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NO. COA06-467

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

IN THE MATTER OF:

G.T.B. and
H.D.B.,
Minor Children.

Dare County
No. 04-J-78

Appeal by Respondent-mother from orders filed 6 June and 27 June 2005 by Judge James Carlton Cole in Dare County District Court. Heard in the Court of Appeals 21 September 2006.

Annick Lenoir-Peek for Respondent-Appellant.

Sharp, Michael, Outten & Graham L.L.P., by Steven D. Michael, for Petitioner-Appellee.

Alexandra S. Gruber for Guardian ad Litem-Appellee.

STEPHENS, Judge.

Respondent-Appellant ("Respondent") is the mother of G.T.B. and H.D.B., the juveniles who are the subject of this appeal. In a petition filed 3 December 2004, the Dare County Department of Social Services ("DSS") alleged that grounds existed to terminate Respondent's parental rights in that Respondent

neglected the children within the meaning of North Carolina General Statute Section 7B-101[,] . . . willfully left the children in foster care or placement outside the home for more than twelve (12) months without showing to the satisfaction of the Court that reasonable progress under the circumstances

have [sic] been made within twelve (12) months in correcting the conditions which led to the removal of the children[,] . . .[and] for a period of six months next preceding the filing of this petition, [has] willfully failed for such period to pay a reasonable portion of the cost of care for the children, although physically and financially able to do so.

The termination hearing began before the Honorable James Carlton Cole in Dare County District Court on 28 February 2005. During the adjudication stage, Respondent's counsel stipulated to the existence of grounds to terminate Respondent's parental rights. After this stipulation, Respondent's attorney requested a continuance before the trial court began hearing evidence for the disposition stage. Judge Cole thus continued the matter and, on 6 June 2005, proceeded with the disposition stage. That same day, the trial court's order finding that grounds existed to terminate Respondent's parental rights was filed. At the 6 June 2005 disposition stage of the termination hearing, the evidence tended to show the following:

Nancy Huff, a social work supervisor with DSS, who has been assigned to the case since March 2002, testified regarding the case history and the various foster placements of the juveniles. She testified that after being taken into physical custody by DSS on 19 April 2001, the children were placed with a maternal great-aunt in New York in December 2001. This placement lasted one or two days and the children were then placed with their paternal grandfather, who also lived in New York. After approximately eight months, this placement was no longer viable, and the children were placed with Respondent's mother, who also lived in New York. The children

stayed there for approximately eight months, when the court ordered their return to North Carolina. Both boys are currently placed in separate foster homes in North Carolina. Because of the medical and counseling services that the boys require, the cost of care for the children is over \$10,000.00 a month.

G.T.B. has been in his current foster placement for approximately ten months and is doing well. He is affectionate toward his foster parents, referring to them as "mom" and "dad," and to their home as his home. He has also made marked academic progress during the current school year.

H.D.B. first met his current foster family in February 2005 and has been placed in their home since March 2005. His foster family has worked hard to help him improve his behavior, and he has been able to begin a pre-school program, something that he previously was unable to do.

Kelly Roberts, a licensed clinical social worker, who owns and operates Coastal Counseling and who worked as a therapist for G.T.B. and H.D.B., testified that she performed her initial evaluation on the juveniles on 15 December 2003 and, while working with the children, observed behavioral issues, sexual behavioral problems, and some developmental delays. She testified further that both boys are currently doing well, and that their behavior has improved since they have been placed in separate homes. Regarding permanent adoption, Ms. Roberts testified that, because of the history of each child, "time is of the essence." She believes that both children are adoptable but, because of their

special needs, they are more likely to be adopted if their placement is separate.

Kaileb Jackson, a social services worker in western North Carolina, whose social services office was responsible for licensing H.D.B.'s foster family, testified that he has been providing support to the family since H.D.B. has been placed with them. He testified further that H.D.B.'s current placement has been more successful than he had hoped and that H.D.B. now "has a peacefulness" about him. Moreover, he sees no reason for any major concerns about his current placement and would recommend adoption by the family with whom H.D.B. currently lives.

