IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-602

Filed: 20 December 2016

Cabarrus County, No. 15 JT 85

IN THE MATTER OF: L.A.T.

Appeal by respondent from order entered 7 March 2016 by Judge Christy E. Wilhelm in Cabarrus County District Court. Heard in the Court of Appeals 5 December 2016.

Ferguson, Hayes, Hawkins & DeMay, PLLC, by James R. DeMay, for petitioner-appellee.

Lisa Anne Wagner for respondent-appellant.

McCULLOUGH, Judge.

This appeal arises from a private termination of parental rights action. Respondent appeals from an order terminating his parental rights to his minor child "Luke."[1] We affirm.

I. Background

Petitioner and respondent were married on 3 March 2008 and lived together in Connecticut. In April 2009, petitioner gave birth to Luke while respondent was

[1] The parties have stipulated to a pseudonym for the minor child pursuant to N.C. R. App. P. 3.1(b).

incarcerated. Petitioner brought Luke to visit respondent in prison, and petitioner and respondent communicated via letters.

When Luke was approximately seven months old, respondent completed his sentence and came to live with his family. During the next two years, petitioner, respondent, and Luke lived together, and respondent worked a variety of odd jobs. In December 2011, respondent assaulted petitioner, fracturing her sternum. Respondent was incarcerated again in February 2012. In August 2012, petitioner and respondent obtained a divorce. Petitioner was awarded sole custody of Luke.

In December 2013, petitioner and Luke moved to North Carolina with petitioner's new husband. In August 2014, petitioner sent respondent a certified letter from her new address asking respondent to relinquish his parental rights. Respondent did not respond or otherwise attempt any communication with petitioner or Luke.

On 30 July 2015, petitioner filed a petition to terminate respondent's parental rights on the grounds of failure to pay child support and willful abandonment. N.C. Gen. Stat. § 7B-1111(a)(4), (7) (2015). On 3 October 2015, respondent filed an answer and motion to dismiss for lack of personal jurisdiction. On 13 November 2015, the trial court denied the motion.

The petition was heard on 10 February 2016. On 7 March 2016, the trial court entered an order terminating respondent's parental rights on the ground of willful abandonment. Respondent filed a timely notice of appeal.

II. Personal Jurisdiction

Respondent argues that the trial court erred by denying his motion to dismiss for lack of personal jurisdiction. He contends that he does not have sufficient minimum contacts with North Carolina to permit the trial court to exercise jurisdiction over him. Respondent has failed to preserve this issue for appellate review.

N.C. R. App. P. 3.1 governs appeals in termination of parental rights cases. Portions of Rule 3.1 set out specific rules that differ from other civil appeals, including provisions which protect juveniles' identities and expedite the time of filings. N.C. R. App. P. 3.1(b)-(c) (2016). However, other than when specific portions of the appeal are governed by these special provisions, "all other existing Rules of Appellate Procedure shall remain applicable." N.C. R. App. P. 3.1(a).

N.C. R. App. P. 3(d) requires that a notice of appeal "shall designate the judgment or order from which appeal is taken . . . ." In this case, respondent's notice of appeal stated it was

> from the Order entered by the Honorable Christy E. Wilhem, District Court Judge Presiding over the District Court of Cabarrus County, Civil Division, on March 7, 2016, filed March 7, 2016, finding grounds for the

> Termination of the Parental Rights of the Respondent . . . and from the Order entered by the Honorable Christy E. Wilhem, District Court Judge Presiding over the District Court of Cabarrus County, Civil Division, on March 7, 2016, and filed March 7, 2016, finding it is in the best interests of the minor child[] that the parental rights of the Respondent . . . be terminated, and so terminating his parental rights to the minor child . . . .

Thus, respondent's notice of appeal only indicated that it was from the trial court's order terminating respondent's parental rights on 7 March 2016. The notice of appeal does not designate the trial court's order denying his motion to dismiss, entered on 13 November 2015, as an order from which his appeal was taken.

> [I]f an appellant omits a certain order from the notice of appeal, our Court may still obtain jurisdiction to review the order pursuant to N.C. Gen. Stat. § 1-278. Review under [N.C. Gen. Stat.] § 1-278 is permissible if three conditions are met: (1) the appellant must have timely objected to the order; (2) the order must be interlocutory and not immediately appealable; and (3) the order must have involved the merits and necessarily affected the judgment.

