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NO. COA06-273

NORTH CAROLINA COURT OF APPEALS

Filed: 2 January 2007

IN THE MATTER OF:

Da.A. and Forsyth County  
De.A., Nos. 03 J 125  
Minor Children. 03 J 144

Appeal by respondents from order entered 25 October 2005 by Judge Lisa V.L. Menefee in Forsyth County District Court. Heard in the Court of Appeals 12 October 2006.

*Forsyth County Attorney Davida W. Martin, by Assistant County Attorney Twanda M. Staley, for petitioner-appellee.*

*Charlotte Gail Blake for respondent-appellant mother.*

*Richard Croutharmel for respondent-appellant father.*

*Womble Carlyle Sandridge & Rice, PLLC, by John E. Pueschel, for guardian ad litem.*

GEER, Judge.

Respondent mother appeals an order terminating her parental rights as to her minor children, Da.A. ("David") and De.A. ("Dennis"); respondent father appeals the same order, which terminated his parental rights as to Dennis.<sup>1</sup> With respect to respondents' argument that the trial court's failure to comply with

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<sup>1</sup>For the reader's ease and in the interest of maintaining the children's privacy, we refer to the children by the pseudonyms "David" and "Dennis."

statutory time limitations requires reversal, we hold that they have failed to show that they suffered prejudice warranting reversal. Since the father challenges the order only on the basis of the allegedly prejudicial delays, we affirm the termination of his parental rights. With respect to the mother, however, we must remand for further proceedings because neither of the two grounds relied upon by the trial court for termination of her parental rights is supported by sufficient findings of fact.

#### Facts

This appeal concerns two half-brothers, David and Dennis. Respondent mother is the biological mother of both children, while respondent father is the biological father of Dennis. David's biological father consented to the termination of his parental rights.

Forsyth County Department of Social Services ("DSS") obtained custody of David and Dennis in November 2001, after respondent mother gave birth to Dennis while in prison. Until that point, David, the older brother, had been living with a friend of the mother, but the friend decided she would be unable to care for both children. In December 2001, the children were adjudicated dependent by the Forsyth County District Court. In its adjudication order and subsequent review orders, the district court directed the mother to undergo a psychological evaluation and complete a substance abuse assessment and parenting skills classes. She completed the psychological evaluation, but did not comply with the other requirements.

The mother was released from prison on 29 April 2002, but found herself incarcerated again a month later for a felony theft offense. During the brief period when she was not incarcerated, the mother had the opportunity to visit her children six times but only took advantage of two visits. Her expected release date from prison is June 2007.

Respondent father has been incarcerated since at least November 2001, when his son Dennis was taken into DSS custody. In the six-month period preceding the filing of the petition to terminate his parental rights, the father had two visits with Dennis in prison. He did not otherwise send cards, letters, or gifts to his son. Although the trial court required him to complete parenting classes, a substance abuse assessment, and a psychological evaluation, he did not do so. Respondent father's expected release date is November 2008.

The father has expressed a desire that his mother be considered as a possible placement option for the child. Not only, however, was the grandmother incarcerated for a period of time, it also came to light, at the time of the hearing, that she had a substance abuse problem, was unemployed, and had no stable housing to offer Dennis.

David and Dennis, meanwhile, have lived with the same foster family since coming into DSS custody in November 2001. David was five years old and Dennis nine days old when they were placed with the foster family. The children have bonded with the foster parents and have done well under their care. In addition, the

foster parents have been approved as an adoptive home for the children.

In February 2003, the district court relieved DSS of efforts to reunify respondents with David and Dennis and changed the permanent plan to adoption. In April 2003, DSS filed petitions to terminate respondents' parental rights. In its order entered on 25 October 2005, the court found three grounds for terminating the father's parental rights: (1) he neglected Dennis; (2) he willfully left Dennis in foster care for more than 12 months without showing that reasonable progress had been made to correct the conditions leading to Dennis' removal; and (3) he willfully abandoned Dennis for at least six months immediately preceding the petition. With respect to the mother, the court found two grounds existed for terminating her parental rights: (1) she willfully left David and Dennis in foster care for more than 12 months without showing that reasonable progress had been made to correct the conditions leading to their removal, and (2) she was incapable of providing for their proper care and supervision such that they were dependent juveniles. After finding grounds for termination, the court concluded that it was in the best interests of the children to terminate the parental rights of both respondents. Both the mother and the father timely appealed this order.

I

Respondents argue that the trial court's failure to comply with certain statutory deadlines constituted reversible error. Specifically, the trial court did not adhere to: (1) N.C. Gen.

Stat. § 7B-1109(a) (2005), which requires that an adjudicatory hearing be held "no later than 90 days from the filing of the [termination of parental rights] petition"; and (2) N.C. Gen. Stat. §§ 7B-1109(e) and 7B-1110(a) (2005), which require that an adjudicatory and dispositional order "be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing." DSS does not dispute that the deadlines were violated.

