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NO. COA06-835

NORTH CAROLINA COURT OF APPEALS

Filed: 6 March 2007

IN THE MATTER OF:

M.S.B.,
A Minor Child.

Wayne County
No. 05 J 236

Appeal by respondent from order entered 1 March 2006 by Judge R. Les Turner in Wayne County District Court. Heard in the Court of Appeals 11 January 2007.

E.B. Borden Parker for petitioner-appellee.

Richard Croutharmel for respondent-appellant.

GEER, Judge.

Respondent mother appeals from an order terminating her parental rights as to her minor daughter, M.S.B. ("Michelle").¹ The evidence in the record indicates that respondent mother has given birth to ten children (none of whom reside with her); has a continuing history of significant crack cocaine use; was in a cocaine-induced coma a month before the birth of Michelle; and, since that time, has been arrested for prostitution, assault, and armed robbery. Nevertheless, the order entered by the trial court contains almost no substantive findings of fact to support its

¹The pseudonym "Michelle" will be used throughout this opinion in order to maintain the child's confidentiality.

conclusion that the mother's parental rights should be terminated based on neglect and abandonment. Strikingly, petitioner Wayne County Department of Social Services ("DSS") has made little effort to defend the order. It filed in this Court a three-and-a-half-page brief – including caption and signature – that does not even bother to address the abandonment ground. Because the court's findings of fact do not support its conclusions of law, we are left with no choice but to reverse and remand for further findings of fact, thereby prolonging this troubling case.

Facts

The record indicates that Michelle, respondent's tenth child, was born in October 2004. Respondent does not have custody of any of her remaining children; one of them died when a month old. A month before Michelle's birth, respondent was airlifted to Pitt Memorial Hospital due to acute respiratory failure after using crack cocaine, where she remained in a coma for two days. Following Michelle's birth, respondent admitted to using crack cocaine on a regular basis throughout her pregnancy. DSS took custody of Michelle three days after her birth and placed her with a woman who was ultimately determined to be Michelle's paternal aunt.

In November 2004, DSS filed a petition alleging that Michelle was neglected and dependent. In the same month, respondent was arrested for prostitution. Respondent did not attend the initial adjudication hearing conducted on 16 December 2004, and, on 27 January 2005, the district court adjudicated Michelle a neglected

and dependent juvenile. The district court found the above facts and also that respondent lived in a home that had holes in the floor and walls, had only a couch and a folding chair as furniture, and contained no food except for a burrito. The district court also found that respondent had hit her boyfriend - who, at that time, was believed to be Michelle's father - with a 2x4, for which she was jailed for assault, and that respondent had bitten her boyfriend, leaving scabs.

On 28 June 2005, after a permanency planning hearing, the district court noted that Michelle's father, the brother of Michelle's custodian, had since been identified through a paternity test. The district court made detailed findings regarding respondent's drug usage from age 13 through the present, including the fact that respondent had admitted cocaine usage twice following Michelle's birth; respondent's history of domestic violence with her boyfriend; respondent's failure to follow through on classes and testing required by the court; and respondent's arrest for prostitution and incarceration. The court found that respondent, who was 36, "has had a rough life and has made no progress in correcting the conditions that caused the removal of the juvenile from her" and "[t]hat the Court cannot conceive of the juvenile being returned to the mother or to [the father] within six months of this date." Accordingly, the court relieved DSS of any further reunification efforts and changed the permanent plan for Michelle to adoption.

On 3 November 2005, DSS filed a petition to terminate respondent's and the father's parental rights, alleging as grounds for termination that respondent had neglected and abandoned Michelle. A hearing was held on the petition on 31 January 2006. Respondent did not attend. Following the hearing, the trial court entered an order signed 28 February 2006, concluding that both parents had neglected and abandoned Michelle. Respondent mother timely appealed from that order.²

Discussion

A termination of parental rights proceeding is conducted in two phases: (1) an adjudication phase that is governed by N.C. Gen. Stat. § 7B-1109 (2005) and (2) a disposition phase that is governed by N.C. Gen. Stat. § 7B-1110 (2005). *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). During the adjudication stage, petitioner has the burden of proving by clear, cogent, and convincing evidence that one or more of the statutory grounds for termination set forth in N.C. Gen. Stat. § 7B-1111 (2005) exist. *In re Huff*, 140 N.C. App. 288, 290, 536 S.E.2d 838, 840 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001). It is the responsibility of this Court to determine whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law. *Id.* at 291, 536 S.E.2d at 840.

²Michelle's father is not a party to this appeal. The district court noted that the father acknowledged at the hearing that he was unable to care for Michelle and wanted his daughter to remain with his sister.

