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NO. COA07-1487

NORTH CAROLINA COURT OF APPEALS

Filed: 17 June 2008

IN THE MATTER OF:
B.C.

Rockingham County
No. 06 JT 199

Appeal by respondent from orders entered 3 October 2007 by Judge Frederick B. Wilkins, Jr. in District Court, Rockingham County. Heard in the Court of Appeals 5 May 2008.

Court of Appeals

No brief for petitioner-appellee.

Duncan B. McCortick, for Respondent-appellant.

Slip Opinion

WYNN, Judge.

Although "there is no requirement that the factual allegations [in a petition to terminate parental rights] be exhaustive or extensive, they must put a party on notice as to what acts, omissions or conditions are at issue."¹ Here, because we find that the petition failed to allege any facts supporting the grounds found by the trial court to terminate Respondent-father's parental rights, we reverse the trial court's order.

B.C., the minor child, was born in 2006, the result of a relationship that involved the alleged statutory rape of

¹ *In re Hardesty*, 150 N.C. App. 380, 384, 563 S.E.2d 79, 82 (2002).

Petitioner-mother by Respondent-father. On 14 December 2006, B.C.'s maternal grandmother, the guardian *ad litem* for Petitioner-mother, filed a petition on Petitioner-mother's behalf to terminate Respondent-father's parental rights. After taking a voluntary dismissal of the petition on 9 February 2007, the guardian *ad litem* refiled the petition to terminate Respondent-father's parental rights to B.C. on 27 February 2007. The petition stated that the child "has continuously resided with Petitioner since her birth. . . . and currently resides with Petitioner, and her maternal grandparents[.]"

The petition alleges that Respondent-father had "no contact with the Child and has failed to provide substantial financial support or consistent care for his legal Child for at least six consecutive months immediately preceding the filing of said Petition[.]" Petitioner-mother additionally claimed that Respondent-father had willfully abandoned B.C. "by failing to perform the natural and legal obligations of parental care and support for at least six consecutive months immediately preceding the filing of said Petition." The petition further noted that Respondent-father was awaiting trial on pending charges for statutory rape, and that the child was the result of that statutory rape.

On 3 October 2007, *nunc pro tunc* 9 July 2007, the trial court concluded that Respondent-father had: (1) "willfully failed to provide substantial financial support for his legal Child for at least six consecutive months immediately preceding the filing of

the Motion, within the meaning of NCGS § 7B-1111[a](5)(d)”; and (2) “[t]he Child was born out of wedlock and Respondent has willfully failed to establish paternity or legitimate the Child, pursuant to North Carolina General Statute § 7B-1111[a](5).” After further finding that termination was in the child’s best interest, the trial court terminated Respondent-father’s parental rights.

Respondent-father now appeals, arguing that the trial court (I) lacked subject matter jurisdiction to terminate his parental rights where the petition did not include sufficient allegations as to failure to establish paternity; (II) failed to make the necessary findings as to whether an affidavit of paternity had been filed; and (III) erred by finding that grounds existed to terminate his parental rights.

I.

First, Respondent-father argues that the petition to terminate his parental rights failed to allege sufficient facts to warrant a determination that grounds existed to terminate his parental rights based on his failure to establish paternity. We agree.

A petition to terminate parental rights must set forth “[f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist.” N.C. Gen. Stat. § 7B-1104(6) (2005). More specifically, “[w]hile there is no requirement that the factual allegations be exhaustive or extensive, they must put a party on notice as to what acts, omissions or conditions are at issue.” *In re Hardesty*, 150 N.C. App. 380, 384, 563 S.E.2d 79, 82 (2002); see also *In re A.D.L.*, 169

N.C. App. 701, 709, 612 S.E.2d 639, 644, *disc. review denied*, 359 N.C. 852, 619 S.E.2d 402 (2005).

Generally, a challenge to the sufficiency of the facts alleged in such a petition will be treated by this Court as a Rule 12(b)(6) motion to dismiss for failure to state a claim for which relief may be granted. See *In re Quevedo*, 106 N.C. App. 574, 578, 419 S.E.2d 158, 159 (treating a challenge to a petition for failing to allege sufficient facts as a Rule 12(b)(6) motion because "(1) the basis for the motion is that the petition fails to state sufficient facts . . . and (2) a motion is treated according to its substance and not its label."), *appeal dismissed*, 332 N.C. 483, 424 S.E.2d 397 (1992); N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). We have also previously held that "[t]he Rules of Civil Procedure apply to proceedings for termination of parental rights[,] and a Rule 12(b)(6) motion may not be made for the first time on appeal." *In re H.L.A.D.*, ___ N.C. App. ___, ___, 646 S.E.2d 425, 434 (2007) (internal citations and quotation marks omitted), *aff'd per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008).

In the instant case, the record shows that, at the close of all evidence at the adjudication hearing, when Petitioner-mother's attorney was arguing that Respondent-father had failed to legitimate the child, Respondent-father's attorney objected, stating:

[COUNSEL]: Your Honor, I object. That wasn't one of the grounds she - she listed in her petition.