Violations of a statutory time limitation may trigger reversal only when the delay has been prejudicial. See *In re C.L.C.*, 171 N.C. App. 438, 443, 615 S.E.2d 704, 707 (2005) ("[T]his Court has held that time limitations in the Juvenile Code are not jurisdictional in cases such as this one and do not require reversal of orders in the absence of a showing by the appellant of prejudice resulting from the time delay."), *aff'd per curiam and disc. review improvidently allowed*, 360 N.C. 475, 628 S.E.2d 760 (2006). See also *In re S.W.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 625 S.E.2d 594, 596 (respondent must show prejudice from untimely hearing and untimely entry of order), *disc. review denied*, 360 N.C. 534, 635 S.E.2d 59 (2006).<sup>2</sup>

The father argues that the delay in the hearing and the delay in the filing of the order prejudiced him because the father-son relationship "remained severed" in the absence of reunification

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<sup>2</sup>The father argues prejudice as to both the delay from the scheduling of the hearing and the filing of the order. Although the mother likewise assigned error with respect to both delays, she makes no effort to explain how she was prejudiced by the untimely hearing.

efforts by DSS. Similarly, the mother argues that she was prejudiced by having an "unresolved" relationship with her children and because of DSS' suspension of reunification efforts. Neither parent, however, chose to appeal the February 2003 order that relieved DSS of reunification efforts and sanctioned a permanent plan of adoption. See *C.L.C.*, 171 N.C. App. at 445, 615 S.E.2d at 708 (holding that parent failed to show prejudice from delay in filing of termination of parental rights order when she could have appealed from permanency planning order but did not do so). If the parents had found the cessation of reunification efforts prejudicial to their interests, they could have appealed that order. See N.C. Gen. Stat. § 7B-1001 (2005); *In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003) ("An order that changes the permanency plan in this manner is a dispositional order that fits squarely within the statutory language of section 7B-1001" and is therefore appealable). For the same reasons, we find unpersuasive the parents' accompanying claim that they were prejudiced by the delay in their inability to appeal the termination of parental rights order. See *In re B.M.*, 168 N.C. App. 350, 354-55, 607 S.E.2d 698, 701 (2005) (holding that respondents' right to appeal was not affected by the untimely filing of the termination of parental rights order when respondents could have appealed from orders directing cessation of reunification efforts and changing the permanent plan to termination of parental rights).

Further, the father's complaint about a lack of reunification efforts by DSS is unconvincing in the face of the trial court's finding – not challenged on appeal – that the father did not comply with any of the limited steps that were a prerequisite to reunification with his son, such as parenting classes, a psychological evaluation, and a substance abuse assessment. If anything, the delay in holding the hearing benefitted the father by providing him with additional time to fulfill the prescribed steps for reunification. He did not, however, avail himself of this added time.

As for the mother's argument, even after reunification efforts were ceased, she continued to have "regular contact" with her children even though she was incarcerated and they were in DSS custody. The fact that she was able to maintain communication with her children tends to belie her claim that the delay was prejudicial to her.

The mother argues further that the delayed order prejudiced "the foster parents' ability to proceed with adoption proceedings." In a similar manner, the father argues the delays were prejudicial because they denied Dennis permanence. Although we have recognized that the prejudice suffered by foster parents and children may contribute to a conclusion that reversal is in order, we must also take into account the fact that reversal would magnify the prejudice suffered by Dennis and the children's foster parents. See *In re D.J.D.*, 171 N.C. App. 230, 243-44, 615 S.E.2d 26, 35 (2005) (pointing out that "[d]elays prejudice the children, who are

denied permanency" and "reiterat[ing] that the best interests of the children are the paramount concern"). Errors on appeal are reversed in order to remedy prejudice. The type of prejudice that warrants reversal of a termination of parental rights order generally cannot be prejudice that will be perpetuated and increased by remanding for further proceedings.

Accordingly, under these circumstances, we refuse to reverse the trial court's order on the basis of prejudicial delay, especially when such a result would operate to the further detriment of the only parties – namely, the foster parents and the children – who conceivably could have been prejudiced by the delay. Indeed, in cases such as this, we believe we must give effect to "the General Assembly's intent . . . to provide parties with a speedy resolution of cases where juvenile custody is at issue." *In re E.N.S.*, 164 N.C. App. 146, 153-54, 595 S.E.2d 167, 172 (holding failure to comply with statutory deadline to be "harmless error" where "respondent cannot show how she was prejudiced by the late filing"), *disc. review denied*, 359 N.C. 189, 606 S.E.2d 903 (2004). These assignments of error are overruled. Because respondent father has not brought forward in his brief any other assignment of error, we affirm the trial court's order terminating his parental rights.

