Third District Court of Appeal

State of Florida

Opinion filed November 27, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-818
Lower Tribunal No. 11-15104

N.B., the mother,
Appellant,

vs.

Department of Children and Families, et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Carlos Lopez, Judge.

Eugene F. Zenobi, Criminal Conflict and Civil Regional Counsel, Third Region, and Kevin Coyle Colbert, Assistant Regional Counsel, for appellant.

Karla Perkins, for appellee Department of Children & Families; Thomasina Moore (Tallahassee), and Laura J. Lee (Tallahassee), for appellee Guardian ad Litem Program.

Before SALTER, SCALES, and HENDON, JJ.

HENDON, J.

N.B. ("Mother") appeals the final judgment terminating her parental rights to her son. Because the Department of Children and Families ("DCF") failed to present clear and convincing evidence to support the termination of the Mother's parental rights, we reverse.

In March of 2015, DCF filed a verified petition for dependency as to J.S.B. ("Child") and his two siblings.[1] Over three years and multiple reunification case plans later,[2] DCF filed its petition for termination of parental rights ("TPR") as to

[1] One sibling has been placed with the Father, and the other sibling is currently placed with the Mother.

[2] On March 13, 2015, a verified petition of dependency was filed by DCF as to three minor children, including the Child, J.S.B., who was placed into foster care. On April 15, 2015, DCF filed a six-month reunification case plan, with provision of services. On August 3, 2015, DCF filed another six-month reunification case plan. The trial court found the Mother in partial compliance, that she completed a parenting course and psychological evaluation, was compliant with medication management, had not yet obtained employment, and no finding regarding housing. On January 28, 2016, DCF filed another six-month reunification case plan. The Mother was again found in partial compliance; she was waitlisted for dyadic therapy, and was participating in other ongoing services. On June 16, 2016, DCF filed another six-month reunification case plan with similar requirements. On October 13, 2016, DCF filed another six-month reunification case plan; the Mother was found in partial compliance, having completed psychological evaluation, and was currently participating in individual, dyadic, and family therapy. On January 19, 2017, DCF filed its TPR petition. On March 3, 2017, the court accepted an adoption case plan for the Child. On May 12, 2017, DCF filed an amended TPR petition, the court made no findings as to Mother's case plan compliance. On June 29, 2017, the trial court accepted a three-month reunification plan from DCF. On October 6, 2017, DCF filed another three-month reunification plan. On December 22, 2018, the trial court found the Mother only partially compliant despite the Mother's compliance with completion of a parenting class, individual therapy, family counseling, dyadic therapy, psychological evaluation, employment, stable

the Mother on October 18, 2018. DCF sought termination based on the following grounds: 1) section 39.806(1)(b), Florida Statutes (2018), Abandonment,[3] alleging that the Mother has not provided any food, clothing, or financial support for the Child since he came into DCF's care, and that the Mother does not consistently visit with the Child and as such has failed to establish or maintain a substantial and positive relationship with the Child; 2) section 39.806(1)(c), Florida Statutes (2018), alleging that the Mother has engaged in conduct towards the Child that

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housing, and visitation. On March 16, 2018, DCF filed another reunification case plan for the Mother, who at that time was compliant in all the required case plan tasks. On June 15, 2018, the court accepted another three-month reunification case plan. On September 14, 2018, the trial court, over the Mother's objection, changed the case plan goal from reunification to adoption, while the Child's sibling was to remain on a reunification track. On October 18, 2018, DCF filed its TPR petition as to the Mother and J.S.B. The hearing on the TPR petition was held on January 31, March 7, and March 9, 2019.

[3] Section 39.01, Florida Statutes (2018), provides:

> (1) "Abandoned" or "abandonment" means a situation in which the parent or legal custodian of a child or, in the absence of a parent or legal custodian, the caregiver, while being able, has made no significant contribution to the child's care and maintenance or has failed to establish or maintain a substantial and positive relationship with the child, or both. For purposes of this subsection, "establish or maintain a substantial and positive relationship" includes, but is not limited to, frequent and regular contact with the child through frequent and regular visitation or frequent and regular communication to or with the child, and the exercise of parental rights and responsibilities. Marginal efforts and incidental or token visits or communications are not sufficient to establish or maintain a substantial and positive relationship with a child.

relationship threatens the life, safety, well-being, or physical, mental, or emotional health of the Child irrespective of the provision of services; 3) section 39.806(1)(e)1., Florida Statutes (2018), alleging that the Child continues to be abused, neglected, or abandoned by the Mother, and her failure to substantially comply with the case plan for a period of twelve months after the Child's placement in to DCF's care constitutes evidence of the Mother's continuing abuse, neglect, or abandonment of the Child; 4) section 39.806(1)(e)3., Florida Statutes (2018), alleging that the Child has been in DCF's care for any twelve of the last twenty-two months, and the Mother has not substantially complied with her case plan requirements so as to permit reunification. Further, DCF alleged that termination of the Mother's parental rights is the least restrictive means of protecting the Child from harm, and that termination is in the best interests of the Child.

