NO. COA06-22

NORTH CAROLINA COURT OF APPEALS

Filed: 21 November 2006

IN THE MATTER OF:

D.J.R. and K.M.R.

Harnett County
No. 04 J 34
No. 04 J 35

Appeal by respondent-father from orders entered 7 July 2005 by Judge Jimmy L. Love, Jr. in Harnett County District Court. Heard in the Court of Appeals 19 October 2006.

Akins, Hunt & Fearon, P.C., by Belinda Keller Sukeena, for Jessica M. Riley, petitioner-appellee.

McLeod & Harrop, by *Donald E. Harrop, Jr., for respondent-appellant.*

JACKSON, Judge.

Charles B. ("respondent") appeals the termination of his parental rights to D.J.R. and K.M.R. For the reasons stated below, we affirm the trial court's termination order.

K.M.R. was born on 24 June 1999, and D.J.R. was born on May 10, 2001. Jessica R. ("petitioner") and respondent, although not married, began living together after petitioner became pregnant with D.J.R., and they ceased cohabiting in May 2002. Petitioner testified that: (1) she discovered money missing from the home; (2)

respondent often would stay out all night; (3) respondent was frequently drinking to excess and smoking marijuana; (4) respondent had multiple drunk driving convictions; (5) respondent got into several car accidents; and (6) respondent was physically and mentally abusive with petitioner, and even once locked petitioner and the children out of the home. Petitioner and respondent ultimately separated in July 2002. Respondent visited with the children every other weekend as well as on Wednesdays until petitioner ceased his visits with the children. However, on several occasions when petitioner brought the children to respondent's mother's house to see respondent, she would find that respondent was either not at the house or that respondent was drunk at the time. After approximately six weeks of such attempts at visitation, petitioner stopped bringing the children to respondent and stopped allowing him to see them. Respondent, in turn, responded by refusing to send child support payments to petitioner.

In the fall of 2002, respondent moved to New York, and petitioner permitted respondent to continue speaking with K.M.R. and D.J.R. on the phone. However, after monitoring the phone calls, petitioner refused to allow respondent to speak with the children, telling him, "If you cannot call and not threaten me, and speak properly to the children, you're not allowed to call." Petitioner informed respondent that he was allowed to write letters to the children, but despite this option, he never sent any cards or letters.

While in New York, respondent bought clothing and toys, including holiday gifts, for the children and sent them to his friend in North Carolina to deliver to petitioner. After several visits, however, petitioner told respondent's friend not to return, and respondent's sister, in turn, went to respondent's friend's house to retrieve some of the gifts. Petitioner then allowed respondent's sister to bring gifts to the children, but in the summer of 2003, after learning that respondent's sister had been talking to respondent about the children, petitioner explained that she did not want respondent's sister to return to the house. Respondent's sister has made no attempt to return since then.

Respondent returned to North Carolina in December 2004. He has a job moving furniture and currently is living with his mother. Additionally, respondent completed an alcohol program while in New York, and his mother believes that he is about eighty percent cured of his alcoholism.

On 4 March 2004, petitioner filed the petitions to terminate respondent's parental rights to D.J.R. and K.M.R. On 7 July 2005, the trial court entered an order terminating respondent's parental rights to both children, and respondent filed timely notice of appeal.

In his first assignment of error, respondent contends that Findings of Fact numbers 8, 10, 15, and 23 entered by the trial

court in both termination orders were not supported by clear and convincing evidence.[1] We disagree.

"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). This Court has noted that "it is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000). Accordingly, "[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). The trial court's conclusions of law, however, are reviewable *de novo*. *See Starco, Inc. v. AMG Bonding & Ins. Servs., Inc.*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (1996).

Finding of Fact number 8 in both the order terminating respondent's parental rights to D.J.R. as well as the order terminating his rights to K.M.R. reads:

> Petitioner testified that during the time the parties lived together, Respondent hit her,

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[1]Respondent expressly abandons his assignment of error as it relates to Findings of Fact numbers 12, 14, and 16. As a result, those facts are deemed supported by competent evidence. *In re Padgett*, 156 N.C. App. 644, 648, 577 S.E.2d 337, 340 (2003).

> called her abusive names, locked her and the young children out of the house, and threatened to kill Petitioner on a number of occasions.

Respondent does not challenge on appeal the court's finding that he hit petitioner, called her abusive names, or locked her and the children out of the house. Rather, his argument is limited to the finding that he threatened to kill petitioner. Respondent contends that petitioner did not testify to that effect. Contrary to respondent's contention, petitioner specifically stated during her testimony that "[respondent] threatened to kill me" and that she had sought assistance from S.A.F.E. of Harnett County after "he had threatened to throw me out the window." As there was competent evidence to support the court's finding that respondent threatened to kill petitioner, respondent's argument is without merit.

Respondent also challenges Finding of Fact number 10 in both orders, which states that "Respondent's criminal record and other witnesses demonstrated that Respondent has a history of violent incidences." Respondent contends that the testimony indicates that he only had alcohol-related convictions and one simple assault conviction from 1999. The court's finding, however, was based on respondent's criminal record *and* other witnesses. As discussed *supra*, competent evidence supported the court's finding that respondent had committed or threatened violent acts against petitioner. Additionally, respondent threatened to kill petitioner's boyfriend or at least break his legs, and petitioner's father recalled that respondent had been involved in a fight following a concert in Raleigh. Finally, although the bulk of

respondent's convictions were alcohol-related violations, such as public drunkenness, respondent acknowledged that he had been convicted previously of assault, being intoxicated and disruptive, and resisting a police officer. Between his criminal record and the testimony of the witnesses, the trial court was justified in finding that respondent had a history of violent incidences.

