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NO. COA10-783

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

IN THE MATTER OF:

O.J.C. and C.B.H.,
Minor Children.

Alleghany County
Nos. 06 JT 27-28

Appeal by Respondent-Appellant Mother from order entered 3 May 2010 by Judge Jeanie R. Houston in District Court, Alleghany County. Heard in the Court of Appeals 15 November 2010.

James N. Freeman, Jr., for Petitioner-Appellee Alleghany Department of Social Services.

Levine & Stewart, by James E. Tanner, III, for Respondent-Appellant Mother.

Pamela Newell for Guardian ad Litem.

McGEE, Judge.

Respondent-Mother appeals from an order entered 3 May 2010, which terminated her parental rights to her minor children, O.J.C. and C.B.H. (collectively the juveniles). The biological fathers of the juveniles are not parties to this appeal and were not living with Respondent-Mother and the juveniles during the pendency of the underlying juvenile cases. For the reasons stated herein, we affirm the order of the trial court.

The Alleghany County Department of Social Services (DSS) first became involved with Respondent-Mother and the juveniles in June

2006, when it received a report from O.J.C.'s daycare. Christy Johnson (Ms. Johnson), a social worker employed by DSS, visited the daycare and observed that O.J.C. had significant bruising on his right buttock and leg and some bruising on his face. O.J.C. told Ms. Johnson that Respondent-Mother had whipped him with a belt and with her hand several times. DSS filed juvenile petitions on 21 June 2006, alleging O.J.C. was an abused juvenile because his parent had inflicted serious injury on him, and that C.B.H. was a neglected juvenile because he lived in an environment injurious to his welfare. DSS obtained non-secure custody of the juveniles the same day.

The trial court entered a consent order on 22 August 2006, adjudicating O.J.C. to be an abused juvenile and continuing the hearing on the neglect petition regarding C.B.H. until 19 September 2006. After the 19 September hearing, the trial court entered an order on 6 November 2006, adjudicating C.B.H. to be a neglected juvenile because he lived in a home injurious to his welfare and where another juvenile had been subjected to abuse. The trial court found that Respondent-Mother admitted that she struck O.J.C. with a belt when he vomited in his bed and that she had struck him "over and over" as a result of losing her temper. The trial court further found that Respondent-Mother appeared to have a diagnosis of bi-polar disorder with anger management issues.

Respondent-Mother was also charged with misdemeanor child abuse arising from her beating of O.J.C. She entered a plea of no contest to the charge on 26 September 2006 and was placed on

probation. Respondent-Mother entered into a family services agreement with DSS, which required her to complete parenting classes, pursue an anger management program, and receive counseling. Respondent-Mother complied with the requirements of her services agreement and C.B.H. was returned to her care for a trial placement on 29 December 2006. O.J.C. was also returned to Respondent-Mother's care for a trial placement on 19 January 2007. On 20 February 2007, the trial court entered a consent order returning full custody of the juveniles to Respondent-Mother and closing the juvenile case.

DSS received a report on 30 January 2008 from O.J.C.'s daycare regarding significant bruising on his left thigh. Upon investigation, DSS confirmed the bruising and that Respondent-Mother had again repeatedly whipped O.J.C. with a belt. Respondent-Mother was taken into custody for violating the terms of her probation and was subsequently charged with misdemeanor child abuse. Respondent-Mother's boyfriend initially cared for the juveniles, but he was unemployed at the time and was facing eviction from his apartment. Respondent-Mother pled guilty to misdemeanor child abuse on 26 February 2008 and was sentenced to a term of forty-five days in jail. DSS took custody of the juveniles that same day, and filed petitions on 28 February 2008 alleging O.C.B. was an abused and dependant juvenile and that C.B.H. was a neglected and dependent juvenile. The trial court entered a consent order on adjudication on 2 April 2008. The trial court concluded that O.C.B. was an abused juvenile and that C.B.H. was a

neglected juvenile, and granted DSS full custody of the juveniles.

DSS initially placed the juveniles in a foster home. However, due to O.C.B.'s behavioral problems, DSS moved him to the Ebenezer Children's Home (the Home) on 30 May 2008. DSS subsequently arranged placement at the Home for C.B.H. so that the juveniles could remain together. During their stay at the Home, O.C.B. had to be hospitalized on several occasions due to his mental instability.

Respondent-Mother was released from incarceration on 21 April 2008 and entered into a service agreement with DSS. In a review order entered 8 July 2008, the trial court found Respondent-Mother had not entirely complied with her service agreement. She had found employment but had not found stable housing and was living in a homeless shelter in Boone, North Carolina. Respondent-Mother also had not started anger management classes and had not completed substance abuse classes. The trial court continued custody of the juveniles with DSS, ordered DSS to continue reunification efforts, and awarded Respondent-Mother weekly visitation with the juveniles.

