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NO. COA05-1571

NORTH CAROLINA COURT OF APPEALS

Filed: 21 November 2006

In the Matter of:
N.L.P.

Davidson County
03 J 118

Appeal by respondent mother from order entered 6 May 2005 by Judge Wayne L. Michael in District Court, Davidson County. Heard in the Court of Appeals 12 September 2006.

Charles E. Frye, III, for petitioner-appellee.

Laura B. Beck, for petitioner-appellee Guardian ad Litem.

Mercedes O. Chut, for respondent-appellant.

WYNN, Judge.

"Willfulness may be found where the parent recognizing her inability to care for the children, voluntarily leaves the children in foster care."¹ Here, Respondent-Mother repeatedly engaged in substance abuse that required her to relinquish her child, N.L.P., to foster care. Because the record shows Respondent engaged in voluntary behavior which continuously resulted in the

¹ *In re Shepard*, 162 N.C. App. 215, 225, 591 S.E.2d 1, 7 (2004) (citation omitted).

relinquishment of N.L.P. to foster care, we affirm the trial court's order terminating her parental rights.

On 23 May 2003, Davidson County Department of Social Services (DSS) petitioned to terminate Respondent's parental rights regarding N.L.P. The evidence at the termination hearing tended to show that in 1999, Respondent was convicted of criminal violations subjecting her to sentences of sixty and thirty-six months intensive supervised probation. In June 1999, DSS filed a petition alleging N.L.P. was neglected and dependent, and a trial court entered an order for DSS to assume custody. In September 1999, an adjudication hearing was held to determine whether N.L.P. was neglected and dependent. At the hearing, Respondent stipulated that:

1. [N.L.P. was] not receiving proper supervision.
2. Environment injurious (house in disarray, . . . no power in home).
3. Substance abuse.

To address Respondent's substance abuse, the trial court ordered that Respondent submit a to substance abuse assessment and comply with the recommendation for treatment. The trial court ordered DSS to retain custody of N.L.P. While Respondent participated in substance abuse programs, N.L.P. remained in foster care from 16 July 1999 until 22 May 2000, a period of eleven months.

On 9 August 2000, a DSS social worker observed Respondent and reported that Respondent was obviously "high." When the social worker confronted Respondent about her behavior, Respondent replied that she had gotten her medication, and showed the social worker

bottles of Xanax and Prozac. A court subsequently ordered Respondent to complete a detoxification program for prescription medications. While Respondent participated in the detoxification program for prescription medication and a prerequisite detoxification program for methadone, DSS again assumed physical and legal custody of N.L.P. from 24 August 2000 until 13 November 2000, a period of over two months.

In a trial court review hearing held 8 May 2001, Respondent admitted she had relapsed into substance abuse. Subsequently, a trial court ordered DSS to retain physical and legal custody of N.L.P. The court also ordered that Respondent could regain custody of N.L.P. if she entered Casaworks, a one-year substance abuse program. However, Respondent did not enter Casaworks, and her probation was revoked. Respondent was incarcerated from 28 August 2001 until 28 February 2003.

After Respondent's release from prison, she lived with her husband at Amends Ministry, located in Greensboro, North Carolina, and obtained a job. Respondent took drug tests administered by Amends Ministry on 14 August 2003, 5 November 2003, 10 December 2003, and 10 February 2004. All tests were negative for drugs. Sadly, Respondent's husband died on 22 February 2004. After her husband's death, Respondent did not return to work and admitted to again using drugs.

Respondent moved from Amends Ministry, and because she had completed her sentence ordered by the trial court, drug tests results were no longer available. DSS supervised visitations

between Respondent and N.L.P. from March 2004 to 2005. DSS workers reported that at the weekly visitations Respondent would become restless, talk fast, shake, sweat profusely, and fall asleep. N.L.P. remained in foster care from 21 June 2001, before Respondent's incarceration, through the date of the termination hearing, 10 February 2005.

At the time of the hearing to terminate parental rights, an officer from the Thomasville Police Department testified that during an accident investigation, Respondent stated that she was on methadone and had used crack cocaine. The officer described Respondent as mumbling, then talkative, crying, and eventually falling asleep in the back of the patrol car.

From the order terminating her parental rights, Respondent appeals. She argues that the trial court erred by (I) concluding as a matter of law that Respondent willfully left N.L.P. in foster care or placement outside the home for more than twelve months without showing to the satisfaction of the court that reasonable progress had been made, and (II) delaying entry of the order in this case beyond the statutory requirement of thirty days after the trial.²

I.

² Respondent also contends the trial court committed error by incorporating thirty-three prior orders and attachments into its termination order. However, we summarily dismiss this assignment of error as the record fails to show that Respondent preserved this issue for review by objecting when the trial court admitted the prior orders into evidence.

Respondent first argues that the trial court erred in concluding as a matter of law that Respondent willfully left N.L.P. in foster care or placement outside the home. We disagree.

