NO. COA05-1591

NORTH CAROLINA COURT OF APPEALS

Filed: 17 October 2006

IN THE MATTER OF:

K.L.S. III, C.A.S.,
and G.M.J.S.,
MINOR CHILDREN

Buncombe County
Nos. 04J361-363

Appeal by respondent-father from judgments entered 1 July 2005 by Judge Marvin P. Pope, Jr., in Buncombe County District Court. Heard in the Court of Appeals 21 August 2006.

Hall & Hall Attorneys at Law, P.C., by Douglas L. Hall, for respondent-father appellant.

Michael N. Tousey for Guardian ad Litem appellee.

Matthew J. Middleton for Buncombe County Department of Social Services, petitioner appellee.

McCULLOUGH, Judge.

Respondent-father ("respondent") appeals from three district court judgments terminating his parental rights to his minor children K.L.S. III, C.A.S., and G.M.J.S. We affirm.

FACTS

Respondent is the biological father of K.L.S. III, C.A.S., and G.M.J.S. Respondent and his wife moved to North Carolina in July 2003. The Buncombe County Department of Social Services ("DSS") became involved with the family shortly after their move to North

Carolina due to allegations of continuing drug abuse and domestic violence by respondent and his wife. DSS required respondent to 2 obtain substance abuse assessments, drug screenings, parenting classes, psychological evaluations, and safety assessments.

In July of 2004, DSS was granted nonsecure custody of the two older children, K.L.S. III and C.A.S., G.M.J.S. not having been born yet. The custody was based on repeated, continued contact between the children's parents, allegations that the mother was allowing unsupervised contact between the children and respondent, and concerns that the family would flee the state. Subsequently, G.M.J.S. was born addicted to methadone and was placed in the custody of DSS on 27 August 2004. All three children remained in the custody of DSS from these respective dates through the time of the trial court's rulings.

Three separate petitions for termination of parental rights, one for each, K.L.S. III, C.A.S. and G.M.J.S., were filed on 29 December 2004. The trial court ruled that the parental rights of respondent regarding all of the children should be terminated. Based on clear, cogent, and convincing evidence, the court concluded (1) that under N.C. Gen. Stat. § 7B-1111(a)(1) (2005), respondent neglected the three children before and after the children came into the custody of DSS, through long-standing, serious untreated substance abuse and mental health problems, and that respondent has failed to correct any of the conditions that led to the removal of the children; (2) that under N.C. Gen. Stat. § 7B-1111(a)(6), respondent is incapable of providing for the

proper care and supervision of the children, such that the children are dependent juveniles within the meaning of N.C. Gen. Stat. § 7B-101 (2005), in that respondent's substance abuse makes him incapable of providing proper care and supervision for the children and there is reasonable probability that such incapability will continue for the foreseeable future; and (3) that under N.C. Gen. Stat. § 7B-1111(a)(9), the parental rights of respondent, with respect to another child of respondent, has been terminated involuntarily by a court of competent jurisdiction and the respondent parents lack the ability and willingness to establish a safe home for K.L.S. III, C.A.S., and G.M.J.S.

Respondent now appeals.

ANALYSIS

Prior to discussing respondent's contentions on appeal, we are compelled to discuss the statement of facts included in respondent's brief on appeal. The North Carolina Rules of Appellate Procedure state that an appellant's brief should contain a full and complete statement of the facts. "This should be a *non-argumentative* summary of all material facts underlying the matter in controversy which are necessary to understand all questions presented for review[.]" N.C.R. App. P. 28(b)(5) (emphasis added). In the instant case, we note that the statement of facts included in respondent's brief is argumentative and not in compliance with the Rule. Counsel is admonished to be attentive to the Rules of Appellate Procedure.

On appeal, respondent makes nine contentions of trial court error. We conclude that the trial court should be affirmed.

I.

Respondent contends that the final judgments terminating his parental rights of K.L.S. III, C.A.S., and G.M.J.S. are a nullity and void *ab initio*, as they were entered one month prior to the final hearing date, and contain findings of fact derived from the evidence received on that final date. We disagree.

Three judgments were filed by the trial court, one for each child involved in these matters, that terminated respondent's parental rights. A few of the date stamps on the judgments state that they were filed on 1 June 2005, but "June" on these stamps is crossed through and "July" has been handwritten instead. Also, the change has been initialed by the clerk. Respondent contends that the judgments were actually entered on 1 June 2005, a full month before the hearing was concluded, and that, therefore, the judgments are void. We disagree.

