NO. COA06-804

NORTH CAROLINA COURT OF APPEALS

Filed: 6 February 2007

IN THE MATTER OF:

Union County
No. 05-J-21

A.D.C.
A MINOR CHILD

Appeal by respondent from order entered 21 February 2006 by Judge Hunt Gwyn in Union County District Court. Heard in the Court of Appeals 22 January 2007.

Dale Ann Plyler for petitioner-appellee.

M. Victoria Jayne for respondent-appellant.

MARTIN, Chief Judge.

Respondent, the mother of the minor child A.D.C. (hereinafter "the child") born 13 March 2004, appeals from an order terminating her parental rights. The Union County District Court awarded legal custody of the child to the Union County Department of Social Services (hereinafter "DSS") on 2 July 2004. The DSS filed a petition to terminate respondent's parental rights on 2 February 2005 and an amended petition on 29 June 2005. As grounds for terminating respondent's rights, petitioner alleged that (1) respondent neglected the child by abandoning her and withdrawing all parental love and affection from the children and by foregoing

all parental responsibilities to the child; (2) respondent for a continuous period of six months next preceding the filing of the petition failed to pay a reasonable portion of the cost of care for the child although physically and financially able to do so; and (3) respondent is incapable of providing for the proper care and supervision of the child such that the child is a dependent juvenile and there is a reasonable probability that such incapability will continue for the foreseeable future. The court conducted a hearing on the petition on 18 January 2006. Respondent, represented by counsel, appeared at the hearing and testified. At the conclusion of the hearing, the court entered an order finding and concluding that petitioner proved by clear, cogent and convincing evidence the grounds alleged for termination of respondent's parental rights.

The order terminating respondent's parental rights contains the following pertinent findings of fact to which respondent has assigned error:

> 11. [Respondent] did willfully abandon the minor child at least six months preceding the filing of this action, in that her whereabouts were unknown at key times before the filing of the action.
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> 12. That contact by [respondent] with the child has been sporadic, at best.
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> 13. That [respondent] has not sent cards, gifts, or made regular efforts to have contact with the child since the child was placed in the custody of Union County Department of Social Services.
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> 14. That [respondent] has abandoned the child allowing the child to remain in the care of her grandmother, [S.C.], without making

efforts to reunify with her child.

15. That [respondent] would only make her whereabouts known for two to three weeks at a time and then would be gone for three to four months. This pattern has been consistent from the time of the child's birth until the date of this hearing.

16. That [respondent] was employed at one time by Ricky Sanders, cleaning offices. She did this for one to one and a half months for two to three hours per day. [Respondent] earned an income while working for Mr. Sanders.

17. [Respondent] has been employed while incarcerated at the Women's Prison in Raleigh, North Carolina. That she has worked since December 2005 earning approximately $2.40 per week.

18. At no time has [respondent] paid any child support for the use and benefit of the minor child while the child has been in the custody of the Union County Department of Social Services.

19. The juvenile has been placed in the custody of the Union County Department of Social Services, a licensed child-placing agency, and [respondent], for a continuous 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 juvenile, although physically and financially able to do so.

...

21. [Respondent] has had the means and ability to pay child support while working for Ricky Sanders and she paid no child support.

22. [Respondent] has asked about the welfare of the child on a sporadic basis, however, these inquiries are insistently [sic] coupled with her request from her mother for money.
....

25. [Respondent] is currently in prison for probation violation due to her substance

> abuse, which renders her unable to provide for the child's care pursuant to N.C. G.S. § 7B-1111-6.
>
> 26. [Respondent] is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future.
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> 27. [Respondent] has neglected the child.

The court concluded that termination of respondent's parental rights is in the child's best interest.

Respondent brings forward two assignments of error.

