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NO. COA05-1139

NORTH CAROLINA COURT OF APPEALS

Filed: 1 August 2006

IN RE:

D.M.B.	
K.S.B.	Cabarrus County
Z.N.B.	Nos. 03 J 182, 183, 184
Juveniles.	

Appeal by respondent mother from order entered 20 January 2005 by Judge Donna H. Johnson in Cabarrus County District Court. Heard in the Court of Appeals 19 April 2006.

David A. Perez for Respondent-Appellant.

Kathleen Arundell Widelski and Victoria Bost for Petitioner-Appellee.

STEPHENS, Judge.

Respondent mother ("Respondent") appeals from trial court's order terminating her parental rights to the minor children, D.M.B., K.S.B., and Z.N.B. For the reasons which follow, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Respondent is the mother of three juveniles, D.M.B., born 26 March 1997, K.S.B., born 3 June 1998, and Z.N.B., born 3 June 2002. On 6 August 2003, D.M.B., K.S.B., and Z.N.B. were placed in the custody of the Cabarrus County Department of Social Services

("CCDSS") pursuant to a petition alleging neglect. The juvenile petition stated that on 30 July 1999, CCDSS received a report concerning the welfare of D.M.B. The report alleged that the home did not have any food for D.M.B and that his feet were black with dirt. The next day, CCDSS visited the home and discovered that D.M.B. was still without food and had not eaten since the previous day. Moreover, the cereal in the home was infested with roaches and the child's only bottle was covered with ants. Additionally, it was apparent that D.M.B.'s diaper had not been changed in at least a day. Throughout the home visit, the child appeared ill and had green mucus on his face and nose.

The petition also alleged that on 3 June 2002, Z.N.B. was born premature and was given C.P.R. upon delivery. The next day, Respondent and Z.N.B tested positive for marijuana and Respondent admitted to smoking marijuana while pregnant. Additionally, the hospital staff was concerned that Respondent had not bonded with Z.N.B. because Respondent had only visited the baby three times, for two to four minutes. During the course of the investigation, Respondent missed appointments for the baby on 10 June 2002, 11 June 2002, 19 June 2002, and 28 June 2002.

The petition continued that on 16 July 2003, D.M.B, who at the time functioned at the level of an eighteen-month-old, was found walking in the street alone. When D.M.B was returned home by a county worker, the worker discovered Z.N.B sitting alone at the top of a set of brick steps. On 18 July 2003, a report was received alleging that the children were out at night, without supervision,

as late as 11:00 p.m. On 18 July 2003, Respondent signed a plan agreeing not to allow the children outside unsupervised. Ten days later, K.S.B. was observed in the street without supervision.

On 15 September 2003, a consent order adjudicating the juveniles neglected was entered. As part of the family services case plan, Respondent was ordered to complete the following to be reunited with her children: (1) submit to a psychological evaluation through Northeast Psychiatric and Psychological Institute and follow any and all recommendations resulting from the evaluation (with the evaluation to be conducted on 1 October 2003); (2) submit to random drug screens upon the request of CCDSS (failure to submit to a drug screen to be considered a positive screen); (3) attend parenting classes with a special focus on children with special needs, and demonstrate skills learned during visits; (4) attend anger management sessions and cooperate with an ongoing therapist; (5) visit with the children according to the visitation agreement; (6) maintain suitable housing; and (7) seek and maintain employment in order to demonstrate financial stability for her and her children.

On 11 December 2003, 18 March 2004, and 11 June 2004, review hearings were held regarding Respondent's progress. After each hearing, review orders were entered in which the court determined that Respondent had made "minimal progress in addressing the issues which led to placement." On 5 August 2004, a permanency planning hearing was held in which the court determined that Respondent "made no progress in addressing the issues which led to placement."

In the order that was then filed on 10 August 2004, the court determined that the permanent plan for the children was adoption.

On 16 September 2004, CCDSS filed a motion in the cause to terminate Respondent's parental rights. The motion alleged that Respondent (1) neglected her minor children; (2) failed, for a continuous period of six months preceding the petition, to pay a reasonable portion of the cost of care for the children, although physically and financially capable of doing so; (3) was incapable of providing for the proper care and supervision of the minor children such that the children were dependent and there was a reasonable probability that Respondent's incapability would continue for the foreseeable future; and (4) had willfully left her children in foster care or placement outside the home for more than twelve months without showing to the satisfaction of the court that reasonable progress under the circumstances had been made in correcting the conditions which led to the removal of the children.

A hearing on the motion to terminate Respondent's rights was held on 3 and 16 December 2004. Present and testifying at the hearing were Respondent; Tasha Pyle, a CCDSS foster care social worker; and B.Y., Respondent's aunt who was then caring for K.S.B.