After making various findings regarding the filing and service of the petition and the father's desires, the district court stated "[t]hat the Court took Judicial Notice of the file entitled: In The Matter Of M.S.B.; 04 JA 235." The court did not make any further reference to the file or incorporate any of the findings of fact contained in prior orders. Instead, the court then made findings of fact regarding Michelle's paternity and the following findings relating to the merits of the petition:

13. That the mother of the juvenile is believed to be again residing with [A.L.B.], who has been in a domestic violence situation with the mother of the juvenile in the past.
14. That the mother has neglected and abandoned the juvenile.
15. That the mother does not visit the juvenile nor does she provide any assistance for the juvenile.
16. That the father has neglected and abandoned the juvenile.
17. That the father has not provided support for the juvenile.
18. That grounds exist to terminate the parental rights of the parents of the juvenile in that both parents have neglected and abandoned the juvenile.

Following these findings, the order appears to move to dispositional findings of fact that include, with respect to the parents:

24. That this is the tenth child born to the mother and the mother does not have custody of any of her children.
25. That the mother has a history of drug abuse.

26. That the father is unable to care for the juvenile at this time.

The district court made no other findings of fact relating to the conduct of respondent.

With respect to the court's finding of neglect, it is well-settled that "[t]he petitioner seeking termination bears the burden of showing by clear, cogent and convincing evidence that such neglect exists at the time of the termination proceeding." *In re Beasley*, 147 N.C. App. 399, 404, 555 S.E.2d 643, 647 (2001) (quoting *In re Ballard*, 311 N.C. 708, 716, 319 S.E.2d 227, 232 (1984)). When, as here, the child has been out of the parent's custody for an extended period, neglect may be established by a prior adjudication of neglect together with proof of a probability of a repetition of neglect. *In re Shermer*, 156 N.C. App. 281, 286, 576 S.E.2d 403, 407 (2003).

In the district court's order terminating respondent's parental rights, while the court took judicial notice of the prior file, the order contains no findings of fact based upon review of that file and the prior orders.³ The record reveals that Michelle was adjudicated neglected, but the court made no such finding in support of its ultimate conclusion that grounds existed for termination of parental rights. Further, neither the court's

³DSS states that "[a] brief summation of the facts judicially noticed in the underlying file shows clear support for a finding that [Michelle] was neglected by the Respondent." DSS overlooks the fact that after taking judicial notice of the file, the court never "judicially noticed" any facts at all. The court's finding of fact merely establishes that the file was considered by the court - nothing more.

factual findings nor its conclusions of law mention any likelihood of a repetition of neglect. See *In re Pope*, 144 N.C. App. 32, 37, 547 S.E.2d 153, 156 (explaining that "parental rights may nevertheless be terminated if there is a showing of a past adjudication of neglect and the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to the parent" (emphasis added)), *aff'd per curiam*, 354 N.C. 359, 554 S.E.2d 644 (2001). Even liberally reading the order, we can find nothing in it that would allow us to conclude that the trial court made the necessary determination as to the probability of a repetition of neglect. Accordingly, we must reverse the district court's conclusion regarding the existence of neglect. See *In re C.C.*, 173 N.C. App. 375, 382, 618 S.E.2d 813, 818 (2005) ("trial court erred in concluding as a matter of law that respondent willfully neglected the children" where "no evidence was presented and no finding was made that a probability of repetition of neglect existed at the time of the termination hearing").

Turning to the abandonment ground, we first note that DSS makes no attempt on appeal to defend that aspect of the district court's order. DSS' brief does not even mention the trial court's finding of abandonment, let alone supply any arguments that might support this ground for termination.

Under N.C. Gen. Stat. § 7B-1111(a)(7), abandonment occurs when "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition

. . . ." Abandonment requires a finding of "'conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child.'" *In re Young*, 346 N.C. 244, 251, 485 S.E.2d 612, 617 (1997) (quoting *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986)). Since DSS filed its petition to terminate respondent's parental rights on 3 November 2005, the relevant time period for considering whether respondent "abandoned" Michelle is 3 May 2005 to 3 November 2005.

The sole finding of fact that could be considered to relate to this ground states: "That the mother does not visit the juvenile nor does she provide any assistance for the juvenile." With respect to the visitation part of this finding, it is not supported by the evidence in the record. The DSS social worker testified at the hearing that respondent had visited the child at least three times. As for the failure to provide assistance, there was no testimony at the termination hearing to support that portion of the finding of fact. A review of the orders in the file – of which the trial court took judicial notice – also does not provide any support for a finding that respondent did not "provide any assistance" from 3 May to 3 November. Finally, the order contains no finding that this failure to provide assistance represented a "'willful determination to forego all parental duties,'" as required for abandonment. *Id.* (quoting *Searle*, 82 N.C. App. at 275, 346 S.E.2d at 514). We, therefore, cannot uphold the trial

court's conclusion that the ground of abandonment justified termination of respondent's parental rights.

In sum, the trial court's factual findings do not support its legal conclusion that grounds existed to terminate respondent's parental rights. While the record, when considered as a whole, raises serious concerns about respondent's fitness as a parent, we cannot affirm a termination order premised upon inadequate factual findings. Accordingly, we reverse the order and remand for further findings of fact. We leave to the discretion of the trial court whether to consider additional evidence on these issues. Given our resolution of this appeal, we do not address respondent's contentions regarding the disposition phase.

Reversed and remanded.

Judges CALABRIA and JACKSON concur.

Report per Rule 30(e).