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NO. COA01-1039

NORTH CAROLINA COURT OF APPEALS

Filed: 18 June 2002

IN RE:

SHEYENNE SHERRI ROCHA
and
CHARLES DAKOTA LOCKLEAR,

Cumberland County
Nos. 98 J 346-47

Juveniles.

Appeal by respondent from order rendered 5 July 2000 and entered as amended 13 March 2001 by Judge John W. Dickson in Cumberland County District Court. Heard in the Court of Appeals 23 April 2002.

Hatley & Stone, P.A., by Michael A. Stone, for respondent appellant.

Cumberland County Department of Social Services, by John F. Campbell, for petitioner appellee.

TIMMONS-GOODSON, Judge.

Wanda Gail Locklear Rocha ("respondent") appeals from an order terminating her parental rights. For the reasons stated herein, we affirm the order of the trial court.

Respondent is the natural mother of the two minor children at issue in the present case: Sheyenne Sherri Rocha ("Sheyenne"), born 10 July 1992, and Charles Dakota Locklear ("Charles"), born 16

March 1996. On 10 April 1996, the district court entered a nonsecure custody order granting the Cumberland County Department of Social Services ("DSS") custody of Charles, who was less than one month old at the time. At an adjudication hearing on 13 November 1996 concerning the alleged neglect and dependency of Charles, respondent stipulated through her attorney that she was unable to care for the child due to her substance abuse problem. The trial court therefore entered an order on 28 January 1997 adjudicating Charles to be a dependent child pursuant to the North Carolina Juvenile Code.

On 13 May 1998, DSS filed a petition to terminate respondent's parental rights regarding Sheyenne and Charles. Although a summons was immediately issued to respondent, it was returned to the office of the clerk on 15 May 1998 with a notation that respondent had not been served because she had "moved to [Georgia]." Unable to discover respondent's whereabouts, DSS took steps to serve respondent by publication. On 8 July 1998, DSS filed an affidavit stating that service by publication was necessary because respondent's address was unknown, and that DSS had been unable, through due diligence, to locate respondent. The affidavit further stated that "[t]he Respondent Mother is believed to be concealing her person or whereabouts to avoid service of process[.]" A Notice of Service by Publication was thereafter published on 30 May, 6 June, and 13 June of 1998. On 22 June 1998, however, the Cumberland County Sheriff's Department personally served notice on respondent.

The matter came before the trial court on 8 May 2000, at which time evidence tending to show the following was presented: Respondent is the mother of at least six children and has a history of substance abuse. None of respondent's children resides with her. At the date of the hearing, respondent was a resident of Georgia, despite the fact that all of her children live in North Carolina. Although Charles has lived in foster care with respondent's relatives since he was one month of age, respondent has never paid any support for his care. In April 1998, respondent's visitation rights were terminated for failure to make sufficient progress in her drug treatment. Respondent never made sufficient progress in the estimation of DSS to have her visitation rights restored. At the time of the hearing, respondent admitted that she had seen Charles only once in the past two years.

The trial court found that there was clear, cogent and convincing evidence to terminate respondent's parental rights on the following grounds: (1) respondent "willfully left the minor children in foster care for more than twelve months without showing to the satisfaction of the Court that reasonable progress under the circumstances has been made within twelve months in correcting those conditions which led to the removal of the children[;]" (2) respondent "failed to pay a reasonable portion of cost of care for the minor children although physically and financially able to do so[;]" (3) respondent was "incapable, as a result of substance abuse, of providing for the proper care and supervision of the children, such that the children are dependent children within the

meaning of N.C.G.S. § 7B-101(9), and that there is a reasonable probability that such incapability will continue for the foreseeable future[;]" and (4) respondent "willfully abandoned the minor child Charles Dakota Locklear for at least six consecutive months immediately preceding the filing of the Petition."

Based on the above-stated evidence and findings, the trial court concluded that statutory grounds existed to terminate respondent's parental rights as to Sheyenne and Charles. The court therefore terminated respondent's parental rights with respect to Charles, but ordered that, "[a]s to the minor child Sheyenne Sherri Rocha disposition of this matter is continued for a period of ninety (90) days." The record, however, contains no further orders concerning Sheyenne. Although the transcript from a 23 October 2000 hearing indicates that the trial judge ordered respondent's parental rights as to Sheyenne terminated, no such written order appears in the record on appeal.

Respondent now appeals from the trial court's order terminating her parental rights.