H.D.B.'s foster and potential adoptive mother, Rebecca, testified that H.D.B. lives with her and her husband on a 75-acre farm, and is "doing really, really, well." She noted that since he has lived there, he is more "at peace and . . . content. . . . He has a lot more self esteem." In support of Rebecca's testimony, Ezerá Foutz, a previous foster father to H.D.B., testified that when the child first came to live with him, he was "wild, nervous, very insecure, almost animalistic in certain survival behaviors." He testified further that he has been surprised by how much H.D.B. has improved after being placed with Rebecca and her husband. Mr. Foutz has found that since H.D.B. has been in his current placement, he has been a "very happy, well-adjusted, confident, actually full of strength child."

Shirley Oliver, Respondent's grandmother (and the great-grandmother of G.T.B. and H.D.B.), testified that she would like

the children to be placed with her. She is retired and currently lives with her husband and her sixteen-year-old grandchild in a four-bedroom, two-bathroom house, situated on three acres of land in New York. Mrs. Oliver has many family members that live within twenty miles of her house and she testified that if the children were placed with her, she would foster relationships between the boys and these family members. She testified further that these familial relationships would include interactions with Respondent because she believes that Respondent should have her children back full-time. Regarding medical and psychological care for the children, Mrs. Oliver testified that the children would eventually be eligible to receive all of the necessary state services in New York, that she and her husband would be able to afford full payment for the services until the costs were covered by New York State, and that the couple could afford all necessary co-payments thereafter. Overall, Mrs. Oliver believed that she was physically and emotionally capable of handling the children if they were placed with her.

Respondent testified that she would like to see her children placed with her grandmother, and that she believes her grandmother could take care of the juveniles. Respondent, with her eight-month-old daughter, has recently moved back to New York and is currently living with a man named Joey, whom she eventually plans to marry. Respondent testified that although the boys are scared of Joey, it is only because he is "strict" and "is very firm in his tone."

Donna Buxton, who has worked as the children's guardian *ad litem* since the inception of this case, testified that she is in favor of termination because the boys need a permanent or final placement. She testified further that the boys are currently placed in very stable homes, and she is optimistic about the finality of each placement.

Based on this evidence, in an order filed 27 June 2005, the trial court found that it was in each child's best interest for the parental rights of Respondent to be terminated. From this order and from the 6 June 2005 order, Respondent appeals.

Respondent first contends that the trial court committed prejudicial error in entering its adjudicatory order more than thirty days after the termination hearing, in violation of N.C. Gen. Stat. § 7B-1109. We find this argument without merit.

Under North Carolina law, "[t]he adjudicatory order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing." N.C. Gen. Stat. § 7B-1109(e) (2005). Generally, "a termination proceeding involves a two-stage process[:] the adjudication stage . . ., and a disposition stage[.]" *In re White*, 81 N.C. App. 82, 85, 344 S.E.2d 36, 38 (citing *In re Montgomery*, 311 N.C. 101, 316 S.E.2d 246 (1984)), *disc. review denied*, 318 N.C. 283, 347 S.E.2d 470 (1986). Trial courts may conduct both stages concurrently, or they may hold a bifurcated proceeding in which the adjudication and disposition stages are conducted separately. *Id.*

Therefore, it follows that when a termination of parental rights hearing is bifurcated, and a trial court, during the adjudication stage, finds that grounds exist to terminate parental rights, the hearing is not complete until the trial court also concludes the disposition stage by determining what is in the best interest of the child.

In this case, the trial court completed the adjudication stage on 28 February 2005 and the disposition stage on 6 June 2005, thus concluding the termination hearing on 6 June 2005. The adjudicatory order, finding that grounds existed to terminate Respondent's parental rights, was entered the same day, clearly within the time frame established by the statute. Additionally, during the adjudication stage, Respondent stipulated that grounds existed to terminate her parental rights. Consequently, she could not have been surprised when the trial court, in its order, found that those same grounds existed.

