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NO. COA06-796

NORTH CAROLINA COURT OF APPEALS

Filed: 17 April 2007

In the Matter of:
D.B.S. and I.D.M.,
Minor Children.

Guilford County
Nos. 04 J 27
04 J 28

Appeal by Respondent mother from order entered 18 October 2005 by Judge Patrice A. Hinnant in Guilford County District Court. Heard in the Court of Appeals 10 January 2007.

Leslie R. Nydick for Respondent-Appellant.

Mercedes O. Chut for Petitioner-Appellee.

Smith, James, Rowlett & Cohen, L.L.P., by Margaret Rowlett, for Guardian ad Litem-Appellee.

STEPHENS, Judge.

Respondent mother ("Respondent") appeals from an order entered by Judge Patrice A. Hinnant on 18 October 2005 terminating Respondent's parental rights to her daughter, D.B.S., and her son, I.D.M. For the reasons stated herein, we affirm the decision of the trial court.

I. FACTUAL AND PROCEDURAL BACKGROUND

In a juvenile petition filed 3 February 2004, the Guilford County Department of Social Services ("DSS") alleged that D.B.S. and I.D.M. were abused, neglected, and dependent. Pursuant to an order filed 9 February 2004, DSS assumed nonsecure custody of the

children. After a hearing on 12 April 2004, the Honorable Lawrence C. McSwain adjudicated D.B.S. abused and neglected and I.D.M. neglected. In a permanency planning order filed 19 November 2004, Judge McSwain concluded that DSS "should file a petition to terminate parental rights[.]" On 4 January 2005, DSS filed a petition alleging that grounds existed, under N.C. Gen. Stat. §§ 7B-1111(a)(1) and (a)(3), to terminate Respondent's parental rights. The termination hearing was held before the Honorable Patrice A. Hinnant on 19 September 2005 in Guilford County District Court.

Cynthia Mejia, a foster care social worker for DSS, testified that on 21 January 2004, DSS received a report alleging that Respondent did not have any food in her home for the children and that she left her children unattended for long periods of time. After this report, DSS completed a family assessment and determined that the family was in need of services. Respondent then entered into a safety plan with DSS in which she agreed that "she would not leave the children, who were two years old and seven months [old] at the time, unattended." After the safety plan was entered, Respondent was arrested for shoplifting while I.D.M. was with her.

Several days later, on 29 January 2004, when Respondent went shopping for formula, she left the children in the care of her cousin's boyfriend, a man named "Tim," whom she had known for only two weeks. Respondent reported that upon her return from the store, she noticed burns on D.B.S.'s buttocks and vaginal area, but she did not seek medical attention for D.B.S. until 31 January

2004. Respondent testified that she delayed seeking medical attention for D.B.S. because she was afraid that DSS would take her children into custody, and she "just wanted a little extra time" with them. Medical personnel determined that D.B.S. had suffered second degree burns.

When DSS conducted an investigation, Respondent offered several versions of what she believed caused the burns to her daughter. Respondent told DSS workers that D.B.S. was burned as a result of diarrhea caused by laxatives the child ate when she was left unsupervised. She also told DSS investigators that her daughter may have been burned by a space heater. Medical experts consulted by DSS, however, did not find Respondent's explanations plausible. Rather, the medical experts opined that the burns were likely caused by either a hot liquid or chemical being poured on the child. As a result of the 21 January report and this incident with D.B.S., DSS took the children into nonsecure custody.

On 12 February 2004, Respondent entered into a case plan for reunification with her children. By entering into the case plan, Respondent agreed to submit to a parenting assessment and follow any recommendations resulting therefrom, to complete parenting classes and demonstrate appropriate parenting skills, to obtain and maintain gainful employment, to pay child support, to obtain and maintain stable housing, to visit with her children on a weekly basis, and to submit to random drug screens.

With regard to housing, Respondent testified that before her children were taken into custody, she was living with her children

in an apartment in Greensboro. While living in this apartment, Respondent was employed through Work First, but when DSS removed D.B.S. and I.D.M. from the home, she was no longer eligible for the program. Respondent failed to pay her rent and was subsequently evicted from her apartment. DSS was not able to make a housing referral for Respondent because there is a mandatory five-year waiting period before Respondent would again be eligible for government subsidized housing following her eviction.

Shortly after being evicted from her apartment, Respondent moved in with Leonard David Washington ("Washington"), a man she had known for about a month. Since moving in with Washington, Respondent made limited efforts to secure individual housing and failed to provide DSS with any documentation of her efforts. DSS evaluated Washington's home to determine its suitability for children, but determined that it was not appropriate. Respondent testified that Washington has provided her with weekly work for which she received cash payments, he allowed her to stay in his house rent free, and he paid for all of the household expenses.