Under Section 7B-1111(a) (2) of the 2003 North Carolina General Statutes:

The court may terminate the parental rights upon a finding . . . (2)[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. 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.

The termination of parental rights under Section 7B-1111(a) (2) involves a two-part process: (1) the adjudication phase, governed by Section 7B-1109, and (2) the disposition phase, governed by Section 7B-1110. See *In re Hendren*, 156 N.C. App. 364, 366, 576 S.E.2d 372, 375 (2003) (citation omitted).

In the adjudication phase, "[t]he 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. . . . [A]nd all findings of fact shall be based on clear, cogent and convincing evidence." N.C. Gen. Stat. § 7B-1109 (e), (f) (2003). On appeal, we review the adjudication phase to determine whether "the trial court's findings are supported by clear, cogent, and convincing evidence and whether the findings support the

conclusions of law." *Hendren*, 156 N.C. App. at 367, 576 S.E.2d at 375 (citation omitted). A clear, cogent, and convincing standard is an intermediate standard of proof, greater than the preponderance of the evidence standard that is required for most civil trials but not as stringent as proof beyond a reasonable doubt. See *In re Montgomery*, 311 N.C. 101, 109-10, 316 S.E.2d 246, 252 (1984) (citation omitted).

In the dispositional phase, the court (having adjudicated that one or more grounds for terminating a parent's rights exist), determines whether terminating the parent's rights is in the juvenile's best interest. N.C. Gen. Stat. § 7B-1110 (2003). Upon a finding that it would be in the best interests of the child to terminate a parent's rights, the trial court has the discretion to terminate parental rights. See *Hendren*, 156 N.C. App. at 366, 576 S.E.2d at 375. On appeal, we review the dispositional phase under an abuse of discretion standard. *Id.* at 367, 576 S.E.2d at 375.

Here, Respondent challenges the trial court's adjudication phase findings of fact and conclusion that Respondent willfully left N.L.P. in foster care or placement outside the home for a period of twelve months. Thus, we must determine whether "the trial court's findings are supported by clear, cogent, and convincing evidence and whether the findings support the conclusions of law." *Id.* at 367, 576 S.E.2d at 375 (citations omitted).

In *Shepard* we distinguished willfulness, as considered when a parent willfully leaves a child in foster care, from willful abandonment. 162 N.C. App. 215, 591 S.E.2d 1 (2004).

"Willfulness" when terminating parental rights on the grounds of N.C. Gen. Stat. § 7B-1111(a)(2), is something less than "willful" abandonment when terminating on the ground of N.C. Gen. Stat. § 7B-1111(a)(7). . . . Willfulness may be found where the parent, recognizing her inability to care for the children, voluntarily leaves the children in foster care."

Id. at 224-25, 591 S.E.2d at 7 (internal and external citations omitted). As we have held that "[w]illfulness may be found where the parent recognizing her inability to care for the children, voluntarily leaves the children in foster care," *Id.* at 225, 591 S.E.2d at 7 (citation omitted), we must also allow for that same finding where a parent voluntarily and continuously engages in behavior which continuously results in a trial court ordering her child into foster care. In addition, grounds for the termination of parental rights under N.C. Gen. Stat. § 7B-1111(a)(2) (2003), where a parent is found to have willfully left the juvenile in foster care for more than twelve months, do not require that the months in foster care be continuous. See *In re Taylor*, 97 N.C. App. 57, 387 S.E.2d 230 (1990).

As the facts indicate, between July 1999 and the hearing on the termination of Respondent's parental rights, in February 2005, Respondent was on a number of occasions found to have engaged in substance abuse. Respondent's conduct granted a trial court authority to order substance abuse treatment and accordingly place

N.L.P. in foster care as the limitations of treatment facilities and program parameters dictated. Respondent's pattern of substance abuse over that period corresponded to the consequence that N.L.P. was placed in foster care for a total of fourteen months before Respondent was incarcerated and twenty-three months after her release.

In light of this, we find the evidence sufficient to meet a clear, cogent, and convincing standard that the trial court could find Respondent's relinquishment of N.L.P. to foster care to be willful. We also find the evidence sufficient to a clear, cogent, and convincing standard that Respondent willfully left N.L.P. in foster care or placement outside the home for a period of at least twelve months.

Respondent also challenges the trial court's determination that Respondent failed to make reasonable progress in correcting the conditions which led to the removal of N.L.P. But again, the evidence does not support her challenge.

At the adjudication hearing held in September 1999, Respondent stipulated to substance abuse as one of the grounds for neglect. In November 1999, in compliance with Respondent's sentence to intensive probation stemming from criminal convictions, Respondent enrolled in His Laboring Few Ministry Residential Program, a substance abuse program. However, before Respondent could complete the program, she returned late from a weekend pass and appeared to program staff to be under the influence. As a result, His Laboring Few Ministry asked Respondent to leave.