Moreover, at the beginning of the adjudication stage, Respondent's attorney requested a continuance from the trial court so that a home study could be completed to evaluate placement with Respondent's grandmother. In denying the motion to continue, Judge Cole stated that he "would move on at least [to] the adjudication stage and determine whether or not the grounds for termination exist. And at that point even if we find that the grounds do exist, we can always continue the disposition to allow for a home study to be completed." After stipulating that grounds existed to terminate Respondent's parental rights, Respondent's attorney again

requested a continuance. At the conclusion of the adjudication stage of the hearing, in response to Respondent's repeated requests, the trial court continued the matter for ninety days before proceeding with the disposition stage. Therefore, to the extent Respondent now argues that the delay between the adjudication and disposition stages constitutes prejudicial error, we disagree and determine that because Respondent invited the delay, her argument is without merit.

Finally, in *In re J.L.K.*, 165 N.C. App. 311, 316, 598 S.E.2d 387, 391, *disc. review denied*, 359 N.C. 68, 604 S.E.2d 314 (2004), this Court determined that a violation of N.C. Gen. Stat. § 7B-1109(e) does not constitute grounds for reversal of a termination of parental rights order unless a respondent can "demonstrate that he suffered any prejudice by the trial court's delay." In her brief to this Court, Respondent contends that she was prejudiced by being "unable to file her notice of appeal[,]"" DSS was prejudiced by being "unable to achieve a permanent plan for the juvenile[s][,]" and the juveniles and their potential adoptive parents were prejudiced by being "unable to achieve permanence[.]"" These arguments concern disposition, not adjudication. There is and can be no contention that the dispositional order was untimely filed. We therefore are not persuaded by Respondent's argument. This assignment of error is overruled.

Respondent next argues that the trial court was without subject matter jurisdiction because the petition to terminate her

parental rights failed to include an affidavit of the status of the child, in violation of N.C. Gen. Stat. § 50A-209.

In North Carolina, jurisdiction for proceedings to terminate parental rights is governed by N.C. Gen. Stat. § 7B-1101. That statute provides in relevant part that the trial court

shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion. . . . Provided, that before exercising jurisdiction under this Article, the court shall find that it would have jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201, 50A-203, or 50A-204.

N.C. Gen. Stat. § 7B-1101 (2003). The Uniform Child-Custody Jurisdiction and Enforcement Act provides that before a court of this state may exercise jurisdiction in a juvenile matter, it must evaluate the presence and duration of time in the state of the child and the child's parents, and the rights of other states to exercise jurisdiction in the matter. N.C. Gen. Stat. § 50A-201 (2003). To aid in this evaluation, in a child custody proceeding,

each party, in its first pleading or in an attached affidavit, shall give information, if reasonably ascertainable, under oath as to the child's present address or whereabouts, the places where the child has lived during the last five years, and the names and present addresses of the persons with whom the child has lived during that period. The pleading or affidavit must state whether the party:

- (1) Has participated, as a party or witness or in any other capacity, in any other proceeding concerning the custody of or visitation with the

- child and, if so, the pleading or affidavit shall identify the court, the case number, and the date of the child-custody determination, if any;
- (2) Knows of any proceeding that could affect the current proceeding, including proceedings for enforcement and proceedings relating to domestic violence, protective orders, termination of parental rights, and adoptions and, if so, the pleading or affidavit shall identify the court, the case number, and the nature of the proceeding; and
 - (3) Knows the names and addresses of any person not a party to the proceeding who has physical custody of the child or claims rights of legal custody or physical custody of, or visitation with, the child and, if so, the names and addresses of those persons.