The trial court entered a permanency planning order on 17 December 2008 relieving DSS of efforts toward reunification of the juveniles with Respondent-Mother and setting the permanent plan for the juveniles as termination of parental rights and adoption. The trial court found Respondent-Mother had failed to comply with any of the provisions of her service agreement with DSS, and had last visited with the juveniles in August 2008. The trial court further found that O.C.B.'s behavioral problems had noticeably improved

since Respondent-Mother ceased visiting him in mid-August.

However, on 2 April 2009, O.C.B. was taken to the Wilkes Regional Medical Center due to his extreme behavior at school. O.C.B. remained at Wilkes Regional Medical Center until 7 April 2009, whereupon he was transferred to Central Regional Hospital where he remained until 2 July 2009, when he was discharged and returned to the foster home. C.B.H. returned to the foster home on 1 May 2009.

DSS filed a petition on 26 August 2009 to terminate Respondent-Mother's parental rights to the juveniles. DSS alleged that grounds existed to terminate the parental rights of the juveniles' parents because: (1) the juveniles had been abused and neglected; (2) the juveniles had lived outside of their home for twelve months and the parents had failed to make reasonable progress in correcting the conditions that led to the removal of the juveniles; (3) the juveniles had been placed outside of their home and the parents had not offered any support for the juveniles; (4) the juveniles were dependent in that the parents were incapable of providing proper care for them and there was a reasonable probability that the incapability would continue; and (5) the parents had willfully abandoned the juveniles for at least six months. Respondent-Mother filed an answer to the petition on 9 November 2009, generally denying that grounds existed to terminate her parental rights to the juveniles.

After a hearing on 26 and 30 March 2010, the trial court entered an order on 3 May 2010 terminating Respondent-Mother's

parental rights to the juveniles. The trial court concluded that grounds existed to terminate Respondent-Mother's parental rights to the juveniles in that she abused O.J.C., neglected C.B.H., and failed to make reasonable progress to correct the conditions that led to the removal of the juveniles while they lived outside of their home for twelve months. The trial court concluded grounds existed to terminate the parental rights of the juveniles' biological fathers in that the fathers had not offered any support for the juveniles while they lived outside of their home, and had willfully abandoned the juveniles for at least six months. Respondent-Mother filed notice of appeal from the order terminating her parental rights on 5 May 2010.

On appeal, Respondent-Mother first argues the trial court abused its discretion when it ordered that reunification efforts cease in the underlying juvenile cases. Respondent-Mother concedes that she has not properly preserved this issue for review, and asks this Court to exercise its authority pursuant to Rule 2 of the North Carolina Rules of Appellate procedure and consider this issue. Because Respondent-Mother failed to properly preserve her right to appeal from the order ceasing reunification efforts, we cannot address her arguments.

Appeals from orders entered in a juvenile abuse, neglect or dependency case are limited by statute to the following:

- (1) Any order finding absence of jurisdiction.
- (2) Any order, including the involuntary dismissal of a petition, which in effect determines the action and prevents a

judgment from which appeal might be taken.

- (3) Any initial order of disposition and the adjudication order upon which it is based.
- (4) Any order, other than a nonsecure custody order, that changes legal custody of a juvenile.
- (5) An order entered under G.S. 7B-507(c) with rights to appeal properly preserved as provided in that subsection,
- (6) Any order that terminates parental rights or denies a petition or motion to terminate parental rights.

N.C. Gen. Stat. § 7B-1001(a) (2009). Appeals from orders ceasing reunification efforts entered pursuant to N.C. Gen. Stat. § 7B-507(c) (2009) are further limited in that:

- a. The Court of Appeals shall review the order to cease reunification together with an appeal of the termination of parental rights order if all of the following apply:
 1. A motion or petition to terminate the parent's rights is heard and granted.
 2. The order terminating parental rights is appealed in a proper and timely manner.
 3. The order to cease reunification is assigned as an error in the record on appeal of the termination of parental rights.
- b. A party who is a parent shall have the right to appeal the order if no termination of parental rights petition or motion is filed within 180 days of the order.
- c. A party who is a custodian or guardian

shall have the right to immediately appeal the order.

