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NO. COA02-125

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2002

IN RE: Cumberland County
ANTOINETTE ARLESHIA LaVANTA McNEIL, No. 00 J 352
A Juvenile

Appeal by respondent from order entered 20 June 2001 by Judge John W. Dickson in Cumberland County District Court. Heard in the Court of Appeals 7 October 2002.

David Kennedy for Cumberland County Department of Social Services, petitioner-appellee.

Margaret Creasy Ciardella for respondent-appellant.

EAGLES, Chief Judge.

Antonio McNeil (respondent) appeals an order terminating his parental rights as the father of Antoinette McNeil, born 24 October 1993.

The Cumberland County Department of Social Services (DSS) initially filed a petition on 6 May 1996 to terminate the parental rights of respondent and Denise Smith, the mother of the minor child. The petition alleged that respondent had failed to establish paternity pursuant to N.C. Gen. Stat. § 49-10, had left the minor child in foster care for a continuous period of six months, had failed to pay a reasonable portion of the cost to care for the minor child, and had willfully abandoned the minor child.

In a 6 November 1998 order, the trial court found that respondent had visited the child from the time she was born until his incarceration eight months later; and that while he was incarcerated, respondent provided the minor child with presents through the "Angel Tree" program and sent her letters. The trial court concluded it would not be in the best interest of the minor child to terminate the parental rights of respondent and dismissed the petition as to respondent. The trial court, however, terminated the rights of Denise Smith.

DSS filed another petition on 9 June 2000 to terminate the parental rights of respondent. DSS alleged that respondent had: (1) neglected the minor child; (2) willfully left the minor child in foster care for more than twelve months without showing any reasonable progress under the circumstances within the twelve months which led to the minor child's removal; (3) failed to pay a reasonable portion of support for the minor child for a continuous period of six months after the minor child had been placed in the custody of DSS; and (4) failed to legitimate the child. On 20 June 2001, the trial court entered an order and terminated respondent's parental rights based on all four statutory grounds set forth in N.C. Gen. Stat. §§ 7B-1111(a)(1), (2), (3) and (5) (2001). Respondent appeals from the order terminating his parental rights.

Respondent contends there was not clear, cogent, and convincing evidence to support a termination of his parental rights under any of the four grounds upon which the trial court based its decision. We find the evidence sufficient to support the order

terminating parental rights and affirm the decision of the trial court.

Termination of parental rights proceedings are conducted in two phases: (1) the adjudication phase, governed by N.C. Gen. Stat. § 7B-1109; and (2) the disposition phase, governed by N.C. Gen. Stat. § 7B-1110. See *In re Mitchell*, 148 N.C. App. 483, 488, 559 S.E.2d 237, 241 (2002) (citations omitted). During the adjudication phase, the burden of proof rests on petitioner to prove "by clear, cogent, and convincing evidence that one or more of the statutory grounds set forth in N.C.G.S. § 7B-1111 for termination exists". *Id.*; see N.C. Gen. Stat. § 7B-1109(e)-(f). The standard of appellate review is whether the trial court's findings are supported by clear, cogent and convincing evidence and "whether the findings support the conclusions of law". *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001).

If petitioner meets its burden of proof that grounds for termination exist, the trial court enters the disposition phase and must consider whether termination is in the best interest of the child. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). It is within the trial court's discretion to terminate parental rights upon a finding that it would be in the best interests of the child. *Id.* at 613, 543 S.E.2d 910.

Section 7B-1111 provides nine separate grounds upon which an order terminating parental rights may be based. N.C. Gen. Stat. §

7B-1111 (2001). A court's finding of one of the statutory grounds for termination, if supported by competent evidence, will support an order terminating parental rights. *In re Nolen*, 117 N.C. App. 693, 700, 453 S.E.2d 220, 225 (1995). The trial court's decision to terminate parental rights is reviewed on an abuse of discretion standard. *In re Allred*, 122 N.C. App. 561, 569, 471 S.E.2d 84, 88 (1996).

A trial court may terminate parental rights under the 7B-1111(a)(2) upon a finding that:

The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing . . . that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile.