N.C. Gen. Stat. § 50A-209(a) (2003). The information in the affidavit is intended "to assist the trial court in determining whether it can assume subject matter jurisdiction over the matter." *In re Clark*, 159 N.C. App. 75, 79, 582 S.E.2d 657, 660 (2003) (citing *Brewington v. Serrato*, 77 N.C. App. 726, 336 S.E.2d 444 (1985)). The official comment to N.C. Gen. Stat. § 50A-209 states that although the statute "authorizes the court to stay the proceeding until the information required in subsection (a) has been disclosed, . . . failure to provide the information does not deprive the court of jurisdiction to hear the case." Moreover, this Court has held that "failure to file this affidavit does not, by itself, divest the trial court of jurisdiction." *Clark*, 159 N.C. App. at 79, 582 S.E.2d at 660 (citing *Pheasant v. McKibben*,

100 N.C. App. 379, 396 S.E.2d 333 (1990), *disc. review denied*, 328 N.C. 92, 402 S.E.2d 417 (1991)).

In a more recent case, this Court, relying on *Clark*, held that failure to file the affidavit as required by N.C. Gen. Stat. § 50A-209 did not divest the trial court of jurisdiction. *In re J.D.S.*, 170 N.C. App. 244, 612 S.E.2d 350, *cert. denied*, 360 N.C. 64, 623 S.E.2d 584 (2005). In so holding, the Court reasoned that "the trial court's findings and conclusions regarding jurisdiction are supported by the record." *Id.* at 249, 612 S.E.2d at 354; *but see In re A.R.G.*, ___ N.C. App. ___, ___, 631 S.E.2d 146, 149-50 (2006) (Wynn, J., dissenting) (suggesting the trial court did not have jurisdiction because the affidavit was not filed until six months after the termination order was entered by the trial court).

In the case *sub judice*, as in *J.D.S.*, although an affidavit was not filed, the trial court's determination that it had jurisdiction to determine the petition to terminate parental rights is supported by the record. Attached by reference to the termination of parental rights petition were the birth certificates of each child, and various orders regarding this matter, including non-secure custody orders, adjudication and disposition orders, review orders, and permanency planning orders. These documents track the history of this case and the placement of each child as the case progressed from the initial non-secure custody order to the petition to terminate Respondent's parental rights. The record demonstrates that uninterrupted custody of the juveniles has been with DSS since physical custody was taken on 19 April 2001 and the

initial non-secure custody order was filed on 30 May 2001. Although the juveniles were placed both in foster homes in North Carolina and with relatives in New York, DSS never ceased its involvement in the lives of these children. Moreover, when the children were placed with relatives in New York and, for logistical reasons, that state's department of social services provided on-site reviews, DSS was in continual communication with the on-site social services office. Additionally, nothing in the record demonstrates that a New York court, or a court of any other state, ever exercised jurisdiction in this matter. Finally, under N.C. Gen. Stat. § 50A-209, Respondent also has the duty to disclose any information relevant to the trial court's evaluation of its subject matter jurisdiction. The fact that Respondent's initial pleading is silent as to any information required by N.C. Gen. Stat. § 50A-209 further strengthens the trial court's determination that it could properly exercise subject matter jurisdiction in this case. Accordingly, we find this argument without merit.

By her next argument, Respondent claims that the trial court erred in finding and concluding that she stipulated to the facts in paragraphs 9(a), 9(b), and 9(c) of the termination of parental rights petition. Those paragraphs specifically set out the grounds alleged to exist to support the termination of Respondent's parental rights. Additionally, Respondent argues that without this stipulation, the trial court erred in concluding that grounds existed to terminate her parental rights.

“[S]tipulations are judicial admissions and are therefore binding in every sense, preventing the party who agreed to the stipulation from introducing evidence to dispute it and relieving the other party of the necessity of producing evidence to establish an admitted fact.” *In re I.S.*, 170 N.C. App. 78, 86, 611 S.E.2d 467, 472 (2005) (quoting *Thomas v. Poole*, 54 N.C. App. 239, 241, 282 S.E.2d 515, 517 (1981) (citations omitted), *disc. review denied*, 304 N.C. 733, 287 S.E.2d 902 (1982)). Generally, our courts favor stipulations that are designed to simplify litigation. *Sloop v. Friberg*, 70 N.C. App. 690, 320 S.E.2d 921 (1984). However, “[w]hen construing a stipulation a court must attempt to effectuate the intention of the party making the stipulation as to what facts were to be stipulated without making a construction giving the stipulation the effect of admitting a fact the party intended to contest.” *I.S.*, 170 N.C. App. at 87, 611 S.E.2d at 473 (citing *Rickert v. Rickert*, 282 N.C. 373, 193 S.E.2d 79 (1972)).