First, she contends the petition should have been dismissed because it fails to comply with the requirements of N.C. Gen. Stat. § 7B-1104(6) (2005), which requires a petition to state facts "that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist." Termination of parental rights proceedings are governed by the Rules of Civil Procedure. *In re McKinney*, 158 N.C. App. 441, 444-45, 581 S.E.2d 793, 795 (2003). The proper procedure to challenge the sufficiency of the allegations of a petition to terminate parental rights is by a motion pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. *See In re Hardesty*, 150 N.C. App. 380, 383, 563 S.E.2d 79, 82 (2002). A motion to dismiss for failure to state a claim must be raised in the trial court and may not be raised for the first time on appeal. *Collyer v. Bell*, 12 N.C. App. 653, 655, 184 S.E.2d 414, 416 (1971). Moreover, the Rules of Appellate Procedure provide in pertinent part that "[i]n order to preserve a

question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(b)(1) (2006). Respondent never made a motion to dismiss the petition or otherwise raised the issue in the court below. This assignment of error is therefore dismissed.

Second, respondent contends the findings of fact are not supported by sufficient evidence. One's parental rights may be terminated only if the existence of a statutory ground permitting such termination is proved by clear, cogent and convincing evidence. *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614 (1997). As the trier of fact in a termination of parental rights proceeding, the trial judge determines the credibility and weight to be given the evidence received at the hearing and makes findings of fact accordingly. *In re Oghenekevebe,* 123 N.C. App. 434, 439, 473 S.E.2d 393, 397 (1996). The appellate court reviews the trial court's order to determine whether the findings of fact are supported by clear, cogent and convincing evidence and whether the conclusions of law are supported by the findings of fact. *In re Allred*, 122 N.C. App. 561, 565, 471 S.E.2d 84, 86 (1996). Findings that are supported by ample, competent evidence are binding on appeal even though there may be evidence to the contrary. *In re Montgomery*, 311 N.C. 101, 112-13, 316 S.E.2d 246, 253-54 (1984). A single ground is all that is required for a court to terminate parental rights. *In re Shermer*, 156 N.C. App. 281, 285, 576 S.E.2d

403, 406-07 (2003).

Karen Crowder, a social worker assigned to the case by the DSS, testified that the child has been in the custody of the DSS since 2 July 2004 and that the child had been placed with the child's maternal grandmother since 6 July 2004. Since the time she took over the case in April of 2005, respondent has not contacted her to inquire about the welfare of the child. When respondent appeared for a court hearing in November of 2005, she did ask to see the child but she offered no reason for not contacting Ms. Crowder concerning the child. Respondent has not purchased any gifts for the child, and to Ms. Crowder's knowledge, has not sent the child any birthday cards or Christmas gifts. Respondent has not paid any money for the use and support of the child. During the two times respondent visited with the child during court hearings, the child would shy away from respondent.

The child's maternal grandmother testified that the child has lived with her since the DSS assumed custody of the child. During the time the child has been placed with her, respondent has been in and out of jail. Respondent did not call and ask about the welfare of the child unless respondent needed something, such as money or shelter. Respondent would stay with her mother for one or two weeks and disappear for months at a time. The maternal grandmother has never received a gift or money for the child from respondent. She acknowledged that she did receive a card directed to the child by respondent on two or three occasions.

Respondent testified that she loves the child. She testified

that she gave the child gifts, wrote letters and cards to the child, purchased diapers and food for the child, and gave money directly to the child. She acknowledged that she has a history of substance abuse and incarcerations. She also acknowledged that she had a job cleaning offices for Ricky Sanders and that she made no child support payments.

We conclude that the court's findings of fact are supported by clear, cogent and convincing evidence. Respondent's testimony created a conflict in the evidence for the court to resolve. Even if respondent had mailed cards and purchased gifts, this evidence does not negate a conclusion that the child has been neglected. "[T]he fact that the parent loves or is concerned about his child will not necessarily prevent the court from making a determination that the child is neglected." *In re Montgomery*, 311 N.C. at 109, 316 S.E.2d at 252.

The order is

Affirmed.

Judges McGEE and HUNTER concur.

Report per Rule 30(e).