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NO. COA01-180

NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2002

IN THE MATTER OF:

Charles America
Kimberly America
Melissa America

From Harnett County
Nos. 95 J 17
95 J 18
95 J 19

Appeal by respondents from orders entered 23 December 1999 by Judge E. H. McCormick in Harnett County District Court. Heard in the Court of Appeals 8 November 2001.

Law Office of James M. Johnson, by James M. Johnson, for respondent-appellant Gloria America.

Tart, Willis & Fusco, P.A., by O. Henry Willis, Jr., for respondent-appellant Roger America, Sr.

Richard E. Jester for petitioner-appellee Harnett County Department of Social Services.

Hayes, Williams, Turner & Daughtry, P.A., by Heather Hayes Williams, for appellee Guardian ad Litem.

BRYANT, Judge.

This is a consolidated appeal of three juvenile proceedings wherein petitioner Harnett County Department of Social Services (DSS) sought to terminate the parental rights of respondents Gloria America (mother) and Roger America, Sr. (father) as to their three children Charles America, Kimberly America and Melissa America. In a fourth juvenile proceeding, petitioner sought to terminate the

parental rights of mother and father as to their fourth child Roger America, Jr. On 7 November 1996, the fourth juvenile proceeding was dismissed and is not a subject of this appeal.

The juvenile proceedings commenced after mother and father separated, and a custody dispute arose between them. During the separation, mother left the children in father's care. On 8 July 1994, mother filed a domestic violence complaint alleging that father assaulted and threatened her. On 26 July 1994, an *ex parte* order was entered, granting a temporary restraining order against father and awarding mother temporary custody of the children. Thereafter, mother made a motion that she be granted permanent custody of and permanent child support for the children, and that she be granted a permanent restraining order against father.

On 26 September 1994, a consent order was entered wherein it was agreed that both mother and father were fit and proper persons to have custody of the children. Mother and father were awarded joint custody with the father having primary physical custody and mother having liberal visitation rights. Father was ordered not to go near or about mother's presence except to pick up and drop off the children, and also not to assault or harass her.

On 22 December 1994, mother instituted a contempt proceeding against father for alleged threats he made to her, and for enforcement of her visitation rights. On 21 February 1995, father was found in willful contempt of the consent order and was sentenced to thirty days in jail. In addition, mother was found to be depressed and without an adequate home for the children. It was

ordered that DSS take immediate, temporary custody of the children.

On 22 February 1995, DSS filed petitions against mother and father alleging Charles, Kimberly and Melissa were dependent juveniles pursuant to N.C.G.S. § 7A-517(13). Immediate custody orders were entered and executed, placing the children in foster care. On 23 March 1995, DSS filed amended petitions against mother and father alleging Charles, Kimberly and Melissa were abused and neglected juveniles pursuant to N.C.G.S. §§ 7A-517(1) (creation of an environment injurious to the welfare of the juveniles), 7A-517(1)(e) (encouraging delinquent acts of moral turpitude), and 7A-517(21) (improper care, supervision or discipline). Father responded to the amended petitions on 10 April 1995 denying the allegations and moving for dismissal for lack of jurisdiction. Father's motion was denied on 3 May 1995.

On 24 July 1995, a consent adjudication and disposition order was entered wherein it was agreed upon that the children were dependent juveniles and that it was in the children's best interest that legal custody be continued with DSS. Mother and father were afforded liberal visitation rights as to the children. Mother, father and the children were ordered to undergo psychological evaluations.

On 10 May 1996, DSS filed petitions seeking to terminate mother and father's parental rights as to Charles, Kimberly and Melissa on the grounds of abuse, neglect and failure to pay a reasonable amount of the cost of care for the children (foster care costs). Mother and father respectively answered the petitions on

16 July 1996 and 19 July 1996 denying the allegations. Both affirmatively pled estoppel against DSS in not requesting them to make reasonable payments for the cost of care for the children.

On 28 April 1998, adjudication orders were entered finding that Charles, Kimberly and Melissa were abused and neglected juveniles, and that both mother and father failed to pay a reasonable amount of the cost of care for the children. On the same date, a preliminary disposition order was entered mandating that the mother, father, and the children undergo comprehensive psychological evaluations.

