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NO. COA09-905

NORTH CAROLINA COURT OF APPEALS

Filed: 8 December 2009

IN THE MATTER OF:  
D.S.A.,  
Minor Child.

Yadkin County  
No. 06 J 48

Appeal by respondent-father from order entered 29 December 2008 by Judge Michael D. Duncan in Yadkin County District Court. Heard in the Court of Appeals 10 November 2009.

*James N. Freeman, Jr., for Yadkin County Department of Social Services petitioner-appellee.*

*Betsy J. Wolfenden for respondent-father appellant.*

*Pamela Newell Williams for guardian ad litem.*

HUNTER, JR., Robert N., Judge.

Respondent-father ("Steve")<sup>1</sup> appeals the trial court's order terminating his parental rights to D.S.A. ("Jason"). Steve argues that the trial court made insufficient findings of fact to support its conclusion of law that Jason "is a neglected child by virtue of the original adjudication of neglect and the likelihood of the recurrence of neglect by [Steve]." We affirm.

On appeal, we review "whether the trial court's findings of fact were based on clear, cogent, and convincing evidence, and

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<sup>1</sup> Pseudonyms will be used throughout this opinion for ease of reading.

whether those findings of fact support a conclusion that parental termination should occur[.]” *In re Oghenekevebe*, 123 N.C. App. 434, 435-36, 473 S.E.2d 393, 395 (1996). “So long as the findings of fact support a conclusion [that one of the enumerated grounds to terminate parental rights exist], the order terminating parental rights must be affirmed.” *Id.* (citing former N.C. Gen. Stat. § 7A-289.32 (1995), which contained grounds to terminate parental rights). “If there is competent evidence to support the trial court’s findings of fact and conclusions of law, the same are binding on appeal even in the presence of evidence to the contrary.” *Id.* at 439, 473 S.E.2d at 397-98.

Steve has not assigned error to any of the trial court’s findings of fact, and therefore, the trial court’s findings of fact are deemed conclusive in this case despite the existence of evidence to the contrary. *Id.*; *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426 (2003); N.C.R. App. P. 10(b)(1) (2009).

Parental rights may be terminated under N.C. Gen. Stat. § 7B-1111(a)(1) (2007) where a child is found neglected by the trial court. A “neglected juvenile” is a child “who does not receive proper care, supervision, or discipline from the juvenile’s parent, guardian, custodian, or caretaker; . . . or who lives in an environment injurious to the juvenile’s welfare[.]” N.C. Gen. Stat. § 7B-101(15) (2007) (emphasis added).

In situations where a juvenile is not in the custody of the parents at the time of the termination hearing, as is the case here, “the trial court must employ a different kind of analysis to

determine whether the evidence supports a finding of neglect." *In re Shermer*, 156 N.C. App. 281, 286, 576 S.E.2d 403, 407 (2003) (citing *In re Pierce*, 146 N.C. App. 641, 651, 554 S.E.2d 25, 31 (2001), *aff'd*, 356 N.C. 68, 565 S.E.2d 81 (2002)). Because the determinative factor is the parent's ability to care for the child at the time of the hearing, we previously have explained that "requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible." *Id.* (emphasis added) (citing *In re Ballard*, 311 N.C. 708, 714, 319 S.E.2d 227, 232 (1984)).

"If there is no evidence of neglect at the time of the termination proceeding, however, *parental rights may nonetheless be terminated if there is a showing of a past adjudication of neglect and the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to [his] parents.*" *In re Reyes*, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000) (emphasis added) (citing *Ballard*, 311 N.C. at 716, 319 S.E.2d at 232). When considering the likelihood of repetition of neglect, "the trial court must also consider evidence of changed conditions." *Shermer*, 156 N.C. App. at 286, 576 S.E.2d at 407.

In this case, Jason was adjudicated neglected by both parents on 30 July 2006, and the trial court took judicial notice of this fact in Finding of Fact No. 8 in its 23 December 2008 order terminating Steve's parental rights. In the July 2006 order adjudicating Jason as neglected, the trial court found as a fact:

21. [Steve] and [Jason's mother] currently reside in a mobile home . . . . They

are being evicted from this mobile home due to non-payment of rent. As a part of the safety assessment required by N.C.G.S. § 7B-101(15) [] Yadkin County inspected this mobile home. The inspection of this mobile home . . . revealed that the front porch of this mobile home is falling in; that there are electrical wires hanging from the ceiling; that there are holes forming where the walls meet the floor; that the floor and the furniture in the home are covered in shavings from cages in the living room where [Steve] breeds rats and mice; that there are two dogs, a cat, three kittens and a Monitor lizard in the home; that there are two dogs kept behind the house; that there was a very strong odor in the house of something rotten and [Steve] explained that the odor was coming from the rat cages.

22. [Steve] and [Jason's mother] plan to move to the home of Debbie . . . when they are evicted from their current mobile home. . . .

23. An inspection of [Debbie's] home . . . revealed that the floors were falling in; that windows were missing from the home; that the home was full of trash; that the home had exposed electrical wiring and that the home had many structural problems. The home of [Debbie] was not appropriate for anyone to reside in at this time.

. . . .

