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NO. COA06-563

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

IN THE MATTER OF:
Z.P.S. & A.M.S.,
Minor Children.

Burke County
No. 04 J 76, 77

Appeal by respondent-appellant from order entered 17 October 2005 by Judge Robert M. Brady in Burke County District Court. Heard in the Court of Appeals 19 October 2006.

Stephen M. Schoeberle for petitioner-appellee Burke County Department of Social Services.

Mary R. McKay for petitioner-appellee Guardian ad litem.

Winifred H. Dillon for respondent-appellant.

STEELMAN, Judge.

Respondent-mother ("respondent") appeals from an order terminating her parental rights to the minor children, Z.P.S. and A.M.S. For the reasons discussed herein, we affirm.

On 10 April 2004, Burke County Department of Social Services ("DSS") received a report that four-month-old Z.P.S. had suffered serious physical injuries inconsistent with father's explanation that Z.P.S. had fallen out of a car seat.

On 16 April 2004, DSS was granted non-secure custody of Z.P.S. and A.M.S., and both children were placed with the same foster

family. On 21 April 2004, DSS filed a juvenile petition alleging abuse and neglect of the minor children, Z.P.S. and A.M.S. The court held an adjudication hearing on 27 May 2004, followed by an order entered 8 June 2004, adjudicating Z.P.S. and A.M.S. neglected juveniles. The court found that the following allegations in the petition were true: "[Z.P.S.] received multiple bruises to his face, chest and back, a subdural hematoma to the right side of his head, and fractures to his legs while in his parents' care[.]" The parents did not controvert these allegations. The court also found that "the injuries he received were not consistent with the parents' explanation that he fell off of a couch in an infant car carrier onto the floor[.]" and that "[A.M.S.] resides in the same home where [Z.P.S.] received those injuries." The court ordered the parents to "maintain stable living arrangements and employment, participate in parenting and anger management classes, and receive psychological evaluations and any recommended treatment."

At respondents request, the court entered an order on 25 August 2004 appointing a guardian *ad litem* for respondent.

On 6 January 2005, the court held a review hearing, followed by an order entered 11 January 2005, finding that "[respondent's] psychological evaluation . . . revealed high levels of depression and stress and an *elevated risk of child abuse*." (emphasis added)

The court also found:

Both parents reported a history of domestic violence including verbal abuse, threats and physical altercations, including that [father] . . . struck [respondent] while she was pregnant. [Respondent] also reported that [father] had held a gun to her head.

On 11 January 2005, the court entered an order ceasing reunification efforts with both parents, again finding that the respondent's "psychological evaluation . . . revealed high levels of depression and stress and an elevated risk of child abuse." The court entered an order on 18 February 2005 making adoption the permanent plan for Z.P.S. and A.M.S.

On 12 April 2005, father relinquished his parental rights to the minor children, Z.P.S. and A.M.S.

On 21 April 2005, DSS filed a motion to terminate parental rights, alleging that grounds for termination of parental rights existed under N.C. Gen. Stat. §§ 7B-1111(a)(1), (a)(2) and (a)(6).

On 13 October 2005, the court entered an order terminating the parental rights of respondent. From this order, respondent appeals.

I: Adjudication

In her first argument, respondent contends that the trial court erred in concluding that grounds for termination existed because the trial court's findings of fact were not supported by clear, cogent and convincing evidence, and the findings of fact did not support the trial court's conclusions of law. We disagree.

A termination of parental rights proceeding is conducted in two phases: (1) adjudication and (2) disposition. See *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). In the adjudication phase, the petitioner has the burden of proving by clear, cogent, and convincing evidence that one or more of the statutory grounds for termination under N.C. Gen. Stat. §

7B-1111(a) exists. *Id.* If a petitioner meets its burden of proving one or more statutory grounds for termination, the trial court then moves to the disposition phase where it must decide whether termination is in the child's best interests. *Id.* The standard of review of the adjudication phase of termination of parental rights is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support its conclusions of law. See *In re Oghenekevebe*, 123 N.C. App. 434, 439-41, 473 S.E.2d 393, 397-99 (1996).

Initially, we observe that the following pertinent findings of fact, contributing to the establishment of grounds for termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) are unchallenged, and therefore, binding on appeal. See *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982).

