NO. COA06-163

NORTH CAROLINA COURT OF APPEALS

Filed: 21 November 2006

IN THE MATTER OF:

A.B.J.
A MINOR CHILD.

Sampson County
No. 04 J 67

Appeal by respondent-father from judgment entered 24 May 2005 by Judge Leonard W. Thagard in Sampson County Superior Court. Heard in the Court of Appeals 17 October 2006.

Daughtry, Woodard, Lawrence & Starling, by K. Alice Morrison, for petitioner-mother appellee.

Terry F. Rose for respondent-father appellant.

McCULLOUGH, Judge.

Respondent-father ("respondent") appeals from a district court judgment terminating his parental rights to his minor child A.B.J. We affirm.

FACTS

Petitioner is the mother of A.B.J., the minor child. Respondent is the father of A.B.J. Petitioner and respondent were married to each other on 19 April 1999 and obtained an absolute divorce on 4 February 2002.

Respondent and petitioner resided together with A.B.J. from 18 November 1999 until February 2000, when respondent was

incarcerated. Respondent's first period of incarceration after A.B.J.'s birth was from February 2000 until August 2000. During that time, petitioner took A.B.J. for visitation with respondent on the weekends.

Respondent was released in August 2000 and resided with petitioner and A.B.J. for approximately two to three weeks before petitioner filed for and obtained a domestic violence protective order. The order concluded that there was a danger of serious and imminent injury to petitioner and A.B.J. It ordered respondent to have no contact with petitioner nor A.B.J. nor any member of petitioner's family or household. It also prohibited respondent from possessing or purchasing a firearm and granted petitioner temporary custody of A.B.J. Petitioner had respondent arrested several times during the year the domestic violence protective order was in effect.

Petitioner filed for custody of A.B.J. Respondent was incarcerated at the time petitioner brought her lawsuit, but he filed an answer indicating that he did not contest full custody because he was in no position to care for A.B.J.; however, he did request visitation with A.B.J. Petitioner was awarded custody of A.B.J. on or about 20 July 2001.[1]

Respondent admits that he has been charged with larceny, injury to property and breaking and entering, and robbery.

[1] We note that although the trial court's Finding of Fact 12 states that respondent was granted custody of A.B.J., this was a typographical error by the trial court because the custody order in the record states that custody was awarded to petitioner.

Respondent also admits that he has been incarcerated for the majority of A.B.J.'s life. Respondent is presently in his fifth month of active participation in the Recovery Ventures Program, a 24-month residential program for substance abusers. The earliest that respondent could successfully complete the substance abuse program is December 2006.

The only time respondent has interacted with A.B.J. since the parties' separation in August 2000 was during Easter 2001. Since Easter 2001, respondent's only attempts to contact A.B.J. include a letter sent on 16 December 2002 and a phone call in October 2003. Also, respondent made no attempt to contact or make inquiry regarding A.B.J. from 5 April 2004 to 5 October 2004.

A petition for termination of parental rights was filed on 6 October 2004. The trial court ruled that the parental rights of respondent regarding A.B.J. should be terminated. Based on clear, cogent, and convincing evidence, the court concluded that respondent willfully abandoned A.B.J. for at least six consecutive months preceding the filing of the petition and that it was in the best interest of A.B.J. to terminate the parental rights of respondent.

Respondent appeals.

I.

Respondent contends that the order of termination should be reversed because the petition to terminate respondent's parental rights was legally insufficient to allege grounds for termination. Specifically, respondent argues the motion only recited the bare

statutory grounds for termination. However, because respondent attempts to raise this issue for the first time on appeal, respondent's argument is without merit.