N.C.G.S. § 7B-1001(a)(5). Additionally, the party wishing to appeal from an order ceasing reunification efforts must give notice to preserve his right to appeal from the order. N.C.G.S. § 7B-507(c). "Notice may be given in open court or in writing within 10 days of the hearing at which the court orders the efforts to reunify the family to cease." *Id.*

In the case before us, Respondent-Mother admits she failed to give the notice required to preserve her right to appeal from the 17 December 2008 order ceasing reunification efforts. Thus, the 17 December 2008 order ceasing reunification efforts is not properly before this Court and this Court lacks jurisdiction to review the order. Because this Court lacks jurisdiction to review the order in question, we are prohibited from invoking Rule 2, as requested by Respondent-Mother, to reach the merits of Respondent-Mother's arguments regarding the order ceasing reunification efforts. *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008) ("[I]n the absence of jurisdiction, the appellate courts lack authority to consider whether the circumstances of a purported appeal justify application of Rule 2."). Accordingly, we do not address Respondent-Mother's arguments regarding the 17 December 2008 order ceasing reunification efforts.

Respondent-Mother also argues the trial court erred in concluding grounds existed to terminate her parental rights to the juveniles based on her abuse of O.J.C. and neglect of C.B.H.

Respondent-Mother contends the last instance of abuse occurred in February 2008, over two years ago, and that there was no evidence concerning the risk of repetition of abuse at the time of the termination proceeding in March 2010. We are not persuaded by Respondent-Mother's argument.

"Termination of parental rights is a two-step process. In the first phase of the termination hearing, [DSS] must show by clear, cogent and convincing evidence that a statutory ground to terminate exists." *In re S.N.*, 194 N.C. App. 142, 145-46, 669 S.E.2d 55, 58 (2008) (citations omitted), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009).

If [DSS] succeeds in establishing the existence of any one of the statutory grounds listed in N.C. Gen. Stat. § 7B-1111, the trial court moves to the second, or dispositional, stage, where it determines whether it is in the best interests of the child to terminate the parental rights.

In re Shepard, 162 N.C. App. 215, 221, 591 S.E.2d 1, 5 (2004) (citations omitted). "On appeal, '[o]ur standard of review for the termination of parental rights is whether the [trial] court's "findings of fact are based upon clear, cogent and convincing evidence" and whether the "findings support the conclusions of law."' " *In re Baker*, 158 N.C. App. 491, 493, 581 S.E.2d 144, 146 (2003) (citations omitted). Findings of fact made by the trial court which are not challenged on appeal are binding on this Court. See *In re S.C.R.*, ___ N.C. App. ___, ___, 679 S.E.2d 905, 909 (2009) (citation omitted) ("[T]he trial court's findings of fact to which an appellant does not assign error are conclusive on appeal

and binding on this Court."). However, "[t]he trial court's conclusions of law are fully reviewable *de novo* by the appellate court." *S.N.*, 194 N.C. App. at 146, 669 S.E.2d at 59 (citation omitted).

Grounds for termination of parental rights exist where "[t]he parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of G.S. 7B-101 or a neglected juvenile within the meaning of G.S. 7B-101." N.C. Gen. Stat. § 7B-1111(a)(1) (2009). An abused juvenile is defined in part as "[a]ny juvenile less than 18 years of age whose parent . . . [i]nfllicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means[.]" N.C. Gen. Stat. § 7B-101(1)(a) (2009). A neglected juvenile is defined as:

A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law. In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C.G.S. § 7B-101(15).

"In deciding whether a child is neglected for purposes of terminating parental rights, the dispositive question is the

fitness of the parent to care for the child 'at the time of the termination proceeding.'" *In re L.O.K.*, 174 N.C. App. 426, 435, 621 S.E.2d 236, 242 (2005) (citation omitted). A trial court may terminate parental rights based upon a past adjudication of neglect if "the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to her parents." *In re Reyes*, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000). "In cases of this sort, the decision of the trial court must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case." *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999). "Termination may not, however, be based solely on past conditions that no longer exist." *L.O.K.*, 174 N.C. App. at 435, 621 S.E.2d at 242 (citation omitted). The law and reasoning regarding the termination of parental rights pursuant to a finding of neglect "apply equally when parental rights are terminated pursuant to a finding of abuse." *In re Alleghany County v. Reber*, 75 N.C. App. 467, 470, 331 S.E.2d 256, 258 (1985).

