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NO. COA01-1256

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

IN THE MATTER OF:
DAVID VANCE WOOD

Johnston County
No. 93 J 33

Appeal by petitioner from judgment entered 26 June 2001 by Judge Franklin Lanier in Johnston County District Court. Heard in the Court of Appeals 14 August 2002.

Law Offices of W.A. Holland Jr., by W.A. Holland, Jr., and Jennifer S. O'Connor, for petitioner-appellant, Johnston County Department of Social Services.

Thigpen & Whidbee, PLLC, by Robert N. Thigpen, for respondent-appellee father.

Jonathan Breeden, for respondent-appellee mother.

Kristoff Law Offices, by Sharon H. Kristoff, Guardian Ad Litem Attorney Advocate.

CAMPBELL, Judge.

Petitioners, Johnston County Department of Social Services ("DSS") and Guardian Ad Litem ("GAL") appeal from a dismissal of a petition filed to terminate the parental rights of respondents. For the reasons stated herein, we affirm the trial court's decision granting respondents' motion to dismiss the termination of parental rights ("TPR") petition at the close of petitioners' evidence.

The events leading up to the TPR hearing began on 18 February 1993, when DSS received a report that David Wood's ("David" or "the

juvenile") sister was being sexually abused by the juvenile's father. By a Voluntary Placement Agreement ("VPA"), the juvenile's sister was placed with DSS. On 24 February 1993, DSS received a report that the respondent-father was communicating threats with relatives and to the juvenile and his siblings. The respondent-mother placed the juvenile and his brother with DSS via a VPA. On 1 March 1993, the respondent-mother informed DSS that she wished to revoke the VPA. DSS filed a juvenile petition on 2 March 1993 alleging David to be neglected. David was returned to the mother pending the adjudication hearing. On 16 September 1993, the adjudication and disposition hearings were held. At the close of the hearings, David was placed in DSS custody and DSS was relieved of further efforts towards reunification pending a review hearing. Until the review hearing, David first stayed with relatives for a short time and was subsequently placed in foster care. At this point, DSS developed with the respondents a family services case plan, which requested the parents attend parenting classes, obtain psychological evaluations and mental health counseling. On 17 February 1994, respondent-father was acquitted of the criminal charges against him relating to the juvenile's sister.

A series of review hearings were held between 31 March 1994 and 4 May 2000. At a 4 May 2000 permanency planning hearing, DSS was ordered to proceed with a plan of adoption. On 30 August 2000, DSS filed a TPR petition. Both respondents denied the allegations therein and the GAL joined DSS in the agency's prayer for relief.

At the TPR hearing on 7 March 2001, the court dismissed the petition pursuant to respondents' request at the close of the petitioner's evidence during the adjudicatory phase of the hearing. In its written order, the trial court found that it was not in the juvenile's best interests that the respondents' parental rights be terminated. Both DSS and the GAL appealed the court's decision.

DSS assigns error to the trial court's use of the incorrect standard of proof to dismiss the petition to terminate parental rights at the adjudicatory stage. We disagree.

N.C. Gen. Stat. §§ 7B-1109 and 7B-1110 provide the procedure by which a trial court shall conduct TPR hearings. The hearing must occur in two stages, but may occur within the same hearing on one day. See *In re Carr*, 116 N.C. App. 403, 448 S.E.2d 299 (1994) (citation omitted). During the adjudicatory stage, the burden is on the petitioner to prove by clear, cogent, and convincing evidence that at least one of the grounds for termination listed in N.C. Gen. Stat. § 7B-1111 exists. N.C. Gen. Stat. § 7B-1109 (2001). Once the petitioner meets this burden in the first stage of the proceeding, the court moves on to the disposition phase in which the court exercises its discretion as to whether or not to terminate parental rights based on the best interests of the child. N.C. Gen. Stat. § 7B-1110; see also *In re Blackburn*, 142 N.C. App. 607, 543 S.E.2d 906 (2001) (citations omitted). Only upon finding that petitioners have shown by clear, cogent and convincing evidence that one or more grounds for termination exists may the court move on to the disposition stage, in which the court is

allowed to make a discretionary decision whether or not to terminate the parental rights. Carr at 407, 448 S.E.2d at 301.

According to our case law, N.C. Gen. Stat. § 7B-1109, which governs the adjudicatory phase, requires the trial court to affirmatively state in its order the standard of proof utilized in the termination proceeding. N.C. Gen. Stat. § 7B-807 (2001). However, a statement regarding the standard of proof is not necessary where the petitioner fails to establish that grounds for termination exist under N.C. Gen. Stat. § 7B-1111. When the court finds no grounds to terminate parental rights, the statute specifically provides:

(c) Should the court determine that circumstances authorizing termination of parental rights do not exist, the court shall dismiss the petition or deny the motion, making appropriate findings of fact and conclusions.

N.C. Gen. Stat. § 7B-1110(c) (2001).

Since the district court in this case concluded as a matter of law that petitioner had not proven such grounds, the trial judge was not required to state the burden of proof that petitioner failed to carry. Section 7B-1109(f), provides, in pertinent part, the following:

(f) The burden in such proceedings shall be upon the petitioner or movant and all findings of fact shall be based on clear, cogent, and convincing evidence. . . .

N.C. Gen. Stat. § 7B-1109(f) (2001). It appears from our review of the above sections that a statement that the petitioner has met its burden of proving circumstances by clear, cogent, and convincing

evidence is required only when the conclusion is that grounds to terminate exist. Thus, when the trial court concludes that the petitioner has not met its burden, and that the next phase (disposition) is not needed, a statement of the burden is not necessary.

In the case *sub judice*, the judge dismissed the petition at the close of the petitioners' evidence during the adjudicatory stage and stated in the Order:

It is in the juvenile[']s best interest that the petition to terminate the parental rights of Ivan and Renee Wood be dismissed at the close of the Johnston County Department of Social Services [sic] evidence because it was not shown that the Wood's [sic] willfully left their child in foster care for more than twelve months as it was alleged in the petition under N.C.G.S. 7B-1111(a)(1) and (2).

Since the trial court here did not find the existence of grounds to terminate parental rights, it properly dismissed the petition. The inclusion of language regarding the best interest of the children was unnecessary, but of no effect, since the court could not properly have moved to the disposition phase in the absence of grounds to terminate. The lower court properly dismissed the petition pursuant to N.C. Gen. Stat. § 7B-1110(c).

Affirmed.

Judges WYNN and HUDSON concur.

Report per Rule 30(e).