A petition or motion to terminate parental rights must contain "[f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist." N.C. Gen. Stat. § 7B-1104(6) (2005). Respondent relies on *In re Hardesty*, 150 N.C. App. 380, 563 S.E.2d 79 (2002), and *In re Quevedo*, 106 N.C. App. 574, 419 S.E.2d 158, *appeal dismissed*, 332 N.C. 483, 424 S.E.2d 397 (1992), to argue that the motion to terminate his parental rights was legally insufficient. The petition in *Hardesty* "merely used words similar to those in the statute setting out [the applicable] ground[ ] for termination . . . " without alleging any facts particular to the respondent. *Hardesty*, 150 N.C. App. at 384, 563 S.E.2d at 82. The respondent in *Hardesty* moved to dismiss the petition under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) for failure to state a claim based upon that statutory ground. *Hardesty,* 150 N.C. App. at 383, 563 S.E.2d at 82. We determined that a petitioner's bare recitation of the alleged statutory ground for termination of parental rights did not satisfy the requirements of N.C. Gen. Stat. § 7B-1104(6). *Hardesty,* 150 N.C. at 384, 563 S.E.2d at 82. We further stated that "[w]hile there is no requirement that the factual allegations be exhaustive or extensive, they must put a party on notice as to what acts, omissions or conditions are at issue." *Id.* We determined that the respondent's Rule 12(b)(6) motion to dismiss for failure to state

a claim should have been granted, and we reversed the termination of the respondent's parental rights on that ground. *Id.*

In *Quevedo,* the petition merely cited the statutory language as grounds for termination of parental rights. *Quevedo*, 106 N.C. App. at 579, 419 S.E.2d at 160. The respondent made a motion on the pleadings according to Rule 12(c) contesting the petition. *Id.* at 578, 419 S.E.2d at 159. The Court, treating the Rule 12(c) motion as a Rule 12(b)(6) motion, disagreed with the respondent because the petition incorporated an attached custody award which stated sufficient facts. *Id.* at 578-79, 419 S.E.2d at 159-60.

The present case is distinguishable from *Hardesty* and *Quevedo*. In *Hardesty*, the respondent challenged the sufficiency of the petition to terminate her parental rights by a Rule 12(b)(6) motion to dismiss for failure to state a claim, which the trial court denied. *Hardesty*, 150 N.C. App. at 383, 563 S.E.2d at 82. In *Quevedo*, the respondent made a pretrial motion for judgment on the pleadings pursuant to Rule 12(c), which the trial court treated as a Rule (12)(b)(6) motion and denied. *Quevedo*, 106 N.C. App. at 578, 419 S.E.2d at 159. However, unlike *Hardesty* and *Quevedo*, respondent in the instant case did not contest the sufficiency of the petition at trial. Respondent did make a motion to dismiss based upon appellee's evidence presented at the hearing, but based on our review of the record, respondent never made a motion contesting the petition.

Accordingly, we disagree with respondent.

II.

Respondent contends that the trial court erred in denying his motion to dismiss at the close of petitioner's evidence. We disagree.

In a proceeding to terminate parental rights, the court may allow a motion to dismiss made at the close of the petitioner's evidence if it determines that the petitioner has not made a showing of a right to relief or that, even if the petitioner has made a colorable claim, the respondent is entitled to judgment on the merits. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 909 (2001). The motion may be granted only in the clearest case. *In re Becker*, 111 N.C. App. 85, 92, 431 S.E.2d 820, 825 (1993). "The trial court is able to weigh all evidence before it and make a determination." *Blackburn*, 142 N.C. App. at 610, 543 S.E.2d at 909.

In the instant case, petitioner alleged in the petition to terminate respondent's parental rights that respondent had willfully abandoned A.B.J. for at least six consecutive months immediately preceding the filing of the petition. Here there was evidence offered at trial supporting this allegation. The petition was filed on 6 October 2004. Petitioner testified that from April 2004 to October 2004, she received no phone calls, letters, cards, or any gifts from respondent for A.B.J. Further, petitioner stated since November 2000, respondent has contacted her two times regarding A.B.J., once with a letter in December 2002 and once by telephone in October 2003. Petitioner's husband at the time of the

trial court proceedings testified that the only phone call he knew of that the respondent made to his house was one in October 2003. The evidence establishes a basis for surviving the motion to dismiss. Respondent has not shown that he is entitled to judgment on the merits at the close of petitioner's evidence.

Accordingly, we disagree with respondent's contention.

III.

