NO. COA06-611

NORTH CAROLINA COURT OF APPEALS

Filed: 06 March 2007

IN THE MATTER OF:
S.E.F.

Harnett County
No. 04 J 156

Appeal by respondent-appellant from an order entered 21 October 2005 by Judge James B. Etheridge in Harnett County District Court. Heard in the Court of Appeals 6 December 2006.

E. Marshall Woodall and Duncan B. McCormick, for Harnett County Department of Social Services.

Elizabeth Myrick Boone, Guardian ad Litem Attorney Advocate.

Janet K. Ledbetter, for respondent-appellantmother.

STEELMAN, Judge.

Proper notice of the motion to terminate respondent's parental rights was served in accordance with the provisions of N.C. Gen. Stat. § 7B-1106.1 and N.C. Gen. Stat. § 1A-1, Rule 5(b). Respondent has failed to show how any ineffective assistance of counsel would have changed the outcome of the hearing. The trial court's findings of fact were supported by clear, cogent, and convincing evidence, and in turn support the conclusions of law that grounds for termination exist.

S.E.F. was born to respondent on 7 November 2003. The Harnett County Department of Social Services ("HCDSS") became involved with the family on 30 June 2004, after receiving a report of insufficient child care supplies. HCDSS made weekly visits to the home and found satisfactory conditions. Respondent called HCDSS on 8 August 2004, and advised them that she was kicking S.E.F's father out of the home and that she and the child would move in with an unknown male whom she had recently met. As a result of respondent's phone call, HCDSS conducted further investigation. On 10 August 2004, HCDSS filed a petition alleging the neglect and dependency of S.E.F. The child was removed from respondent's care the same day pursuant to a non-secure custody order. Denyse Lee, a foster care social worker for HCDSS, met respondent on 16 August 2004. Ms. Lee, together with respondent, developed a family service case plan with the goal of reuniting the family. By consent of respondent, S.E.F. was adjudicated neglected and dependent on 12 November 2004. Respondent failed to fulfill the family services case plan requirements. She was hospitalized with psychiatric problems on 1 September 2004, 1 December 2004, and 26 January 2005. Reunification efforts ceased on 22 April 2005, after the custody review hearing had been continued on three occasions and respondent did not appear at any of the hearings. A motion to Terminate Parental Rights ("TPR") of respondent was filed on 11 July 2005. A hearing was held on 23 September 2005. At that time, respondent continued to be a patient in a psychiatric hospital in New Jersey and had not visited S.E.F. since November of 2004. Ms.

Lee testified at the hearing regarding the status of the family at that time and during the time prior to the hearing. An order terminating parental rights was filed 21 October 2005, and respondent gave notice of appeal on 26 October 2005.

In her first argument, respondent contends that the trial court was without jurisdiction to hear the TPR motion because of defects in the notice of the filing of the motion to terminate parental rights, and the notice of hearing. We disagree.

This action was commenced by the filing of a Juvenile Petition on 10 August 2004. This was personally served upon respondent 11 August 2004. Counsel was appointed to represent respondent shortly thereafter. On 7 January 2005, Jesse Jones, an attorney, was appointed as guardian *ad litem* for respondent, due to respondent's psychiatric problems. On 11 July 2005, HCDSS filed a motion to terminate parental rights as to both parents. This motion was served by mail upon respondent, her counsel, and her guardian *ad litem*, as evidenced by a certificate of service. A notice complying with the requirements of N.C. Gen. Stat. § 7B-1106.1 was served upon the same persons at that time. The address shown on the certificate of service for respondent was: "Sherry Farney, 258 East Broadway, Salem, NC 08079." At the time of mailing, respondent was in a psychiatric hospital in New Jersey and the address should have read "NJ" rather than "NC." On 13 September 2005, a revised notice of hearing in juvenile proceedings was mailed by the Harnett County Clerk of Court to respondent at "258

East Broadway, Salem [sic] NJ 08079," advising respondent of the hearing on 23 September 2005.

N.C. Gen. Stat. § 7B-1102(b) provides that when a termination of parental rights proceeding is filed by means of a motion in a pending juvenile proceeding, that service of the motion and notice pursuant to N.C. Gen. Stat. § 7B-1106.1 "shall be served in accordance with [N.C. Gen. Stat. §] 1A-1, Rule 5(b)," subject to several exceptions which are not applicable to this case. Rule 5(b) provides that service may be made on the party or the party's attorney of record by regular mail. In this case, there is no dispute that service of the motion for termination of parental rights and notice was mailed to both respondent's attorney and her guardian *ad litem*. Under Rule 5(b) of the N.C. R. Civ. P., this was sufficient service regardless of the defect in the address of respondent. We further note that respondent does not expressly argue in her brief that she did not receive the motion and notice. Rather, she makes the equivocal assertion that: "It is also not clear whether the motion to terminate parental rights was ever received by the mother, Sherry F., because the address was defective." This stands in sharp contrast to her assertion that she did not receive the revised notice dated 13 September 2005. This assignment of error is without merit.

In her second argument, respondent contends that her counsel was ineffective. We disagree.

In cases involving petitions of abuse, neglect, or dependency of a minor child, the parent has a right to counsel, if indigent.

N.C. Gen. Stat. § 7B-602(a) (2005). A claim of ineffective assistance of counsel requires a demonstration by the claimant that first, counsel's assistance was deficient; and second, without counsel's deficient performance, the result at trial would have been different. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)).