After a review of the record, it appears that the date stamp machine malfunctioned. The clerk obviously attempted to change the date from 1 June 2005 to 1 July 2005. The date on the judgment involving G.M.J.S. was not switched to 1 July 2005, but that seems to be an oversight considering all of the other 1 June 2005 dates had been changed. Moreover, the date stamp next to the trial judge's signature is 1 July 2005, and according to N.C.R. Civ. P.

58, a judgment is not entered until it is reduced to writing, signed by the judge, and filed with the clerk of court. N.C. Gen. Stat. § 1A-1, Rule 58 (2005).

Therefore, we see no merit in respondent's contention.

II.

Next, respondent contends that the trial court committed prejudicial error by terminating his parental rights by failing to adjudicate the motion within 90 days of filing as required by the North Carolina General Statutes. We disagree.

The North Carolina General Statutes state that the hearing on the termination of parental rights shall be held no later than 90 days from the filing of the petition. N.C. Gen. Stat. § 7B-1109(a) (2005). At the hearing, the court is supposed to determine whether the juvenile's parents are present and represented by counsel. N.C. Gen. Stat. § 7B-1109(b). If the parents are not represented by counsel, the court is supposed to determine if the parents are indigent, and if so, whether they desire to have counsel appointed for them. N.C. Gen. Stat. § 7B-1109(b). Then, if the parents desire the appointed counsel, "[t]he court shall grant the parents such an extension of time as is reasonable to permit their appointed counsel to prepare their defense to the termination petition or motion." N.C. Gen. Stat. § 7B-1109(b). We have stated that the appellant must show prejudicial error by the trial court in not holding the termination hearing within 90 days of the

petition in order for us to reverse. *In re D.J.D., D.M.D., S.J.D., J.M.D.*, 171 N.C. App. 230, 243, 615 S.E.2d 26, 35 (2005).

In the instant case, we do not believe respondent has shown the necessary prejudicial error for reversal. The petitions were filed on 29 December 2004. The hearing on the termination of parental rights was calendared for 28 March 2005 (90 days following filing), or as soon thereafter as it could be heard. The case came before the trial court on 30 March 2005 when counsel and guardians ad litem were appointed. Then, at the request of respondent's counsel, the trial court continued the case to the 25 April 2005 term of court in order to give respondent's counsel time to file an answer. Because of respondent's counsel's request for a continuance, the trial court conducted the hearing on 3 May 2005 and 4 May 2005. On 4 May 2005, the trial court continued the hearing again for the purpose of receiving court records from other states. There were no objections by respondent's counsel found in the transcript or in the record regarding the continuance. On 1 July 2005, the trial court, after having received court records from another state, reconvened for approximately fifteen minutes. Again, respondent's counsel had no objection regarding the 1 July 2005 trial court session. Finally, on 1 July 2005, the trial court filed three judgments terminating the parental rights of respondent.

We believe that respondent has not been prejudiced to warrant reversal. It was respondent's counsel that first requested a continuance to file his answer which delayed the hearing for more

than 30 days. Also, respondent's counsel had no objections to the continuance to 1 July 2005. Finally, respondent's brief argues that the delay put on hold any sense of closure for the children, but based on the record, all three children had been in the custody of DSS since at least August 2004. Thus, after reviewing all of the facts, we do not believe respondent has shown the necessary prejudicial error for a reversal.

Therefore, we see no merit in respondent's contention.

III.

Respondent contends that the trial court was without subject matter jurisdiction to hear the three petitions. We disagree.

"'Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question[, and] . . . is conferred upon the courts by either the North Carolina Constitution or by statute.'" *In re T.B.*, ___ N.C. App. ___, ___, 629 S.E.2d 895, 896 (2006) (citation omitted). N.C. Gen. Stat. § 7B-1101 (2005) "confers upon the court general jurisdiction over termination of parental rights proceedings." *In re T.B.*, ___ N.C. App. at ___, 629 S.E.2d at 897. "However, 'a trial court's general jurisdiction over a type of proceeding does not confer jurisdiction over the specific action.'" *Id.* (citation omitted). We have held that in termination of parental rights cases, "the trial court has subject matter jurisdiction only if the record includes a copy of an order, in effect when the petition is filed, that awards DSS custody of the child." *Id.* The reasoning of our holding was that in order for DSS to have "standing to file for termination of

parental rights, DSS must prove that it has legal custody of the child at the time the petition is filed." *Id.*

In the instant case, three petitions for termination of parental rights were filed, one for each child. Unlike in *In re T.B.*, where the petition was not accompanied by a copy of a custody order, *id.* at ___, 629 S.E.2d at 898, here there was a copy of a nonsecure custody order attached to each petition. With regard to K.L.S. III and C.A.S., a nonsecure custody order was attached to each petition with no maximum duration of custody specified in the order clearly indicating that the children were placed in the custody of DSS. With regard to G.M.J.S., a nonsecure custody order was attached to the petition which included a five-day maximum duration of custody, but the petition stated that the child was currently in the custody of DSS. Moreover, the trial court found that G.M.J.S. remained in the custody of DSS from 27 August 2004 until the time of the trial court proceedings. There is no specific assignment of error contesting this fact.

