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NO. COA01-400

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

IN THE MATTER OF:

DIANA CALLEJA	Forsyth County
DOB: 1-20-97	Nos. 97 J 434
SINDY RODRIGUEZ	97 J 435
DOB: 10-26-95	

Appeal by respondent from judgment entered 30 January 2001 by Judge Chester C. Davis in Forsyth County Superior Court. Heard in the Court of Appeals 29 November 2001.

*Louise E. Harris, for respondent-appellant.*

*Theresa A. Boucher, for petitioner-appellee Forsyth County Department of Social Services.*

*The Teeter Law Firm, by Kelly Scott Lee, guardian ad litem, for Diana Calleja and Sindy Rodriguez*

BRYANT, Judge.

This is an appeal by the respondent, Marta Rodriguez, from a juvenile order terminating her parental rights as to two of her children. For the reasons stated herein, we affirm the order of the trial court.

On 15 December 1997, the Forsyth County Department of Social Services [FCDSS] filed petitions alleging that respondent's two daughters, Sindy Rodriguez and Diana Calleja, were neglected. Both

children were placed in a licensed foster home.  Sindy was two years old at the time, and Diana was ten months old.

In a juvenile order entered 2 March 1998, the trial court adjudicated the children to be neglected within the meaning of N.C.G.S. § 7A-517(21) (now § 7B-101(15)).  When FCDSS filed the neglect petitions, ten-month-old Diana had ruptured eardrums.  The court found clear, cogent and convincing evidence that

[o]n or about December 12, 1997 . . . [Diana had] a severe ear infection in both ears with drainage of blood and puss [sic] which has been evident for more than two weeks.  The medical staff ascertained that an untreated bacterial infection ultimately led to Diana Calleja suffering "ruptured ear drums" in both ears while in the care of [respondent].  This condition despite treatment can cause hearing impairment and/or permanent hearing loss.

Further, the court found that respondent failed to offer a reasonable and acceptable explanation for the lack of medical treatment, and that respondent had failed to administer the prescribed medication.  When FCDSS took Diana to the hospital her ears were draining pus and blood.  The court also found that Sindy "lived in an environment injurious to her welfare due to the medical neglect of . . . Diana."

The court set out several requirements to be met before respondent could re-unify with her children, including the following: 1) improve her parenting skills by attending parenting classes, demonstrate her ability to use these skills during visitations with her children, and demonstrate her ability to provide for and control her children without FCDSS's intervention; 2) demonstrate an understanding of how to provide for her

children's medical needs; 3) maintain stable housing and employment; and 4) show her ability to care for her children.

On 7 March 2000, FCDSS filed a petition to terminate respondent's parental rights as to the two children, alleging, inter alia, that respondent continued to neglect her children and that respondent willfully left them in foster care without showing that reasonable progress under the circumstances was made to correct the conditions leading to the removal of the children. On 30 January 2001, the trial court entered an order terminating respondent's parental rights. The trial court concluded that grounds did not exist to terminate respondent's parental rights because of neglect pursuant to N.C.G.S. § 7B-1111 (a) (1), but found that grounds did exist to terminate respondent's parental rights because respondent willfully left her children in foster care for more than twelve months without showing that reasonable progress under the circumstances has been made to correct the conditions that led to the removal of her children pursuant to N.C.G.S. § 7B-1111 (a) (2). Respondent appealed.

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Respondent presents five assignments of error. We note at the outset that respondent failed to cite to any authority in support of her third, fourth and fifth assignments of error. They are therefore deemed abandoned. See N.C. R. App. P. Rule 28(b) (5).

In her remaining assignments of error, respondent argues that the trial court erred when it: 1) denied respondent's motion to dismiss because the petition was not properly before the court; and

2) found as fact that respondent had not made sufficient progress within twelve months to correct the conditions which led to the removal of the children. We disagree and affirm the order of the trial court terminating respondent's parental rights.

There are two stages involving a petition to terminate parental rights: adjudication and disposition. At the adjudication stage, the petitioner has the burden of proving by clear, cogent and convincing evidence that at least one statutory ground for termination exists. *In re McMillon*, 143 N.C. App. 402, 408, 546 S.E.2d 169, 173-74, review denied, 354 N.C. 218, 554 S.E.2d 341 (2001) (citing *In re Young*, 346 N.C. 244, 485 S.E.2d 612 (1997); *In re Bluebird*, 105 N.C. App. 42, 411 S.E.2d 820 (1992)); see N.C.G.S. § 7B-1109(f) (2000) (requiring findings of fact to be based on clear, cogent, and convincing evidence). A finding of one statutory ground is sufficient to support the termination of parental rights. *In re Pierce*, 67 N.C. App. 257, 261, 312 S.E.2d 900, 909 (1984). Upon so finding, the trial court proceeds to the disposition stage, where it determines whether termination of parental rights is in the best interest of the child. *In re McMillon* at 408, 546 S.E.2d at 174. On appeal from an order terminating parental rights, this Court reviews whether the trial court's findings of fact are supported by clear, cogent and convincing evidence, and whether those findings support the court's conclusions of law. *Id.* at 408, 546 S.E.2d at 174 (citing *In re Huff*, 140 N.C. App. 288, 536 S.E.2d 838 (2000), appeal dismissed and review denied, 353 N.C. 374, 547 S.E.2d 9 (2001); *In re Allred*,