On 21 December 1999, final disposition orders were entered terminating father's parental rights as to the three children. Mother's parental rights were terminated only as to Charles and Kimberly. The petition to terminate mother's parental rights as to Melissa was dismissed and it was ordered that DSS begin reunification procedures as to mother and Melissa. The dismissal of the petition as to mother and Melissa is a not a subject of this appeal. The disposition orders were announced in open court and filed on 23 December 1999. Mother and father respectively gave notice of appeal on 23 December 1999 and 21 December 1999, both assigning error to the termination of their parental rights as to the children.¹

¹ We note that at the time the petitions for termination of mother and father's parental rights were filed and the adjudication hearing commenced in this case, relevant portions of Chapter 7A of the North Carolina General Statutes governed the termination of parental rights (TPR) cases. Subsequently, Chapter 7B of the North Carolina General Statutes was enacted and currently governs TPR cases.

Standard of review

At the trial court level,

[t]here is a two-step process in a termination of parental rights proceeding. *In re Montgomery*, 311 N.C. 101, 316 S.E.2d 246 (1984). In the adjudicatory stage, the trial court must establish that at least one ground for the termination of parental rights listed in N.C. Gen. Stat. § 7A-289.32 (now codified as section 7B-1111) exists. N.C. Gen. Stat. § 7A-289.30 (1998) (now codified as N.C. Gen. Stat. § 7B-1109). In this stage, the court's decision must be supported by clear, cogent and convincing evidence with the burden of proof on the petitioner. *In Re Swisher*, 74 N.C. App. 239, 240, 328 S.E.2d 33, 35 (1985). We note that Chapters 7A and 7B interchangeably use the "clear, cogent and convincing" and the "clear and convincing" standards. It has long been held that these two standards are synonymous. *Montgomery*, 311 N.C. at 109, 316 S.E.2d at 252. Once one or more of the grounds for termination are established, the trial court must proceed to the dispositional stage where the best interests of the child are considered. There, the court shall issue an order terminating the parental rights unless it further determines that the best interests of the child require otherwise. N.C. Gen. Stat. § 7A-289.31(a) (1998) (now codified as section 7B-1110(a)). See also *In re Carr*, 116 N.C. App. 403, 448 S.E.2d 299 (1994).

In re Blackburn, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001).

The standard of review on appeal is whether the trial court's findings of fact are supported by clear, cogent and convincing evidence, and whether those findings support the trial court's conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *appeal dismissed, rev. denied by* 353 N.C. 374, 547 S.E.2d 9, and *appeal dismissed, rev. denied by* 353 N.C. 374, 547

S.E.2d 9 (2001).

I.

In their respective appellate briefs mother and father present several contentions regarding the trial court's findings of fact and conclusions of law in the adjudication stage of the TPR proceedings. As mother and father essentially present the same arguments on appeal, this Court will simultaneously address both mother and father's contentions. In instances where an argument is only advanced by one of the respondents, this Court will make clear which party is advancing the argument.

a. Collateral estoppel

Father contends that at the TPR proceedings, petitioner was collaterally estopped from arguing that Charles, Kimberly and Melissa were abused and neglected juveniles. We disagree.

"Under the doctrine of collateral estoppel, also known as issue preclusion, 'parties and parties in privity with them - even in unrelated causes of action - are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination.'" *Scarvey v. First Federal Savings and Loan Ass'n of Charlotte*, ___ N.C. App. ___, ___ 552 S.E.2d 655, 658-59 (2001).

Father argues that as relates to the 1995 adjudication and disposition proceedings, petitioner in its amended complaint alleged that Charles, Kimberly and Melissa were abused and neglected juveniles. Father argues that the children were found to be dependent - versus abused or neglected - and placed in the

immediate, temporary custody of DSS. Father argues that because DSS had already alleged abuse and neglect in the 1995 proceedings, and the children were not found to be abused or neglected, petitioner was precluded from raising these issues at the subsequent TPR proceeding.