## II

We now address the remaining arguments of respondent mother challenging the trial court's determination that grounds for termination of her parental rights existed. We agree with the

mother that the trial court applied the wrong test under N.C. Gen. Stat. § 7B-1111(a)(2) (2005) and made inadequate findings of fact under N.C. Gen. Stat. § 7B-1111(a)(6). We therefore remand for further findings of fact.

The mother first contends that the trial court erred in failing to appoint a guardian ad litem ("GAL") for her when the petition relied upon N.C. Gen. Stat. § 7B-1111(a)(6) as one of its grounds for termination. A GAL was eventually appointed, but not until 22 September 2004, long after the filing of the petition. The mother did not, however, assign as error the belated appointment of a GAL. The assignment of error referenced in this section of the mother's brief states only: "The trial court erred in finding and concluding that the mother is incapable of providing for the proper care and supervision of her children, such that they are dependent children and that such incapability will continue for the foreseeable future." This Court's review "is confined to a consideration of those assignments of error set out in the record on appeal . . . ." N.C.R. App. P. 10(a). Because of the absence of an assignment of error, we do not address this issue.

N.C. Gen. Stat. § 7B-1111(a)(2) provides that parental rights may be terminated if: "The 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." The mother contends that the trial court

inappropriately limited its review of the evidence to whether she had made "reasonable progress" within 12 months prior to the filing of the termination of parental rights petition.

A previous version of the statute contained the language "within 12 months." As our Supreme Court has explained:

[D]uring the 2001 session of the General Assembly, the legislature struck the "within 12 months" limitation from the existing statute detailing the requirements for establishing grounds for the termination of parental rights. Thus, under current law, there is no specified time frame that limits the admission of relevant evidence pertaining to a parent's "reasonable progress" or lack thereof.

*In re Pierce*, 356 N.C. 68, 75 n.1, 565 S.E.2d 81, 86 n.1 (2002) (internal citations omitted); see also *C.L.C.*, 171 N.C. App. at 447, 615 S.E.2d at 709 ("The focus is no longer solely on the progress made in the 12 months prior to the petition.").

Despite the change in the law, the trial court's order specifically states that "[t]he relevant time period to be considered in this proceeding is April 24, 2002 to April 24, 2003" — the 12 months before the filing of the TPR petition. Further, the court expressly concluded that the mother failed to make "reasonable progress . . . *within 12 months* in correcting those conditions which led to the removal of the juvenile." (Emphasis added.) The trial court thus applied the wrong standard in determining whether grounds existed under N.C. Gen. Stat. § 7B-1111(a)(2).

Although DSS and the children's guardian ad litem argue that the trial court did not merely confine its focus to the 12 months

preceding the petition, citing a few findings that reflect a consideration of evidence outside the 12-month period, those findings cannot override the trial court's express articulation of the wrong standard. In any event, those findings do not necessarily relate to the trial court's analysis under § 7B-1111(a)(2). On remand, the trial court must consider the evidence in light of the proper standard.

With respect to the next ground for termination of the mother's parental rights, the trial court tracked part of the language of N.C. Gen. Stat. § 7B-1111(a)(6), concluding that the mother "is incapable of providing for the proper care and supervision of her children, such that they are dependent juveniles within the meaning of N.C.G.S. 7B-101, and there is a reasonable probability that such incapability will continue for the foreseeable future." The remainder of the statute, as in effect at the time the petition was filed in this case,<sup>3</sup> stated: "Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other similar cause or condition." N.C. Gen. Stat. § 7B-1111(a)(6) (2001) (emphasis added). N.C. Gen. Stat. § 7B-101(9) (2001) in turn provided that a dependent juvenile is "[a] juvenile in need of assistance or placement because the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or whose parent, guardian, or custodian is unable to

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<sup>3</sup>The amendments that gave rise to the current language were effective 4 June 2003. The petitions in this case were filed on 9 April 2003.

provide for the care or supervision and lacks an appropriate alternative child care arrangement."

The trial court made no findings of fact that the mother's incapability of providing care and supervision was due to one of the specified conditions or any other "similar cause or condition." Further, the order contains no specific finding that the mother lacked an appropriate alternative child care arrangement. Without such findings, the trial court's order terminating the mother's parental rights based on N.C. Gen. Stat. § 7B-1111(a)(6) cannot be upheld. See *In re Clark*, 151 N.C. App. 286, 289, 565 S.E.2d 245, 248 (reversing order when record contained no evidence and trial court made no findings that the respondent, who was incarcerated, suffered from any physical or mental condition or that he was incapable of arranging for appropriate supervision for his child), *disc. review denied*, 356 N.C. 302, 570 S.E.2d 501 (2002). Accordingly, we remand for further findings of fact on this ground as well.

Because of our resolution of this appeal, we need not address the mother's remaining arguments. We leave to the discretion of the trial court the decision whether to conduct further evidentiary hearings on remand.

Affirmed in part; reversed and remanded in part.

Judges STEELMAN and STEPHENS concur.

Judge STEPHENS concurred prior to 31 December 2006.

Report per Rule 30(e).