During the adjudication stage of the termination hearing, Respondent’s attorney (Ms. Norcross) addressed the trial court and stated:

MS. NORCROSS: Your Honor, as to the mother only because that is the only person that I have authority to speak for, we would be willing to stipulate to paragraph nine (9), that subparagraph A, B, and C on (inaudible) what were the others that I didn’t --

. . . .

MS. NORCROSS: We would stipulate to the basis of those, Your Honor. And further, we would add that disposition be held over to a later date so that we can be prepared for that.

The subparagraphs to which Respondent's attorney refers, contained in the petition to terminate parental rights, allege, *inter alia*:

- a. That [Respondent] . . . neglected the children within the meaning of North Carolina General Statute Section 7B-101[.]
- b. That [Respondent] . . . willfully left the children in foster care or placement outside the home for more than twelve (12) months without showing to the satisfaction of the Court that reasonable progress under the circumstances have [sic] been made within twelve (12) months in correcting the conditions which led to the removal of the children[.]
- c. The children have been placed in the custody of the petitioner and [Respondent] . . . for a period of six months next preceding the filing of this petition, [has] willfully failed for such period to pay a reasonable portion of the cost of care for the children, although physically and financially able to do so.

Moreover, later in the hearing, the trial court addressed Respondent directly.

THE COURT: [Respondent], stand up please.

MS. NORCROSS: She's having a hard time hearing.

THE COURT: What we have done today through your attorney is to agree that grounds[,] that if we were to present all the evidence today in court that the Court, that I would be able to return a finding either as to any one for a termination of parental rights, all we need is one ground, not all three. And so what we have agreed to do

today[,] because you have agreed that at least one ground exists, you've stipulated that all three (3) grounds exist, I am ordering that disposition be continued for a period of ninety (90) days.

That puts you right back in the - - in the picture . . . you may decide it's in the best interest that the adoption move forward, but at least you-all have that time - - you've got time to talk to Ms. Norcross and you come back in ninety (90) days if this has not been resolved then we will have a full blown hearing at that time as to - - at that time the Court will have to decide even though grounds exist whether in fact to terminate the parental rights.

[O]ften times attorneys and their clients will get into a contest as to whether the grounds exist and more often than not, the grounds do exist. The fight is . . . even though the grounds exist, whether or not the Court should terminate the parental rights. And I allow a lot of latitude and we do it this way. So work with Ms. Norcross, you-all decide what you-all are going to do.

It is clear that Respondent's attorney stipulated to the existence of all three grounds alleged in the petition to terminate Respondent's parental rights. Respondent, however, now argues that the stipulation is not valid because she did not personally stipulate to the existence of these grounds. We find Respondent's argument without merit.

Respondent provides no authority, and our research fails to find support for Respondent's contention, that she should not be bound by the stipulations of her attorney. On the contrary, this Court has held that, in a termination proceeding, a party's attorney may stipulate to facts, and those stipulations are binding on the party. See *I.S.*, 170 N.C. App. at 86, 611 S.E.2d at 472. Moreover, other than Respondent's attorney's statement that "[s]he's having a hard time hearing[,] " there is no proof that Respondent could not hear, understand, or, through her attorney, participate in the proceeding, including decisions regarding stipulated facts.

Further, we are persuaded by Judge Cole's thorough explanation to Respondent of what had transpired and what was to come. The trial court did not have the obligation to ask Respondent if she understood what was happening, or to explain any procedures to her. Therefore, we believe Respondent's present assertion, that her stipulation to the existence of grounds to terminate her parental rights was not valid, is without merit.

For this reason, the trial court did not err in finding and concluding that grounds existed to terminate Respondent's parental rights. This assignment of error is overruled.

Respondent next argues that the trial court erred in failing to make independent findings of fact in its adjudicatory order, instead adopting the language from previous underlying court orders. We disagree.

