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NO. COA06-667

NORTH CAROLINA COURT OF APPEALS

Filed: 3 April 2007

IN THE MATTER OF:
C.G.D.D. and J.D.D.P.,
Minor children

Buncombe County
Nos. 05 J 104
05 J 105

Appeal by respondents mother and father from judgments entered 4 November 2005 and 7 November 2005 by Judge Rebecca B. Knight in Buncombe County District Court. Heard in the Court of Appeals 14 December 2006.

Dennis Gibson for petitioner-appellee Buncombe County Department of Social Services.

Michael N. Tousey for appellee guardian ad litem.

Michael E. Casterline for respondent-appellant Shannon D.

Charles W. McKeller for respondent-appellant Duke P.

CALABRIA, Judge.

Shannon D. ("Shannon") and Duke P. ("Duke") appeal from judgments terminating their parental rights to their children, C.G.D.D. and J.D.D.P. We affirm, but remand to the trial court for correction of the wording of Finding of Fact 47.

Shannon is the biological mother of both minor children in this case, and Duke is the biological father of J.D.D.P. The biological father of C.G.D.D., Hipolito D. ("Hipolito"), did not

file an answer to the petition to terminate his parental rights and did not appeal from the judgment terminating his parental rights. He is not a party to the instant case.

On 15 November 2002, the Buncombe County Department of Social Services ("D.S.S.") received a Child Protective Services ("C.P.S.") report alleging that Duke assaulted Shannon in the presence of the minor children and that he also assaulted C.G.D.D. The D.S.S. substantiated the allegations of neglect, finding that the minor children were living in an environment injurious to their welfare. During the D.S.S. investigation, C.G.D.D. stated that Duke physically abused him and Shannon, and that he was afraid of Duke. Shannon stated that Duke had physically abused her numerous times, including once striking her in the head with a can, causing her to lose consciousness. Both Shannon and Duke accused each other of abusing crack cocaine.

Following the D.S.S. investigation, Shannon agreed to a safety plan that included keeping C.G.G.D. away from Duke, and protecting the children from inappropriate discipline. When Shannon subsequently violated this agreement by bringing C.G.D.D. with her to Duke's house, D.S.S. continued to have concerns about J.D.D.P. being inappropriately disciplined. On 9 January 2003, D.S.S. attempted to complete a case plan with Shannon but she refused to either complete a case plan or complete activities listed in the case plan, and later failed to show up for a D.S.S. staffing on 16 January 2003. D.S.S. then filed petitions alleging neglect since Shannon had used inappropriate discipline, lost her housing, and

failed to follow through with counseling and other services. The allegations regarding Duke included crack cocaine use, failure to cooperate with D.S.S., and violating the terms of a safety agreement prohibiting him from unsupervised contact with J.D.D.P.

On 22 May 2003, D.S.S. filed a second petition alleging that the minor children were neglected, and sought custody of the children. A non-secure custody hearing was held the following day, and the trial court found, *inter alia*, that Shannon had not only lost her job but also had been evicted from her home, and had failed to follow through with counseling. The court found that Duke had attempted to take C.G.D.D. out of school in an apparent attempt to use the child as leverage to secure the return of J.D.D.P. by intimidation. The court further found that C.G.D.D. had been tardy 124 out of 136 school days and absent 12 days.

At the conclusion of the 23 May 2003 hearing, the court adjudicated the children neglected and entered an order placing the children in the legal custody of D.S.S. Following a dispositional hearing on 7 July 2003, the court ordered Shannon and Duke to submit to substance abuse assessments, attend parenting classes, submit to psychological evaluations, submit to random drug screens, and pay child support. In addition, Duke was ordered to attend treatment to curb his fits of domestic violence.

Following a permanency planning and review hearing on 15 November 2004, the court relieved D.S.S. of reunification efforts between J.D.D.P. and Duke. The court determined that Duke had failed to comply with court orders by missing meetings with

J.D.D.P.'s therapist, missing treatment team meetings, and evading drug testing. The court found that reunification was still the appropriate plan with respect to Shannon, but relieved D.S.S. of reunification efforts with Shannon following a 10 January 2005 permanency planning and review hearing.