122 N.C. App. 561, 471 S.E.2d 84 (1996)). If the decision is supported by such evidence, the trial court's findings are binding on appeal, even if there is evidence to the contrary. *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988).

**I.**

Respondent first argues that the trial court erred when it denied respondent's motion to dismiss because FCDSS filed its termination of parental rights [TPR] petition after the Juvenile Code was amended and became effective. Effective 1 July 1999, the Juvenile Code was amended by replacing former Articles 41 through 59 of Chapter 7A with Chapter 7B.

The trial court, *sua sponte*, raised the issue of the effective date and application of the amended Juvenile Code. Upon further review, however, the trial court concluded that the effective date of the amended Juvenile Code did not preclude the use of evidence of acts committed prior to 1 July 1999 as a basis for TPR petitions filed after 1 July 1999.

Respondent argues that the trial court erred in denying her motion to dismiss because the neglect report and petition for custody were filed prior to 1 July 1999, but the TPR petition was filed after 1 July 1999. Respondent bases this argument on the fact that FCDSS filed a TPR petition pursuant to § 7B-1103, which applies only to petitions, reports *and* reviews commenced on or after 1 July 1999. Respondent states in support of her argument that: 1) the petition was filed after 1 July 1999; therefore, the amended Juvenile Code does not apply; 2) because the amended

Juvenile Code does not apply, the cut-off date is 1 July 1999 for admitting acts of a parent in a TPR proceeding; 3) consequently, the trial court erred in admitting acts committed after 1 July 1999. We disagree. When construing statutes, our Supreme Court has stated:

This Court presumes that the legislature acted in accordance with reason and common sense, and that it did not intend an absurd result. Also, when construing a statute, we always look to its purpose. An underlying theme of the North Carolina Juvenile Code is for the trial court to serve the best interest of the child.

*In re Blake*, 347 N.C. 339, 341, 493 S.E.2d 418, 420 (1997) (citations omitted). Although the Juvenile Code states that the amendments apply to: 1) abuse, neglect, and dependency reports received; 2) petitions filed; and 3) reviews commenced on or after 1 July 1999, to require all three conditions to be met for the amended Juvenile Code to apply would lead to absurd results. As the guardian ad litem argues, "The Legislature would not create a ground for termination that requires evidence over a twelve month period and then arbitrarily cut off evidence that could be used to prove it." Such would not be in the best interest of the child. Accordingly, this assignment of error is overruled.

## II.

Respondent next argues that the trial court erred in concluding that she had not, under the circumstances, made sufficient progress within twelve months to correct the conditions leading to the removal of Cindy and Diana. The trial court found that respondent failed to make reasonable progress under the

circumstances to address the children's medical problems. The trial court specifically found that respondent unjustifiably missed medical appointments while the children were in foster care:

[Respondent] missed at least 8 out of 10 medical appointments for Diana's medical needs. There were issues of having no way to contact [respondent] to attend some of the appointments and some other appointments were missed because she had to work or she got notice the same day of the appointment and had to find transportation. The court finds that the reasons for the missed appointments were not justified.

Respondent argues that "[t]he court erred in holding [her] to a standard of Americans who can speak English, who can make use of the medical providers in town, who obtain phone service easily, and who generally 'know the system.' These are the 'circumstances' under which [respondent] operated." We disagree.

N.C.G.S. § 7B-1111(a), which enumerates nine bases upon which a court may terminate parental rights, allows for termination of parental rights upon a finding that the parent willfully left a juvenile in foster care for more than twelve months without showing that reasonable progress under the circumstances was made to correct the conditions that led to the removal of the juvenile. N.C.G.S. § 7B-1111(a)(2) (2000). In determining willfulness, this Court has previously stated:

In the context of a termination based on willful abandonment, this Court has held that the word "willful" connotes purpose and deliberation. Willfulness under § 7A-289.32(3) [(now § 7B-1111(a)(2))], however, is something less than willful abandonment. A finding of willfulness is not precluded even if the respondent has made some efforts to regain custody of the children.

