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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-389

Filed 5 December 2023

Lenoir County, No. 22 JT 33

IN THE MATTER OF: N.I.R.W.

Appeal by respondent-father from order entered 14 December 2022 by Judge Beth Heath in Lenoir County District Court. Heard in the Court of Appeals 1 November 2023.

No brief filed for petitioner-mother.

Garron T. Michael for respondent-father.

ARROWOOD, Judge.

Respondent-father (“father”) appeals, pursuant to N.C.G.S. §§ 7A-27(b) and 7B-1001(a)(7), from the trial court’s order terminating his parental rights over his son, Nate.¹ After careful review of the record and applicable law, we affirm.

I. Background

Father and petitioner-mother (“mother”) got married in 2009 and had their first and only child, Nate, in February 2011. Shortly after Nate’s birth, mother

¹ To preserve anonymity, we use the above pseudonym to refer to the juvenile.

separated from father and took Nate to live with Nate's maternal grandmother.

Mother and father divorced on 11 October 2012. Mother married her current husband ("Husband") on 19 October 2012. Nate has lived full-time with his mother his entire life. At all relevant times, mother and Nate were living in Kinston, North Carolina with Husband, and father was living in Knoxville, Tennessee with his mother and one-year-old child.

Mother filed a petition seeking the termination of father's parental rights on 28 April 2022. Father was served with the termination petition on 18 May 2022. Father never filed an answer or response to the petition. A notice of hearing was filed on 13 July 2022, which listed 20 September 2022 as the hearing date. The 13 July 2022 notice did not list an attorney for father. On 7 September 2022, the clerk's office contacted Attorney Evan Hiatt ("Hiatt"), requesting that he serve as father's appointed counsel for the hearing. Another notice of hearing was filed the same day, which listed Hiatt as father's attorney and 1 November 2022 as the new hearing date.

According to Hiatt, he sent a letter to father regarding the case—"the same day [Hiatt] was appointed on September 7th." Father responded to Hiatt via email two weeks later on 21 September 2022. Hiatt replied to father's email on 26 September 2022. On 25 October 2022, the clerk's office contacted Hiatt and asked whether he and father were available for the hearing on 7 November 2022, and Hiatt replied that he was available. The clerk's office then issued its last notice of hearing,

setting the hearing for 7 November 2022.

Hiatt emailed father about the new hearing date on 26 October 2022. Father replied to Hiatt nine days later on 4 November 2022, stating that “he doubted . . . whether he was going to be able to make it [to the hearing] . . . because he is a sole provider for a one-year-old . . . and takes care of his elderly mother who’s recently had a stroke.”

On 7 November 2022, the day of the hearing, Hiatt and father spoke for the first time over the phone. During the phone call, father—who was not present at the hearing—requested that Hiatt seek a continuance. At the start of the hearing, Hiatt moved for the continuance on behalf of father.² Mother objected to the continuance, arguing that it was not merited because father had failed to file any answer to the petition and had “done nothing.”

After a bench conference, the trial court denied the motion, “find[ing] that [father] was notified of [Hiatt] being his attorney as of the September 7th, 2022[] notice of hearing[.]” The trial court further stated in its ruling that father “went from September 21st to November the 4th without reaching out to [Hiatt]” and “was notified by notice of hearing filed on October 25th of the November 7th court date.”

Mother testified that the last time father saw or visited Nate was when Nate was only a few months old. Mother stated that father had not attempted to

² Counsel supported the motion by “walk[ing] through” the case’s procedural history to show that more time was needed to adequately prepare for the hearing.

correspond with Nate or pursue any type of relationship with him since that visit. Mother testified that she did not hide Nate from father, nor did she prevent a relationship between them from forming. According to mother, Nate was unaware of father and viewed Husband as his dad. Mother testified that on two occasions, when attempting to contact father by phone around 2013, he hung up as soon as she told him who she was, and, after the second time, he changed his number. When mother and father were in contact, communication was limited to Facebook Messenger.

Father was required to pay mother \$3,108.00 annually in child support pursuant to a court order filed 14 March 2013; however, in the six months leading up to the hearing, father had paid only \$350.00 “since September of last year.” Mother testified that father consistently made child support payments until around 2017 but “[o]ver the last four or five years [payments had] been very sporadic.”

In an order entered 14 December 2022, the trial court terminated father’s parental rights over Nate. The order concluded the following in relevant part:

2. That there exist sufficient grounds for termination of the parental rights of [father]. That [father] has willfully abandoned the minor child for at least six consecutive months immediately proceeding the filing of this Petition pursuant to N.C.G.S. 7B-1111(7). That in addition, [father] has, for a period of one year or more next proceeding the filing of this Petition, has willfully failed without justification to pay for the care, support, and education of the minor child as required by Court Order pursuant to N.C.G.S. 7B-1111(4).
3. That termination of the parental rights of [father] as to Nate, are terminated.

Father timely appealed on the same day.