In March of 2005, D.S.S. filed petitions seeking to terminate the parental rights of Shannon and Duke. The trial court heard evidence and in November of 2005 entered judgments terminating the parental rights of Shannon and Duke. The court found that Shannon had continually engaged in destructive and dangerous behavior toward the children, and that she continued to place herself in dangerous situations by maintaining relationships with abusive men. Although Shannon had complied with most services required by the court, she failed to show adequate improvement. The court also determined that Shannon had failed to provide for the children's financial support. The court found that Duke had neglected J.D.D.P. by exposing him to domestic violence and drug abuse and abandoning the child during 2005. It further found that he had failed to provide appropriate financial support for the child. From those judgments, Shannon and Duke appeal.

Termination of parental rights is a two-step process that requires this Court to apply two separate standards of review. There is an adjudicatory phase, governed by N.C. Gen. Stat. § 7B-1109(e) (2005), followed by a dispositional phase, governed by N.C. Gen. Stat. § 7B-1110 (2005). Findings made by the trial court in the adjudicatory phase must be supported by clear, cogent, and

convincing evidence, and the findings must support a conclusion that at least one statutory ground for termination of parental rights exists. *In re Shermer*, 156 N.C. App. 281, 285, 576 S.E.2d 403, 406 (2003). "Clear, cogent and convincing evidence describes an evidentiary standard stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt." *The N.C. State Bar v. Sheffield*, 73 N.C. App. 349, 354, 326 S.E.2d 320, 323 (1985).

In the dispositional phase, the trial court considers the best interests of the child. We review this determination for an abuse of discretion. *Shermer*, 156 N.C. App. at 285, 576 S.E.2d at 407. Reversal for abuse of discretion is limited to instances where the appellant can show the judge's decision is "manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980).

I. Shannon

We first address the court's orders terminating the parental rights of Shannon. On appeal, Shannon argues that the petitions to terminate her parental rights failed to confer subject matter jurisdiction upon the court because the dispositional order conferring custody of the children upon the petitioner was not attached. In support of her argument, Shannon cites N.C. Gen. Stat. § 7B-1104(5) (2005), which states that a custody order identifying the juvenile's custodian and stating the custodian's address "shall be attached to the petition or motion." *Id.*

Shannon contends that the absence of the custody order deprived the court of subject matter jurisdiction over the case. We disagree.

"The use of the word 'shall' by our Legislature has been held by this Court to be a mandate, and the failure to comply with this mandate constitutes reversible error." *In re Z.T.B.*, 170 N.C. App. 564, 569, 613 S.E.2d 298, 300 (2005). However, this Court recently distinguished *Z.T.B.* in the case of *In re W.L.M.*, ___ N.C. App. ___, 640 S.E.2d 439 (2007). In *Z.T.B.*, the child's physical placement and identity of the child's legal custodian were in question when the motion to terminate the father's parental rights was filed. In *W.L.M.*, as in the case *sub judice*, there was no question about the child's placement or custody. The termination petition stated that D.S.S. had custody and incorporated by reference the order conferring custody on D.S.S.

Although we have held that the failure to comply with the requirements of N.C. Gen. Stat. § 7B-1104(5) deprives the court of subject matter jurisdiction and constitutes reversible error, we have nonetheless recognized that this error may be remedied. In the recent case of *In re: T.B., J.B., C.B.*, ___ N.C. App. ___, 629 S.E.2d 895 (2006), we reversed a court's decision to terminate the parental rights of the respondents because a custody order did not accompany the petition. However, we stated:

This omission need not have been fatal if petitioner had simply amended the petition by attaching the proper custody order or otherwise ensured the custody order was made a part of the record before the trial court. Thus, it was the failure by DSS either to attach the custody order to the petition or to

remedy this omission that ultimately deprived the court of subject matter jurisdiction.

Id. at ___, ___ S.E.2d at ___. In the present case, the petitioner initially failed to attach copies of the custody orders to its petitions to terminate the parental rights of the respondents. However, the petitioners at trial moved to introduce the relevant custody orders, and the orders were accepted into evidence without objection. Thus, the petitioner remedied the initial omission and cured any defect with respect to subject matter jurisdiction. This assignment of error is therefore overruled. Shannon has failed to argue her remaining assignments of error and thus we deem them abandoned pursuant to N.C. R. App. P. 28(b)(6) (2006) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.").