Yorke v. Novant Health, Inc., 192 N.C. App. 340, 348, 666 S.E.2d 127, 133 (2008) (internal quotation marks and citation omitted). N.C. Gen. Stat. § 1-278 applies only to interlocutory orders which are not immediately appealable. S*ee Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 382 (1950). The denial of a motion to dismiss for lack of personal jurisdiction is just such an order, as N.C. Gen. Stat. § 1-277(b) states that "[a]ny interested party *shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person . . . .*" N.C. Gen. Stat. § 1-277(b) (2015) (emphasis added). "This does not mean, of course, that

[respondent] had to pursue an appeal from the order at that time; he could have preserved his exception for determination later as [N.C. Gen. Stat. §] 1-277(b) permits." *Gualtieri v. Burleson*, 84 N.C. App. 650, 654-55, 353 S.E.2d 652, 655-56 (1987). But respondent was required to comply with the applicable Rules of Appellate Procedure if he waited until after final judgment to appeal the denial of his motion to dismiss. *See id.* Since the trial court's order denying respondent's motion to dismiss for lack of personal jurisdiction was an immediately appealable interlocutory order that was not designated in his notice of appeal, his argument regarding that order is not properly before us.

III. Willful Abandonment

Respondent argues that the trial court erred by concluding that his parental rights were subject to termination on the ground of willful abandonment. We disagree.

"The standard for review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984). "If unchallenged on appeal, findings of fact are deemed supported by competent evidence and are binding upon this Court." *In re A.R.H.B.*, 186 N.C. App. 211, 214, 651 S.E.2d 247, 251 (2007) (internal quotation marks and citations omitted).

Under N.C. Gen Stat. § 7B-1111(a), a trial court may terminate the parental rights to a child upon a finding that the 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) (2015). The petition in the instant case was filed on 30 July 2015, and therefore the relevant time period is from 30 January 2015 until 30 July 2015.

> Abandonment has been defined as wilful neglect and refusal to perform the natural and legal obligations of parental care and support. It has been held that if 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) (citation omitted).

In this case, the trial court made the following unchallenged findings of fact:

> 9. That the Court finds by clear, cogent and convincing evidence that grounds exist to terminate the parental rights of Respondent . . . pursuant to §7B[-]1111(a)(7) based upon the following:
>
> a. Respondent has a history of incarceration and has in fact been incarcerated for the majority of the child's life.
>
> b. Respondent committed an assault on Petitioner during their marriage that resulted in Petitioner having a fractured sternum.

c. Respondent has not physically visited with the child since January 2012.

d. For more than two years prior to the filing of the Petition to Terminate Parental Rights, Respondent sent no cards, gifts, or emails to the minor child nor did he call to inquire about his well-being.

e. Petitioner maintained contact with Respondent, although not always by telephone. Respondent always had an address for Petitioner and the minor child and even had the personal cellular telephone number of Petitioner's current husband.

f. Respondent failed to provide any financial support for the minor child even during the periods of the child's life that he wasn't incarcerated other than a brief period of time that he was employed while the parties still lived together more than four (4) years ago.

Respondent contends that these findings do not support a conclusion that he willfully abandoned Luke because his ability to keep in contact with Luke was severely limited both by his incarceration and by petitioner moving to North Carolina with Luke. However, this Court has made clear that "a respondent's incarceration, standing alone, neither precludes nor requires a finding of willfulness[]" under N.C. Gen. Stat. § 7B-1111(a)(7). *In re McLemore*, 139 N.C. App. 426, 431, 533 S.E.2d 508, 510-11 (2000). While we have recognized that "a parent's opportunities to care for or associate with a child while incarcerated are different than those of a parent who is

not incarcerated," *In re B.S.O.*, 234 N.C. App. 706, 711, 760 S.E.2d 59, 64 (2014), our cases still require an incarcerated parent to make some effort to utilize the means available to them to stay in contact with their child in order to preclude a finding of willful abandonment. *See McLemore*, 139 N.C. App. at 431, 533 S.E.2d at 511 (concluding "that one ineffectual attempt at contact during the relevant six month period in this case would not preclude otherwise clear willful abandonment, despite the fact of respondent's incarceration during that time").

The trial court's unchallenged findings demonstrate that respondent made no attempt to contact Luke for more than two years prior to the filing of the petition, despite being sent petitioner's address and having petitioner's husband's cell phone number. While respondent's brief notes some of the ways he stayed in contact with Luke earlier in his life, none of the cited actions occurred during the relevant six-month period. Consequently, the trial court properly concluded that respondent had willfully abandoned Luke.

IV. Conclusion

Respondent did not designate the trial court's order denying his motion to dismiss for lack of personal jurisdiction in his notice of appeal, and as a result, his argument regarding that order is not properly before this Court. The trial court's unchallenged findings of fact support its conclusion that respondent's parental rights to Luke were subject to termination on the ground of willful abandonment.

Accordingly, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

Judges BRYANT and TYSON concur.

Report per Rule 30(e).