NO. COA06-167

NORTH CAROLINA COURT OF APPEALS

Filed: 3 October 2006

IN THE MATTER OF:

P.P.B.

Halifax County
No. 04 J 34

Appeal by respondents from order entered 23 June 2005 by Judge H. Paul McCoy, Jr., in Halifax County District Court. Heard in the Court of Appeals 23 August 2006.

Joyce L. Terres and Jeffery L. Jenkins, for Halifax County Department of Social Services, petitioner-appellee.

Womble Carlyle Sandridge & Rice, PLLC, by Stuart A. Brock, for Guardian ad Litem Melinda Hardy, petitioner-appellee.

Appellate Defender Staples Hughes, by Assistant Appellant Defender Keischa M. Lovelace, for respondent-mother-appellant.

Mary McCullers Reece for respondent-father-appellant.

JACKSON, Judge.

Z.B. ("respondent mother") and L.M. ("respondent father") appeal the termination of their parental rights to P.P.B. For the reasons stated below, we affirm the trial court's termination order.

Respondent mother was a forty-three-year-old single mother and college student. In 2002, she enrolled in St. Paul's College in

Lawrenceville, Virginia and began working towards a degree in business education. She paid for her education and the needs of her son and herself with student loans, work study, scholarships, and Virginia public assistance. In the fall of 2003, she became pregnant with P.P.B. while in school.

In March 2004, respondent mother was living temporarily with her mother in Roanoke Rapids, North Carolina when she began experiencing pregnancy-related complications and went to the emergency room at Halifax Regional Medical Center. She admitted to the doctors that she had not received any prenatal care and had used cocaine a week earlier. A few days later, she gave birth to P.P.B. approximately seven to eight weeks prematurely. Both respondent mother and P.P.B. tested positive for cocaine as a result of respondent mother's drug usage during her pregnancy, and P.P.B. remained in the hospital due to low birth weight, special nutrition needs, jaundice, and fever.

On 23 March 2004, Halifax County Department of Social Services ("DSS") filed a juvenile petition alleging P.P.B. was neglected and dependent. That day, the trial court entered a nonsecure custody order placing P.P.B. in DSS' custody. On 29 March 2004, both parents were ordered to complete substance abuse screening and mental health assessments, to follow all resulting recommendations, and to cooperate with paternity testing efforts.

Between March and June 2004, respondent mother continued her education in Virginia. The foster mother stated that during this time, respondent mother never missed a scheduled visit with P.P.B.

Respondent father also visited with P.P.B. when his work schedule permitted.

Respondent mother participated in a substance abuse screening and attended five weekly meetings for outpatient group therapy between 28 April 2004 and 26 May 2004. However, respondent mother missed the last three meetings and her case was closed as unsuccessful.

Respondent father also participated in a substance abuse screening, where he admitted to a long history of alcohol and cocaine abuse. He previously had received inpatient treatment on at least four occasions since the 1980s. Nonetheless, he had used both alcohol and cocaine only days before his screening. On 20 August 2004, the trial court suspended respondent father's visitation rights until paternity was established and respondent father began substance abuse treatment.

In August and September 2004, DSS asked respondent mother several times to submit to random drug testing. She was asked on 12 August 2004 to submit to a hair sample test, but she refused as she had just had her hair professionally braided. Although respondent mother promised to return the following day, DSS learned on 17 August 2004 that respondent mother had not returned as promised. DSS asked respondent mother to submit to drug testing on 19 August 2004, but once again, she failed to comply. On 26 August 2004, respondent mother rejected another DSS request for a drug test, and on 31 August 2004, the trial court ordered respondent mother to comply with drug testing that day or else her visitation

would be suspended. When she finally submitted to drug testing on 8 September 2004, she tested positive for cocaine, and consequently, her visitation was suspended.

As a result of her positive drug test, a mental health reevaluation was scheduled for 14 October 2004. DSS rescheduled the evaluation for 1 November 2004 due to respondent mother's midterm examinations at St. Paul's College. Respondent mother, however, failed to attend the rescheduled evaluation, just as she had failed to attend her 28 October 2004 court hearing. Respondent mother made no attempt to contact DSS, and all phone numbers provided to DSS for respondent mother had been disconnected.