II. Duke

Respondent father, Duke, appeals from a judgment terminating his parental rights to J.D.D.P. On appeal, Duke brings forth two assignments of error, specifically challenging Findings of Fact 47, 48, and 49 as being unsupported by clear, cogent, and convincing evidence. He further argues that the trial court erred in concluding that his parental rights should be terminated. We disagree.

To terminate a respondent's parental rights, the trial court must find by clear, cogent, and convincing evidence that one or more grounds exist to terminate parental rights. N.C. Gen. Stat. § 7B-1111 (2005). Here, the trial court found that three separate

grounds for terminating Duke's parental rights exist and concluded that terminating Duke's parental rights was in the best interests of the child. Since only one ground for termination is required, we need only consider whether the trial court erred in determining J.D.D.P. was a neglected juvenile. North Carolina General Statute § 7B-1111(a) (1) (2005) defines a neglected juvenile as:

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 has not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or has been placed for care or adoption in violation of the law.

Id. In challenging Finding of Fact 47, Duke argues that the court had insufficient grounds to find that J.D.D.P. was neglected at the time of the termination hearing. Duke correctly points out that a finding of neglect must be based on a showing of neglect at the time of the termination hearing, and may not be supported solely by a prior finding of neglect. *In re Ballard*, 311 N.C. 708, 713-14, 319 S.E.2d 227, 231 (1984).

However, findings other than those challenged on appeal provide sufficient grounds to support a finding that J.D.D.P. was neglected and there was a likelihood of repetition of neglect. Findings of fact not challenged on appeal are binding. *In re S.N.H. & L.J.H.*, ___ N.C. App. ___, ___, 627 S.E.2d 510, 512 (2006).

The trial court found, *inter alia*, that D.S.S. was relieved of reunification efforts on 15 November 2004, and that since then, Duke did not request any visitation with the child, did not have

any contact with D.S.S., and failed to attend permanency planning and treatment team meetings.

Finding of Fact 47 states:

Pursuant to N.C.G.S. § 7B-1111(a)(1) the Respondent Father neglected the minor child at the time the Department filed its petition on January 28, 2003 due to severe domestic violence between the Respondent parents, the violent behaviors of the Respondent Father, the Respondent Father's substance abuse problems, and the Respondent Father's inappropriate behaviors around the Respondent Mother and the minor child. The Respondent Father has failed to consistently and appropriately comply with services to address his many significant issues, including his Intermittent Explosive Disorder and his substance abuse issues. The Respondent Father has not been honest with the professionals who have attempted to provide services to him. The Respondent Father has failed to support the minor child, and only made one support payment when [a]n order to show cause for contempt had been served on him for his failure to pay child support. The Respondent Father willfully abandoned the minor child in that he has made no efforts since November 2004 to have any contact with J.[D.D.P.]. There is a reasonable probability of a repetition of neglect if J.[D.D.P.]'s custody and care were returned to the Respondent Father in that the Respondent Father has failed to consistently participate in services to be reunited with the minor child. The Respondent Father has the capability to make progress in the issues that led to the removal of the minor child from his care and custody, but he has chosen to cease participation in services that would have hopefully enabled him to make sufficient progress in reunification efforts and be able to parent his son. The Respondent Father has chosen a lifestyle that is detrimental to his ability to provide proper care, supervision and discipline for the minor child. There is evidence to support a finding that the Respondent Father will be able to provide the appropriate level of care and supervision of J.[D.D.P.] at any time within the next year.

Duke contends that there is no clear, cogent, and convincing evidence to support this assignment of error. He points to the testimony of Lindsey Spratt, a social worker for D.S.S., stating that she had no negative information about Duke since D.S.S. was relieved of reunification efforts in November of 2004. We find this argument unavailing, as the record contains unchallenged facts capable of supporting the court's determination that Duke continued to neglect J.D.D.P. after D.S.S. was relieved of reunification efforts.

Specifically, Duke failed to request visitation with the child, failed to have contact with D.S.S., and failed to attend permanency planning and treatment team meetings. Duke made no effort to maintain contact with the child, and did not contact J.D.D.P.'s therapist or the social worker assigned to the case. Duke's efforts were limited to his signing an Easter card sent to the child from the paternal grandmother. These facts are summarized in the trial court's Finding of Fact 45, which Duke has not challenged and is therefore binding on this Court. These facts provide clear, cogent, and convincing evidence that Duke's neglect of J.D.D.P. continued up to the time of the termination hearing.