32. The Court expressed serious concern as to the judgment of [Steve] and [Jason's mother] in living in the conditions and under the circumstances described by [Yadkin County Department of Social Services.]

Given that Jason was previously found neglected in 2006, the trial court was required in the case *sub judice* to consider both the "probability of repetition of neglect if the juvenile were returned to [his] parents[,] " *Reyes*, 136 N.C. App. at 815, 526 S.E.2d at 501, and "evidence of changed conditions[,] " *Shermer*, 156 N.C. App. at 286, 576 S.E.2d at 407, in deciding whether to

terminate Steve's parental rights. In its 23 December 2008 order, the trial court examined Steve's living conditions following its July 2006 order, and found as a fact:

16. The parents moved into a home owned by the maternal grandmother located at Patsy Lane. . . . DSS made a home visit on February 13, 2007 and discovered the following: the home was very cluttered; the front door would not close; the outside porch was very cluttered; a hose was run into the house for water; the bathroom was filthy; many dirty dishes were in the kitchen; the floors were in disrepair; windows were broken and boarded up; there were cages for various animals; and dogs were free to roam in and out of the home. [Steve] told the social worker that he did not have the money to buy the tools to repair the water lines; however, [Steve] did purchase a 50 gallon fish tank and bought a new rabbit.

17. As of April 2, 2007, the parents had begun living with a friend in Winston-Salem. Shortly after that, [Steve] told [DSS] that he was moving back to the Patsy Lane residence but he ended up going to a residence located at Quaker Avenue. . . .

. . . .

23. In February of 2008, [Jason's] mother left her apartment in Boonville. [Steve] lived in that apartment at times although he was not on the lease and his living there violated HUD regulations. Both parents indicated they would move to the Patsy Lane residence; however, they ended up moving to the paternal grandparents' home. [Jason's] mother has since lived with various friends and relatives and currently lives at the Patsy Lane residence. That residence is not a suitable or safe residence for a child to live. [Steve] continues to live with his parents. Their home was the subject of a home study and was not accepted for placement of [Jason].

. . . .

28. The minor child's relationship with his parents is tenuous. [Jason's] mother has demonstrated a more determined effort aimed at correcting the conditions that led to the minor child's removal than has [Steve], although even her effort was late in coming and has not achieved the desired result, especially as far as adequate and safe housing for the minor child is concerned. *[Steve] shows no promise or potential in securing adequate and safe housing for himself, the mother or his child.* His attitude continues to be one of resistance[.]

(Emphasis added.) Based on these unchallenged findings following the July 2006 adjudication of neglect, the trial court concluded as a matter of law:

5. When viewed in light of the conditions that initially led to the removal of the minor child from the home, [Steve's] conditions, especially his housing and residential conditions, have not changed or improved.

6. The likelihood of a repetition of neglect on the part of [Steve] is high.

7. [Steve] has failed to correct the conditions that led to findings of neglect which constitute failure to provide proper care and proper supervision, leading to an environment that was injurious to [Jason's] welfare.

These observations from the record show that from July 2006 through December 2008, Steve failed to establish a healthy home environment for Jason, and resisted assistance offered to him by Yadkin County DSS to remedy the harmful living conditions that led to Jason's status as neglected. Contrary to Steve's argument on appeal that the July 2006 adjudication primarily concerned the actions of a boyfriend of Jason's mother in 2006, our review of the record shows that the July 2006 order also rested heavily on the

poor living conditions provided by Steve. As such, the trial court's conclusion in its December 2008 order that future neglect is likely supported by the unchallenged findings of fact given that Steve has not acquired and maintained suitable housing since July 2006.

Furthermore, Steve's reliance on our decision in *In re Phifer*, 67 N.C. App. 16, 312 S.E.2d 684 (1984) is misplaced. In *Phifer*, we held that the termination of the respondent-mother's parental rights was improper where the petitioner had presented "a mere showing that [the respondent-mother had] abused alcohol or drugs, without some evidence of harmful effect upon a child." *Phifer*, 67 N.C. App. at 26, 312 S.E.2d at 690. As we have stated in decisions subsequent to *Phifer*, "this Court has since required that the trial court consider the 'probability of a *repetition* of neglect' mentioned in *Ballard*" as opposed to bare speculation on whether neglect may occur in the future. *In re D.D.H.*, No. COA04-390, 2005 WL 89359, at \*6 (N.C. App. Jan. 18, 2005) (emphasis added). Given that neglect was established in 2006, and Steve does not now challenge Finding of Fact 28 which states that Steve "shows no promise or potential in securing adequate and safe housing for . . . his child," *Phifer* is not applicable.

Despite Steve's presentation of contrary evidence, the record shows that the trial court properly concluded that Jason was neglected under N.C.G.S. § 7B-1111(a)(1) due to Steve's inability to provide a home that is not "injurious to [Jason's] welfare" subsequent to the initial finding of neglect in 2006. N.C.G.S. §

7B-101(15). Since the unchallenged findings of fact in the 23 December 2008 order support the trial court's conclusions of law, the order terminating Steve's parental rights is sufficient under our standard of review. Accordingly, this assignment of error is overruled, and the order of the trial court is

Affirmed.

Judges MCGEE and GEER concur.

Report per Rule 30(e).