Respondent was referred to the Guilford Center to complete a parenting assessment. She missed her first set of appointments, but later rescheduled and completed the evaluation. At the end of the assessment, counseling was recommended for Respondent. Respondent was referred to a counselor in November 2004, but did not start individual counseling until July 2005. Respondent testified that this delay resulted from her counseling referral not being immediately provided and stated that when the referral was

eventually made, her counselor was "booked up." However, Respondent also admitted that she failed to document the delay in the referral. At the time of the termination hearing, Respondent was continuing to attend individual counseling sessions.

Respondent completed a basic parenting course and was subsequently ordered, in November 2004, to complete the STAR program. She completed the intake appointment in January 2005, started the program in March 2005, and completed the program in July 2005. Respondent testified that in the STAR program she has learned that she needs to provide her children with "both discipline and love" and that her children "should always be [her] first priority." Respondent additionally recognized that she struggled disciplining her children in the past, but testified that she had worked to improve in that area of parenting and stated that now her children "really listen to me[.]" These programs were intended to assist Respondent in improving her parenting skills, but DSS workers noted that Respondent's progress was not satisfactory.

Respondent's visits with her children began at a DSS office, but then moved to a local McDonald's restaurant in order to provide a better environment for Respondent to interact with her children. Ms. Mejia testified that during their visits, Respondent was very loving and really cared for her children, and the children were generally very excited to see her. Respondent testified that during visits, she talked and played with her children and that her children love her. However, Respondent admitted that she did not

provide activities for her children and failed to bring items that would help promote D.B.S.'s cognitive growth. The evidence also demonstrated that Respondent was late to visits on several occasions. Respondent testified that, even though the visits were scheduled for 10:00 or 11:00 a.m., she was late because she overslept. Respondent stated that when she does not need to get up for work, she sleeps until around two o'clock in the afternoon.

Vicky Spock, a Guilford County child support establishment agent, testified that although the case was referred to child support on 6 April 2004, Respondent was not placed under a child support order until 1 February 2005. Ms. Spock stated that the delay was a result of DSS's failure to obtain service of process on Respondent. Before being placed under this order, Respondent had failed to enter into a voluntary support agreement. Respondent acknowledged previously receiving a letter regarding child support, but nevertheless failed to contact the payment office.

Pursuant to the child support order, Respondent was required to pay \$56.00 per month in current support and \$20.00 per month toward arrearages, of which she owed \$672.00 at the time the order was entered. After entry of the order, all necessary sums due DSS have been paid. Although she had worked for Washington for eighteen months and had limited expenses since moving in with him, Respondent provided her children with only a couple of outfits and, before the entry of the support order, did not provide DSS with any financial support despite knowing that DSS had to pay to care for her children.

After the filing of the termination petition, in February 2005, Respondent found work at a Wendy's restaurant, but quit this job in May 2005 for various reasons, including her supervisor's apprehensions regarding Respondent's need for time off work to attend scheduled visitation with her children. Respondent testified that she did not have a job lined up when she terminated her employment at Wendy's, but had recently found another job and testified that her current supervisor allowed her time off to visit with her children.

Overall, Respondent recognized that she did not immediately begin to comply with her case plan, claiming that she was depressed and "didn't force [herself] to get out there and do what [she] was supposed to do." However, she stated that the support she had received from Washington encouraged her to start working to regain custody of her children.

At the conclusion of the hearing, Judge Hinnant found that grounds existed to terminate Respondent's parental rights for her failure to pay support while her children were in DSS custody and her neglect of her children. Judge Hinnant then determined that it was in the best interest of each juvenile to terminate Respondent's parental rights. Judge Hinnant entered an order terminating Respondent's parental rights on 18 October 2005. Respondent appeals.

II. QUESTIONS PRESENTED

By her first argument, Respondent contends that the trial court erred in entering findings of fact and conclusions of law

regarding her failure to pay a reasonable portion of the cost of care for her children. Specifically, Respondent argues that because DSS did not offer any documentation regarding her employment and earnings during the six months before the termination of parental rights petition was filed, the trial court erred in finding that her failure to pay support for her children was willful. After a careful review of the evidence, we disagree.

In a termination of parental rights case, "[i]f the trial court concludes that the petitioner has proven grounds for termination, this Court must determine on appeal whether 'the court's findings of fact are based upon clear, cogent and convincing evidence and [whether] the findings support the conclusions of law.'" *In re L.A.B.*, ___ N.C. App. ___, ___, 631 S.E.2d 61, 64 (2006) (quoting *In re Allred*, 122 N.C. App. 561, 565, 471 S.E.2d 84, 86 (1996) (citation omitted)). In this case, the trial court determined that grounds existed to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(3). That statute provides that parental rights may be terminated if a

juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent, for a continuous period of six months next preceding the filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C. Gen. Stat. § 7B-1111(a)(3) (2003).