Regarding visitation and support, Respondent testified that she sees Z.N.B. once a month and K.S.B. two to three times a week, but that she had not seen D.M.B. for three to four months. B.Y., however, testified that whereas Respondent initially visited K.S.B. once a month, she no longer visited her regularly or made regular

phone calls to her. Moreover, Pyle testified that of the fifty-two scheduled visits with Z.N.B. during the past year, Respondent missed twenty-four.

Respondent testified that she has provided approximately \$300.00 to B.Y. to help care for K.S.B. and that she purchased Christmas presents for her children. However, B.Y. testified that since K.S.B. has been staying with her, Respondent has provided little in the way of support. She testified that Respondent bought K.S.B. one outfit and one pair of shoes, but has never provided groceries or money.

Regarding parenting skills and supervision, Pyle testified that during the children's Christmas visit with their mother, Respondent was not ready upon their arrival and did not properly direct or supervise the children during the visit. More generally, Pyle testified that D.M.B.'s behavior changes between his foster home and visits with his mother. At his foster home, D.M.B. is calm and well mannered. However, when visiting with his mother, D.M.B., who has been diagnosed as severely autistic, was not well behaved. He would run from his mother, hit his siblings, and cause himself to vomit.

With regard to employment and suitable housing, Respondent testified that she was employed as a shift leader at Jack in the Box, earning an hourly wage of \$7.50 while working 40 hours per week. Prior to her employment at Jack in the Box, she worked part-time at Waffle House for about two weeks, and also received

unemployment benefits in the amount of \$90.00 per week. Respondent was able to demonstrate suitable and stable housing. Although Respondent did not have a driver's license, she was working on getting her license and a car. In the interim, she relied on her parents to transport her.

As for substance abuse issues, Respondent testified that she does not have a problem with cocaine or alcohol. Pyle, however, testified that on 17 February 2004, she discussed Respondent's positive drug screen with her and Respondent could not provide a reason why the test came back positive. Moreover, Respondent did not complete a substance abuse treatment program as required by the court. When asked about her failure to complete a program, Respondent stated that she "just didn't." Additionally, Respondent was on probation for driving while license revoked and DWI and had a probation violation hearing pending. Moreover, she was on house arrest for federal trafficking in cocaine charges, stating that she expected her case to be heard within two years.

With respect to the quality and quantity of her efforts since her children were placed in foster care, Respondent testified that she believes she has done all she can do for her children.

Following the hearing, the trial court entered an order terminating Respondent's parental rights to the minor children D.M.B, K.S.B., and Z.N.B. In entering this order, the trial court found that statutory grounds exist by clear, cogent and convincing evidence that Respondent neglected her minor children and there is

a likelihood that such neglect will continue in the future; Respondent failed, for a continuous period of six months preceding the petition, to pay a reasonable portion of the cost of care for the juveniles, although physically and financially capable of doing so; and Respondent willfully left her children in foster care for more than twelve months without showing to the satisfaction of the court that reasonable progress under the circumstances had been made in correcting those conditions which led to the removal of the children. Respondent appeals.

II. QUESTIONS PRESENTED

In her first assignment of error, Respondent contends that the trial court lacked subject matter jurisdiction because no copy of any order by which Petitioner-Appellee was granted custody of the minor children was attached to the motion to terminate parental rights as required by law. North Carolina General Statute 7B-1104(5) provides that a petition or motion to terminate parental rights shall contain "[t]he name and address of any person or agency to whom custody of the juvenile has been given by a court of this or any other state; and a copy of the custody order shall be attached to the petition or motion." N.C. Gen. Stat. § 7B-1104(5) (2005).

Respondent cites *In re Z.T.B.*, 170 N.C. App. 564, 570, 613 S.E.2d 298, 301 (2005), to support her contention that when a petition fails to comply with a statutory mandate, it is "facially defective and fail[s] to confer subject matter jurisdiction upon

the trial court." Respondent's reliance on *Z.T.B.* is misplaced. In a subsequent case, this Court, relying on "precedential authority[,]"¹ determined that, absent a showing of prejudice, failure to comply with N.C. Gen. Stat. § 7B-1104(5) does not deprive the trial court of subject matter jurisdiction. *In re B.D.*, ___ N.C. App. ___, ___ 620 S.E.2d 913, 918 (2005) (citation omitted), *disc. review denied*, ___ N.C. ___, 628 S.E.2d 245 (2006).

