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NO. COA03-1395

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2004

IN THE MATTER OF:
J.D.S.

Wake County
No. 02 J 482

Appeal by respondent from an order terminating her parental rights entered 21 February 2003 by Judge Michael R. Morgan in Wake County District Court. Heard in the Court of Appeals 26 May 2004.

Juanita B. Hart and Corinne G. Russell, Wake County Attorney's Office, for appellee-Wake County Human Services.

Richard Croutharmel, Wake County Guardian ad Litem Program, for appellee-child

Terry F. Rose for respondent-appellant mother.

STEELMAN, Judge.

Appellee-child (J.D.S.) was placed in the nonsecure custody of appellee Wake County Human Services (Human Services) on 14 February 2001 pursuant to a petition by Human Services alleging neglect by the mother (primarily based on improper discipline). By order filed 18 June 2001, arising out of a hearing on 14 March 2001, the trial court adjudicated the child neglected by respondent-appellant mother (respondent) and placed J.D.S. in the custody of her father, and conditions were ordered, the compliance with which were required for reunification of respondent and J.D.S. These

conditions were: (1) complete a psychological evaluation at Human Services and comply with its recommendations; (2) complete a substance abuse assessment and comply with any recommendations; (3) complete anger management class at Human Services; (4) complete an approved parenting class; (5) maintain stable housing and employment; and (6) pay child support as required through Wake County Child Support Enforcement. J.D.S. was removed from the custody of her father on 11 June 2001 and placed in the custody of Human Services upon allegations that she was neglected by her father. J.D.S. was adjudicated a neglected juvenile by order filed 10 October 2001. This case was reviewed on multiple occasions subsequent to this order, and changes in the requirements for reunification were implemented. On 30 May 2002 the trial court entered its final order outlining the requirements respondent had to meet to achieve reunification with J.D.S., which in addition to the requirements listed in the 18 June 2001 order included: (1) Respondent demonstrate appropriate parenting skills, and comply with the recommendations of Human Services; (2) respondent participate in J.D.S.'s therapy; (3) respondent participate in J.D.S.'s medical care and education; and (4) respondent maintain weekly contact and monthly visits with the social worker. Based on its assessment of the efforts of J.D.S.'s parents, Human Services subsequently changed its recommendation from reunification of J.D.S. and her parents to a plan preparing for both reunification and termination of parental rights and adoption to an outside family. Human Services finally changed its recommendation to

outright termination of parental rights and placement of J.D.S. by adoption. On 8 and 10 January 2003 The trial court conducted a hearing on the petition by Human Services to terminate the parental rights of J.D.S.'s parents. On 21 February 2003 an order terminating the parental rights of respondent and J.D.S.'s father was filed. From this order terminating her parental rights, respondent appeals.

"[I]n order to prevail in a termination of parental rights proceeding . . . the petitioner must: (1) allege and prove all facts and circumstances supporting the termination of the parent's rights; and (2) demonstrate that all proven facts and circumstances amount to clear, cogent, and convincing evidence that the termination of such rights is warranted." *In re Pierce*, 356 N.C. 68, 70, 565 S.E.2d 81, 83 (2002). "A clear, cogent and convincing evidentiary standard is a higher standard than preponderance of the evidence, but not as stringent as the requirement of proof beyond a reasonable doubt." *In re Hardesty*, 150 N.C. App. 380, 385, 563 S.E.2d 79, 83 (2002).

A proceeding for termination of parental rights requires the trial court to conduct a two part inquiry. N.C.G.S. § 7B-1109(e) (2001) directs that the court first "shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. [§] 7B-1111 which authorize the termination of parental rights of the respondent." Disposition is governed by N.C.G.S. § 7B-1110 (2001), which provides in relevant part that upon a finding "that any one or more of the conditions authorizing a termination of the parental rights of a parent exist, the court shall issue an order terminating the parental rights of such parent . . . unless the court shall

further determine that the best interests of the juvenile require that the parental rights of the parent not be terminated." N.C.G.S. § 7B-1111(a) (2001).

In re Baker, 158 N.C. App. 491, 493, 581 S.E.2d 144, 146 (2003). On appeal, "our standard of review for the termination of parental rights is whether the court's 'findings of fact are based upon clear, cogent and convincing evidence' and whether the 'findings support the conclusions of law.'" *Id.* (citations omitted). "So long as the findings of fact support a conclusion based on [the relevant statute], the order terminating parental rights must be affirmed." *In re Oghenekevebe*, 123 N.C. App. 434, 436, 473 S.E.2d 393, 396 (1996) (citation omitted).