6. On May 27, 2004, the Court adjudicated the minor children to be neglected based upon the facts that on or about April 10, 2004, [Z.P.S.] *received multiple bruises to his face, chest and back, a subdural hematoma to the right side of his head, and fractures to his legs while in his parents' care; that the injuries were not consistent with his parents' explanation that he fell off of a couch in an infant carrier onto a floor; and that [A.M.S.] resided in the same home where [Z.P.S.] received those injuries. . . . (emphasis added)*

8. Dr. [Wellser] observed that, during the clinical interview, . . . [that respondent] report[ed] significant difficulties in certain life areas. Psychologically, she presented as a depressed woman with a poor sense of identity. She had experienced the impact

of traumatic events with the development and/or exacerbation of irrational fears, feelings of helplessness, rumination and worry. She reported feelings of bitterness, suspiciousness, unhappiness and moodiness. She also reported feelings of hostility and apprehension and has had thoughts of death and suicide, although she denied any current thoughts or desires to harm herself. She endorsed test items that indicated real difficulties in her *ability to feel closeness to her children and she did not express confidence in her ability to care adequately for them*. Her test responses were similar [to] other respondents who may be *excessively punitive* and rigid toward their children, and demonstrating an array of personal and interpersonal characteristics that are similar to the characteristics of known physical child abusers, *indicating an increased risk of child abuse*. (emphasis added)

9. As a result of the evaluation, Dr. [Wellser] recommended that Ms. Hyatt receive thorough and comprehensive psychological intervention to help reduce her depression and modify her negative sense of herself and her negative attitude toward parenting. He recommended that such intervention not simply be directed to providing skills such as parenting skills or anger management skills.

In her brief, respondent challenges the following pertinent findings of fact, with regard to grounds for termination under N.C. Gen. Stat. § 7B-1111(a)(1), arguing that they are not supported by clear, cogent and convincing evidence:

7. Ms. Hyatt was evaluated by Richard [Wellser], Ph.D., psychologist, on April 22, 26 and 28, 2004. The report of such evaluation is dated September 15, 2004, and specifically incorporated herein by reference. Ms. Hyatt was diagnosed with major depressive disorder and borderline personality disorder or post-traumatic

stress disorder. Dr. [Wellser] found that Ms. Hyatt had an elevated abuse scale indicating an *increased risk of physical child abuse, which the Court finds to be of particular concern, in light of the physical injuries that [Z.P.S.] received while in his parents' care.* Dr. [Wellser] also found that Ms. Hyatt had a high degree of personal distress and personal adjustment problems with high levels of anxiety, depression and loss of behavioral and emotional control. . . . (emphasis added)

11. The sessions that Ms. Hyatt has attended and is currently attending at the Family Guidance Center do not qualify as the thorough and comprehensive psychological intervention recommended by Dr. [Wellser], but they are intervention simply directed to providing skills. Ms. Hyatt has not received any intervention recommended by Dr. [Wellser] to deal with her major depressive disorder and borderline personality disorder or post-traumatic stress disorder. As a result, she remains at increased risk for physical child abuse. . . .

We first consider whether the above findings of fact challenged by respondent regarding the grounds for termination under N.C. Gen. Stat. § 7B-1111(a)(1) are supported by clear, cogent and convincing evidence. We hold that they are.

Respondent specifically contends that the following portion of finding of fact, number seven, is not supported by clear, cogent and convincing evidence: "Ms. Hyatt was diagnosed with major depressive disorder and borderline personality disorder or post-traumatic stress disorder." This argument is unsubstantiated by the record. Dr. Richard Welser, former chief psychologist for the general psychiatry division of Broughton Hospital and an expert in clinical psychology, evaluated respondent and testified at the

termination proceeding that his informal diagnosis of respondent was an "Axis I diagnosis of Major Depressive Disorder" and possibly an "Axis II [diagnosis of]. . . Borderline Personality Disorder." However, Dr. Wellser explained that the second diagnosis "oftentimes . . . seems to resolve to an Axis I diagnosis of Post Traumatic Stress Disorder." In her brief, respondent quibbles between the terms "formal diagnosis" and "informal diagnosis," but the trial court made no such distinction. We conclude that evidence supports the trial court's finding of fact, number seven, that Dr. Wellser diagnosed respondent with the aforementioned disorders.

Respondent next contends that the trial court's finding of fact, number eleven, that Ms. Hyatt remained at an increased risk for physical child abuse, was not supported by clear, cogent and convincing evidence. At the termination hearing, Dr. Wellser stated that respondent had a "tendency to be punitive[,] " observing that she "had periods of time where she was very upset[,] . . . very distraught and certainly . . . not exhibiting good self-control." Dr. Wellser testified that respondent may be "[unable] to deal with all the chaos that children provide[,] " and may "respond to those situations . . . punitive[ly][,]" with "excessive" and "corporal punishment[s][.]" Dr. Wellser explained that her punitive response "would be something that she would have learned, probably, from her family of origin or the style they dealt with issues with children[,] " recalling that "punitive measures were used in [respondent's] family when she was growing

up." "[O]f course," Dr. Wellser said, "[this history] presented itself in her child discipline."