II. Discussion

On appeal, father contends the trial court violated his statutory right to effective assistance of counsel when it denied his attorney’s motion for continuance at the termination hearing. Father also contends that the trial court abused its discretion by denying the motion. We address each argument in turn.

A. Effective Assistance of Counsel

Father contends that his statutory right to effective assistance of counsel was denied when trial court denied his motion to continue because the ruling “left his trial counsel without adequate time to prepare a defense.” We disagree.

“Generally, a trial court’s decision concerning a motion to continue is reviewed for abuse of discretion; however, ‘the denial of a motion to continue presents a reviewable question of law when it involves the right to effective assistance of counsel.’” *In re M.T.-L.Y.*, 265 N.C. App. 454, 460 (2019) (quoting *In re Bishop*, 92 N.C. App. 662, 666 (1989)). “Questions of law are reviewed de novo.” *Id.* (citation omitted). Nonetheless, “a reviewing court will only review a denial of the motion de novo if the respondent-parent asserts before the trial court that a continuance was necessary to protect a constitutional right.” *In re C.A.B.*, 381 N.C. 105, 112 (2022) (cleaned up). In this case, assuming *arguendo* that the constitutional basis was

apparent when father's counsel moved to continue the hearing, we review the trial court's denial of the motion de novo.

“Parents have a right to counsel in all proceedings dedicated to the termination of parental rights, including the right to effective assistance of counsel.” *M.T.-L.Y.*, 265 N.C. App. at 460 (cleaned up). “The right to effective assistance of counsel includes, as a matter of law, the right of client and counsel to have adequate time to prepare a defense.” *In re Bishop*, 92 N.C. App. 662, 666 (1989) (citing *State v. Maher*, 305 N.C. 544, 550 (1982)). “Unlike claims of ineffective assistance of counsel based on defective performance of counsel, prejudice is presumed in cases where the trial court fails to grant a continuance which is essential to allowing adequate time for trial preparation.” *Id.* (cleaned up). However, “[w]here the lack of preparation for trial is due to a party's own actions, the trial court does not err in denying a motion to continue.” *Id.* (citations omitted).

In *Bishop*, a petition to terminate respondent's parental rights was filed on 5 February 1987. 92 N.C. App. at 664. After two continuations, the matter was heard approximately six months later on 20 August 1987. *Id.* at 666. Respondent was not present for the first two days of the termination hearing, and the attorney representing respondent moved for another continuance at the hearing, which was denied. *Id.* “The motion stated that counsel had only met with respondent on two or three occasions, respondent had not contacted counsel for two and one-half to three

months, counsel had been unable to locate respondent, and counsel had not had adequate communication with respondent to properly represent her.” *Id.*

The *Bishop* Court affirmed the trial court’s denial of the motion finding that “there was ample time for trial preparation and respondent simply failed to cooperate with her counsel.” *Id.* In its ruling, the Court pointed to (1) counsel’s repeated and unsuccessful efforts to contact respondent; (2) the two previous continuances as well as period of time between when the petition was filed and heard; and (3) the fact that respondent was traveling during much of that time. *Id.*

Similarly, in *M.T.-L.Y.*, a motion to terminate respondent’s parental rights was filed on 17 November 2017, “almost three months before the motion was heard on 9 February 2018.” 265 N.C. App. at 460. The attorney for respondent moved for a continuance at the February hearing, “arguing that she had little contact with [m]other prior to the hearing date.” *Id.* at 459. Moreover, respondent “contended that notwithstanding that she and her attorney communicated via phone and by e-mail and by text, they lacked sufficient face-to-face communication to prepare adequately for the termination hearing.” *Id.* at 460 (cleaned up).

In ruling on the trial court’s denial, this Court pointed to the fact that respondent (1) offered “no legal authority on the importance of having face-to-face communication with one’s attorney when alternative means ha[d] been employed” and (2) provided no explanation for “why or how her attorney would have been better prepared had the hearing been continued.” *Id.* at 461. Additionally, because

respondent had “almost three months” between when the motion was filed and heard and had the same attorney for about a year, this Court held that the trial court did not err in denying respondent’s motion to continue. *Id.* at 460; *see also In re S.H.*, 204 N.C. App. 595, 2010 WL 2367257, at *6 (2010) (unpublished) (holding that the trial court did not err in denying respondent’s motion for a continuance because “there was sufficient time—roughly six months—to adequately prepare for the termination proceedings” and respondent “never attempted to contact [his attorney] or anyone else involved in the case” between the time the termination motion was filed and when the hearing occurred).

Here, the petition to terminate father’s parental rights was filed more than six months before the 7 November 2022 termination hearing. Although Hiatt was not appointed to father’s case until 7 September 2022, father never contacted the court to ask about the case or counsel after being served with the petition on 18 May 2022.