In the termination order, Judge Hinnant found that:

21. Mr. Washington is self employed doing home maintenance work such as lawn care, gutters and painting. [Respondent] works for Mr. Washington earning \$40.00 per day in cash and she has worked for him since moving in with him in February, 2004.
22. Although [Respondent] works for Mr. Washington and has earned \$40.00 per day in cash, *she has failed to voluntarily provide any financial support for her children.*
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45. [Respondent] has failed to actively seek and obtain stable employment since the children have been in DSS custody. She has failed to provide the Court or DSS with any documentation where she has sought employment and she has failed to obtain stable employment. She was not under an Order to pay support for the children prior to the filing of the petition to terminate parental rights in that the Guilford County Child Support Enforcement Agency had not been able to locate [Respondent] in that she has moved.
46. [Respondent] has been working with her friend, Mr. Leonard David Washington, earning \$40.00 cash per day doing home maintenance since February, 2004. She has had no living expenses other than her clothing. However, *she did not provide any financial assistance for the minor children* prior to the filing of the petition to terminate her parental rights. [Respondent] also[] obtained employment at Wendy's for 3 months, but quit this employment due to conflicts with co-workers. In August[] 2005, she obtained employment at Ms. Winner's for 3 weeks, but quit this employment as well.

(Emphasis added.)

At the termination hearing, Respondent testified that she met Washington in January 2004 and lived with him since February 2004. She stated further that Washington was self-employed, that she had

been "working with him every week since [she] moved in with him[,]” and that "he’s been paying [her] every week[.]” With regard to her household expenses, Respondent testified further that Washington does not charge her rent, pays for the food in the home, and although Respondent "helped him on the water bill once[,]” Washington pays for all of the utilities. Additionally, the evidence presented at the hearing demonstrated that Washington has paid for all of Respondent’s toiletries and makeup, as well as her hairstyling appointments. Finally, the evidence also established that prior to being placed under a child support order, Respondent had failed to pay any support toward the care of her children while they were in DSS custody.

This testimony provided clear, cogent and convincing evidence upon which the trial court relied in making its findings of fact. That is, based on Respondent’s testimony, it is clear that for the six months preceding the filing of the termination of parental rights petition, Respondent earned money working for Washington, had limited expenses, and yet failed to provide any support for her children. These findings are sufficient to support the trial court’s conclusion of law that grounds existed, pursuant to N.C. Gen. Stat. § 7B-1111(a)(3), to terminate Respondent’s parental rights. See *In re T.D.P.*, 164 N.C. App. 287, 290, 595 S.E.2d 735, 738 (2004) (holding that the respondent’s parental rights could be terminated when the respondent failed to pay a portion of the cost of care for his child, and "there was clear and convincing evidence

that respondent had an ability to pay an amount greater than zero"), *aff'd per curiam*, 359 N.C. 405, 610 S.E.2d 199 (2005).

Respondent also contends that the trial court committed reversible error by finding that Respondent earns "\$40.00 per day in cash[.]" While Respondent is correct that the evidence does not support the "\$40.00 per day" determination, absent this finding, the remaining findings of fact support the conclusion of law because Respondent did not pay any support. It was not that Respondent earned "\$40.00 per day" and failed to pay a reasonable amount of support for her children which led to the trial court's conclusion under N.C. Gen. Stat. § 7B-1111(a)(3); rather, it was that Respondent earned some money and had very limited living expenses, yet failed to pay any support for her children, which resulted in the trial court's decision that this statutory ground existed to terminate Respondent's parental rights. Accordingly, Respondent's argument is overruled.

Respondent next argues that because she was not under a court order to pay support for her children, the trial court erred in terminating her parental rights. To support her contention, Respondent relies on *In re Roberson*, 97 N.C. App. 277, 387 S.E.2d 668 (1990), and *In re Faircloth*, 161 N.C. App. 523, 588 S.E.2d 561 (2003). Respondent's reliance on these cases is misplaced and her interpretation of the law is incorrect. Therefore, her argument is rejected.

The procedural posture of *Roberson* is clearly distinguishable from the facts of the case currently before this Court. Specifically, in *Roberson*, the petitioner sought to terminate the respondent's parental rights pursuant to N.C. Gen. Stat. § 7A-289.32(5), now codified as N.C. Gen. Stat. § 7B-1111(a)(4), which requires the petitioner to "prove the existence of a support order that was enforceable during the year before the termination petition was filed." *Roberson*, 97 N.C. App. at 281, 387 S.E.2d at 670 (citation omitted). In this case, Respondent's parental rights were not terminated pursuant to N.C. Gen. Stat. § 7B-1111(a)(4); rather, DSS's petition relied on Respondent's failure under N.C. Gen. Stat. § 7B-1111(a)(3) to pay support while her children were in DSS custody. This provision does not require a child support order to be in place prior to the filing of the termination of parental rights petition. *See, e.g., T.D.P.*, 164 N.C. App. at 289, 595 S.E.2d at 737 (the "respondent's assertion that a support order is necessary to require him to pay a portion of the cost of T.D.P.'s foster care is also without merit") (citation omitted). Accordingly, Respondent's argument is without merit.