At the TPR hearing, the trial court heard from the Mother; Dr. Jean-Charles, the Mother's current dyadic therapist; Noely Marquez, the Mother's past dyadic therapist; Claudia Riquits, the DCF case manager; Dr. Munson, the psychological evaluator; Dustin Brown, the Mother's mental health therapist; and Richard French, the Guardian ad Litem. Following the evidentiary hearing, the trial court entered an order terminating the Mother's parental rights on all of the statutory grounds alleged in DCF's TPR petition. The trial court also found, based on the

eleven factors contained in section 39.810, Florida Statutes (2018), that termination was in the manifest best interests of the Child. The Mother contends that the termination order should be reversed because the trial court failed to make the necessary findings to support termination and because the trial court's findings are not supported by clear and convincing evidence. We agree.

Our standard of review for challenges to the sufficiency of the evidence supporting a termination of parental rights is whether the trial court's order is supported by substantial competent evidence. T.P. v. Dep't of Children & Family Servs., 935 So. 2d 621, 624 (Fla. 3d DCA 2006). Not only must the trial court find by clear and convincing evidence that at least one of the statutory grounds for termination exists, it must also find that termination is in the manifest best interests of the child. See § 39.802(4)(a), (c), Fla. Stat. (2018); Padgett v. Dep't of Health & Rehab. Servs., 577 So. 2d 565, 571 (Fla. 1991) (holding that, before a parent's rights can be terminated, DCF must show by clear and convincing evidence that reunification with the parent poses a substantial risk of significant harm to the child). Further, because parental rights constitute a fundamental liberty interest, DCF must establish that termination of parental rights is the least restrictive means of protecting the child or children from serious harm. Id. at 571; see also J.C. v. Fla. Dep't. of Children & Family Servs., 937 So. 2d 184, 193 (Fla. 3d DCA 2006) (holding that natural parents have a fundamental liberty interest in the care,

custody, and management of their children); L.D. v. Dep't. of Children & Family Servs., 957 So. 2d 1203 (Fla. 3d DCA 2007) (Shepherd, J., dissenting). Full and accurate fact finding is essential not only on the question whether DCF has authority to terminate parental rights but also on the question whether it is in the child's best interests to do so. K.R.L. v. Dep't of Children & Family Servs., 83 So. 3d 936, 939 (Fla. 3d DCA 2012).

DCF appropriately concedes that the record evidence does not support termination on the grounds of abandonment, pursuant to section 39.806(1)(b)**,** and further concedes that the record evidence shows that the Mother has benefitted from the services provided to her, such that termination pursuant to section 39.806(1)(c) also fails. Indeed, the record clearly shows that the Mother has a substantial and positive relationship with the Child, and the Child with her. When at the TPR hearing Dr. Jean-Charles, the Mother's dyadic therapist, was asked whether the dyadic therapy was successful in renewing and strengthening the parent-child bond, Dr. Jean-Charles stated, "it was, in their case, very successful." The therapist testified that the Child now calls the Mother "Mom," and is happy and eager to see his Mother, and is sad and disappointed to leave her. This record evidence cuts strongly against terminating the Mother's parental rights.

Pursuant to section 39.806(1)(e), Florida Statutes (2018),[4] parental rights may be terminated if the parent fails to substantially comply with a case plan. "However, the failure to comply with a case plan may not be used as a ground for termination of parental rights if the failure is due to the parent's lack of financial resources or the failure of DCF to make reasonable efforts to reunify the parent and child." K.J. v. Dep't of Children & Family Servs., 906 So. 2d 1183, 1184 (Fla. 4th DCA 2005); J.F. v. Dep't of Children & Families, 890 So. 2d 434, 439 (Fla. 4th DCA 2004) (holding that evidence did not support termination of parental rights under section 39.806(1)(e), for failing to substantially comply with case plan, where mother failed to complete intensive therapy, as required under case plan, "because of various problems, not attributable to her"). In this case, N.B. was required to attend parenting classes, therapeutic visitations, as well as to participate in individual therapy, family and dyadic therapy, and to be compliant with her medications. The record demonstrates that the mother completed her parenting classes, and continues to attend dyadic and family therapy. We acknowledge that during the months that DCF was providing the Mother with services, she experienced occasional mental health setbacks, and her attendance was not perfect.

[4] Section 39.806(1)(e)1., Florida Statutes (2018), provides that a twelve-month period for compliance with a case plan begins to run "only after the child's placement into shelter care or the entry of a disposition order placing the custody of the child with the department or a person other than the parent and the approval by the court of a case plan with a goal of reunification with the parent, whichever occurs first[.]"