In this case, the trial court found Respondent-Mother physically abused O.J.C. in June of 2006 and February of 2008. Respondent-Mother was convicted of misdemeanor child abuse in each instance. She received a probationary sentence for her 2006 conviction, the terms of which she violated when she physically abused O.J.C. in 2008. Respondent-Mother's suspended sentence was activated due to her probation violation and she served an active

sentence for her 2008 conviction. After her release from incarceration, Respondent-Mother had sporadic employment and, at the time of the termination proceedings, had been employed only fifteen of the prior sixty months. Respondent-Mother also lacked stable housing, having lived at the "Hospitality House," in an apartment, with friends, and in a tent. Respondent-Mother moved to Myrtle Beach, South Carolina in August of 2009. Shortly before the termination proceedings commenced in March 2010, Respondent-Mother moved in with her father in Michigan. Additionally, the trial court found Respondent-Mother had had no involvement with mental health services since she moved to Myrtle Beach in August 2009. Respondent-Mother does not challenge any of these findings of fact and thus they are binding on appeal.

Respondent-Mother does challenge the trial court's finding that:

Regarding the issue of abuse the Court finds the incident of January, 2008 particularly troubling. [O.J.C.] was whipped with a belt on Monday, January 30 even though

(a) he had been whipped by his mother or her boyfriend the day before

(b) he was physically sick at the time

(c) she had previously beaten [O.J.C.] in 2006 which required DSS involvement

(d) his mother was on probation for a previous episode of child abuse

(e) his mother was taking medications to help control her anger

(f) his mother had received counseling for prior abuse of the same child.

If the threat of certain incarceration is not enough to deter [Respondent-Mother] from inflicting serious physical abuse on her children they can never be safe in her home.

Respondent-Mother argues findings (a) and (b) mistakenly attribute the "double whipping" that occurred in 2006 to the incident that occurred in 2008. While we agree that the trial court appears to conflate the 2006 "double whipping" incident with the 2008 beating, this error does not affect the trial court's conclusion. After careful review of the record before us on appeal, we conclude that the trial court's pertinent findings of fact are supported by competent evidence in the record.

Respondent-Mother's prior abuse of O.J.C. and neglect of C.B.H. are uncontested. Respondent-Mother twice physically abused O.J.C. Respondent-Mother admitted at the hearing that, after receiving counseling and taking anger management classes, she abused O.J.C. in 2008. Respondent-Mother was on probation for the 2006 incident when she beat O.J.C. in 2008 and was also taking medication for her bipolar disorder. At the time of the hearing, Respondent-Mother had not been involved in any mental health services since August of 2009, she was no longer taking medication for her bipolar disorder, and she had only lived with her father for approximately three weeks. Respondent-Mother stated that she physically abused O.J.C. when he was acting out and she was stressed. Respondent-Mother testified that she thought she now handled stress better than she had in the past. However, the

stressors which triggered the previous beatings of O.J.C. are still present in Respondent-Mother's life and she has stated she did not know how she would react when she was around her sons, and would not know until she was given a chance to parent them again. Further, the two instances of physical abuse inflicted upon O.J.C. by Respondent-Mother, as well as Respondent-Mother's lack of demonstrated progress with regard to her mental health and in obtaining stable employment and housing, all support a conclusion that there is a probability of a repetition of the abuse and neglect of the juveniles should the juveniles be returned to Respondent-Mother's care. The trial court did not specifically state in its findings of fact that abuse and neglect would likely recur if the juveniles were returned to Respondent-Mother's care. However, it is clear that the trial court found repetition of abuse and neglect likely based on its finding that the juveniles could never be safe in Respondent-Mother's home.

The trial court's findings of fact support its conclusion that grounds existed to terminate Respondent-Mother's parental rights based on her abuse of O.J.C. and neglect of C.B.H. We hold the trial court did not err in concluding grounds existed to terminate Respondent-Mother's parental rights to her sons pursuant to N.C.G.S. § 7B-1111(a) (1).

Because we find grounds for termination of parental rights were properly established pursuant to N.C.G.S. § 7B-1111(a) (1), we need not address Respondent-Mother's further arguments regarding the trial court's conclusion that grounds to terminate her parental

rights also existed pursuant to N.C.G.S. § 7B-1111(a)(2). N.C.G.S. § 7B-1111(a) ("The court may terminate the parental rights upon a finding of one or more of the following[grounds.]"); see also *In re D.B.*, 186 N.C. App. 556, 561, 652 S.E.2d 56, 60 (2007) ("Where a trial court concludes that parental rights should be terminated pursuant to several of the statutory grounds, the order of termination will be affirmed if the court's conclusion with respect to any one of the statutory grounds is supported by valid findings of fact."), *aff'd per curiam*, 362 N.C. 345, 661 S.E.2d 734 (2008). We affirm the order of the trial court terminating Respondent-Mother's parental rights to her minor children, O.J.C. and C.B.H.

Affirmed.

Chief Judge MARTIN and Judge BRYANT concur.

Report per Rule 30(e).