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NO. COA05-1084

NORTH CAROLINA COURT OF APPEALS

Filed: 6 June 2006

IN THE MATTER OF
G.G.A.R.,
minor child.

New Hanover County
No. 04 J 449

Appeal by Respondent from order entered 18 March 2005 by Judge John J. Carroll, III, in District Court, New Hanover County. Heard in the Court of Appeals 28 March 2006.

Dean Hollandsworth for petitioner-appellee.

Regina Floyd-Davis, Guardian Ad Litem.

Lisa Skinner Lefler for respondent-appellant.

WYNN, Judge.

A trial court may consider relative placement as grounds for why it would not be in the child's best interests to terminate a parent's parental rights.¹ In this case, Respondent argues that the trial court failed to make findings of fact as to the possibility of relative placement in lieu of termination of parental rights. Because the transcript reveals that the trial judge did, in fact, consider relative placement, we decline to hold that the trial court abused its discretion by terminating Respondent's parental rights.

¹ *In re J.A.A.*, __ N.C. App. __, __, 623 S.E.2d 45, 51 (2005).

On 3 December 2002, the New Hanover County Department of Social Services ("DSS") filed the initial Juvenile Petition, alleging neglect by lack of proper care and supervision or discipline and dependency, lack of compliance with substance abuse treatment and domestic violence. The minor child was placed with her maternal step-grandmother at the time of the filing of the Juvenile Petition, but was later placed in foster care on 16 December 2002.

The minor child was adjudicated neglected and dependent on 13 February 2003. The case was reviewed on 8 May 2003, and the plan of reunification remained in effect, with a permanency planning hearing to occur within six months. At the time of the permanency planning hearing on 13 November 2003, Respondent was incarcerated on felony charges for armed robbery and drug possession. During the permanency planning hearing, the minor child's paternal aunt requested to be considered as a possible relative placement and DSS requested that the Columbus County Department of Social Services conduct a home study. As it related to placement of the minor child with her paternal aunt, the trial court found at the permanency hearing that "[the minor child's] current placement[] allow[s] [her] to remain close and in contact with [her sister]. Placement out of county for [the minor child] would eliminate the level of contact the siblings have with each other. The foster parent for [the minor child] has demonstrated a commitment to adopting [her] should she become free for adoption." At the conclusion of the permanency planning hearing, the trial court

changed the permanent plan for the minor child from reunification to adoption and ordered DSS to proceed with the termination of parental rights. Subsequently, the minor child's mother signed a relinquishment for adoption by the minor child's foster parent; however, Respondent never agreed with the plan for adoption.

On 20 October 2004, DSS filed a petition for termination of parental rights against Respondent. The trial court proffered four statutory grounds for terminating Respondent's parental rights: (1) Respondent "neglected the juvenile," pursuant to section 7B-1111(a)(1); (2) Respondent "willfully . . . left the juvenile in foster care for more than twelve months[,]" pursuant to section 7B-1111(a)(2); (3) Respondent failed "to establish paternity or legitimize the child prior to the filing of the petition[,]" pursuant to section 7B-1111(a)(5); and (4) Respondent "willfully abandoned the juvenile[,]" pursuant to section 7B-1111(a)(7). See N.C. Gen. Stat. §§ 7B-1111(a)(1), (2), (5), and (7) (2005). By order filed 18 March 2005, the trial court terminated Respondent's parental rights and ordered DSS to implement the plan for the adoption of the minor child. Respondent appeals.

In his first argument on appeal, Respondent contends the trial court erred in its failure to make findings of fact and conclusions of law regarding the possible placement of the minor child with her paternal aunt in the order terminating his parental rights. Respondent's argument is without merit.

A termination of parental rights proceeding is conducted in two stages: (1) the adjudication phase, which is governed by N.C. Gen. Stat. § 7B-1109 (2005) and (2) the disposition phase, which is governed by N.C. Gen. Stat. § 7B-1110 (2004). See *In re Brim*, 139 N.C. App. 733, 738, 535 S.E.2d 367, 370 (2000). Section 7B-1109(e) of the North Carolina Statutes provides that in the adjudication phase, the trial court

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.