N.C. Gen. Stat. § 7B-1111(a)(2) (2001). Willfulness under section 7B-1111(a)(2) is "something less than willful abandonment". *Nolen* 117 N.C. App. at 699, 453 S.E.2d at 224. "A finding of willfulness is not precluded even if the respondent has made some efforts to regain custody of the children." *Id.* The trial court must also find that the parent has failed to make reasonable progress in correcting the conditions which led to the removal of the child. N.C.G.S. § 7B-1111(a)(2). In *Nolen*, this Court held that sporadic efforts by the parent to improve her situation constituted willful failure to correct conditions that led to the removal. *Nolen*, 117 N.C. App. at 699-700, 453 S.E.2d at 224-25. In *In re Oghenekevebe*, 123 N.C. App. 434, 437, 473 S.E.2d 393, 397 (1996), this Court found the respondent willfully left her child in foster care where "she failed to show any progress in her therapy until her parental

rights were in jeopardy". Further, the Supreme Court has recently clarified which twelve month period is critical in addressing this issue under the identical language in the prior juvenile code. See *In re Pierce*, 356 N.C. 68, ___ S.E.2d ___ (2002) ("within 12 months" refers to the twelve months prior to the date DSS petitioned the court to terminate parental rights). Thus, the relevant period here is the twelve months prior to 9 June 2000, the date DSS filed the second petition to terminate parental rights.

In support of its conclusion that respondent's parental rights should be terminated pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) , the trial court entered the following pertinent findings of fact:

That the Petitioner is a duly constituted Department of Social Services of Cumberland County, North Carolina, which has legal and physical custody of the minor child pursuant to an Adjudication of Neglect on 1/25/93 in File No. 92 J 689. The court takes Judicial Notice of those matters contained in 92 J 689 and incorporates them herein.

. . . .

On 8/3/98 the putative father was before the Court on a Petition to terminate his and the mother's parental rights. At that time he was incarcerated. The Petition as to him was dismissed with a subsequent plan of reunification with him being ordered upon his release on probation in 12/98.

Between 12/98 and 8/99, Respondent father was out of prison. He was employed for some of this time, but provided no support whatsoever. Nor did he comply with court orders, including substance abuse treatment. He tested positive for cocaine approximately 6 out of 18 times he was tested.

Between 8/99 and 3/31/00 he maintained no contact with the Agency. On or about 3/31/00 his probation was revoked and he returned to prison. . . .

Respondent has excepted to each of these findings. After a review of the record, we determine these findings are based upon orders entered in the case, the testimony of DSS social worker Rhonda Chason and respondent's probation officer Ronnie Locklear. During the hearing, Chason testified that the nine-year-old minor child has been in foster care "since her birth." She testified that respondent attended visits sporadically, but did bring "some clothes and some type of toy, stuffed toys." Chason also testified that respondent had not obtained a residence for himself pursuant to his case plan. She further testified that from August 1999 to December 1999, respondent had not been in contact with DSS and had not sent her money for clothes, food or school. Chason stated that during the period of time respondent held a job he did not give the minor child any money and that the State of North Carolina has supported the minor child her entire life. Locklear testified that "out of the 18 times [respondent] was tested, he tested positive on six separate occasions." He also testified that respondent "was taken to 'TASK' and he refused to go . . . he would not participate in the local drug treatment." Locklear further testified that respondent had started a job with an electrician, but was terminated from that employment for being under the influence on the job. From the testimony of these three witnesses the trial court could reasonably conclude that in the twelve month period preceding the DSS petition from 9 June 1999 to 9 June

2000, respondent willfully left his daughter in foster care. Accordingly, we find the trial court's findings are supported by clear, cogent and convincing evidence. Furthermore, we hold that these findings support the court's conclusion that Antonio McNeil was subject to having his parental rights terminated pursuant to N.C. Gen. Stat. § 7B-1111 (a) (2). *See, e.g., In re Nolen*, 117 N.C. App. 693, 453 S.E.2d 220 (1995), *In re Oghenekevebe*, 123 N.C. App. 434, 473 S.E.2d 393 (1996). Respondent fails to show, nor do we find, that the trial court abused its discretion in terminating respondent's parental rights.

Because we have determined that one of the grounds set forth in N.C. Gen. Stat. § 7B-1111 supports the trial court's order, we need not address respondent's challenge to the trial court's termination on other grounds. *See In re Allred*, 122 N.C. App. at 565, 471 S.E.2d at 86. Accordingly, the trial court's order terminating respondent's parental rights is affirmed.

Affirmed.

Judges McCULLOUGH and HUDSON concur.

Report per Rule 30(e).