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NO. COA11-589

NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

IN THE MATTER OF:

Macon County

No. 10 JT 1

M.G.

Appeal by respondent-mother from orders entered 1 March 2011 by Judge Richlyn D. Holt in Macon County District Court. Heard in the Court of Appeals on 24 October 2011.

William R. Shilling for petitioner-appellee, Macon County Department of Social Services.

Levine & Stewart, by James E. Tanner III, for respondent-appellant mother.

Deana K. Fleming for guardian ad litem.

BRYANT, Judge.

Where the trial court terminates respondent-mother's parental rights based on neglect and the child is not in respondent's custody at the time of the hearing, we reverse and remand for the making of sufficient findings of fact and

conclusions of law appropriately assessing the probability of a repetition of neglect.

On 20 January 2010, the Macon County Department of Social Services ("DSS") filed a juvenile petition alleging that three-month-old Monica¹ was an abused, neglected, and dependent juvenile. Monica was taken into non-secure custody by DSS at the same time.

Following a hearing, the trial court entered an order adjudicating Monica abused and neglected on 17 August 2010. In the order, the trial court found that Monica had suffered non-accidental injuries, including head trauma, retinal hemorrhages, a broken tibia, and a subdural hematoma; that the child's father had admitted to shaking Monica, pled guilty to felony child abuse regarding Monica, and was serving an active term of 25 to 39 months imprisonment; that respondent had seen the father acting rough with Monica; and that the father had committed acts of domestic violence against respondent. The trial court also found that respondent admitted to shaking Monica, although it appears that the father was responsible for the injuries leading to the DSS investigation. In a separate disposition order, the trial court kept Monica in the custody of DSS. By the time of

¹ We use this pseudonym for the purpose of protecting the child's identity.

this order, the father had voluntarily relinquished his parental rights to Monica.

In an order entered 3 December 2010, the trial court relieved DSS of responsibility for making reasonable reunification efforts and changed the permanent plan for Monica to adoption. On 4 January 2011, DSS filed a motion to terminate respondent's parental rights to Monica, alleging abuse or neglect as grounds for termination. See N.C. Gen. Stat. § 7B-1111(a)(1) (2009). Respondent filed an answer to the petition, denying the existence of abuse or neglect. The trial court conducted a termination hearing on 7 February 2011, and in an order entered 1 March 2011, the trial court found the existence of abuse and neglect as grounds for termination. In a separate disposition order, the trial court concluded that it was in the juvenile's best interest to terminate respondent's parental rights. Respondent appeals.

On appeal, respondent contends that: (1) the trial court erred in terminating her parental rights without making sufficient findings of fact or conclusions of law regarding the existence of abuse or neglect at the time of the hearing or appropriately assessing the risk of future neglect; and (2) the

trial court abused its discretion in determining that it was in the juvenile's best interest to terminate respondent's parental rights.

I.

Respondent first argues the trial court erred in terminating her parental rights without making sufficient findings of fact or conclusions of law regarding the existence of abuse or neglect at the time of the hearing or appropriately assessing the risk of future neglect. We agree.

On appeal, we review the trial court's orders to determine "whether the trial court's findings of fact were based on clear, cogent, and convincing evidence, and 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) (citation omitted). Pursuant to N.C. Gen. Stat. § 7B-1111(a) (2009), a trial court may terminate parental rights upon a finding of one of the ten enumerated grounds. "So long as the findings of fact support a conclusion . . . [that one of the enumerated grounds exists], the order terminating parental rights must be affirmed." *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426 (2003) (internal citation omitted).

Here, the trial court concluded that termination of respondent's parental rights was justified based on the existence of abuse and neglect "up to and including this date and at the time of this proceeding." North Carolina General Statute § 7B-1111 provides, in pertinent part:

(a) The court may terminate the parental rights upon a finding of one or more of the following:

(1) The 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). Neglect is defined as follows:

Neglected juvenile. - 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.

N.C. Gen. Stat. § 7B-101(15) (2009). An abused juvenile is defined, in pertinent part, as one who has suffered "a serious physical injury by other than accidental means" or who is

subjected to a substantial risk of such injury. N.C. Gen. Stat. § 7B-101(1).

However, it is well-established that “[a] finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding.” *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997). Where the child is not in the custody of the parents at the time of the termination hearing, trial courts generally “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) (internal citation omitted). In these instances, the trial court’s analysis focuses on “the best interests of the child and the fitness of the parent to care for the child at the time of the termination proceeding.” *Id.* 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.* at 286, 576 S.E.2d at 407 (internal citation omitted).