Meanwhile, DSS encountered similar resistance from respondent father, who failed to attend a scheduled paternity testing appointment on 17 September 2004. On 6 October 2004, respondent father contacted DSS for the first time to request visitation. In accordance with the trial court's order on 24 June 2004, DSS denied respondent father's visitation request as he still had not begun substance abuse treatment, a condition for reinstating his visitation rights. On 15 October 2004, respondent father again failed to attend a paternity testing appointment, and the testing was rescheduled again.

Visitation by respondent mother was reinstated by order dated 22 November 2004. The court ordered respondent mother not to miss a single visit. Respondent mother contacted DSS about visitation, and visitation resumed 2 December 2004. At that visit, however, respondent mother indicated that having P.P.B. back in her life

would only complicate things and that she would like it if P.P.B. remained in the foster parents' home. Respondent mother missed scheduled visits on 9 December 2004, 16 December 2004, 30 December 2004, 6 January 2005, and 27 January 2005, and respondent mother also failed to attend the permanency planning meeting on 18 January 2005.

Respondent father, who also missed the permanency planning meeting, told DSS on 18 January 2004 that he wanted nothing to do with the case, including support, if P.P.B. was not returned to her mother. Three days later, on 21 January 2005, respondent father was judicially determined to be P.P.B.'s father.

On 24 February 2005, the court held a permanency planning hearing, which neither respondent mother nor respondent father attended. In addition to noting respondent mother's failed drug test, missed treatment sessions, missed visitations, and failure to attend parenting classes, the court also found that respondent father had not cooperated with DSS, had not participated in substance abuse screenings, had not provided any child support, and had not shown any interest in P.P.B. Accordingly, P.P.B.'s placement plan was changed from reunification to adoption, and visitation with both parents was suspended pending further review.

DSS filed a Motion for Termination of Parental Rights on 5 May 2005. A hearing was held 9 June 2005, and once again, respondent mother was not present in court. Her attorney had not had contact with her since 5 December 2004. The trial court found that both

parents had willfully abandoned P.P.B. and ordered their parental rights terminated by order dated 23 June 2005.

Both respondent mother and respondent father appeal the trial court's conclusion that they willfully abandoned their minor child. Therefore, we will address this issue first.

"On appeal, our standard of review for the termination of parental rights is whether the court's findings of fact are based upon clear, cogent and convincing evidence and whether the findings support the conclusions of law." *In re Baker*, 158 N.C. App. 491, 493, 581 S.E.2d 144, 146 (2003) (citations, alteration, and internal quotation marks omitted). Furthermore, "[t]he presumption is in favor of the correctness of the proceedings in the trial court, and the burden is on the appellant to show error." *In re Moore*, 306 N.C. 394, 403, 293 S.E.2d 127, 132 (1982) (citations omitted). In the case *sub judice*, the trial court concluded that both parents had willfully abandoned P.P.B. pursuant to North Carolina General Statutes, section 7B-1111(a)(7). This conclusion will be upheld if supported by the trial court's findings of fact and those findings are based on clear, cogent, and convincing evidence.

Section 7B-1111(a) provides that "[t]he court may terminate the parental rights upon a finding . . . [that] [t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion." N.C. Gen. Stat. § 7B-1111(a)(7) (2005). As clarified by this Court, "'[a]bandonment imports any wil[l]ful or intentional conduct

on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child.'" *In re T.C.B.*, 166 N.C. App. 482, 485, 602 S.E.2d 17, 19 (2004) (alteration in original) (quoting *In re Apa*, 59 N.C. App. 322, 324, 296 S.E.2d 811, 813 (1982)). "'Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence,'" *id.* (quoting *In re Adoption of Searle*, 82 N.C. App. 273, 276, 346 S.E.2d 511, 514 (1986)), and as this Court recently noted, "[w]illful abandonment has been found where a parent withholds his presence, his love, his care, the opportunity to display filial affection, and [willfully] neglects to lend support and maintenance." *In re D.J.D.*, 171 N.C. App. 230, 241, 615 S.E.2d 26, 33 (2005) (second alteration in original) (quoting *In re McLemore*, 139 N.C. App. 426, 429, 533 S.E.2d 508, 509 (2000) (interpreting N.C. Gen. Stat. § 7A-289.32, the predecessor to N.C. Gen. Stat. § 7B-1111)).