In the instant case, respondent has failed to satisfy the required two-part test for ineffective assistance of counsel. Respondent argues that her attorney did not file an answer to the TPR motion, did not make any objections at the TPR hearing, and did not meet with her prior to the hearing. She has not, however, specified what objections should have been made at the hearing and how a filed answer to the TPR motion would have afforded her a more fair hearing. *See In re B.P.*, 169 N.C. App. 728, 733, 612 S.E.2d 328, 332 (2005). Further, respondent was afforded assistance greater than required by statute, as both an attorney and guardian *ad litem* were appointed to represent her interests. *See* N.C. Gen. Stat. § 1A-1, Rule 17(c) (2005); *In re Shepard*, 162 N.C. App. 215, 226-28, 591 S.E.2d 1, 8-10 (2004); 2004 Formal Ethics Opinion 11, N.C. State Bar (21 January 2005). Both the guardian *ad litem* and respondent's attorney were present at the hearing terminating her parental rights. Respondent has not demonstrated that absent the alleged errors of counsel, there is a reasonable possibility that the outcome of the trial would have been different. *See Braswell*, at 563, 324 S.E.2d at 248. It is not the role of this Court to

fashion arguments for an appellant. This assignment of error is without merit.

In her third argument, respondent contends that certain findings of fact are unsupported by the evidence and the conclusions of law are unsupported by the findings of fact. We disagree.

In termination of parental rights cases, the trial court is required to conduct a two-step inquiry. An adjudicatory hearing on termination is the first step. At this hearing, the petitioner is required to prove the existence of grounds for termination by clear, cogent, and convincing evidence. N.C. Gen. Stat. § 7B-1109 (2005). The second step, disposition, requires the trial court to, in its discretion, determine whether terminating the parental rights of the respondent based upon one or more grounds for termination is in the best interests of the child. N.C. Gen. Stat. § 7B-1110 (2005). The grounds that would support termination of parental rights are enumerated in N.C. Gen. Stat. § 7B-1111.

On appeal, this Court must determine whether contested findings of fact are supported by clear, cogent, and convincing evidence. *In re Allen*, 58 N.C. App. 322, 325, 293 S.E.2d 607, 609 (1982). Even if there is evidence to support a contrary finding, if there is sufficient evidence in the record supporting the trial court's findings of fact, we are bound by the trial court's findings. *Id.* If the trial court's conclusions of law are supported by the findings of fact, then they also are binding on

appeal. *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 397-98 (1996).

Respondent challenges multiple findings of fact, the following of which are pertinent to this appeal:

> 21. On or about August 10, 2004, and at times prior thereto the juvenile has been allowed by her parents to live in an environment injurious to her welfare in that a history of domestic violence had occurred between the parents both in New Jersey and North Carolina with threats of violence being reported to DSS thereby placing the juvenile at risk of harm. The mother and the juvenile had been evicted from their residence in Dunn, NC and the mother was planning to move into a home with two males she had known for only a month and whose last name and place of residence she did not know. At the time, the parents do not have relatives in North Carolina and the relatives in New Jersey were not willing or were not able to take the juvenile into their home(s). The juvenile did not at the time of the filing of the petition and does not now have anyone responsible for her care and she is in need of placement.
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> 25. The mother did obtain a job with McDonalds [sic] but failed to maintain the same. She reported to the child support agency. The mother has paid a total of $146.38 in child support payments. The last payment made was November 9,2004, in the amount of $30.46. She did not enroll in PRIDE and did not obtain a home.
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> 28. It is noted from the psychological evaluation report that the mother does not admit she has any mental health problems; she feels she is a victim; she has little insight into her own condition.
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> 39. Neither parent has given any gifts, birthday cards, Christmas cards or any

correspondence to the juvenile since her placement in DSS care.

40. Notwithstanding that proper notice was given, neither parent attended the permanency planning hearing on May 13, 2005 or this hearing for termination of their parental rights to the juvenile.

46. The mother is unable and incapable of providing for the juvenile as more specifically shown in the foregoing findings. The mother's mental health conditions appear to be long lasting and cannot within a reasonable time be expected to improve so as for her to be able to adequately parent the child.

48. From all the evidence before the court, a placement of the child with either the mother or the father would likely result in a continuation of neglectful acts in the care and supervision of this child.

49. As indicated by the evidence and the foregoing findings, the neglect of the juvenile continues to the time of the hearing and there is a likelihood that if she is returned to the parents, the neglect would continue.

We hold that each of these findings are supported by clear, cogent, and convincing evidence. A case plan was developed by HCDSS and respondent. The case plan included steps respondent should take to improve the quality of life of the child. Ms. Lee testified at the hearing regarding HCDSS' repeated attempts to reunite respondent with the child, respondent's lack of financial support for the child and inability to secure employment, and her infrequent communication with the child. Ms. Lee further stated that respondent did not attend rehabilitative services agreed upon in her case plan. Evidence was submitted at the hearing including an evaluation of respondent's psychological health which diagnosed

her with post traumatic stress disorder, alcohol abuse or dependence, and borderline personality disorder. Respondent was directed to seek long-term mental health counseling, psychiatric care, alcohol abuse treatment, vocational rehabilitation, and parenting classes. There was no evidence before the trial court that respondent took active steps toward these recommendations during the time period that the child was removed from her care. *See, e.g, In re McMillon*, 143 N.C. App. 402, 409-10, 546 S.E.2d 169, 174-75, *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001).

These findings support the trial court's conclusions of law that the child was neglected as defined in N.C. Gen. Stat. § 7B-1111(a)(1), that neglect would likely continue if the child were returned to respondent, and that the termination of respondent's parental rights was in the best interests of the child.

Because we conclude that statutory grounds for the termination of respondent's parental rights exist under N.C. Gen. Stat. § 7B-1111(a)(1), we do not discuss her further arguments regarding termination. *See In re O.C. and O.B.*, 171 N.C. App. 457, 467, 615 S.E.2d 391, 397 (2005).

The termination of respondent's parental rights is affirmed.

AFFIRMED.

Judges McGEE and BRYANT concur .

Report per Rule 30(e).