*In re Nolen*, 117 N.C. App. 693, 699, 453 S.E.2d 220, 224 (1995) (citations omitted).

To help respondent reunify with her children, FCDSS contracted with David Pardo, a Spanish-speaking therapist, to perform a family evaluation and provide individual parenting classes for respondent and her children. Respondent attended a session with her children in May 1999, and was to visit Pardo weekly for individual sessions. However, between June 1999 and February 2000, respondent did not attend any appointments; she either rescheduled or failed to show up. Thereafter, from February through May 2000 respondent went to Pardo's office four times for individual counseling.

Galo Maldonado, a Spanish-speaking pastor at a Hispanic Mission in Winston-Salem, testified that respondent sought his assistance after learning about him from a friend. When Maldonado referred respondent to group meetings or services, respondent had problems following through. Maldonado testified that he was not surprised to learn that respondent did not keep her appointments with Pardo because she has a problem with consistency and following through on things.

Respondent asks this Court to excuse her because of her lack of understanding of the English language and familiarity with our "system." We cannot do so. Respondent's inability to deal with our "system" is largely due to her own lack of diligence. We find her failure to follow through was not reasonable under the circumstances.



Furthermore, when respondent's children were adjudicated to be neglected under N.C.G.S. § 7A-517(21) (now § 7B-101(15)) in February 1998, the district court ordered respondent to "[a]ttend all medical appointments of her daughters and ask questions of the physicians regarding the need of the visit." Respondent failed to do so. The children's foster mother testified that respondent attended only one of the scheduled medical appointments for Diana's ears, which needed attention at least once a month from the time the child was one until she was two-and-a-half years old. Respondent argues that she was not told of these appointments. However, a social worker testified that FCDSS had a hard time contacting respondent about medical appointments. The social worker testified that FCDSS was unable to contact respondent for seventy percent of the appointments. Respondent attended approximately half of the scheduled appointments when DSS was able to contact her. In ruling on the TPR order, the trial court found that although respondent testified that she would do anything for her daughters, respondent's "actions do not speak as loud as her words . . . ." The court's finding that respondent unjustifiably missed medical appointments of the children is supported by clear, cogent and convincing evidence.

In adjudicating the children to be neglected, the trial court also ordered respondent to "[d]emonstrate her ability to meet the needs of each child and control her children without needing the intervention of social workers to supervise or protect the children." In the TPR order, the trial court found that respondent

failed to set limits for the children during visits. A social worker for FCDSS testified that respondent let her children "run wild" through their offices to the point that she had to intervene. Respondent even testified that she allowed her children to bite her during visits so they would not cry. When the social worker tried to instruct respondent on using "time-out" to discipline the children, respondent told the worker that she did not believe in discipline. Rather, respondent would pat the children on the back and say, "Mommy loves you." At one point, Diana hit Sindy, the older child, in the face with a toy because Sindy was tormenting her for nearly the entire visit at FCDSS.

In the TPR order, the trial court noted that Pardo, the Spanish-speaking therapist, "opined that [respondent] was still in need of intensive work on her parenting skills especially in light of Sindy's above average need for structure." Because Sindy has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder, management is very important for proper social and educational development. The foster mother testified that, although Sindy is a loving child, she must be watched constantly: "[I]f you don't have the doors bolted, [Sindy] will walk out the door and you'll find her two blocks away. She gets into things. She's very destructive." The foster mother explained that by destructive she meant that Sindy is physical toward toys and other children.

It is apparent from the foregoing that the trial court's finding that respondent failed to set limits for the children (and

her inability to meet the needs of the children and control them without intervention of social workers) is based on clear, cogent and convincing evidence in the record. Further, we hold that these findings support the trial court's conclusion that respondent willfully left her children in foster care without showing that reasonable progress had been made to correct the conditions leading to the removal of the children.

In the TPR order, the court found as fact:

The Court noted in its determination of what was in the best interest of the children that while [respondent] had made some improvements by attending . . . parenting classes, obtaining housing and employment; she had failed to make substantial progress in the areas of individual counseling, attending to the medical concerns of the children and learning to provide them with appropriate structure . . . . Based upon the now existing language barrier between the mother and the children and [respondent's] apparent inability to set structure and control Sindy Rodriguez; the Court finds it is in the best interest of the children to terminate the parental rights of [respondent] to the children, Sindy Rodriguez and Diana Calleja Rodriguez.

Based on the foregoing, we hold that the trial court did not err in terminating respondent's parental rights, and that such termination was in the best interest of the children.

AFFIRMED.

Judges McGEE and HUNTER concur.

Report per Rule 30(e).