Duke points to the last sentence of Finding of Fact 47, which states, "There is evidence to support a finding that the Respondent Father will be able to provide the appropriate level of care and supervision of J.[D.D.P.] at any time within the next year." Duke contends this finding does not support the conclusion that he failed to make progress in correcting the conditions which led to

the child's removal. However, it is clear to us, in light of all the findings in Finding of Fact 47, that this statement omits the word "not." Accordingly, this assignment of error is overruled, however, we remand for correction of this typographical error.

Duke next challenges Finding of Fact 48 on the grounds that there was no clear, cogent, and convincing evidence to support a finding that he failed to make reasonable progress. We find this argument to be without merit. Finding of Fact 48 states:

Pursuant to N.C.G.S. § 7B-1111(a)(2) the Respondent Father has willfully left the minor child in an out of home placement and in foster care for more than twelve months without showing to the satisfaction of the court reasonable progress in correcting the conditions that led to the removal of the minor child from his care. The minor child was placed with the paternal grandmother on May 23, 2003, and was removed from that placement on February 25, 2004 and placed in foster care. J.[D.D.P.] has continuously remained in foster care since that time. The Respondent Father has not adequately addressed his Intermittent Explosive Disorder; there is insufficient evidence to find he has resolved his long-standing cocaine addiction and substance abuse. The Respondent Father has not even requested a visit with his son or inquired about his welfare since November 2004.

As previously mentioned, unchallenged Findings of Fact 44 and 45 summarize Duke's efforts toward reunification. Those findings establish that Duke failed to complete treatment for his Intermittent Explosive Disorder and cocaine addiction, and made little to no effort to visit the child once D.S.S. gained custody. These findings provide clear, cogent, and convincing evidence to

support the findings made in Finding of Fact 48. As such, this assignment of error is overruled.

Duke next challenges Finding of Fact 49 as being unsupported by clear, cogent, and convincing evidence. That finding states:

Pursuant to N.C.G.S. § 7B-1111(a)(3) the Respondent Father has willfully failed without justification for a period of six months preceding the filing of this petition to pay a reasonable portion of the cost of care for the minor child although physically and financially able to do so, and despite being court ordered. The Respondent Father had the ability to contribute to the support of J.[D.D.P.] in that he is able bodied, capable of earning income in the real estate field and in construction, and during the six months prior to the filing of this petition he paid no child support. The Respondent Father's attempts to avoid paying his child support obligations by lying about J.[D.D.P.]'s placement establish that the failure to pay child support was willfully and without just cause.

The trial court's Finding of Fact 46, which is unchallenged, provides the factual basis to support Finding of Fact 49. Finding of Fact 46 establishes that Duke was ordered by the court to pay child support, but evaded paying child support by lying about the child's placement. Specifically, it establishes that Duke succeeded in getting the child support action dismissed by telling the child support enforcement case manager that the child was in the paternal grandmother's custody, when in fact the child was in the custody of D.S.S. and placed in foster care. Duke eventually made a purge payment in the amount of \$1,240, but this payment was made on 6 June 2005, nearly three months after D.S.S. filed the petition to terminate his parental rights. This fact supports the

trial court's determination that Duke willfully avoided paying child support and provides clear, cogent, and convincing evidence to support Finding of Fact 49. This assignment of error is overruled.

In his last argued assignment of error, Duke challenges the trial court's dispositional order terminating his parental rights to J.D.D.P. As stated above, our standard of review for a trial court's dispositional order is abuse of discretion and a court's dispositional order will not be overturned absent a showing that it was manifestly unsupported by reason. Here, the findings provide abundant grounds for the trial court to conclude that termination of Duke's parental rights is in the best interests of J.D.D.P. Accordingly, this assignment of error is overruled.

Duke has failed to argue his remaining assignments of error and they are therefore deemed abandoned pursuant to N.C. R. App. P. 28(b)(6) (2006) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.").

We affirm the judgment of the trial court but we remand to the trial court for the sole purpose of correcting Finding of Fact 47 to insert the word "not" so that the last sentence will read, "There is evidence to support a finding that the Respondent Father will not be able to provide the appropriate level of care and supervision of J.[D.D.P.] at any time within the next year."

Affirmed and remanded.

Judges GEER and JACKSON concur.

Report per Rule 30(e).