After receiving Hiatt’s 7 September 2022 letter indicating Hiatt’s appointment, like in *Bishop* and *S.H.*, father largely failed to communicate with Hiatt about the case. Other than father’s 21 September 2022 email, father did not reach out to Hiatt—despite receiving emails from Hiatt on 26 September 2022 and 25 October 2022—until 4 November 2022 when he told Hiatt that he doubted whether he could attend the hearing. Thus, during the approximately two months

leading up to the hearing, father had sufficient time to prepare with counsel but chose not to.³

Father contends that his limited interaction with Hiatt—here, the sporadic emails and one phone conversation on the day of the hearing—was a product of “[f]ather’s inability to travel to North Carolina to attend court.” Although father lived in Tennessee, as indicated above, he had roughly two months to discuss and strategize with Hiatt by phone or email. Further, like in *M.T.-L.Y.*, father offers “no legal authority on the importance of having face-to-face communication with one’s attorney when alternative means [could] have been employed.” *M.T.-L.Y.*, 265 N.C. App. at 461. The fact that Hiatt and father only spoke directly for the first time “three hours before the termination hearing” was thus a product of father’s inaction.

Father also contends that his inability to adequately prepare for the hearing resulted from the court not filing “a formal appointment of counsel.” However, father cites no legal authority showing that a formal filing was required, nor does he explain how Hiatt’s 7 September 2022 appointment by the court was insufficient.⁴ Moreover, like in *M.T.-L.Y.*, father does not “explain why or how [Hiatt] would have been better prepared had” a formal appointment been filed other than stating that Hiatt and the

³ Father states in his brief that the 7 September 2022 notice of hearing “contained no contact information for Mr. Hiatt,” and that only Hiatt’s name was provided. This statement provides no support for father in that Hiatt sent a letter to father on 7 September 2022, which provided sufficient contact information as indicated by father’s email to Hiatt two weeks later.

⁴ The court contacted Hiatt on 7 September 2022 to request that Hiatt represent father, and the 7 September 2022 Notice of Hearing lists Hiatt as father’s attorney.

trial court were confused by it. *Id.* Accordingly, the trial court did not violate father's statutory right to effective assistance of counsel when it denied his attorney's motion for continuance.

B. Abuse of Discretion

Father next contends that the trial court abused its discretion by denying his motion to continue because of "the unique set of circumstances surrounding [f]ather at the time of the termination hearing."

"A motion to continue is addressed to the court's sound discretion and will not be disturbed on appeal in the absence of abuse of discretion." *Doby v. Lowder*, 72 N.C. App. 22, 24 (1984) (citing *Cleeland v. Cleeland*, 249 N.C. 16, 18 (1958)). "Continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it." *Id.* (citations omitted).

"The chief consideration is whether granting or denying a continuance will further substantial justice." *Id.* (citing *Shankle v. Shankle*, 289 N.C. 473, 483 (1976)). "Regardless of whether the motion raises a constitutional issue or not, a denial of a motion to continue is only grounds for a new trial when defendant shows both that the denial was erroneous, and that he suffered prejudice as a result of the error." *State v. Walls*, 342 N.C. 1, 24–25 (1995) (citing *State v. Branch*, 306 N.C. 101, 104 (1982)).

"[T]o demonstrate prejudice resulting from the denial of a motion to continue an adjudicatory hearing, a respondent-parent should indicate what the parent's

‘expected testimony’ will address and ‘demonstrate its significance’ to the trial court’s adjudication of the grounds for termination.” *In re C.A.B.*, 381 N.C. at 120 (quoting *In re A.L.S.*, 374 N.C. 515, 518 (2020)). In *In re A.L.S.*, the trial court held that respondent failed to demonstrate prejudice arising from the trial court’s denial of her motion to continue in part because “counsel offered only a vague description of . . . expected testimony and did not tender an affidavit or other offer of proof to demonstrate its significance.” 374 N.C. 515, 518 (citations omitted).

Here, father’s brief points to several of his circumstances in arguing that the trial court abused its discretion in denying his motion. Specifically, father highlights that (1) he lived outside North Carolina; (2) he was caring for his one-year-old son and elderly mother, which was not disputed; (3) he was not present at the hearing; (4) he had not previously been granted a continuance; (5) no formal appointment of counsel was filed; and (6) an “off-record bench conference” was held “as part of [the court’s] process in deciding to deny [f]ather’s motion to continue.”

However, father provides no indication what his expected testimony would have been had his motion been granted—let alone its significance. Although not required, father also did not support his motion with an affidavit or offer of proof. *See State v. Gibson*, 229 N.C. 497, 501 (1948) (“[I]t is desirable that an application for a continuance should be supported by an affidavit showing sufficient grounds for the continuance.”) Accordingly, the trial court did not abuse its discretion by not granting father’s motion to continue.

IN RE: N.I.R.W.

Opinion of the Court

III. Conclusion

For the foregoing reasons, the trial court's order is affirmed.

AFFIRMED.

Judges CARPENTER and FLOOD concur.

Report per Rule 30(e).