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NO. COA05-1079

NORTH CAROLINA COURT OF APPEALS

Filed: 18 July 2006

IN THE MATTER OF:

Greene County

No. 03 JT 43

J.M.P.,

A Minor Child.

Appeal by respondent from order entered 20 December 2004 by Judge R. Les Turner in Greene County District Court. Heard in the Court of Appeals 8 May 2006.

*Borden Parker, for petitioner-appellee Greene County Department of Social Services.*

*Katharine Chester for respondent-appellant.*

*Tim Finan, for Guardian ad Litem.*

LEVINSON, Judge.

Respondent-father (father) appeals from an order terminating his parental rights in J.M.P. We reverse.

The pertinent facts may be summarized as follows: On 6 June 2003, the Greene County Department of Social Services (DSS) filed a petition alleging that J.M.P. was a neglected juvenile and "live[d] in an environment injurious to [his] welfare." The petition alleged, in part, that father struck K.W., a child of Lakeisha W., with a "hard plastic miniblind wand." Father was living with his girlfriend, Lakeisha W., at the time. An

examination of K.W. revealed marks consistent with being struck with a wand because she had "multiple scars, bruises [and] healing lacerations on her thighs, buttocks, lower back and abdomen." Father stated that, while he routinely spanked K.W., he used a belt instead of a miniblind wand. When K.W. was asked how she received the marks, she replied, "Mike beat me up."

When K.W. was removed from her mother's home, Lakeisha W. was pregnant with J.M.P. After the birth of J.M.P., DSS worked with Lakeisha W. to protect J.M.P. from father. Consequently, a safety assessment and plan was signed by Lakeisha W. on 29 May 2003; the plan provided that father would "have no contact with [J.M.P.]". However, DSS asserted, on 6 June 2003 father was observed in Lakeisha W.'s home. DSS therefore obtained nonsecure custody of J.M.P. on 6 June 2003 and, in a 1 August 2003 order, the trial court found that father violated the safety plan by having contact with J.M.P. in the home of Lakeisha W. The trial court concluded that J.M.P. was a neglected juvenile, and required that father (1) have no visitation with the juvenile, (2) attend parenting and anger management classes, (which he completed in April and May of 2004), and (3) undergo a complete psychological and psychiatric evaluation.

A mental health evaluation conducted by Wilson-Greene Mental Health, Developmental Disabilities and Substance Abuse Services revealed the following concerning father: a potential anti-social personality disorder; reported marijuana use at age 15 with the last reported usage in mid August 2003 when he smoked one "blunt"

daily; and involvement in drug dealing activities within the preceding year. On 14 November 2003, DSS was relieved of its efforts to reunify J.M.P. with father and, on 24 November 2003, DSS filed a petition to terminate the parental rights of father and Lakeisha W. on the basis that both parents neglected the juvenile. The case came on for hearing on 27 September 2004.

Evelyn Corbett, a case manager for DSS, testified that Lakeisha W. signed a safety assessment because she wanted to ensure that father had no contact with J.M.P. because he had previously abused J.M.P.'s half-sibling, K.W. Corbett further testified that, since working on the case, she only had "limited contact" with father and that he failed to attend permanency planning hearings. Corbett stated that father never made DSS aware of his residence, and that she did not believe that father followed up with any treatment as a result of the mental health evaluation. Corbett stated she had no information that father directly harmed J.M.P.

Father testified. He was currently housed at a Department of Corrections facility and had not completed mental health treatment since having the evaluation. Although father pled guilty to abusing K.W., he stated, "I didn't mean to spank her." Father stated that he "smoked marijuana occasionally[,]" and that he spanked one of his sons on the hand.

By order entered 20 December 2004, the trial court concluded that father neglected J.M.P. and terminated his parental rights in him. From this order father now appeals.

While father makes several arguments on appeal, we address one that is dispositive. Father contends that the trial court failed to make the required findings regarding the likelihood of future neglect of J.M.P. We agree.

For a termination of parental rights based on neglect, the trial court must determine whether neglect is present at the time of the termination proceeding. See *In re Ballard*, 311 N.C. 708, 716, 319 S.E.2d 227, 232 (1984). If a juvenile should ever be removed from the parent before the date of the termination hearing "evidence of neglect by a parent prior to losing custody . . . is admissible in subsequent proceedings to terminate parental rights." *Id.* at 715, 319 S.E.2d at 232. However, in those circumstances, "parental rights may [] be terminated if there is a showing of a past adjudication of neglect and the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to [his] parents." *In re Reyes*, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000) (emphasis added).

In the instant case, the trial court's order entered 20 December 2004 is devoid of any finding regarding the probability that neglect will recur if J.M.P. was returned to father's care. Consequently, in the absence of a specific finding as to a probability of repetition of neglect, as required by *Reyes*, the trial court's order must be reversed and remanded for entry of a new order.

Father also argues on appeal that the petition to terminate parental rights does not provide the required notice as to what

conditions were at issue in the case pursuant to N.C. Gen. Stat. § 7B-1104(6) (2005) (petitioner must "state . . . [f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist.").

Father argues that, because the petition only conclusively averred that father neglected J.M.P., the trial court lacked subject matter jurisdiction to adjudicate the petition. In making this argument, father relies heavily on *In re Quevedo*, 106 N.C. App. 574, 419 S.E.2d 158 (1992), and *In Re Hardesty*, 150 N.C. App. 380, 563 S.E.2d 79 (2002). However, unlike the circumstances in those cases, the record here is devoid of any indication that father moved to dismiss the petition to terminate parental rights for failure to state a claim in accordance with N.C. Gen. Stat. § 1A-1, Rules 12(b)(6) and/or 12(c) (2005). Moreover, father cites no authority that petitioner's failure to comply with G.S. § 7B-1104(6) divests the trial court of subject matter jurisdiction, and we find none. We therefore reject the argument that the trial court lacked jurisdiction to adjudicate the petition.

In light of the foregoing, we need not address father's remaining arguments. On remand, it is within the discretion of the trial court whether to receive additional evidence.

Reversed and remanded.

Chief Judge MARTIN and Judge JACKSON concur.

Report per Rule 30(e).