Respondent has not assigned as error the trial court's findings of fact, thus they are binding on appeal. *In re Wilkerson*, 57 N.C. App. 63, 65, 291 S.E.2d 182, 183 (1982). "When the trial court is the trier of fact, the court is empowered to assign weight to the evidence presented at the trial as it deems appropriate. In this situation, the trial judge acts as both judge and jury, thus resolving any conflicts in the evidence." *Oghenekevebe*, 123 N.C. App. at 439, 473 S.E.2d at 398 (citations omitted). Further, respondent has not assigned as error the trial court's conclusion that termination of respondent's parental rights was in the best interest of J.D.S., and thus has waived any objection to that conclusion. *In re Baker*, 158 N.C. App. 491, 497, 581 S.E.2d 144, 148 (2003). Our review in this case is thus limited to whether the trial court's findings of fact support its conclusions of law that

respondent committed acts under N.C. Gen. Stat. § 7B-1111 warranting termination of her parental rights.

The trial court found three grounds for termination of respondent's parental rights:

a. That the . . . mother neglected the child within the meaning of N.C.G.S. Section 7B-101(15), and it is probable that there would be a repetition of the neglect if the child was returned to the care of the . . . mother.

b. That the . . . mother willfully left the child in foster care for more than twelve (12) months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting the conditions which led to the removal of the child. Poverty is not the sole reason that the . . . mother [is] unable to care for the child.

c. That the child has been placed in the custody of the Petitioner and the . . . mother, for a continuous period of six months next preceding the filing of the Petition, willfully failed for such period to pay a reasonable portion of the cost of care for the child although physically and financially able to do so.

Any one of these grounds is sufficient to support termination, *Baker*, 158 N.C. App. at 497, 581 S.E.2d at 148; *In re Pierce*, 67 N.C. App. 257, 261, 312 S.E.2d 900, 903 (1984).

In her first assignment of error respondent argues that the trial court erred in terminating her parental rights based upon neglect because the trial court failed to find that neglect was present at the time of termination or that there was a probability of repetition of neglect. We disagree.

In order for the trial court to terminate someone's parental rights based on neglect, it must find that:

The parent has . . . neglected the juvenile. The juvenile shall be deemed to be . . . neglected if the court finds the juvenile to be . . . a neglected juvenile within the meaning of G.S. 7B-101.

N.C. Gen. Stat. § 7B-1111 (2004). N.C. Gen. Stat. § 7B-101(15) (2004) defines a neglected juvenile as:

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.

Respondent contends that the trial court improperly relied on the prior adjudication of neglect to support its termination of her parental rights based upon neglect. Respondent argues that the trial court's findings of fact do not support the conclusion that she was neglecting J.D.S. at the time of the termination hearing. In this case J.D.S. had been in foster care for 20 months prior to the termination of parental rights hearing.

"[A] prior adjudication of neglect may be admitted and considered by the trial court in ruling upon a later petition to terminate parental rights on the ground of neglect." *In Re Ballard*, 311 N.C. 708, 713-14, 319 S.E.2d 227, 231 (1984). However, such prior adjudication, standing alone, will not suffice where the natural parents have not had custody for a significant period prior to the termination hearing. *Id.* Therefore, the court must take into consideration "any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect. The determinative factors must be the best interests of the child and the fitness of the parent to care for the child at the time of the termination

proceeding." *Id.* at 715, 319 S.E.2d at 232
(citation omitted) (first emphasis added).

In re Brim, 139 N.C. App. 733, 742, 535 S.E.2d 367, 372
(2000) (second emphasis removed).