Respondent argues that the trial court's termination of her parental rights is in error because (1) service of process regarding the petition for terminating her parental rights was defective; and (2) the trial court's findings of fact and conclusions of law are not supported by the evidence. For the reasons stated herein, we affirm the order terminating respondent's parental rights.

As a preliminary matter, we note that respondent's appeal is interlocutory, as the order from which she is appealing does not dispose of the case but requires further action by the trial court in order to finally determine the rights of all the parties involved in the controversy. See *Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). Although the order terminates respondent's parental rights as to Charles, it reserves for future determination respondent's parental rights as to Sheyenne. Thus, the order is not final, but leaves further issues for resolution at a later date. Although we do not generally review interlocutory orders, such appeals are allowed if the order affects respondent's substantial rights. See N.C. Gen. Stat. §§ 1-277(a), 7A-27(d) (1) (2001). We conclude that the termination of respondent's parental rights as to one of her children affects her substantial rights, and we therefore address respondent's appeal. See *Petersen v. Rogers*, 337 N.C. 397, 400-01, 445 S.E.2d 901, 903 (1994) (noting that a parent's right to custody, care and control of his or her child is a paramount and constitutionally-protected right). As there is no order in the record terminating respondent's parental rights over Sheyenne, however, we must dismiss respondent's appeal as it concerns this child. We therefore limit our review of respondent's appeal to her arguments concerning the termination of her parental rights over Charles.

Respondent argues that the trial court erred in terminating her parental rights because she did not receive proper notice of the petition filed by DSS. Respondent asserts that there was no

summons issued in this matter until 4 August 1999, more than a year after commencement of the action. Thus, argues respondent, the "entire action and cause was technically discontinued," such that the trial court lacked personal jurisdiction over respondent, as well as subject matter jurisdiction over the case. This argument has no merit.

The record clearly shows that a summons was issued within five days after the petition for termination of parental rights was filed, but it was returned because the sheriff could not locate respondent. Respondent was then served by publication, and respondent was personally served by the Cumberland County Sheriff's Department on 22 June 1998. Moreover, respondent had adequate notice of the proceedings against her, as she personally appeared and was represented by counsel at the termination hearing. Thus, the trial court properly concluded that it had jurisdiction to hear the case, and we overrule respondent's first assignment of error.

By her next assignment of error, respondent argues that the findings and conclusions by the trial court are unsupported by the evidence. Respondent contends that none of the evidence presented at trial was timely or relevant, but rather based on events occurring more than a year before the termination hearing. We disagree.

The trial court concluded that there existed four separate grounds under section 7B-1111 of the North Carolina General Statutes to terminate respondent's parental rights. Any one of these grounds, if sustained by the evidence, is sufficient to

support a termination of parental rights. See N.C. Gen. Stat. § 7B-1111(a) (2001). The petitioner seeking termination of parental rights has the burden of showing by clear, cogent and convincing evidence that such grounds exist. See N.C. Gen. Stat. § 7B-1109(f) (2001); *In re Ballard*, 311 N.C. 708, 716, 319 S.E.2d 227, 232 (1984). The appellate court's task upon review is to "determine whether the trial court's findings of fact were based on clear, cogent, and convincing evidence, and whether those findings of fact support a conclusion that parental termination should occur on the grounds stated in N.C. Gen. Stat. § [7B-1111]." *In re Oghenekevebe*, 123 N.C. App. 434, 435-36, 473 S.E.2d 393, 395 (1996); see also N.C. Gen. Stat. § 7B-1109(f) (stating that "all findings of fact shall be based on clear, cogent, and convincing evidence"). Where the petitioner meets its burden, and the trial court's findings of fact support any one of the statutory grounds, we should affirm the order terminating parental rights. See *In re Swisher*, 74 N.C. App. 239, 240, 328 S.E.2d 33, 35 (1985). We therefore examine the grounds for terminating respondent's parental rights as found by the trial court and the evidence supporting such findings.

First, the court determined that respondent willfully left Charles in foster care for more than twelve months without making reasonable progress in correcting the conditions which led to the removal of the children. See N.C. Gen. Stat. § 7B-1111(a)(2) (2001). Under this section, "[a] finding of willfulness is not precluded even if the respondent has made some efforts to regain

custody of the children." See *In re Nolen*, 117 N.C. App. 693, 699, 453 S.E.2d 220, 224 (1995).