On 16 February 2000, a trial court ordered Respondent to attend Davidson County's Day Reporting Center, a thirty-six week intensive outpatient service for substance abuse offenders. On 9 August 2000, a social worker made an unannounced visit to Respondent's home. The social worker reported that it was obvious Respondent was "high": she was "sleepy acting," and her speech was slurred. Respondent stated that she had been to get her medication and showed the social worker bottles of Xanax and Prozac.

On 14 August 2000, a trial court ordered Respondent to complete a detoxification program for prescription medication. But before she could be admitted, Respondent confessed to taking methadone. Accordingly, Respondent was required to participate in detoxification programs for methadone and prescription medications.

On 13 November 2000, a trial court ordered Respondent to attend the Recovery Group at Davidson County Mental Health and to receive Intensive Outpatient Support through the Davidson County Day Reporting Center. Both programs are designed to address substance abuse issues. On 2 January 2001, Respondent tested positive for LSD at the Day Reporting Center. On 18 January 2001, Respondent tested positive for morphine at the Davidson County Mental Health Center. On 26 April 2001, Respondent tested positive for cocaine and opiates.

On 1 May 2001, the Day Reporting Center issued a letter negatively terminating Respondent from the Intensive Outpatient Support Program. In its letter, the Day Reporting Center cited seventeen missed substance abuse treatment groups due to sickness

(verification not provided), eight missed group meetings with no reason stated, six treatment violations, poor staffing reports, positive opiate drug screening on 5 December 2000 and positive LSD screening on 2 January 2001, ten or more missed office visits, failure to follow up with school/housing/vocational rehabilitation, not working when capable of doing so, and failure to call in consistently. A trial court revoked Respondent's probation and activated a sentence of incarceration.

Respondent reported to the Central Women's Prison on 28 August 2001, and remained incarcerated until 19 March 2003. While in prison, Respondent was also convicted of possession of a Schedule I controlled substance stemming from charges alleged in May 2001.

During supervised visits between May 2004 and February 2005, DSS social workers reported statements by Respondent that she heard noises and that a picture had flown off of her kitchen wall. A visitation supervisor testified that she became concerned with Respondent's conduct. She testified that during visits Respondent would become restless, talk fast, sweat profusely, shake, and fall asleep.

This evidence was sufficient to meet a clear, cogent, and convincing standard that Respondent had failed to make reasonable progress in correcting her drug abuse. Accordingly, we find the trial court had sufficient grounds to find that Respondent had failed to make reasonable progress in correcting the conditions which led to the removal of N.L.P.

In sum, the evidence supports the trial court's determination that "[R]espondent has struggled valiantly, but despite her efforts and the efforts made by the Davidson County Department of Social Services and numerous other agencies to assist her the [trial court] does not find that said [R]espondent can provide for [N.L.P.]'s need for safety, continuity and permanence." Accordingly, we affirm the trial court's findings of fact and conclusion that Respondent willfully left the child 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 has been made within twelve months in correcting those conditions which led to the removal of the child.

II.

Respondent next argues the trial court committed reversible error in delaying the entry of the order in this case beyond the statutory requirement of thirty days after the hearing. We disagree.

Section 7B-1110(a) of the North Carolina General Statutes (2003) states in pertinent part that "[a]ny order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the hearing" However, in *In re C.J.B.*, this Court reasoned that a violation of the thirty-day entry requirement was not *per se* a ground for reversing an order. 171 N.C. App. 132, 614 S.E.2d 368 (2005).

Our Court has never held that entry of the written order outside the thirty-day time limitations expressed in sections 7B-1109 and 7B-1110 was reversible error absent a showing

of prejudice. To the contrary, we have held that prejudice must be shown before the late entry will be deemed reversible error.

Id. at 134, 614 S.E.2d at 369 (citations omitted).

In *C.J.B.* there was a five month delay between the conclusion of a termination of parental rights hearing and the entry of a written order terminating parental rights; this Court held that the delay amounted to an adequate showing of prejudice and accordingly reversed and remanded the order. *Id.*; see also, *In re O.S.W.*, _ N.C. App. _, 623 S.E.2d 349 (2006); *In re L.E.B.*, 169 N.C. App. 375, 610 S.E.2d 424 (2005). However, in *In re J.L.K.*, this Court held that a nearly three month delay between the end of a hearing to terminate parental rights and the entry of a written order was not *per se* prejudicial where the trial court announced its judgment at the conclusion of the hearing. 165 N.C. App. 311, 598 S.E.2d 387 (2004).

Here, the hearing to terminate Respondent's parental rights ended on 17 February 2005. The order granting Petitioner's request to terminate Respondent's parental rights was announced at the conclusion of the hearing but was not reduced to writing and entered until 6 May 2005, almost three months later. While the trial court's failure to file the termination order within the statutory thirty-day period was error, we hold the error was not prejudicial.

We have reviewed Respondent's remaining arguments and find them to be without merit.

Affirmed.

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Judges HUDSON and TYSON concur.

Report per Rule 30(e).