THE COURT: It's part of the evidence.

. . .

[COUNSEL]: But, it's not one of the grounds, Judge. We were not put on notice. She didn't list the statute. No statute is listed, and she didn't - and so a reasonable person, Judge, has to go on the - the - the grounds that are listed. She didn't list that in the petition.

We find this objection to be sufficient to preserve the question of the adequacy of the allegations of the petition for our review on appeal.

The petition to terminate Respondent-father's parental rights is devoid of any reference to or even suggestion of Respondent-father's alleged failure to establish paternity or to legitimate the child. Indeed, the petition refers to him as the father of the child and calls B.C. his "legal Child." The only relevant facts alleged in the petition are the following:

5. Father has no contact with the child and has failed to provide substantial financial support for his legal Child for at least six consecutive months immediately preceding the filing of said Petition, although, upon information and belief, he is physically and financially able to do so.
6. Father is awaiting trial on pending charges for statutory rape. The Child at issue in this matter is the product of said statutory rape.
7. Father has willfully abandoned the Child by failing to perform the natural and legal obligation of parental care and support for at least six consecutive months immediately preceding the filing of said Petition.

We find these statements to be insufficient to put Respondent-father on notice that paternity would be one of the "acts, omissions or conditions" at issue at the adjudication hearing. *Hardesty*, 150 N.C. App. at 384, 563 S.E.2d at 82.

Based on the petition filed in this case, Respondent-father

would have been unaware that Petitioner-mother intended to argue his alleged failure to establish paternity or to legitimate the child as a possible grounds to terminate his parental rights. Accordingly, we reverse that portion of the trial court's order terminating Respondent-father's parental rights on the grounds that "[t]he Child was born out of wedlock and Respondent has willfully failed to establish paternity or legitimate the Child, pursuant to North Carolina General Statute § 7B-1111[a](5)."

II.

In his final two arguments, Respondent-father asserts that the trial court erred by concluding that he failed to legitimate the child and by finding that grounds existed to terminate Respondent-father's rights.² We agree.

A finding of any one of the grounds separately enumerated in N.C. Gen. Stat. § 7B-1111 is sufficient to support the termination of parental rights. *In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990). "The standard of appellate review is 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." *In re D.J.D.*, 171 N.C. App. 230, 238, 615 S.E.2d 26, 32 (2005) (citing *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *disc. review denied and appeal*

² Because we have already reversed the portion of the trial court's order terminating Respondent-father's parental rights on the grounds that he failed to establish paternity or legitimate the child, we decline to consider his additional argument that the trial court failed to enter sufficient findings as to each subsection of N.C. Gen. Stat. § 7B-1111(5).

dismissed, 353 N.C. 374, 547 S.E.2d 9, 10 (2001)).

The trial court's order terminating Respondent-father's parental rights cited the following two grounds:

3. Respondent has willfully failed to provide substantial financial support for his legal Child for at least six consecutive months immediately preceding the filing of the Motion, within the meaning of NCGS § 7B-1111(5)(d).

4. The Child was born out of wedlock and Respondent has willfully failed to establish paternity or legitimate the Child, pursuant to North Carolina General Statute § 7B-1111(5).

However, the grounds outlined in Conclusion of Law Three are not a proper basis for termination of parental rights. Rather, N.C. Gen. Stat. § 7B-1111(5)(d) represents one of four subsections with respect to which the trial court must make findings of fact prior to terminating the parental rights of a father of a juvenile born out of wedlock. See, e.g., *In re I.S.*, 170 N.C. App. 78, 88, 611 S.E.2d 467, 473 (2005) (noting that, when basing the termination of parental rights on N.C. Gen. Stat. § 7B-1111(a)(5), "the court must make specific findings of fact as to *all four subsections.*" (emphasis added and citation omitted)); *In re T.L.B.*, 167 N.C. App. 298, 302, 605 S.E.2d 249, 252 (2004) ("Upon a finding that the putative father has not attempted any of the four possible ways to legitimate his child, the trial court may terminate [his] parental rights." (quotation and citation omitted)).

The Juvenile Code does include other grounds related to child support as a possible basis for the termination of parental rights. See N.C. Gen. Stat. § 7B-1111(3) (failure for six months prior to filing of petition to pay a reasonable portion of the cost of care

for the juvenile while in "the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home); *id.* § 7B-1111(4) (willful failure to pay without justification for one year prior to the filing of the petition for the "care, support, and education of the juvenile, as required by [a] decree or custody agreement."). However, neither of those grounds is at issue in this case, as the child has been in the custody and care of Petitioner-mother since birth, and Respondent-father was never ordered by judicial decree nor custody agreement to pay child support.

Thus, the trial court's conclusion of law that Respondent-father has "willfully failed to provide substantial financial support for his legal Child for at least six consecutive months immediately preceding the filing of the Motion, within the meaning of NCGS § 7B-1111[a](5)(d)" is insufficient as a matter of law as a grounds to terminate his parental rights. Accordingly, we reverse the trial court's order.

Reversed.

Judges McCULLOUGH and BRYANT concur.

Report per Rule 30(e).