In the adjudicatory order, the trial court found that:

After the matter was called for hearing and after the Court had taken judicial notice of the prior Orders and Court reports, the biological mother, knowingly and voluntarily, after conferring with her counsel, stipulated in open Court that the facts and grounds for termination of parental rights as stated in paragraphs 9(a)(b)(c) of the Petition to Terminate Parental Rights were admitted and would be found by clear, cogent and convincing evidence by the Court.

Once the trial court made this finding, all other findings, including those adopted from the prior court orders, established the procedural history of the case. Further, in light of this finding, the other findings from previous orders were unnecessary to establish that grounds existed to terminate Respondent's parental rights.

Once Respondent stipulated to the existence of grounds to terminate her parental rights, the trial court concluded the adjudication stage, hearing no evidence and leaving only the prior orders and reports on which to rely. Therefore, because Respondent's stipulation led to the trial court's actions, we are not persuaded by her argument that the trial court erred by failing to make "independent" findings of fact and impermissibly relied on the prior orders. Additionally, there is no restriction against the inclusion of findings of fact in a termination order that mirror findings of fact from prior orders in the same case. Rather, this Court has held only that "the trial court's factual findings must be more than a recitation of allegations." *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002). In

this case, the trial court's order is clearly more than a mere recitation of the allegations. Judge Cole's adjudicatory order did more than find that the juveniles were neglected, left in foster care for twelve months without Respondent making reasonable progress toward improving the conditions that led to their removal, or left in foster care for six months without Respondent paying a reasonable portion for their support although physically and financially capable. The eighty-three page adjudicatory order contains detailed findings of fact on all three of the grounds alleged, including a description of the lives of the juveniles and the neglect from which they suffered, the opportunities that Respondent was given to make progress toward being reunited with her children and how she inexplicably failed to take advantage of these opportunities, and a description of the work opportunities that Respondent took advantage of and the amount of income she was able to generate, while nonetheless failing to provide adequate support for her children. Judge Cole's order is clearly more than a mere recitation of allegations, and this argument is overruled.

By her final argument, Respondent contends the trial court erred in finding and concluding that it would be in the juveniles' best interest to terminate Respondent's parental rights.

Under North Carolina law, "[a]fter an adjudication that one or more grounds for terminating a parent's 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).

The decision to terminate parental rights rests within the discretion of the trial court. *In re Blackburn*, 142 N.C. App. 607, 543 S.E.2d 906 (2001). In making this determination, "[t]he best interest of the children is the polar star by which the discretion of the court is guided." *Bost v. Van Nortwick*, 117 N.C. App. 1, 8, 449 S.E.2d 911, 915 (1994) (internal citations and quotations omitted), *appeal dismissed*, 340 N.C. 109, 458 S.E.2d 183 (1995). A trial court's decision to terminate parental rights is thus reviewed under an abuse of discretion standard. *In re C.D.A.W.*, ___ N.C. App. ___, 625 S.E.2d 139 (2006).

After a thorough review of the testimony and record herein, we find no basis for holding that the trial court abused its discretion in choosing to terminate Respondent's parental rights. The evidence presented to the trial court demonstrated that the juveniles have been in the physical custody of DSS since 19 April 2001. Since that time, the children have bounced between placements in foster homes in North Carolina and with family members in New York. The continual change and domestic upheaval have not been conducive to the intellectual or emotional growth of the children, and both children need stability in their lives to be able to mature. There is no indication from the evidence or the testimony presented at the hearing that Respondent will be financially or emotionally capable of parenting these children at any time in the foreseeable future.

Moreover, the overwhelming evidence before the trial court established that the children were markedly improving in their

current placements, had fewer behavior problems when they were placed separately, and that each child's current placement was moving toward permanency. Indeed, Ms. Roberts testified that permanent adoptive placement was necessary for the boys and that, for each child, "time [was] of the essence." In light of the testimony that each boy is finally experiencing success in his current placement, and that permanency is finally within reach, we hold that the trial court did not abuse its discretion by terminating Respondent's parental rights. Accordingly, this assignment of error is overruled.

The orders of the trial court from which Respondent appeals are thus

AFFIRMED.

Judges STEELMAN and GEER concur.

Report per Rule 30(e).