To this end, we conclude that the trial court had subject matter jurisdiction over the proceedings.

IV.

Next, respondent contends that his constitutional, statutory, and due process rights were violated by the trial court appointing the same person to serve as his attorney and his guardian ad litem. We disagree.

First, respondent contends that the North Carolina General Statutes require separate persons to be appointed counsel and

guardian ad litem. We disagree. The applicable statutes in effect at the time the petition was filed state the parent has a right to appointed counsel in cases of indigency. N.C. Gen. Stat. § 7B-1101 (2003). In addition to the right of appointed counsel, the statute states that a guardian ad litem shall be appointed where it is alleged that a "parent's rights should be terminated pursuant to G.S. 7B-1111(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) (2003). Nothing in the above-referenced statutes require that separate persons are required to serve as appointed counsel and guardian ad litem. Moreover, on 1 October 2005, House Bill 1150 went into effect and by its own terms applies to actions filed on or after that date, thus not applying to the instant case. N.C. Sess. Laws, ch. 398, § 19. The new provision states that the trial court may not appoint the same person to serve as both the parent's attorney, as well as the parent's guardian ad litem. N.C. Gen. Stat. § 7B-1101.1(c) (2005). Since the legislature did not make the new provision effective until 1 October 2005, we do not believe that we should rewrite the statute controlling in this case to require different persons to serve as appointed counsel and guardian ad litem. Therefore, we see no merit in respondent's contention that the statute in effect for the instant case required different persons to serve as his appointed counsel and guardian ad litem.

Respondent also contends that 2004 Formal Ethics Opinion 11 ("FEO 11") from the N.C. State Bar states that a trial attorney and guardian ad litem for a parent normally should not be and usually are not the same person. We disagree.

FEO 11 discusses the role of a lawyer who is appointed as the guardian ad litem for a respondent-parent with diminished capacity. 2004 Formal Ethics Opinion 11 (21 January 2005). It also discusses the case of *In re Shepard*, 162 N.C. App. 215, 591 S.E.2d 1 (2004). 2004 Formal Ethics Opinion 11. FEO 11 states:

> If the court appoints the same lawyer as counsel for the parent and as the parent's GAL, does the lawyer have a conflict of interest?
>
> Opinion #3:
>
> The *Shepard* court acknowledged that there exists little guidance on the role or specific duties of a GAL, but suggested that the role of the GAL is guardian of the parent's procedural due process. *Shepard*, at 7. If the role of the GAL is limited to ensuring procedural due process for the parent by helping to explain and execute his or her rights, then this role is consistent with the role of a lawyer representing a client. Therefore, there is no conflict of interest in undertaking representation as both GAL and lawyer. The Ethics Committee takes no position at this time as to whether the GAL has additional responsibilities or whether an expanded role could result in a conflict of interest.

Id. Therefore, we do not think that FEO 11 suggests that a trial attorney and guardian ad litem for a parent normally should not be and usually are not the same person. Although we note that under other facts a trial court may determine that the same role cannot

be filled adequately by one individual, here we think that respondent was not prejudiced by his counsel serving in both roles.

Therefore, we perceive no abuse of the trial court's discretion in failing to appoint separate counsel.

V.

Next, respondent contends that the trial court erred by failing to make findings of fact on the record, instead improperly delegating its finding duty to the attorney for DSS. We disagree.

The North Carolina Rules of Appellate Procedure state "a listing of the assignments of error . . . shall be separately numbered. Each assignment of error shall, so far as practicable, be confined to a single issue of law ... ." N.C.R. App. P. 10. We read respondent's assignment of error as contesting whether it was proper to allow the attorney for the DSS to draft the order in the termination of parental rights proceeding.

We rejected the issue asserted by respondent in *In re J.B.*, 172 N.C. App. 1, 616 S.E.2d 264 (2005). In *In re J.B.*, we held that it is not error for a trial court to direct petitioner's counsel to draft an order containing written findings of fact and conclusions of law on its behalf. *Id.* at 25, 616 S.E.2d at 279.