With regard to whether respondent could provide the children with proper care, both at the time of the initial evaluation and at the time of the termination proceedings, Dr. Wellser testified that when he initially evaluated her, "it was not appropriate for the children to be placed with [respondent]." Dr. Wellser further acknowledged that "[i]f her issues [were] not appropriately treated," there would be "a reasonable probability that her incapability to properly care for the children will [continue in the] foreseeable future[.]"

After thorough review of the record, we conclude that clear, cogent and convincing evidence supports findings of fact seven and eleven. See *Williams v. Insurance Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975) (stating that "the court's findings of fact . . . are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary").

Respondent next argues that the following conclusion of law is not supported by the findings of fact. We disagree.

3. Sufficient grounds exist pursuant to N.C.G.S. §§ 7B-111 1(a)(1), (a)(2) and (a)(6) for the termination of the parental rights of Monica Lorene Poarch in that she has neglected the minor children; in that she willfully has left the minor children in foster care 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 minor children; and in that she is incapable of providing proper care and supervision for the minor children, such that they are dependent 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 trial court expressly based its judgment on three of the enumerated grounds: N.C. Gen. Stat. § 7B-1111(a)(1), (a)(2), and (a)(6), the first of which provides that the court may terminate a parent's parental rights where:

(1) The 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-101 provides the definition of neglected juvenile:

A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law. In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

Id.

When determining whether statutory grounds exist for termination under N.C. Gen. Stat. § 7B-1111(a)(1), a trial court

may consider "prior adjudications of neglect" but "they will rarely be sufficient, standing alone, to support a termination of parental rights, since the petitioner must establish that neglect exists at the time of the hearing." *In re Pierce*, 146 N.C. App. 641, 651, 554 S.E.2d 25, 31 (2001), *aff'd*, 356 N.C. 68, 565 S.E.2d 81 (2002). Our Supreme Court reasoned, however, that in some cases it would be almost impossible to terminate parental rights on neglect grounds if "termination . . . [could] be based *only* upon evidence of events occurring after a prior adjudication of neglect which resulted in removal of the child from the custody of the parents." *In re Ballard*, 311 N.C. 708, 714, 319 S.E.2d 227, 232 (1984) (emphasis added). Therefore, in addition to considering evidence of neglect by the parent prior to losing custody of a child, the court must also consider "evidence of changed conditions . . . in light of the history of neglect by the parent[], and the probability of a repetition of neglect." *Id.* The court may terminate parental rights, even if there is no evidence of neglect at the time of the termination proceedings, if (1) there is a showing of a past adjudication of neglect and (2) the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to the parent. *In re Pope*, 144 N.C. App. 32, 37, 547 S.E.2d 153, 156 (2001) (citing *Ballard*, 311 N.C. at 716, 319 S.E.2d at 232).

The trial court's findings of fact clearly support its conclusion of law that grounds existed to terminate respondent's parental rights under N.C. Gen. Stat. § 7B-1111(a)(1). Therefore,

we need not address the remaining grounds found by the court. See *Moore* at 404, 293 S.E.2d at 132-33.

II: Disposition

In her second argument, respondent contends that the trial court erred in terminating respondent's parental rights because termination was not in the best interests of the children. We disagree.

Once petitioner has met its burden of proof at the adjudication stage, the court then moves to the disposition stage, where the court's decision to terminate the parental rights is discretionary. *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). The court must decide whether termination is in the child's best interests. See *Blackburn* at 610, 543 S.E.2d at 908. Our review of the trial court's "best interests" determination is under an abuse of discretion standard. *In re Nesbitt*, 147 N.C. App. 349, 352, 555 S.E.2d 659, 662 (2001).

In the instant case, the trial court found the following:

The minor children have resided in the same foster-to-adopt placement since being placed in the Department's custody on April 16, 2004. They are bonded to their foster parents who want to adopt them should they become free for adoption. [Z.P.S] has had surgery to correct a problem with his urethra, and [A.M.S.] has been diagnosed with acid reflux. Both of them receive the services of an occupational therapist. All of their medical and developmental needs are being met by their foster parents.

The trial court also incorporated the challenged and unchallenged findings of fact contained in the adjudication portion of the order.

We conclude that the court made adequate findings with regard to the best interests of the children and discern no abuse of discretion. We affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

Judges GEER and STEPHENS concur.

Report per Rule 30(e).