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NO. COA11-512
NORTH CAROLINA COURT OF APPEALS

Filed: 20 September 2011

IN THE MATTER OF:

Q.J. and Q.W.

Mecklenburg County
Nos.09 JT 26-27

Appeal by Mother from order entered 12 January 2011 by Judge Elizabeth T. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 5 September 2011.

Senior Associate Attorney, Kathleen Arundell Widelski, for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services.

Pamela Newell, for appellee Guardian Ad Litem.

Rebekah W. Davis, for respondent-appellant, mother.

STEELMAN, Judge.

Where the minor children had not been in foster care for more than twelve months at the time DSS filed the petition seeking to terminate Mother's parental rights, no findings of fact were made as to Mother's ability to pay for support of the minor children, and no findings of fact were made as to the

probability of Mother's continued neglect at the time of the termination hearing, the trial court erred in terminating Mother's parental rights.

I. Factual and Procedural History

On 16 January 2009, the Mecklenburg County Department of Social Services, Youth and Family Services (DSS) filed a juvenile petition alleging that Q.J., born in October 2008, and Q.W., born in November 2007, were neglected and dependent juveniles. DSS alleged that Mother tested positive for methadone at Q.W.'s birth and positive for cocaine at Q.J.'s birth; that Q.J. is medically fragile; that Mother and Q.W. live with the maternal grandmother, Ms. G.; and that there have been many 911 disturbance calls to the home of Ms. G. Q.J. was still in the hospital following his birth at the time the juvenile petition was filed. DSS took non-secure custody of the juveniles. Paternity of the juveniles was never established.

After holding adjudication and dispositional hearings on 13 March 2009, the trial court adjudicated Q.J. and Q.W. neglected and dependent juveniles and awarded custody of the juveniles to DSS. In a permanency planning order filed 11 May 2009, the trial court ordered the permanent plan for the juveniles to be a concurrent plan of guardianship with Ms. G. and adoption.

A permanency planning review hearing was held on 12 October 2009. By order entered the same day, the trial court found that Mother had not worked towards the goals set forth in her case plan and that she had moved to Pennsylvania. The court further found that although Ms. G. wanted the juveniles placed with her, she did not have appropriate housing due to other adults residing in the home with substance abuse issues. The trial court ordered a permanent plan of adoption. On 12 January 2010, DSS filed a termination petition, alleging that grounds existed to terminate the parental rights of Mother under N.C. Gen. Stat. § 7B-1111(a)(1)(2009) (neglect), N.C. Gen. Stat. § 7B-1111(a)(2)(2009) (failure to make reasonable progress), and N.C. Gen. Stat. § 7B-1111(a)(3)(2009) (failure to pay reasonable portion of cost of care).

A termination hearing was held in July and November 2010. By order filed 12 January 2011, the trial court made the following pertinent findings:

3. The children were adjudicated as neglected and dependent juveniles on March 13, 2009. At that hearing, the mother informed the court that she was unable to care for the children and that she wanted the maternal grandmother to be the children's caretaker. [DSS] did enter into a case plan with the maternal grandmother [Ms. G.]; however, [Ms. G.] did not complete the requirements of that case plan.

4. [DSS] also developed a case plan for the [] mother despite her expressed lack of interest in reunification.

5. The mother's case plan was based on her mediated agreement. Pursuant to that mediated agreement [] mother agreed to complete a FIRST assessment and comply with the recommendations of that agreement, involvement in substance abuse treatment, mental health treatment, parenting education, obtaining and maintaining appropriate housing and employment and weekly contact with the social worker.

6. The mother has not provided proof that she has complied with any of the terms of her case plan. She has never provided any proof of engaging in substance abuse treatment or mental health treatment. She has not visited with the children regularly and has not maintained contact with the social worker. She has not provided any monetary support for the children.

. . . .

10. [DSS] has spent approximately \$21,531.00 on the support of [Q.J.] and \$24,361 on the support of [Q.W.]. Neither parent has paid any support on behalf of either child.

Based on these facts, the trial court concluded that grounds existed to terminate the parental rights of Mother under N.C. Gen. Stat. § 7B-1111(a)(1), (a)(2), and (a)(3). The trial court further concluded that it was in the best interests of Q.J. and Q.W. to terminate Mother's parental rights. Mother

appeals.

II. Standard of Review

"The standard of review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law. We then consider, based on the grounds found for termination, whether the trial court abused its discretion in finding termination to be in the best interest of the child." *In re Shepard*, 162 N.C. App. 215, 221-22, 591 S.E.2d 1, 6 (citation and quotations omitted), *disc. review denied sub nom., In re D.S.*, 358 N.C. 543, 599 S.E.2d 42 (2004).