Therefore, we conclude the trial court did not err.

VI.

Respondent further contends that the trial court erred in accepting into evidence orders from another state, Connecticut, absent any evidence of the standard of proof in said proceedings, and absent a sufficient foundation for their admission. Respondent

asserts that we should vacate the trial court's ruling and remand due to egregious error. We disagree.

First, we think there is some question as to whether the trial court actually admitted the Connecticut records into evidence, but even if the trial court did accept the records into evidence, we still find no error. As discussed below under part "VII" of this opinion, we determine there is valid evidence in the record supporting the trial court's findings of fact and that at least one statutory ground for terminating the parental rights of respondent is supported by those findings. Therefore, respondent's contention has no merit.

VII.

The remaining contentions of respondent all relate to the trial court's findings of fact. Specifically, respondent makes three contentions: (1) that the trial court erroneously based findings of fact on the testimony of respondent's wife when respondent did not get to cross-examine her after she failed to reappear at trial for cross-examination; (2) that the trial court erroneously based findings of fact upon dispositional and permanency planning orders, when only the underlying adjudication order was accepted into evidence; and (3) the trial court's findings of fact and conclusions of law as to the prior termination of respondent's parental rights as to another child in the State of Maine is not supported by any competent evidence and cannot form a ground for termination as to these children. Respondent asserts

that we should vacate the findings and remand to the trial court. We disagree.

This Court reviews an order terminating parental rights for whether findings of fact are supported by clear, cogent, and convincing evidence, and whether those findings of fact support a conclusion that parental rights should be terminated for one of the grounds set forth in the North Carolina General Statutes. *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 397-98 (1996). Where a trial court concludes that parental rights should be terminated pursuant to several of the statutory grounds, the order of termination will be affirmed if the court's conclusion with respect to any one of the statutory grounds is supported by valid findings of fact. *In re Swisher*, 74 N.C. App. 239, 240-41, 328 S.E.2d 33, 34-35 (1985).

In the instant case, the trial court determined that respondent's parental rights should be terminated pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), (6) and (9). We determine that respondent's argument is immaterial because there are ample findings of fact that support at least one of the statutory grounds.

N.C. Gen. Stat. § 7B-1111(a)(1) provides that the trial court may terminate a parent's parental rights based upon neglect if "[t]he 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(a)(1). N.C. Gen. Stat. § 7B-101(15) 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.

N.C. Gen. Stat. § 7B-101(15). This Court has upheld a termination of parental rights on the ground of neglect where a parent refused to correct her substance abuse problems and failed to make improvements in her lifestyle which might help her care for and supervise her children. *In re Leftwich*, 135 N.C. App. 67, 72-73, 518 S.E.2d 799, 803 (1999). In the instant case, we determine that the trial court made findings of fact supported by clear, cogent, and convincing evidence that were properly allowed in evidence which support the conclusion that respondent neglected the minor children pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). The trial court concluded that the children lived in an environment injurious to their welfare and did not receive proper care and supervision from respondent, that respondent has failed to comply with any of the services offered by DSS and ordered by the trial court to alleviate the problems, and that it is reasonably probable that there would be a repetition of neglect in that respondent has failed to correct any of the conditions that led to the removal of the children from his care and custody. Sufficient findings of fact derived from valid evidence support this conclusion. For

example, the trial court found that respondent had long-standing, serious substance abuse problems and that there was a long history of domestic violence between respondent and his wife. Further, the trial court determined that it is reasonably probable that there would be a repetition of neglect because respondent has failed to correct many of the conditions that led to the removal of the children from his custody. A review of the record reveals that evidence of the substance abuse and domestic violence came from multiple sources, including witness testimony. For example, at least one witness testified that respondent told him that respondent used crack. The same witness testified that he has seen respondent and respondent's wife get into fights. Further, an employee of DSS testified that respondent has failed to attend any of the child and family team meetings arranged by DSS following the adjudication in the underlying juvenile case. The same DSS employee testified that respondent has failed to provide a clean drug screen to DSS. Further, the trial court found that respondent has refused to submit to drug testing to prove to the satisfaction of the court that he is not using controlled substances. To this end, we conclude that respondent's contentions are not material because there is ample evidence in the record that supports the termination of his parental rights based on at least one statutory ground.

Accordingly, the trial court did not err in terminating the parental rights of respondent.

Affirmed.

Chief Judge MARTIN and Judge HUNTER concur.

Report per Rule 30(e).