In Finding of Fact number 15, the trial court found that "[w]itnesses testified that Respondent drove drunk while the children were in his care." As petitioner concedes, there is no direct evidence to support this finding. Nevertheless, there appears to be sufficient circumstantial evidence to satisfy the evidentiary standard of clear, cogent, and convincing evidence. *Cf. State v. Berry*, 356 N.C. 490, 500, 573 S.E.2d 132, 140 (2002) (noting that "there is no distinction between the weight to be given to direct and circumstantial evidence."). Respondent acknowledged that he had been convicted twice of driving under the influence, and petitioner explained that in the summer of 2001, respondent, after drinking and getting into an argument with petitioner, had taken petitioner's car and "drove it into an electric box . . . and left it there." One witness, whose father was in a relationship with and living with respondent's mother, noted that respondent had driven drunk with the witness' son in the truck. The same witness testified that, sometime in late 2001, she found respondent drunk and passed out while he was supposed to be watching D.J.R. and K.M.R. While respondent was passed out, D.J.R. was in the play pen crying, and K.M.R. was running around.

Respondent, who had battled alcoholism for several years and continued to do so at the time of the trial, frequently would drink to the point of losing consciousness and had even urinated on himself during one such instance. After evaluating all of the evidence, the trial court was justified in finding that respondent, who had driven drunk with another's child and had drunk to excess while his own children were in his care, had driven drunk while D.J.R. and K.M.R. were in his care. Accordingly, respondent's assignment of error is overruled.

Respondent also contests the trial court's Finding of Fact number 23, in which the court stated that "Respondent has another child in New York under the age of one. He stated that he does not provide any support for that child." This finding is not supported by clear, cogent, and convincing evidence. When asked if he had any children in New York, respondent replied that there was "a possibility of one" but noted that paternity had not been established. Although respondent knew that the child was nine months old at the time, his mere knowledge of the child's age, contrary to the contentions of petitioner, does not support the trial court's finding that respondent was the father. Furthermore, when asked if he was paying support for the child, respondent did not state that he was not paying support but rather reaffirmed that "[i]t has not been proven that that is my child." Respondent's testimony was not contradicted on this issue, and no further evidence was introduced regarding the respondent's alleged child in New York. Nevertheless, although there may have been insufficient

evidence to support the trial court's Finding of Fact number 23, the evidence before the trial court, as discussed *infra*, fully supported the conclusion that grounds existed to terminate respondent's parental rights. Accordingly, respondent's assignment of error is overruled.

In evaluating respondent's second argument, we note the trial court based its termination order on sections 7B-1111(a)(1), (a)(4), and (a)(7). Pursuant to section 7B-1111(a)(1), a trial court may terminate parental rights upon a finding that "[t]he 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." N.C. Gen. Stat. § 7B-1111(a)(1) (2005). The trial court specifically found that "Respondent has neglected the minor child pursuant to the statutory definition of neglect," which provides that a neglected juvenile is "[a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent . . .; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care . . . ." N.C. Gen. Stat. § 7B-101(15) (2005). Even without considering the findings of fact challenged by respondent, the trial court's unchallenged findings sufficiently support the conclusion that respondent neglected D.J.R. and K.M.R. For example, the trial court found and respondent did not dispute, *inter alia*, that for the two years prior to the hearing, respondent (1) has not sent any letters to

the children, (2) has not attempted to personally visit the children, (3) has not provided any support for the children or assisted with their medical bills, despite being gainfully employed, and (4) did not file any legal action to obtain custody or visitation rights to the children. Additionally, petitioner's father explained that he did not believe it even would be safe for the children to be in their father's care. Although respondent argues on appeal that the trial court should have considered changed circumstances and given more weight to the fact that respondent has a job and is living in North Carolina once again, it is worth noting that respondent did not even return to North Carolina until over nine months after the petitions in the instant case were filed. As a result of respondent's neglect, D.J.R. does not have any memories of respondent, and K.M.R. has only vague memories of her father. Accordingly, we hold that there was no error in the trial court's conclusion that respondent neglected D.J.R. and K.M.R., and thus, the court properly determined that grounds for termination existed pursuant to section 7B-1111(a)(1).

It is well-established that "[i]f a conclusion that grounds exist under any section of the statute is supported by findings of fact based on clear, cogent, and convincing evidence, the order terminating parental rights must be affirmed." *In re Mills*, 152 N.C. App. 1, 6, 567 S.E.2d 166, 169 (2002) (quoting *In re Ballard*, 63 N.C. App. 580, 586, 306 S.E.2d 150, 154 (1983), *rev'd on other grounds*, 311 N.C. 708, 319 S.E.2d 227 (1984)), *cert. denied*, 356 N.C. 672, 577 S.E.2d 627 (2003); *see, e.g.*, *In re Swisher*, 74 N.C.

App. 239, 240, 328 S.E.2d 33, 34–35 (1985) ("In the case *sub judice* the court based its order upon three of these grounds. If either of these grounds is based upon findings of fact supported by clear, cogent and convincing evidence the order appealed from should be affirmed."). In the instant case, the trial court's findings of fact, with the exception of Finding of Fact number 23, were supported by clear, cogent, and convincing evidence, and these findings, in turn, supported the court's conclusion of neglect. Because we hold that termination of parental rights was proper under North Carolina General Statutes, section 7B-1111(a)(1), we need not address respondent's assignments of error pertaining to the remaining grounds on which the trial court based its termination order, and accordingly, we affirm the trial court's termination of respondent's parental rights.

Affirmed.

Chief Judge MARTIN and Judge ELMORE concur.

Report per Rule 30(e).