The remaining contentions of respondent all relate to the trial court's findings of fact and conclusions of law. Specifically, respondent makes four contentions: (1) that the trial court erred in finding as fact that respondent's family had not requested visitation with A.B.J. since the separation of the parties; (2) that the trial court erred in concluding that respondent willfully abandoned A.B.J. for at least six months preceding the filing of the petition and effectively for four years prior to the filing of the petition; (3) that the trial court erred in concluding there was no reasonable possibility of a meaningful relationship between respondent and A.B.J., as there was no finding of fact or evidence to support such a conclusion; and (4) that the trial court erred in concluding that it was in the best interest of A.B.J. to have respondent's parental rights terminated, as the court made no findings of fact as to the child and his best interests that would support such a conclusion. We disagree.

There are two stages to a termination of parental rights proceeding: adjudication and disposition. *In re Brim*, 139 N.C. App. 733, 741, 535 S.E.2d 367, 371 (2000). During the adjudication

stage, the petitioner has the burden of proof by clear, cogent, and convincing evidence that one or more of the statutory grounds set forth in N.C. Gen. Stat. § 7B-1111 (2005) exists. N.C. Gen. Stat. § 7B-1109(e)-(f) (2005). "A finding of any one of the grounds enumerated [in N.C. Gen. Stat. § 7B-1111], if supported by competent evidence, is sufficient to support a termination." *In re J.L.K.*, 165 N.C. App. 311, 317, 598 S.E.2d 387, 391, *disc. review denied*, 359 N.C. 68, 604 S.E.2d 314 (2004).

The standard of appellate review is whether the trial court's "'findings of fact are based upon clear, cogent, and convincing evidence' and whether the 'findings support the conclusions of law.'" *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000) (citation omitted), *appeal dismissed, disc. review denied*, 353 N.C. 374, 547 S.E.2d 9, 10 (2001).

After a trial court determines that grounds to terminate parental 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). Whether termination is in the best interests of the child is discretionary, and a court may decline to terminate parental rights only "where there is reasonable hope that the family unit within a reasonable period of time can reunite and provide for the emotional and physical welfare of the child[.]" *Blackburn*, 142 N.C. App. at 613, 543 S.E.2d at 910.

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)(7). N.C. Gen. Stat. § 7B-1111(a)(7) provides that the trial court may terminate a parent's parental rights if "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion[.]"

We determine that the trial court made findings of fact supported by clear, cogent, and convincing evidence which support the conclusion that respondent willfully abandoned A.B.J. for at least six consecutive months immediately preceding the filing of the petition. "Factual findings that are supported by the evidence are binding on appeal, even though there may be evidence to the contrary." *In re L.A.B.*, ___ N.C. App. ___, ___, 631 S.E.2d 61, 64 (2006). "'Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.'" *Id.* at ___, 631 S.E.2d at 64 (citation omitted). The trial court made unchallenged findings that from 5 April 2004 to 5 October 2004, respondent made "no attempt to contact or make inquiry regarding [A.B.J.]." Further, the trial court found that "although incarcerated, Respondent was able to make telephone calls and use the mail." These findings support the conclusion that respondent willfully abandoned A.B.J. for at least six consecutive months immediately preceding the filing of the petition.

After having determined that a ground existed to terminate respondent's parental rights, we need to address respondent's contention that the trial court erred by concluding that it was in

the best interests of A.B.J. to have respondent's parental rights terminated. "[U]pon a finding that grounds exist to authorize termination, the trial court is never required to terminate parental rights under any circumstances, but is merely given the discretion to do so." *In re Tyson*, 76 N.C. App. 411, 419, 333 S.E.2d 554, 559 (1985). "The trial court has discretion to terminate parental rights if it finds termination would be in the best interest of the juvenile." *In re M.N.C.*, ___ N.C. App. ___, ___, 625 S.E.2d 627, 633 (2006). "The standard for appellate review of the trial court's decision to terminate parental rights is abuse of discretion." *Id.* at ___, 625 S.E.2d at 633.

In the instant case, there was no abuse of discretion by the trial court. An uncontested finding of fact by the trial court states that there had been only three attempts at communication by respondent since 16 December 2002. Further, the trial court found, and it is uncontested, that the guardian ad litem appointed to represent the best interests of A.B.J. recommended that respondent's parental rights be terminated after doing an investigation of the facts, including interviewing petitioner and her husband, reviewing respondent's criminal record, and listening to all testimony at the hearing. Therefore, we disagree with respondent's contentions.

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

Affirmed.

Judges WYNN and McGEE concur.

Report per Rule 30(e).