N.C. Gen. Stat. § 7B-1109(e). The disposition phase, which is governed by section 7B-1110 of the North Carolina General Statutes, provides that upon a trial court's 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. Gen. Stat. § 7B-1110. The trial court has discretion, if it finds by clear, cogent, and convincing evidence that at least one of the statutory grounds exists, to terminate parental rights upon a finding that it would be in the best interests of the child. *In re Blackburn*, 142 N.C. App. 607, 613, 543 S.E.2d 906, 910 (2001). The trial court's decision to terminate parental rights is reviewed under an abuse of discretion standard. *Brim*, 139 N.C. App. at 744, 535 S.E.2d at 373.

In this case, Respondent argues that the trial court erred because there were no findings of fact as to the possibility or appropriate nature of relative placement in lieu of termination of parental rights. During the adjudication phase of a termination of parental rights proceeding, "the trial court does not consider whether there is a relative who can take custody of the minor child, but focuses on whether there is evidence to support termination on the grounds alleged in the petition." *In re J.A.A.*, __ N.C. App. at __, 623 S.E.2d 45 at 51. Notwithstanding, the trial court may consider relative placement during the dispositional phase of a termination proceeding as grounds for why it would not be in the child's best interests to terminate a parent's parental rights if a fit relative comes forward and declares their desire to have custody of the minor child. *Id.*

The trial court in this case determined that it was in the minor child's best interests to terminate Respondent's parental rights and to proceed with the plan of adoption for the minor child. Although the trial court's order terminating Respondent's parental rights does not contain any specific findings that reject the minor child's placement with her paternal aunt, "the trial court is not required to make findings of fact on all the evidence presented, nor state every option it considered." *Id.* (citing *Fortis Corp. v. Northeast Forest Products*, 68 N.C. App. 752, 753, 315 S.E.2d 537, 538 (1984)). To the contrary, the trial court must only "make brief, pertinent and definite findings and conclusions about the matters in issue." *Id.* Moreover, although the written

order terminating Respondent's parental rights does not specifically outline the trial court's consideration of possible placement of the minor child with her paternal aunt, it does not mean that the trial court did not consider this option. See *id.*

Indeed, the trial transcript reveals that the trial judge did, in fact, consider placement of the minor child with her paternal aunt. The trial judge stated:

It was brought out during this hearing that the aunt -- and she is present in court and made a comment not under oath, but it appears that the aunt has had minimal contact with the child, supervised visit, maybe one other visit within the last two plus years for the child, and has -- as has been brought out in the other orders and was brought out today by the Department, the child currently is in a nurturing environment and is the only child with the foster parents and is participating numerous activities and is doing well.

Thus, it is apparent from the trial transcript that the trial judge did consider granting the minor child's paternal aunt custody. Based on the trial judge's statements, findings of fact and conclusions of law, we cannot say that the trial court failed to consider relative placement when making its best interest determination. As the trial court made the appropriate findings of fact and conclusions of law on the issues related to the termination of Respondent's parental rights, Respondent's assignment of error is, therefore, rejected.

In his next argument on appeal, Respondent contends the trial court erred in concluding that grounds existed to terminate his parental rights. We disagree.

We first note that although the trial court concluded that grounds existed pursuant to sections 7B-1111(a)(1), (2), (5) and (7) of the North Carolina General Statutes to terminate Respondent's parental rights, we find it dispositive on appeal that the evidence is sufficient to support termination of Respondent's parental rights under section 7B-1111(a)(2). See *In re Pierce*, 67 N.C. App. 257, 261, 312 S.E.2d 900, 903 (1984) (a finding of one statutory ground is sufficient to support the termination of parental rights).

Under section 7B-1111(a)(2) of the North Carolina General Statutes, a court may terminate parental rights on the ground "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C. Gen. Stat. § 7B-1111(a)(2). The twelve-month period for the evaluation of reasonable progress under section 7B-1111(a)(2) is not limited to the twelve months immediately preceding the filing of the petition. *In re Pierce*, 356 N.C. 68, 75, 565 S.E.2d 81, 86 (2002). The willful leaving of the child is "something less than willful abandonment" and "does not require a showing of fault by the parent." *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 398 (1996). A finding of this ground may be made when the parent has made some attempt to regain custody of the child but has

failed to show reasonable and positive progress. *In re Nolen*, 117 N.C. App. 693, 699-700, 453 S.E.2d 220, 224-25 (1995).

