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NO. COA11-596
NORTH CAROLINA COURT OF APPEALS

Filed: 18 October 2011

IN THE MATTER OF:

S.A.C. and H.K.D.

Orange County
Nos. 07 JT 144
07 JT 145

Appeal by mother from order entered 15 February 2011 by Judge Beverly Scarlett in Orange County District Court. Heard in the Court of Appeals 26 September 2011.

Northen Blue, L.L.P., by Carol J. Holcomb and Samantha H. Cabe, for petitioner-appellee Orange County Department of Social Services.

Pamela Newell, for guardian ad litem.

Leslie C. Rawls, for respondent-appellant mother.

MARTIN, Chief Judge.

This case is before the Court a second time. On 16 October 2007, the Orange County Department of Social Services ("DSS") filed a juvenile petition and obtained non-secure custody of the juveniles. S.A.C. and H.K.D. were adjudicated dependent juveniles on 17 January 2008.

DSS filed motions to terminate mother's parental rights to the juveniles, and on 19 March 2009, the trial court found that grounds existed pursuant to N.C.G.S § 7B-1111(a)(1) (abuse and neglect) and (a)(6) (dependency) to terminate mother's parental rights to both juveniles. Accordingly, the trial court entered an order terminating mother's parental rights to S.A.C. and H.K.D. Mother appealed.

On appeal, this Court reversed and remanded, stating:

that the findings are insufficient to support the conclusion that grounds existed for termination of respondent-mother's parental rights. The trial court failed to make any findings addressing the risk of future neglect of the children. Furthermore, at the time of the termination hearing, respondent-mother had been engaged in mental health counseling twice a week for nearly six months. The sessions addressed matters relevant to respondent-mother's ability to care for the children, namely her depression, domestic violence, substance abuse, coping skills, and anger management. The trial court failed to make findings regarding whether respondent-mother's incapability would continue for the foreseeable future, and whether she lacked an appropriate alternative child care arrangement. We hold that the trial court's findings of fact do not support its conclusions of law.

In re S.A.C. & H.K.D., __ N.C. App. __, 689 S.E.2d 601 (2010) (unpublished). This Court left to the discretion of the trial court whether to receive additional evidence on remand. *Id.*

(citing *Heath v. Heath*, 132 N.C. App. 36, 38, 509 S.E.2d 804, 805 (1999)).

Upon remand, the trial court held a hearing on 22 March 2011. At the beginning of the hearing, the trial court stated it would receive additional evidence that "better explains" the mental health treatment received by mother, as well as what occurred in mother's parenting classes. The court declined, however, to allow any additional evidence of events occurring since its last hearing in the matter on 19 March 2009. Counsel for DSS and mother acknowledged this time limitation at the hearing.

Mother introduced two new exhibits at the hearing: (1) clean drug screen reports from 2 February, 17 February, and 17 March, 2009; and (2) a fax from Pregnancy Support Group in Durham containing a class syllabus for parenting classes and acknowledging that mother completed such classes. The fax from Pregnancy Support Group was dated 14 July 2010. Although the record is not conclusive, the context of the hearing on 22 March 2011 suggests that the 14 July 2010 date is simply the date on the fax. DSS presented no new evidence. After the hearing, the trial court again concluded that grounds existed to terminate mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1)

and (6). The trial court then terminated mother's parental rights. Mother appeals.

Mother's sole argument on appeal is that the trial court erred when it limited the introduction of evidence to matters that occurred no later than 19 March 2009 and then relied on matters occurring after that date to terminate her parental rights. We agree.

In the trial court's amended order, it found as fact:

49. *Respondent-Mother did not present any evidence from her therapist at the October 22, 2010 hearing that she had continued therapy after the February and March 2009 hearing dates. The only evidence Respondent Mother presented was evidence of two (2) negative drug screens that were completed before or during the previous hearing dates and a syllabus of a parenting class that her attorney stated she was taking*

. . . .

53. *As of the October 22, 2010 hearing date, Respondent Mother was again incarcerated and was therefore physically unavailable to parent the juveniles.*

(Emphasis added.)

"When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Santosky v. Kramer*, 455 U.S. 745, 753-54, 71 L. Ed. 2d 599, 606

(1982); *see also In re Murphy*, 105 N.C. App. 651, 653, 414 S.E.2d 396, 397-98, *aff'd per curiam*, 332 N.C. 663, 422 S.E.2d 577 (1992). It was entirely within the trial court's discretion to permit presentation of additional evidence on remand. *See Hicks v. Alford*, 156 N.C. App. 384, 389, 576 S.E.2d 410, 414 (2003). However, it was fundamentally unfair for the court to exclude the presentation of evidence of matters occurring after the date of the prior termination hearing, and then to penalize mother for her failure to present such evidence.

Mother presented two new pieces of evidence at the 22 March 2011 hearing, both of which she contends comply with the trial judge's limitation of evidence to events occurring prior to the 19 March 2009 hearing. In Finding of Fact 49, the trial court determined that mother failed to present evidence from her therapist that she had continued therapy after the 19 March 2009 hearing. The court made this finding in direct contradiction to its restriction as to what additional evidence would be received. Additionally, in Finding of Fact 53, the trial court noted that mother was presently incarcerated, in contradiction of its intent to consider matters only occurring prior to 19 March 2009. Both counsel for mother and DSS recognized the time limitation on new evidence. The only new evidence actually

presented was introduced by mother herself. Until mother saw the filed order, there was no indication that the trial court's decision would rest on post-March 2009 matters. Thus, mother had no reason or opportunity to object to the introduction of post-March 2009 evidence.

We are unable to determine from the record the weight afforded by the trial court to these improper findings of fact. Therefore, we must again reverse the termination order and remand for further proceedings. We note that, within its discretion, the trial court may elect to receive additional evidence on remand.

Reversed and remanded.

Judges McGEE and CALABRIA concur.

Report per Rule 30(e).