As to respondent mother, the trial court found that she had failed to visit regularly since March 2004, had missed several mandatory visits in December 2004 and January 2005, had failed to maintain contact with DSS, and had failed to provide financial support for her minor child. The trial court then concluded that "[respondent mother's] behavior indicates an intent to forgo all parental duties toward [P.P.B.]" and provided grounds under section 7B-1111(a)(7) that she had willfully abandoned her minor child for at least six consecutive months immediately preceding the filing of the motion to terminate parental rights.

Respondent mother argues that the trial court considered events outside the relevant six-month period of 5 November 2004 to 5 May 2005. However, the statute requires that the child be abandoned for *at least* six months prior to the motion or petition to terminate parental rights. *See* N.C. Gen. Stat. § 7B-1111(a)(7). It therefore was within the court's discretion to consider events prior to the six-month period immediately preceding the filing of the motion.

Respondent mother also argues that the court made no findings of her financial resources during the relevant six-month period. However, "[s]ince the petitions did not allege, and the court did not find, that respondent [mother] had not paid a reasonable portion of the cost of child care while the child[] [was] in foster care, the court was not required to make findings as to [her] ability to pay." *In re White*, 81 N.C. App. 82, 87, 344 S.E.2d 36, 39 (citation omitted), *disc. rev. denied*, 318 N.C. 283, 347 S.E.2d 470 (1986). The trial court found that while respondent mother received money through work study at St. Paul's College for part of the six-month period preceding the filing of the motion to terminate her parental rights, she paid no child support during that time. These facts evidence an ability to pay at least *some* amount of support, and though her legal obligation to pay support may have been suspended when she began receiving public assistance from Virginia, her moral obligation to support P.P.B. remained. *See Tilley v. Tilley*, 30 N.C. App. 581, 583, 227 S.E.2d 640, 641–42 (1976) (quoting *Ford v. Sec. Nat'l Bank*, 249 N.C. 141, 143, 105

S.E.2d 421, 423 (1958)). Additionally, as this Court has noted, even earning as little as forty cents per day evidences an ability, and thus an obligation, to pay child support. *See In re T.D.P.*, 164 N.C. App. 287, 595 S.E.2d 735 (2004), *aff'd*, 359 N.C. 405, 610 S.E.2d 199 (2005) (per curiam). In the case *sub judice*, despite working twenty hours per week at six dollars per hour, in addition to receiving $228.00 per month in public assistance, respondent mother failed to provide any financial support for P.P.B., and accordingly, the trial court properly concluded that respondent mother demonstrated an intent to forgo all parental duties toward P.P.B.

Respondent mother further argues that her failure to maintain contact with DSS was due to DSS' ceasing of all communications. This argument is without merit. Although DSS was under no obligation to contact respondent mother once P.P.B.'s placement plan was changed to adoption, nothing prevented respondent mother from inquiring about her child. During the six months immediately preceding the filing of the motion to terminate parental rights, respondent mother talked to DSS only once regarding visitation and once regarding substance abuse treatment in Virginia, and respondent mother failed to follow up on either of these conversations. Respondent mother also failed to appear at several court appearances during the relevant six months — including the permanency planning hearing — and she failed to maintain contact with her attorney. Even if DSS had attempted to contact respondent mother, all of the phone numbers provided to DSS for respondent

mother had been disconnected. The responsibility for any failure in communication falls squarely on respondent mother and only further evidences her apparent intent to abandon P.P.B.

Respondent mother also states that she visited her daughter four times during the relevant six months. However, this does not negate the fact that she was ordered by the court not to miss a single visit, yet still missed five visits in December 2004 and January 2005. Although respondent mother argues that it was difficult for her to visit P.P.B. while in school in another state, this Court notes that respondent mother's college was in Lawrenceville, Virginia, which is located approximately fifty miles from the heart of Northampton County, where P.P.B. presently resides. Additionally, at least a few of the missed visits would have occurred during the college's winter break, during which time respondent mother would have been free from school obligations.

Contrary to respondent mother's contention, there was clear, cogent, and convincing evidence supporting the trial court's conclusion that respondent mother willfully abandoned her minor child. Therefore, her assignment of error is without merit.