We agree with the determination in *B.D.*, and for the following reasons, overrule Respondent's assignment of error. In the present case, as in *B.D.*, Respondent was not able to show that she was unaware of the placement of her children at any point during the case. Moreover, from the Record on Appeal, it is apparent that Respondent was represented by counsel throughout the process and

¹See *In re Joseph Children*, 122 N.C. App. 468, 471, 470 S.E.2d 539, 541 (1996) (citation omitted), in which respondent claimed that she was denied assistance of counsel because her summons did not contain the statement "parents may contact the clerk immediately to request counsel," as required by statute. This Court determined that, although the notice requirement was not specifically complied with, the Court did "not, however, believe the discrepancy is material in this case so as to result in any prejudice to the respondent." *Id.* (Citation omitted). In making this determination, the Court held that although the statutory language was missing, the notice "supplied information that if seen by respondent would inform her of the petition filed against her, her need to answer the service of process, the availability of counsel if she was indigent, as well as the phone number of the Deputy Clerk of Juvenile Court[.]" *Id.* at 472, 470 S.E.2d at 541. Additionally, in *In re Humphrey*, 156 N.C. App. 533, 539, 577 S.E.2d 421, 426 (2003), this Court found that a violation of N.C. Gen. Stat. § 7B-1104(7), where the petition or motion for the termination of parental rights did not include a statement that it had not been filed to circumvent the Uniform Child-Custody Jurisdiction and Enforcement Act, did not automatically warrant reversal because "under the facts in this case we find that respondent has failed to demonstrate that she was prejudiced[.]"

that Respondent was present at the initial and review hearings impacting her parental rights. From her testimony at the hearing to terminate her parental rights, it is clear that she knew that CCDSS had legal custody of her children pursuant to the 15 September 2003 consent order which she and her attorney signed. After evaluating these facts, we believe that Respondent has been unable to demonstrate any prejudice from the failure to attach a copy of the custody order to the petition to terminate Respondent's parental rights. Accordingly, this assignment of error is overruled.

By her second and third assignments of error, Respondent contends that the trial court erred in entering findings of fact numbers 10, 10(e) and its subparts, 10(g) and its subparts, 10(j) and its subparts, and 10(l) and its subparts. These findings of fact center around review hearings held on 11 December 2003, 18 March 2004, and 11 June 2004, and the permanency planning hearing of 5 August 2004, and contain the grounds which the court found justified termination of Respondent's parental rights. Respondent argues that these findings of fact are not supported by evidence offered at the termination hearing, and that the trial court impermissibly relied on prior court orders and court reports in making the decision to terminate Respondent's parental rights.

In termination of parental rights cases, the burden "shall be upon the petitioner or movant and all findings of fact shall be

based on clear, cogent, and convincing evidence." N.C. Gen. Stat. § 7B-1109(f) (2005). A trial court, however, "may take judicial notice of earlier proceedings in the same cause." *In re Isenhour*, 101 N.C. App. 550, 553, 400 S.E.2d 71, 73 (1991) (citing *In re Byrd*, 72 N.C. App. 277, 324 S.E.2d 273 (1985)). When a trial court takes judicial notice of such earlier proceedings, neither party is required to offer the file of such proceedings in evidence. *Id.*

In the present case, neither party offered the file of earlier proceedings in evidence, and the trial court did not expressly take judicial notice of the file. However, in *In re M.N.C.*, ___ N.C. App. ___, 625 S.E.2d 627 (2006), this Court determined that expressly taking judicial notice of a case file is not required. The *M.N.C.* Court held that it was "apparent from a careful review" that the trial court took judicial notice of the prior orders. *Id.* at ___, 625 S.E.2d at 632.

In this case, after conducting a careful review of the transcript and record, we believe that the trial court took judicial notice of the case file, including the court summaries and orders from the above-mentioned hearings, which are described in detail in the challenged findings of fact. Moreover, these findings of fact are also supported by the testimony at the termination hearing. At the hearing, Respondent testified about her ability to maintain suitable housing; Pyle testified regarding Respondent's failed drug test, her inability to appropriately direct and control her children's behavior, and her difficulty securing employment; and Pyle and B.Y. testified regarding

Respondent's failed visitation with her children and failure to provide support for her children. From the foregoing, we conclude that there was clear, cogent, and convincing evidence to support the contested findings of fact. Accordingly, this assignment of error is likewise overruled.

Respondent next contends that the trial court erred in concluding that statutory grounds existed to terminate Respondent's parental rights. In Conclusion of Law three, the trial court stated:

That statutory grounds exist by clear, cogent and convincing evidence to terminate the Respondent['s] . . . parental rights in that the Respondent . . . has neglected D[,] S[,] and Z within the meaning of N.C.G.S. § 7B-101(15) and there is a likelihood that such neglect would continue in the future, the Respondent . . . has willfully failed to pay for the cost of the juveniles' care for a continuous period of six months next preceding the filing of this petition although financially and physically able to do so and the Respondent . . . has left the children in foster care 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 children.