The trial court made the following finding of fact in support of its conclusion to terminate Respondent's parental rights under section 7B-1111(a) (2):

6. The Respondent-Father has willfully, and not due solely to poverty, left the child in foster care or placement outside of the home for more than twelve months without showing to the satisfaction of the Court that reasonable progress under the circumstances has been made in correcting those conditions which led to the child's removal. At the date of this hearing, the child has been out of the home for approximately twenty-five months. At the time of the adjudication of this matter, the Respondent-Father was ordered to undergo a substance abuse assessment and follow any recommendations including random drug screens. He failed to return for a follow up appointment after his initial assessment; he refused all but one of the drug screens and only became involved in a treatment program while incarcerated, by his report. He was ordered to participate in and successfully complete an anger management class, which he failed to do. He was ordered to participate in supervised visitation after providing three negative, consecutive random drug screens, which he failed to do. He was ordered to resolve all criminal charges and succeeded in doing that by pleading guilty to four charges of armed robbery in November of 2004 in a plea agreement dismissing several charges and receiving an active sentence of approximately twelve years. He was also ordered to sign releases of information to any treatment programs, however, having participated in none while not incarcerated; he had no opportunity to comply with this order. By his non-compliance with the majority of the items ordered by the Court and his lack of participation in department planning meetings and other case plan activities, the child could not have been placed with him during the time of this matter even in the absence of incarceration. As such, the requisite time

period of twelve months without sufficient progress to restore custody has been exceeded.

The record reveals that at the time of the adjudication, the trial court ordered Respondent to undergo a substance abuse assessment and follow any recommendations, including random drug screening. A social worker testified at the termination hearing that Respondent failed to return for a follow up appointment after his initial assessment and refused all of the drug screenings, with the exception of one. Moreover, Respondent only became involved in a treatment program after his incarceration. The social worker further testified that Respondent failed to, (1) participate in and successfully complete an anger management class; (2) obtain and maintain safe, stable housing; and (3) participate in supervised visitation after providing three negative, consecutive random drug screens. Respondent did not present any evidence to contradict the social worker's testimony.

Moreover, at the time of the filing of the petition to terminate Respondent's parental rights on 20 October 2004, Respondent had not seen the minor child since 3 January 2003, due to non-compliance with court orders and his incarceration. As of the date of the termination hearing, the minor child had been out of the home for twenty-one months, and had been in the same foster home for nearly two years.

We conclude that the trial court's findings of fact were based on clear, cogent, and convincing evidence and, based on those findings, that the trial court properly determined that Respondent had left the minor child in foster care for twelve months without

reasonable progress. We further hold that these findings support the trial court's conclusion that Respondent was subject to having his parental rights terminated pursuant to section 7B-1111(a)(2) of the North Carolina General Statutes. This Court has held "that extremely limited progress is not reasonable progress. This standard operates as a safeguard for children. If parents were not required to show both positive efforts and positive results, a parent could forestall termination proceedings indefinitely by making sporadic efforts for that purpose." *In re B.S.D.S.*, 163 N.C. App. 540, 545, 594 S.E.2d 89, 93 (2004) (internal citations and quotation marks omitted); see also *Nolen*, 117 N.C. App. at 700, 453 S.E.2d at 225 (stating "[i]mplicit in the meaning of positive response is that not only must positive efforts be made towards improving the situation, but that these efforts are obtaining or have obtained positive results.").

Because we find there were grounds to terminate Respondent's parental rights under section 7B-1111(a)(2) of the North Carolina General Statutes, we need not address Respondent's remaining assignments of error relating to the trial court's order terminating his parental rights. See *Owenby v. Young*, 357 N.C. 142, 145, 579 S.E.2d 264, 267 (2003) ("[t]he finding of any one of the grounds is sufficient to order termination.").

Respondent next contends the trial court erred in its failure to appoint a guardian *ad litem*. Respondent's argument is without merit.