In the instant case, the primary condition leading to respondent's loss of custody of her children was her substance abuse problem. Respondent testified that she entered into five separate intervention plans with DSS in order to regain custody of her children. According to respondent, these plans called for her "to get into an inpatient or outpatient program, have random drug screens, parenting classes, [a] stable home and [to] have a job for at least three months." Although respondent produced evidence of her active employment status, she admitted that she had not enrolled in a drug treatment program, nor had she undergone random drug testing in the past two years. Respondent affirmed that she tested positively for marijuana and cocaine in 1996, on 27 February 1998, and on 23 March 1998.

We conclude that there was clear, cogent, and convincing evidence to support the trial court's finding and conclusion that respondent failed to make sufficient progress in correcting the conditions that led to the loss of custody of her children. See *Nolen*, 117 N.C. App. at 700, 453 S.E.2d at 224-25 (stating that, "[e]xtremely limited progress is not reasonable progress"). Although this finding and conclusion, standing alone, adequately serves as a basis for the termination of respondent's parental rights, see *In re Pierce*, 67 N.C. App. 257, 261, 312 S.E.2d 900, 903 (1984), we address the remaining three grounds for termination.

As further grounds for terminating respondent's parental

rights, the trial court determined that respondent "failed to pay a reasonable portion of cost of care for [Charles] although physically and financially able to do so." This finding was clearly supported by the evidence of record. Respondent testified that she had never paid any type of support for any of her children, despite the fact that she was actively employed. Thus, the trial court properly found and concluded that respondent failed to pay a reasonable portion of the cost of Charles' care.

The trial court also found that respondent was incapable, as a result of her substance abuse, of properly caring for and supervising Charles, such that he was a dependent child within the meaning of section 7B-101(9) of our General Statutes, and that there was a reasonable probability that such incapability would continue for the foreseeable future. See N.C. Gen. Stat. § 7B-1111(a)(6) (2001). Such incapability by a parent to properly care for a child may arise as a result of substance abuse. See *id.* A dependent juvenile is one "in need of assistance or placement because the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or whose parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2001).

In the instant case, respondent lost custody of her children as a result of substance abuse. Although she agreed to undergo treatment for her drug problem, respondent has never completed a drug treatment program as required by the DSS intervention plan,

nor has she undergone random drug testing. Although respondent produced some evidence at trial of negative drug screening, these tests were not conducted randomly and therefore lacked credibility. There was little evidence before the trial court to demonstrate a change in respondent's drug status. We conclude there was clear and convincing evidence to support the trial court's determination that respondent was incapable of properly caring for her child as a result of her substance abuse.

Finally, the trial court found that respondent had "willfully abandoned the minor child Charles Dakota Locklear for at least six consecutive months immediately preceding the filing of the Petition." "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986). Whether a parent has willfully intended to abandon his or her child is a question of fact to be determined from the evidence. See *id.* at 276, 346 S.E.2d at 514.

At trial, respondent admitted that she had seen Charles only once in at least two years, because her visitation rights had been suspended. Respondent lost her visitation rights due to her failure to take sufficient steps to address her substance abuse problem and never regained such rights. Thus, it was respondent's own behavior which prevented her ability to visit her child, and she cannot argue on appeal that the termination of her visitation rights precludes a finding of abandonment by the trial court. See

In re Bradley, 57 N.C. App. 475, 479, 291 S.E.2d 800, 802-03 (1982) (holding that where a parent has the opportunity to provide for his child but forfeits that opportunity due to his own behavior, the parent cannot assert that he had no ability to provide for the child). Moreover, the evidence showed that, shortly after her children were taken into DSS custody, respondent moved to Georgia, where she maintained only sporadic contact with DSS. We conclude that the trial court had clear and cogent evidence to support its finding that respondent willfully abandoned her child. We therefore overrule respondent's final assignment of error.

A petition for termination of parental rights must be carefully considered in light of all the circumstances and with the children's best interests firmly in mind. "Although severing parental ties is a harsh judicial remedy, the best interests of the children must be considered paramount." *In re Adcock*, 69 N.C. App. 222, 227, 316 S.E.2d 347, 350 (1984). In the case at bar, Charles lives with his maternal great aunt and uncle, who are willing and able to adopt him. While the decision to terminate parental rights should never be lightly made, it is not in the best interests of a neglected or dependent child to require that he languish indefinitely in foster care in the dim hope of eventual reunification with a parent. The order of the trial court terminating respondent's parental rights as to Charles Dakota Locklear is affirmed.

Affirmed.

Judges GREENE and HUNTER concur.

Report per Rule 30(e).