A court may terminate parental rights if it finds:

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

(2) The 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. Provided, however, that no parental rights shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

(3) The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent, for a continuous period of six months next preceding the filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C. Gen. Stat. § 7B-1111(a)(1)-(3) (2005). Respondent contends that since the trial court erred in making findings of fact 10(e), 10(g), 10(j) and 10(l), the court's findings of fact are insufficient to support its conclusion of law that statutory grounds existed to terminate Respondent's parental rights. We disagree.

As determined above, findings of fact 10(e), 10(g), 10(j) and 10(l) are supported by the case file of which the court properly took judicial notice. These findings establish that (1) Respondent missed her first two psychological evaluation appointments on 1 and 6 October 2003 and was not evaluated until 23 January 2004; (2) Respondent cancelled scheduled visitation appointments with her children, and although she completed a parenting course and was cooperating with Family Preservation to improve her parenting skills, she failed to show progress in this area; (3) Respondent had a history of failed drug tests, including failure to submit a

specimen and providing a cold specimen, and although Respondent completed three intake appointments and her substance abuse treatment was scheduled to begin, she missed half of her substance abuse classes and there was no verification of her attendance at NA/AA; (4) Respondent was inconsistent in her efforts to complete anger management classes, missing appointments and being discharged from class; and (5) Respondent was inconsistent in her efforts to gain employment, gained employment, and then quit the day after her employment was verified by the social worker assigned to this case.

Moreover, absent these findings, there remain unchallenged findings supported by the evidence presented at the termination hearing that are sufficient to support the trial court's determination. These findings establish that (1) Respondent failed to appear for visits with all three of her children, only attending visitation with them approximately fifty percent of the time; (2) Respondent continues to struggle to appropriately supervise her children; (3) Respondent failed to complete any drug abuse treatment program; (4) Respondent failed to pay a reasonable amount of child support for her children, although physically and financially capable of doing so; and (5) Respondent continues to have criminal legal problems, in that on 15 October 2003, she pled guilty to driving while impaired and driving while license revoked, and is currently facing federal trafficking in cocaine charges. These findings are plainly sufficient to support the court's Conclusion of Law as to the existence of statutory grounds to

terminate Respondent's parental rights detailed therein. This assignment of error has no merit and is overruled.

By her final assignment of error, Respondent argues that the trial court erred in determining that the best interest of the juveniles would be served by terminating Respondent's parental rights.

North Carolina law provides that "[a]fter an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest." N.C. Gen. Stat. § 7B-1110(a) (2005). This statute grants the trial court discretion in making its decision to terminate parental rights. *In re Blackburn*, 142 N.C. App. 607, 543 S.E.2d 906 (2001). "The trial court does not automatically terminate parental rights in every case that presents statutory grounds to do so[,]" *In re Nesbitt*, 147 N.C. App. 349, 352, 555 S.E.2d 659, 662 (2001) (citations omitted); rather, "[t]he best interest of the children is the polar star by which the discretion of the court is guided." *Bost v. Van Nortwick*, 117 N.C. App. 1, 8, 449 S.E.2d 911, 915 (1994) (internal quotation marks and citations omitted), *appeal dismissed*, 340 N.C. 109, 458 S.E.2d 183 (1995). A trial court's decision to terminate parental rights is thus reviewed under an abuse of discretion standard. *In re C.D.A.W.*, ___ N.C. App. ___, 625 S.E.2d 139 (2006).

A careful and close review of the testimony and the record herein reveals no basis for holding that the trial court abused its discretion in choosing to terminate Respondent's parental rights. The testimony and record reflect that whereas Respondent made minimal progress in obtaining employment, maintaining suitable housing, and submitting to a psychological evaluation, her problems with substance abuse persisted. Those problems are compounded by her denial that such problems exist, evidenced in part by her failure to complete substance abuse treatment for no reason other than she just quit going. Moreover, her inability to apply any skills she may have learned in parenting classes to appropriately supervise her children is of great concern. Given her failure to make progress in these critical areas, it is most troubling that Respondent believes she has done all that she reasonably could do to be reunited with her children and that she fails to appreciate the import of her lack of progress on the welfare of her children. In view of Respondent's failure to make adequate progress, and her apparent acceptance of this failure, we agree with the trial court that the juveniles are best served by terminating the parental rights of their mother. We hold that the trial court did not abuse its discretion in its termination of Respondent's parental rights. Accordingly, this assignment of error is overruled.

For the reasons stated, the district court's order is affirmed.

AFFIRMED.

Judges MCGEE and HUNTER concur.

Report per Rule 30(e).