The record indicates, however, that her mental health outlook has improved, and her sporadic lapses in attendance appear to have been due in part to scheduling conflicts, transportation and work issues, and communication issues, not because of any lack of interest on the Mother's part to participate.[5] "[T]he 'substantially comply' language contained in section [39.806] . . . is a term of art [that] requires more than just a determination that the case plan has not been completed." B.L. v. Dep't of Children & Families, 950 So. 2d 1264, 1266 (Fla. 5th DCA 2007). The trial court is required to determine whether the cause that led to the dependency "ha[d] not been significantly remedied to the extent that the well-being and safety of [the child] will be endangered upon the child . . . being returned to the [parent]." Id.

Here, the record shows that the Child was removed from the Mother's care because she failed to protect the Child from abuse by the Child's uncle. Since then, the abuser has been removed from the childrens' lives and the Mother has custody of two of her children, one of which was subject to the same dependency petition as the Child. Not only has the initial cause been remedied,[6] but the Mother

[5] DCF concedes that, because the Mother was provided with a 12-month period within which to be found in substantial compliance, termination pursuant to section 39.806(1)(e)2., Florida Statutes (2018), pertaining to the material breach of a case plan, is not applicable.

[6] See § 39.522(2), Florida Statutes (2019), which provides as follows:

has made positive strides in addressing her mental health issues, in great part because of the multiple case plan extensions and the services provided to the Mother and Child by DCF since the Child was removed from her care in 2015. See also M.E. v. Fla. Dep't of Children & Families, 919 So. 2d 637, 644 (Fla. 3d DCA 2006).

Contrary to the trial court's order, there is no record evidence to support a finding that the Child would be in danger while in the Mother's exclusive care and there is no record evidence that the Mother could not provide for the child's mental or physical well-being. Indeed, she has full custody of the Child's older sibling, as well as a younger child at home. We find affirmative record evidence that the Mother is amenable to services, she is healthy, does not abuse drugs, has satisfactorily completed all of the therapeutic tasks set before her, has provided clothing, food, and love for her son as well as she could under her circumstances. The Mother's therapist, Dustin Brown, testified that he was conducting ongoing family therapy and was concerned that if the Child was reunified with the Mother,

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> In cases where the issue before the court is whether a child should be reunited with a parent, the court shall review the conditions for return and determine whether the circumstances that caused the out-of-home placement and issues subsequently identified have been remedied to the extent that the return of the child to the home with an in-home safety plan prepared or approved by the department will not be detrimental to the child's safety, well-being, and physical, mental, and emotional health.

she may have difficulties managing three children. The record indicates that there was no evidence adduced at the TPR hearing that the Mother could not care for all of the children together. The therapist testified that because the Mother had improved with family therapy, her prognosis was fair. He recommended that he have another three months to observe the Mother with all three children and to continue counseling her. This evidence, however, does not translate into a failure to substantially comply with her case plan, and does not provide a "clear and convincing" basis to support termination of the Mother's parental rights under section 39.806(1)(e)3., Florida Statutes (2018). See B.B. v. Dep't of Children & Families (In re G.R.), 793 So. 2d 988, 989 (Fla. 2d DCA 2001) (holding that DCF acted prematurely in seeking termination of parental rights where mother was "making a determined effort to rehabilitate herself" and children were "well cared for and secure"); see also J.H. v. Dep't of Children & Family Servs. (In re H.H.), 865 So. 2d 634, 636 (Fla. 2d DCA 2004); R.W.W. v. Fla. Dep't of Children & Families (In re C.W.W.), 788 So. 2d 1020 (Fla. 2d DCA 2001) (finding that DCF failed to establish that termination was least restrictive means to prevent harm to child where DCF did not demonstrate that child would be harmed by continued custody with foster family while mother worked on case plan).

Finally, we do not need to address whether the trial court's findings that termination was in the manifest best interest of the Child and is the least restrictive

means to protect the Child from serious harm are supported by clear and convincing evidence, as we conclude that no competent, substantial evidence supports the trial court's finding that DCF established by clear and convincing evidence the statutory grounds set forth in its petition to terminate the Mother's parental rights. See C.R. v. Dep't of Children & Families, 253 So. 3d 97, 102 (Fla. 3d DCA 2018).

Taking into consideration DCF's concessions, we find the record does not contain clear and convincing evidence to support termination. We reverse the order terminating the Mother's parental rights as to J.S.B. and remand this matter for expeditious reinstatement of the most recent case plan having a goal of reunification.[7]

Reversed and remanded.

[7] See In re H.H., 865 So. 2d 634, 636 (Fla. 2d DCA 2004) ("Such case plan would not bar the trial court from granting . . . long-term placement at some point in the future upon a proper showing of noncompliance or that reunification would be a detriment to the children's safety, well-being, and physical, mental, and emotional health.").