Section 7B-1101(1) of the North Carolina General Statutes requires the trial court to appoint a guardian *ad litem* for the respondent where "it is alleged that [the respondent's] rights should be terminated pursuant to G.S. 7B-1111[(a)](6), and the incapability to provide proper care and supervision pursuant to that provision is the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or another similar cause or condition." N.C. Gen. Stat. § 7B-1101(1) (2004); see also *In re J.D.*, 164 N.C. App. 176, 180, 605 S.E.2d 643, 645 (noting that the duty of appointment arises when the allegation of incapability under N.C. Gen. Stat. § 7B-1111(a)(6) is alleged in the petition for termination), *disc. review denied*, 358 N.C. 732, 601 S.E.2d 531 (2004). Where the petition to terminate parental rights neither alleges incapability due to a debilitating condition nor cites section 7B-1111(a)(6) and "none of the allegations in the [petition] tend[] to show [the] respondent is incapable of providing care for the children[,] " the trial court does not err by failing to appoint a guardian *ad litem* for the respondent. *In re O.C.*, 171 N.C. App. 457, 462, 615 S.E.2d 391, 394 (2005); see also *In re B.M.*, 168 N.C. App. 350, 357, 607 S.E.2d 698, 703 (2005) (stating "[i]t is the use of the term 'incapable' which triggers the requirement of N.C. Gen. Stat. § 7B-1101 for the appointment of a guardian *ad litem*.").

In the case *sub judice*, the petition for termination of Respondent's parental rights identified four statutory grounds for terminating Respondent's parental rights: (1) Respondent "neglected

the juvenile," pursuant to section 7B-1111(a)(1); (2) Respondent "willfully . . . left the child in foster care . . . for more than twelve months[,] " pursuant to section 7B-1111(a)(2); Respondent failed to establish paternity or legitimize the child prior to the filing of the petition, pursuant to section 7B-1111(a)(5); and Respondent "willfully abandoned the juvenile[,] " pursuant to section 7B-1111(a)(7). See N.C. Gen. Stat. §§ 7B-1111(a)(1), (2), (5), and (7). None of the allegations in the petition reflect that Respondent was incapable of caring for the minor child, nor does the petition allege incapability due to a debilitating condition or cite to section 7B-1111(a)(6) as the basis for terminating Respondent's parental rights. Although the petition does contain references to Respondent's drug abuse, the trial court is not required to appoint a guardian *ad litem* "in every case where substance abuse or some other cognitive limitation is alleged." *In re H.W.*, 163 N.C. App. 438, 447, 594 S.E.2d 211, 216 (applying N.C. Gen. Stat. § 7B-602(b)(1)), *disc. review denied*, 358 N.C. 543, 603 S.E.2d 877 (2004). As there were no allegations of Respondent's incapability to parent the minor child properly, the trial court was not required to conduct a hearing on the issue of appointing a guardian *ad litem* for Respondent. Accordingly, Respondent's assignment of error is rejected.

In his final argument on appeal, Respondent contends that because of the trial court's failure to file its order terminating his parental rights within the thirty day periods established in sections 7B-1109(e) and 7B-1110(a) of the North Carolina General

Statutes, we should reverse that order and remand to the trial court for a new proceeding. We disagree.

Section 7B-1109(e) of the North Carolina General Statutes provides that the "adjudicatory order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing." N.C. Gen. Stat. § 7B-1109(e). Section 7B-1110(a) provides:

Should the court determine 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 with respect to the juvenile unless the court shall further determine that the best interests of the juvenile require that the parental rights of the parent not be terminated. Any order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing.

N.C. Gen. Stat. § 7B-1110(a).

In order for Respondent to obtain a new trial based on the trial court's failure to file the order terminating his parental rights in a timely fashion, he must show prejudice. *In re P.L.P.*, __ N.C. App. __, __, 618 S.E.2d 241, 245 (2005); *In re J.L.K.*, 165 N.C. App. 311, 316, 598 S.E.2d 387, 391, *disc. review denied*, 359 N.C. 68, 604 S.E.2d 314 (2004). This Court has been more likely to find prejudice as the length of the delay increases. *In re T.L.T.*, 170 N.C. App. 430, 432, 612 S.E.2d 436, 438 (2005); *In re L.E.B.*, 169 N.C. App. 375, 379, 610 S.E.2d 424, 426 (2005). Notwithstanding, this Court has declined to adopt a *per se*

standard, even when long delays are involved. *In re P.L.P.*, ___ N.C. App. at ___, 618 S.E.2d at 245.

Here, the trial court filed the order terminating Respondent's parental rights two months after the termination hearing. However, Respondent fails to articulate how the trial court's delay in entering the order terminating his parental rights prejudiced him. We, therefore, hold that Respondent has not met his burden of proving prejudice. Thus, Respondent's assignment of error is rejected.

Affirmed.

Judges ELMORE and LEVINSON concur.

Report per Rule 30(e).