As to respondent father, the trial court found that he had visited P.P.B. only three times since March 2004, had twice failed to appear for paternity testing, had failed to maintain contact with DSS, had refused to pay child support, and had never asked for custody. The trial court then concluded that "[respondent father's] behavior indicates an intent to forgo all parental duties toward [P.P.B.]" and provided grounds under section 7B-1111(a)(7)

that he had willfully abandoned his minor child for at least six consecutive months immediately preceding the filing of the motion to terminate parental rights.

Like respondent mother, respondent father argues the trial court considered events outside the relevant six-month period. Respondent father notes that during the relevant six months, he took a paternity test and was adjudicated to be P.P.B.'s father. However, for the reasons stated above, the trial court was free to consider the prior paternity test appointments that respondent father failed to attend. In addition, the paternity issue could have been resolved at the initial court date of 29 March 2004 by providing an Affidavit of Parentage, which respondent father made no attempt to provide.

Respondent father also argues that his failure to visit was a direct result of the trial court's Amended Dispositional Order of 20 August 2004. That order prohibited visitation between P.P.B. and respondent father until respondent father was judicially determined to be the biological father and until respondent father began substance abuse treatment. However, he fails to attribute that order to his own failure both to obtain a judicial determination of paternity and to seek substance abuse treatment. Had he completed both of these requirements, the trial court's order would not have precluded him from visiting P.P.B.

In sum, the trial court's findings are based on clear, cogent, and convincing evidence that respondent father willfully abandoned his minor child. The trial court did not err in so concluding.

In respondent mother's other assignment of error, she contends the trial court erred in ordering the termination of her parental rights. We disagree.

The termination of parental rights is a two-step process, and a different standard of review applies at each phase. *See In re L.A.B.*, ___ N.C. App. ___, ___, 631 S.E.2d 61, 64 (2006) (citing *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001)). During the adjudicatory stage, DSS has the burden of proving by clear, cogent, and convincing evidence that at least one statutory ground for termination of parental rights exists under North Carolina General Statutes, section 7B-1111. *See Blackburn*, 142 N.C. App. at 610, 543 S.E.2d at 908. Once DSS has met its burden, the trial court moves to the dispositional phase and must consider whether termination is in the best interests of the child. *See id.* A trial court's disposition in a termination proceeding is reviewed only for abuse of discretion. *See id.* at 613, 543 S.E.2d at 910. Ultimately, "[a]lthough severing parental ties is a harsh judicial remedy, the best interests of the child[] must be considered paramount." *In re Shepard*, 162 N.C. App. 215, 221, 591 S.E.2d 1, 5 (2004) (quoting *In re Adcock*, 69 N.C. App. 222, 227, 316 S.E.2d 347, 350 (1984)). In fact, "the [trial] court is *required* to issue an order of termination in the dispositional stage, unless it finds the best interests of the child would be to preserve the parent's rights." *Blackburn*, 142 N.C. App. at 613, 543 S.E.2d at 910 (emphasis added); *see also* N.C. Gen. Stat. § 7B-1110(a) (2005).

As demonstrated above, clear, cogent, and convincing evidence exists that respondent mother willfully abandoned P.P.B. Additionally, based on the record before it, the trial court properly concluded that it was in the best interest of the child that respondent mother's and respondent father's parental rights be terminated, thereby providing an opportunity for P.P.B. to be adopted into a loving, nurturing, and supportive home. Having come to this conclusion, it was within the trial court's discretion to terminate their parental rights. Respondent mother has failed to show that the court abused its discretion, and accordingly, this assignment of error is without merit.

Respondent father has brought several additional assignments of error, the first of which contends the trial court erred in failing to appoint him a guardian *ad litem*. We disagree.

At the time the motion to terminate respondent father's parental rights was filed, North Carolina General Statutes, section 7B-1101 provided in relevant part:

> [A] guardian ad litem shall be appointed in accordance with the provisions of G.S. 1A-1, Rule 17, to represent a parent in the following cases:
>
> (1) Where it is *alleged* that a parent'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 (2003) (emphasis added).[1] Two years ago, this Court reversed an order terminating parental rights on the ground that a guardian *ad litem* had not appointed. *In re S.B.*, 166 N.C. App. 488, 602 S.E.2d 691 (2004). Specifically, we noted that

> the motion in the cause to terminate respondent's parental rights with respect to S.B. alleges that '[r]espondent has a twenty year history of heavy substance abuse,' then proceeds to allege, as grounds for termination of respondent's rights, S.B.'s juvenile dependency due to respondent's 'incapability' in language that tracks the statutory language of section 7B-1111(a)(6).