Additionally, Respondent's reliance on *Faircloth* does not support her argument. Respondent contends that the holding in *Faircloth* requires that parental rights may not be terminated for failure to pay support under N.C. Gen. Stat. § 7B-1111(a)(3) until a court order is in place establishing a reasonable amount of support. In a footnote, the *Faircloth* Court did note that legal proceedings were never initiated which would have required the

respondent "to pay support after the . . . children were placed in CCDSS custody; thus, there was no child support order entered establishing what would have been a reasonable portion of the cost of care for the . . . children." *Faircloth*, 161 N.C. App. at 526, 588 S.E.2d at 564. However, the *Faircloth* Court did not rely on this factor to reverse the order terminating the respondent's parental rights. Rather, the Court in *Faircloth* relied on the fact that the evidence presented at the hearing did not address whether the respondent was financially capable of paying support for her children. *Id.* In this case, as previously discussed, the evidence presented at the hearing established that Respondent was capable of paying support for her children while they were in DSS custody. Accordingly, this argument is overruled.

By her third argument, Respondent contends that the trial court erred in finding that the juveniles were neglected. Specifically, Respondent argues that although there was a prior adjudication of neglect, the evidence presented at the hearing did not support the trial court's determination that the juveniles were neglected at the time of the hearing. We disagree.

Pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), a trial court may terminate parental rights if it finds that "[t]he parent has . . . neglected the juvenile. The juvenile shall be deemed to be . . . neglected if the court finds the juvenile to be . . . a neglected juvenile within the meaning of G.S. 7B-101." N.C. Gen. Stat. § 7B-

1111(a)(1) (2005). Under North Carolina law, a neglected juvenile is

[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.

N.C. Gen. Stat. § 7B-101(15) (2005). In a termination of parental rights case, the burden is on the petitioner to demonstrate that the juveniles are neglected at the time of the hearing. *In re Ballard*, 311 N.C. 708, 319 S.E.2d 227 (1984). "Termination of parental rights for neglect may not be based solely on past conditions which no longer exist." *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997) (citing *Ballard*, 311 N.C. at 714, 319 S.E.2d at 231-32). Although evidence of a prior adjudication of neglect is admissible and relevant to the trial court's determination, the likelihood of the repetition of neglect will ultimately allow the trial court to reach a conclusion regarding its current existence. *In re Leftwich*, 135 N.C. App. 67, 518 S.E.2d 799 (1999). Relevant to this determination is whether Respondent has "made any meaningful progress in eliminating the conditions that led to the removal of her children." *Id.* at 72, 518 S.E.2d at 803.

In this case, there was evidence presented at the termination of parental rights hearing that Judge McSwain adjudicated both juveniles neglected after a hearing held 12 April 2004. In addition to this prior adjudication of neglect, there was also evidence regarding Respondent's failure to comply with her case plan for reunification. Specifically, this evidence established that Respondent failed to find housing that was suitable for her children, failed to timely find adequate, documented employment, and failed to make adequate improvement in her parenting skills. Although Respondent is correct that there was also evidence presented regarding her compliance with certain aspects of her case plan, the trial court may judge the credibility of the evidence and determine the weight to be assigned to competing testimony. On appeal, this Court considers only whether the trial court's findings of fact are supported by clear, cogent and convincing evidence and the findings of fact support the trial court's conclusions of law. We conclude the trial court's order meets this standard. Therefore, Respondent's argument is overruled.

By her final argument, Respondent contends that the trial court erred in terminating her parental rights because DSS failed to make reasonable efforts at reunification. In her brief to this Court, Respondent specifically argues that DSS (1) failed to give Respondent a court order for child support in a reasonable period of time and thus failed to inform Respondent what a reasonable portion of the cost of care for her children would be, (2) failed

to assist Respondent in finding alternative housing and subsequently determined that the housing Respondent was able to secure was inappropriate for her children, and (3) failed to assist Respondent in following through with her parenting plan. Respondent's contentions are without merit.

In *In re Frasher*, 147 N.C. App. 513, 517, 555 S.E.2d 379, 382 (2001), this Court recognized "an intent by the legislature to eliminate the requirement that DSS provide services to a parent before a termination of parental rights can occur . . . [and] that a determination that DSS made [reasonable] efforts to provide services to a parent is no longer a condition precedent to terminating parental rights." Accordingly, Respondent's argument is overruled.

For the reasons stated, the order of the trial court terminating the parental rights of Respondent is

AFFIRMED.

Judges TYSON and STROUD concur.

Report per Rule 30(e).