Under such circumstances, "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." *Ballard*, 311 N.C. at 713-14, 319 S.E.2d at 231. However, the prior adjudication, standing alone, does not support termination based on neglect. "The trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *Id.* at 715, 319 S.E.2d at 232. Thus, a trial court may find either that neglect existed at the time of the hearing or "that grounds for termination exist upon a showing of a 'history of neglect by the parent and the probability of a repetition of neglect.'" *In re L.O.K.*, 174 N.C. App. 426, 435, 621 S.E.2d 236, 242 (2005) (quoting *Shermer*, 156 N.C. App. at 286, 576 S.E.2d at 407). This Court has also applied the same analysis to termination cases involving abuse. See *In re McMillon*, 143 N.C. App. 402, 411-12, 546 S.E.2d 169, 176, *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001).

Here, although Monica had been out of respondent's custody for over a year, the trial court found:

[t]hat all statutory reviews have been held and that the minor child continues to be a neglected and abused juvenile as defined by N.C. General Statutes § 7B-101 up to and

including the date of this hearing.

The trial court then concluded that grounds existed to terminate respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1).

Regarding the finding of abuse, we note that the record is devoid of any evidence which would tend to support a finding of ongoing abuse at the time of the hearing. Therefore, we turn to neglect as a ground for termination of respondent's parental rights.

Since the trial court also based its conclusion on ongoing neglect, the findings supporting such a conclusion at the time of the termination hearing must show that Monica was not given proper care, supervision or discipline; that Monica was not given proper medical or remedial care; or that Monica was subjected to living in an environment injurious to her welfare. See N.C. Gen. Stat. § 7B-101(15). The only findings made by the trial court pertinent to ongoing neglect at the time of the termination hearing are the following:

40. That the Respondent Mother's visitation is supervised, usually at the Macon Program for Progress center or occasionally at DSS. That during a September 8, 2010, visit between the minor child and the Respondent Mother at MPP, the minor child slid out of a chair and hit her head on the floor. That Pedro Cisneros was the visitation supervisor

for that visitation and witnessed the event. That the Respondent Mother denied, and continues to deny, that the minor child hit her head during the visitation. That the minor child cried a lot during visitations but the Respondent Mother was able to calm the minor child after a period of time. That during other visits, Mr. Cisneros was able to observe the Respondent Mother not being attentive to the minor child putting toys into her mouth or climbing on items from which the minor child is likely to fall.

41. That during visitations, the Respondent Mother does not seem to be aware of some of the physical dangers related to the minor child's condition.

These two findings are the only two which are relevant to respondent's supervision or care of Monica at the time of the hearing.

While some of the trial court's findings suggest that respondent did not diligently inquire about her daughter's medical condition or attend her daughter's medical appointments, the findings do not show that respondent was denying Monica proper care, supervision, discipline, or medical care at the time of the hearing. Furthermore, the trial court found that respondent attended all visitations, paid child support and carried medical insurance for Monica.

The guardian *ad litem* argues that the trial court's order should be affirmed because the evidence was sufficient to

support a finding that repetition of neglect was likely if Monica was returned to respondent's custody. However, this argument fails because the trial court framed its adjudication in terms of abuse or neglect at the time of the hearing. Notably absent from the trial court's order is any finding or mention of a probability or likelihood of repetition of abuse or neglect or consideration of respondent's changed circumstances. *See Ballard* at 715, 319 S.E.2d at 232 ("The trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect."). Moreover, while the circumstances leading to Monica's prior adjudication of abuse and neglect were grave, the trial court cannot base termination solely on a prior adjudication of abuse and neglect and circumstances which no longer exist. *See In re C.C.*, 173 N.C. App. 375, 382, 618 S.E.2d 813, 818 (2005) (holding that the trial court erred in concluding that a parent willfully neglected her children where DSS failed to present evidence showing neglect at the time of the hearing or the probability of repetition of neglect if the children were returned to their mother).

The trial court was required to make a finding of fact pertaining to the probability of a repetition of neglect. For

the reasons stated herein, we reverse the trial court's order terminating respondent's parental rights to the juvenile and remand for further proceedings consistent with this opinion. As a result, we do not address respondent's challenge to the trial court's best interest determination.

Reversed and remanded.

Judges Elmore and Ervin concur.

Report per Rule 30(e).