or unable to have the contact with his own minor children that is contemplated in the definitions of neglect and abandonment in Chapter 7B.

40. The Court notes and finds as a fact that during the same period of time for which he claims an inability to have contact and relationships with his children, he has:

a. Held seven different jobs;

> b. Purchased and given away automobiles,
>
> c. Obtained housing at no cost to himself at different points and obtained housing on his own at other points;
>
> d. Held [] associate and undergraduate degree[s]; and
>
> e. Successfully filed for visitation pro se in Guilford County and on his own choosing and election withdrew that request for visitation.
>
> 41. With the exception of the Respondent-Father's lack of relationship and communication with his three minor children, he walks and carries himself quite ably, quite intelligently and quite articulately. That, whatever else his delusional disorder does to him; it does not render him unfit or unable to have the contact with his own minor children that, by any reading of the law or common sense, is required.

Respondent initially contends that the trial court's findings of fact are deficient because they do not contain specific dates or address the relevant statutory time period. We note, however, that the statute requires that the juveniles be abandoned for "*at least*" six months prior to the motion or petition to terminate parental rights. N.C. Gen. Stat. § 7B-1111(a)(7) (emphasis added). Here, the trial court's findings make it abundantly clear that respondent's failure to

contact the children or maintain a relationship *both* encompassed and immediately preceded the relevant statutory time period.

Respondent additionally argues that the "findings inaccurately distort the overwhelming evidence in this case." Respondent contends that the evidence demonstrates his "tremendous efforts to maintain a relationship with his children." We are not persuaded.

Respondent admitted that he had not seen the juveniles since 2002, and had not sent any cards or gifts to his children despite having known their address since 2007. Respondent also acknowledged that there was no custody order preventing him from seeing the juveniles. Respondent claimed he did not send any cards or gifts, or attempt to contact the juveniles, because he felt his efforts would be "useless" due to his belief that petitioner would thwart his attempts. The record demonstrates, however, that respondent failed to make any attempt at contacting the juveniles, providing cards or gifts, or maintaining a relationship during the statutory period and extending for several years prior to the statutory period. Consequently, there is no evidence that petitioner thwarted his attempts during this period, and respondent's belief that petitioner would thwart his attempts was mere supposition.

We therefore conclude that the trial court's findings regarding respondent's failure to communicate with the juveniles or maintain a relationship are supported by the evidence, and support its conclusion that grounds existed to terminate his parental rights due to abandonment. Accordingly, we hold the trial court did not err in its conclusion that grounds existed to terminate respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(7).

Respondent additionally argues that the trial court erred by concluding that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) to terminate his parental rights. However, because we conclude that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) to support the trial court's order, we need not address the remaining ground found by the trial court to support termination. *Taylor*, 97 N.C. App. at 64, 387 S.E.2d at 233-34. Accordingly, we affirm.

AFFIRMED.

Judges CALABRIA and BEASLEY concur.

Report per Rule 30(e).