In the instant case J.D.S. was adjudicated neglected mainly based on respondent's improper use of physical discipline, which included blows that left marks on J.D.S. The trial court's findings of fact from the 18 June 2001 order adjudicating J.D.S. neglected by respondent show that respondent was investigated on multiple occasions regarding the use of improper discipline, beginning when J.D.S. was about six months old. Respondent continued to use improper discipline, including an incident where respondent whipped J.D.S. with a belt, despite repeated admonitions by Child Welfare Services to refrain from such conduct. Respondent was investigated by Wake Child Protective Services in 1998, 1999, 2000, and 2001. Respondent was referred for child welfare treatment services in 1998 and 1999, but each time the case was closed when respondent sent J.D.S. to live with a relative. J.D.S.'s maternal great aunt reported that when J.D.S. lived with her, and took her medications, her performance in school improved and she was better behaved. J.D.S.'s great aunt also reported that when J.D.S. lived with her mother, J.D.S. reported that she was afraid of her mother and that she was also hit and spanked by her. The great aunt reported seeing marks on J.D.S. consistent with such abuse. The findings of fact also show that respondent did not comply with the recommendations of mental health professionals regarding medications and therapy, that respondent yelled at,

threatened, and demeaned J.D.S., and that as a result of respondent's conduct, there was "physical, mental or emotional impairment of [J.D.S.], or a substantial risk of such impairment as a consequence of the failure of [respondent] to provide proper care and discipline." The trial court properly relied on this prior adjudication of neglect as evidence supporting its finding of neglect in the termination proceeding. *Brim*, 139 N.C. App. at 742, 535 S.E.2d at 372. As a result of the adjudication of neglect, respondent was ordered to complete ten steps to achieve reunification with J.D.S., as listed above. The trial court found that respondent failed in completing many of these tasks.

Specifically, the trial court found: 1) Though she completed a psychological evaluation in October of 2001, respondent did not engage in the individual counseling recommended in the year and a half that followed; 2) she responded to the last request by Human Services that she take a random drug test by stating: "Hold out your hand and I'll pis[s] in it if you want a drug screen;" 3) although she completed an eight week anger management course, she was unable to integrate the principles of the class into her daily life; 4) though she completed the parenting class, she did not "demonstrate the positive change in parenting skills and behavior that the facilitators would hope to see;" 5) she failed to maintain stable housing, having lived in at least five different locations between September 2001 and October 2002; 6) she failed to maintain stable employment, holding at least nine different jobs and going through periods of unemployment; 7) she failed to make the required

child support payments, except when payments were withheld from her paycheck without her approval; 8) she thereafter failed to inform Wake County Child Support Enforcement of her places of employment (thereby preventing child support withholding); 9) though she attended some sessions of joint therapy with J.D.S., she was told by the therapist to cease attending and first pursue individual therapy because she did not respond to J.D.S. in a "nurturing manner when the child was obviously seeking affection and approval from her;" 10) she failed to visit J.D.S. on a regular basis even though Human Services attempted to work with her to set up a schedule to accommodate her job schedule; 11) she was not prevented from meeting the above requirements due to poverty, rather she failed to change her "attitude and behaviors consistent with making reunification with the child [her] first priority;" 12) finally, respondent had the "ability to achieve reunification with J.D.S., but has failed to demonstrate substantial progress toward correcting the conditions which caused the child to remain in foster care for more [than] twenty months."

The nature of respondent's neglect was improper care and discipline of J.D.S. The respondent's acts of neglect were removed from the time of hearing by nearly two years. The critical inquiry for the trial court was the probability of repetition of neglect by respondent and her fitness to care for the child at the time of the hearing. The trial court's findings of fact reveal that respondent was not interested in addressing the underlying problems which gave rise to the original adjudication of neglect. The trial court's

findings do show that respondent completed some of the classes that she was required to attend. However, the trial court also found that respondent refused to comply with recommendations that she seek individual counseling until the eve of a hearing and that she was unable to apply what she learned in the classes to her relationship with J.D.S. Respondent's failure to address the underlying causes of the original neglect clearly support the trial court's conclusion that the neglect was likely to recur and that at the time of the hearing "the parents will not promote the healthy and orderly, physical and emotional well-being of the child." See *In re Caldwell*, 75 N.C. App. 299, 330 S.E.2d 513 (1985). This assignment of error is without merit.

Because we find that the trial court did not err in terminating respondent's parental rights under N.C. Gen. Stat. § 7B-1111(a)(3), "we need not discuss the remaining . . . grounds for termination asserted by petitioner." *Baker*, 158 N.C. App. at 497, 581 S.E.2d at 148 (quoting *Brim*, 139 N.C. App. at 743, 535 S.E.2d at 373 (2000)).

AFFIRMED.

Judges TYSON and BRYANT concur.

Report per Rule 30(e).