In reviewing the record, it is clear that in 1995, the petitioner, mother and father entered into a consent adjudication and disposition, where the parties *stipulated* that the children were dependent juveniles. The issues of abuse and neglect were never litigated nor stipulated to prior to the TPR proceeding. Therefore, we find that the petitioner was not collaterally estopped from raising the issues of abuse and neglect at the TPR proceeding.

b. Neglect at time of TPR proceeding

Both mother and father contend there existed no evidence of neglect at the time of the TPR proceeding. They both argue that the trial court therefore erred in finding that the children were neglected juveniles.

A "neglected juvenile" is defined in part as follows:

(21) 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.G.S. § 7A-517(21) (1995) (now codified as N.C.G.S. § 7B-101(15)).

In cases where the child has already been placed out of the custody of the parents prior to the TPR proceedings, it would be impossible for the petitioner to prove neglect at the time of the TPR proceedings. See *In re Ballard*, 311 N.C. 708, 714, 319 S.E.2d 227, 231 (1984). Although the trial court may consider prior adjudications of neglect, these prior adjudications cannot serve as the sole basis for a finding of neglect at the time of the TPR proceeding. See *Ballard*, 311 N.C. at 713-14, 319 S.E.2d at 231-32. The trial court must also consider evidence of changed conditions in light of the probability of neglect in the future. See *Ballard*, 311 N.C. at 715, 319 S.E.2d at 232.

In the case at bar, the trial court found that the father contributed to the neglect of and the creation of an environment injurious to the children by encouraging them to physically retaliate against each other. The father had used illicit substances in the home, and on several occasions drank excessively and once 'passed out' while the children were in his sole custody. In addition, on one occasion father fired a bullet at mother but the bullet struck Melissa in her hand.

The trial court also found that the father had refused to participate in several of the court ordered psychological evaluations. During one evaluation session that the father did attend, he encouraged the children to engage in play which involved inflicting physical discomfort upon the other playmate (a game of slapstick). On one occasion when father encountered Charles and his foster mother at the community market, father spoke to them in

a loud manner and used profanity, accusing the foster mother of turning Charles against him. The father used loud language and caused several disruptions during the TPR proceedings. Further, the trial court found that the father's actions of disobeying the trial court's custody and visitation orders led to his children being placed in foster care, and moreover those actions continued up until and during the TPR proceedings. As relates to the father, we find there existed clear, cogent and convincing evidence supporting the findings, and those findings support the conclusion that there exists the probability of neglect in the future.

The trial court's conclusion concerning the mother, however, is not based on findings supported by clear, cogent and convincing evidence that would indicate the probability for repetition of neglect in the future. It appears that the trial court hinged its findings concerning the mother on two facts: 1) when the mother and father lived together, the mother allowed the children to be exposed to the father's violent acts against her and the children, and 2) after mother and father separated, mother left the children in father's care, in spite of his past acts of violence against her and the children.

In reviewing the record, the evidence shows that the mother sought permanent custody of the children in an effort to place the children in her care. After mother and father's separation, mother temporarily lived in a women's shelter, but later made efforts to secure suitable housing for herself and the children. Moreover, mother gainfully participated in court ordered psychological

evaluations and regularly attended parenting classes. It is this Court's determination that there was insufficient evidence to support the conclusion that there existed the probability for future incidents of neglect as pertains to the mother.

Notwithstanding the lack of evidence that would indicate the probability of neglect in the future as pertains to the mother, the trial court found an independent ground for the termination of mother and father's parental rights. Namely, the trial court found that neither parent paid a reasonable amount of the cost of care for the children. This Court must therefore determine whether the adjudication order is valid - as pertains to the mother - based upon this independent ground.

c. Equitable estoppel

Both mother and father contend that the petitioner was equitably estopped from asserting as a ground for TPR that mother and father did not pay a reasonable amount of the cost of care for the children. As this Court has already found that an independent ground existed to terminate the father's parental rights, we will only address the issue of equitable estoppel as pertains to the mother.

"The doctrine of estoppel is a means of preventing a party from asserting a defense which is inconsistent with his prior conduct." *Purser v. Heatherlin Properties*, 137 N.C. App. 332, 337, 527 S.E.2d 689, 692, *rev. denied by* 352 N.C. 676, 545 S.E.2d 428 (2000). Under North Carolina law, when children are removed from the care of their parents and placed in foster care, the parents

are under an obligation to provide a reasonable amount of the cost of care for the children if the parents are physically and financially able to do so. See *In re Clark*, 303 N.C. 592, 604, 281 S.E.2d 47, 55 (1981). Failure to tender a reasonable amount of the cost of care for the children for the six months next preceding the filing of the TPR petition can serve as a basis to terminate their parental rights. See N.C.G.S. § 7A-289.32(4) (1995) (now codified as N.C.G.S. § 7B-1111 (3)).