Id. at 493, 602 S.E.2d at 694 (alteration in original).

The instant case is distinguishable from *In re S.B.* Here, DSS' motion to terminate parental rights did not allege dependency. Rather, DSS alleged, *inter alia*, neglect, failure to pay child support, failure to make satisfactory progress, and willful abandonment as grounds for terminating parental rights. Although the initial juvenile petition filed on 23 March 2004 alleged dependency, a trial court is obligated to conduct a hearing regarding the appointment of a guardian *ad litem* only "where an allegation is made that parental rights should be terminated," *In re J.A.A.*, ___ N.C. App. ___, ___, 623 S.E.2d 45, 48 (2005), not merely where an order for nonsecure custody is sought. Furthermore, although DSS' motion referenced respondent father's thirty-year history of alcohol abuse and twenty-year history of

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[1]The General Assembly amended section 7B-1101, but the amended provision, now in section 7B-1101.1, only applies to termination petitions filed on or after 1 October 2005. *See In re D.H.*, ___ N.C. App. ___, ___, 629 S.E.2d 920, 923 (2006) (discussing the effect of the amendment).

cocaine 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." *J.A.A.*, ___ N.C. App. at ___, 623 S.E.2d at 48 (citation and internal quotation marks omitted). Because DSS did not allege dependency in its motion to terminate respondent father's parental rights and because there is no allegation or evidence in the record that respondent father's substance abuse was a significant factor in his neglect of P.P.B., the trial court was not obligated to appoint a guardian *ad litem* for respondent father. *See D.H.*, ___ N.C. App. at ___, 629 S.E.2d at 925; *J.A.A.*, ___ N.C. App. at ___, 623 S.E.2d at 48; *see also In re K.H.*, ___ N.C. App. ___, ___, 627 S.E.2d 478, 481–82 (2006) (Jackson, J., dissenting).

In his next assignment of error, respondent father contends the trial court erred in finding that his failure to obtain a paternity test indicated no strong desire to establish paternity so that he could reestablish visitation with P.P.B. We disagree.

As indicated above, respondent father could have provided an Affidavit of Parentage at the 29 March 2004 hearing, thus immediately establishing paternity of P.P.B. However, paternity was not established until ten months later. Respondent father missed two scheduled paternity test appointments, despite having spoken with DSS only days before one of them and despite his knowledge that judicial determination of paternity was a requirement to his being allowed to visit P.P.B. Therefore, the trial court's finding is supported by clear, cogent, and convincing

evidence, which in turn supports the court's conclusion of willful abandonment.

Respondent father also assigns error to the trial court's incomplete finding that he told the social worker that "he was not asking that the child be placed with him, and that he did not plan to pay any support for the child." Respondent father's complete statement, however, was set out in an earlier finding of fact, and as such, this assignment of error is without merit.

In his final assignment of error, respondent father contends the trial court erred in considering the possibility of adoption as a factor supporting the termination of his parental rights. We disagree.

Although termination of parental rights is a two-step process, this Court has not required two separate hearings. *See White*, 81 N.C. App. at 85, 344 S.E.2d at 38. Furthermore,

> since a proceeding to terminate parental rights is heard by the judge, sitting without a jury, it is presumed, in the absence of some affirmative indication to the contrary, that the judge, having knowledge of the law, is able to consider the evidence in light of the applicable legal standard and to determine whether grounds for termination exist before proceeding to consider evidence relevant only to the dispositional stage.

Id.

Respondent father argues the trial judge erred by considering the positive impact that the child's adoption might have, while still considering the evidence of grounds for termination. He references transcript pages wherein the judge was dictating his order into the record. As an order lists all findings of fact,

then all conclusions of law, it was not error to dictate findings as to the impact of adoption prior to dictating conclusions as to grounds for termination.

For all of the foregoing reasons, we hold that there was no error in the trial court's order terminating the parental rights of respondent mother and respondent father.

Affirmed.

Judges CALABRIA and GEER concur.

Report per Rule 30(e).