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NO. COA01-1410

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

IN THE MATTER OF:

GREGORY JACKSON

Johnston County  
No. 98 J 61

Appeal by respondent, Peggy Green, from order entered 14 March 2001 by Judge Franklin F. Lanier in Johnston County District Court. Heard in the Court of Appeals 15 July 2002.

*Jennifer S. O'Connor for petitioner-appellee Johnston County Department of Social Services.*

*Terry F. Rose for respondent-appellant Peggy Green.*

WALKER, Judge.

The Johnston County Department of Social Services (petitioner) filed a petition to terminate the parental rights of Peggy Green (respondent) to her son on 19 April 1999. Petitioner unsuccessfully attempted service of summons upon respondent at her last known address. Pursuant to an order of the court issued 7 May 1999, the DSS served notice by publication. Respondent did not file an answer or pleading and did not appear for the hearing to terminate rights on 29 July 1999. The trial court filed an order terminating respondent's parental rights on 13 August 1999.

On 8 December 1999, respondent filed a motion to set aside the order terminating parental rights, contending that she was incarcerated in the Johnston County Jail at the time of the hearing and was not allowed to attend the hearing. She also contended that she had not received notice of the hearing, had not been represented by counsel, had not waived her right to representation by counsel, and had not been informed of her right to counsel.

The trial court heard the motion on 16 December 1999 and denied it. Respondent appealed, but because the tape of the proceeding was erased, thereby precluding preparation of a stenographic transcript, the motion was heard again by the trial court on 14 March 2001. After hearing the evidence, the trial court found that, while respondent's failure to attend or respond may have been due to excusable neglect, respondent failed to show that she had a meritorious defense which would justify setting aside the order. The trial court, in its discretion, denied the motion and the respondent appeals.

A motion for relief from a judgment or order made pursuant to Rule 60(b) of the Rules of Civil Procedure is addressed to the discretion of the trial judge, whose decision will not be disturbed on appeal absent a showing of abuse of that discretion. *Harris v. Harris*, 307 N.C. 684, 687, 300 S.E.2d 369, 372 (1983). If the motion seeking relief does not allege facts corresponding to the specific grounds for relief stated in clauses (1) through (5) of Rule 60(b), then clause (6) allowing relief for any other reason justifying relief applies. *In re Oxford Plastics v. Goodson*, 74

N.C. App. 256, 259, 328 S.E.2d 7, 9 (1985). To qualify for relief under this section, the movant must show (1) extraordinary circumstances exist and (2) justice demands granting of relief. *Id.* Whether relief is sought under the first five clauses or under clause six, the movant must make a *prima facie* demonstration of a meritorious defense or claim. *Id.* at 260, 328 S.E.2d at 10.

Respondent contends that the trial court erred (1) by refusing to find that justice demanded the granting of relief to respondent and (2) by concluding that respondent does not have a meritorious defense. We disagree.

Respondent did not allege in her motion that she had a defense and she did not present affirmative evidence of a defense. During direct examination at the hearing, she only presented evidence regarding the circumstances of her failure to appear for the termination of parental rights hearing. The order terminating her rights shows that she left the child with a maternal great-grandmother who was unable to care for the child and who was unaware of respondent's whereabouts. The termination order further shows that respondent has not participated in a required substance abuse treatment program and that respondent had pending drug-related charges. The evidence at the hearing on the motion to set aside the order shows that respondent was subsequently convicted of the drug charges for which she was incarcerated. Respondent had not obtained treatment for substance abuse and she had not paid for the cost of care for the child--another ground stated by the trial court for termination of her parental rights.

We conclude the trial court did not abuse its discretion in denying the motion to set aside the order terminating respondent's parental rights. The order is

Affirmed.

Judges THOMAS and BIGGS concur.

Report per Rule 30(e).