Mother claims that petitioner did not notify her of the obligation to pay a reasonable amount of the cost of care for the children until after the TPR proceeding had commenced. In addition, she argues that when she attempted to tender payment, petitioner instructed her to instead use the money to make repairs to her home. Mother contends that the petitioner therefore could not assert this failure to pay as a ground for the termination of her parental rights. We disagree.

The trial court found that from February 1995 until February 1997, mother was physically able to work. From August 1995 until February 1997, mother was gainfully employed and earning an income. In February 1995, mother moved into a tenant house with her friend, and made improvements upon the property. Commencing in August 1995, however, mother's house was suitable for living and it was thereafter unnecessary for mother to use her resources to make home repairs versus making support payments.

The trial court found that on 6 October 1995, mother was advised by a DSS social worker to contact the child support office

and arrange for the payment of the cost of care for the children. Mother failed to contact the child support office as requested. In addition, during the relevant six month period preceding the filing of the TPR petitions (10 November 1995 through 10 May 1996) mother failed to pay any amount of the cost of care for the children.

Based on our review of the record, it is clear that prior to the TPR proceedings, mother was given notice of her obligation to make support payments. It is clear that mother was earning an income and was physically and financially able to make support payments. Sometime around February 1995, a DSS worker advised mother to use her money to make repairs to her house. However, in October 1995, two months after the house was made suitable for living, a DSS worker subsequently informed mother to contact the child support office to arrange payments for the children's cost of care.

Any DSS directive for mother to use her money to make home repairs was sufficiently negated when DSS subsequently informed mother of her obligation to make cost of care payments - - especially when this subsequent directive was made prior to the crucial six month period before the filing of the TPR petition. Mother argues that any home repair payments made after August 1995 were equivalent to making cost of care payments. However, any payments made for home repairs after August 1995, when the house was already suitable for living, were properly disregarded as being equivalent to support payments.

We conclude that the petitioner was not estopped from

asserting as a ground for TPR that mother failed to make reasonable cost of care payments in the six months preceding filing of the TPR petition. In addition, we find that clear, cogent and convincing evidence existed to support the claim that mother failed to make reasonable cost of care payments. Therefore, we hold that the trial court did not err in concluding that mother failed to make reasonable cost of care payments in violation of N.C.G.S. § 7A-289.32(4) (1995) (recodified as N.C.G.S. § 7B-1111(3)).

d. Due process rights

Father contends that petitioner violated his due process rights by not informing him that failure to pay a reasonable amount of the cost of care for the children could serve as the basis for the termination of his parental rights. As previously stated, the termination of father's parental rights was properly based upon the ground of neglect. As an independent ground exists for the termination of father's parental rights, it is unnecessary for this Court to address the father's due process argument.

II.

Finally, mother and father argue that the trial court abused its discretion in terminating their parental rights. We disagree.

"The trial court's decision to terminate parental rights, if based upon a finding of one or more of the statutory grounds supported by evidence in the record, is reviewed on an abuse of discretion standard." *In re McMillon*, 143 N.C. App. 402, 408, 546 S.E.2d 169, 174, *rev. denied by* 354 N.C. 218, 554 S.E.2d 341 (2001). "Abuse of discretion results where the court's ruling is

manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Once grounds for a TPR disposition are established, the trial court *shall* order said termination unless it is in the children's best interest for termination not to be ordered. See N.C.G.S. § 7A-289.31(a) (now codified as 7B-1110(a)). Here, the trial court found that neither of the parents had meaningful relationships with the children. Further the trial court found that the children expressed an interest in remaining out of the custody of the parents. It was not an abuse of discretion for the trial court to order termination of mother and father's parental rights as to the respective children.

AFFIRMED.

Judges McGEE and HUNTER concur.

Report per Rule 30(e).