III. Failure to Make Reasonable Progress

In her first argument, Mother contends the trial court erred in concluding that grounds existed to terminate the Mother's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), because the minor children had not been in foster care for more than twelve months when DSS filed the termination petition. We agree.

Under section 7B-1111(a)(2) of the North Carolina General Statutes, a court may terminate parental rights on the ground "[t]he parent has willfully left the juvenile in foster care or

placement outside the home for more than 12 months without showing to the satisfaction of the court 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). We have previously held that the term "for more than 12 months" refers to the duration of time beginning with the child's removal from the home pursuant to a court order and ending with the termination petition or motion. *In re A.C.F.*, 176 N.C. App. 520, 526-27, 626 S.E.2d 729, 734 (2006).

Our review discloses that Q.J. and Q.W. were removed from Mother's care on 16 January 2009 pursuant to a non-secure custody order, and DSS filed the petition to terminate parental rights on 12 January 2010, four days short of the requisite twelve-month period. Because Q.J. and Q.W. were not removed from Mother's custody for the requisite period of time, we hold that the trial court erred in terminating Mother's parental rights based upon N.C. Gen. Stat. § 7B-1111(a)(2).

IV. Failure to Pay a Reasonable Portion of Cost of Care

In her second argument, Mother contends the trial court's conclusion that grounds existed to terminate Mother's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(3) is not

supported by sufficient findings of fact. We agree.

N.C. Gen. Stat. § 7B-1111(a)(3) provides that parental rights may be terminated where

[t]he juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent, for a continuous period of six months next preceding the filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

Id. As part of this ground for termination, the trial court must make findings of fact regarding the parent's ability to pay. *In re T.D.P.*, 164 N.C. App. 287, 289, 595 S.E.2d 735, 737 (2004), *aff'd per curiam*, 359 N.C. 405, 610 S.E.2d 199 (2005).

In the instant case, the trial court merely found that Mother did not pay child support for the care or custody of the juveniles. The trial court did not address Mother's ability to pay, *i.e.*, whether she earned any money, or whether she had any income or means which could be used to provide support for the minor children. Because of the lack of such findings, we hold that the trial court erred in terminating Mother's parental rights under N.C. Gen. Stat. § 7B-1111(a)(3).

V. Neglect

In her third argument, Mother contends that the trial

court's conclusion that grounds existed to terminate her parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) is not supported by sufficient findings of fact. We agree.

Under section 7B-1111(a)(1) of the North Carolina General Statutes, a court may terminate parental rights on the ground that the parent has neglected the juvenile. N.C. Gen. Stat. § 7B-1111(a)(1). A neglected juvenile is defined in part as "[a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent[.]" N.C. Gen. Stat. § 7B-101(15) (2009). "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., J.K.W., T.L.W., & T.L.W.*, 174 N.C. App. 426, 435, 621 S.E.2d 236, 242 (2005) (quoting *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984)).

Where [] a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, the trial court must employ a different kind of analysis to determine whether the evidence supports a finding of neglect. This is because requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible.

In re Shermer, 156 N.C. App. 281, 286, 576 S.E.2d 403, 407

(2003) (citations omitted). "[A] prior adjudication of neglect may be admitted and considered by the trial court in ruling upon a later petition to terminate parental rights on the ground of neglect." *In re Ballard*, 311 N.C. 708, 713-14, 319 S.E.2d 227, 231 (1984). A trial court may terminate parental rights based upon a prior 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 [his] parents." *In re Reyes*, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000) (citation omitted).

In the instant case, the trial court found that Q.J. and Q.W. had previously been adjudicated neglected juveniles. However, the trial court did not make a finding based upon clear, cogent, and convincing evidence that there was a probability of repetition of neglect if the children were returned to Mother. The trial court's findings of fact fail to address continued neglect at the time of the termination hearing, or the probability of future neglect. We further note that petitioner bears the burden of proof to establish by clear and convincing evidence that grounds for termination exist. See N.C. Gen. Stat 7B-1109(f) (2009). Because the trial court failed to make findings of fact that Mother's neglect of the juveniles

was likely to be repeated at the time of the termination hearing, we hold that the trial court erred in terminating Mother's parental rights under N.C. Gen. Stat. § 7B-1111(a)(1).

VI. Conclusion

We conclude that there are fatal defects in each of the grounds for termination of Mother's parental rights. The order of the trial court must be reversed.

REVERSED.

Chief Judge MARTIN and Judge McCULLOUGH concur.

Report per Rule 30(e).