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NO. COA08-1089

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2009

IN THE MATTER OF:
R.M.H., C.N.P.

New Hanover County
Nos. 06 JT 27, 28

Appeal by Respondent from order entered 16 June 2008, *nunc pro tunc* 28 April 2008, by Judge R. Russell Davis in District Court, New Hanover County. Heard in the Court of Appeals 26 January 2009.

Court of Appeals

No brief filed for petitioner-appellee New Hanover County Department of Social Services.

Windy N. Rose for appellant-respondent mother.

Pamela Newell Williams for guardian ad litem.

Slip Opinion

WYNN, Judge.

Respondent-Mother appeals from an order terminating her parental rights to her sons, R.M.H. and C.N.P. After careful review, we affirm.

In January 2006, the New Hanover County Department of Social Services ("DSS") received a report that R.M.H. and C.N.P. were being improperly disciplined. At the time of the complaint, Respondent, her children, and her boyfriend lived with Respondent's father, his wife, and B.P., Respondent's seven-year-old stepsister. When DSS social worker Miranda Pearce visited Respondent's home to address the concerns raised in the report, the adults all denied

using inappropriate discipline on the children. After the meeting, Respondent admitted that her children were afraid of her father and that her father abused his wife.

On 24 January 2006, Ms. Pearce returned to Respondent's residence and spoke to B.P. who admitted that she was afraid of her father. She told Ms. Pearce that her father mistreated her mother and that her father beat R.M.H. and C.N.P. Ms. Pearce discovered that R.M.H. and C.N.P. shared an unlit bedroom with Respondent and her boyfriend, and slept on the floor amidst dirty, feces-stained clothing. Thereafter, DSS filed a juvenile petition seeking removal of the children from Respondent's home. On 24 January 2006, in a nonsecure custody order, the trial court gave DSS custody of R.M.H. and C.N.P. On 16 February, the trial court entered an order adjudicating R.M.H. and C.N.P. neglected.

After the adjudication, DSS developed a case plan for Respondent with the goal of reunification. Soon thereafter, Respondent and her boyfriend moved out of her father's home, and Respondent obtained a job at a fast-food restaurant. However, by July 2006, Respondent's hours at her job were cut back, and she and her boyfriend faced eviction. On 31 July 2006, the day before her scheduled visit with her children, she left town. The day of the planned visit, Respondent contacted social worker Cary Hennessey, informed her that she had moved to Wilkes County, and cancelled the visit.

Respondent also failed to attend the permanency planning hearing on 3 August 2006. Respondent returned to Wilmington on 12

August 2006 to gather her personal belongings. The children's guardian *ad litem* arranged a visit on the same day, which was Respondent's last visit with her children. Between 12 August 2006 and 30 November 2006, Respondent did not maintain regular contact with Ms. Hennessey. Respondent and her boyfriend lived at various motels and boarding houses until she eventually ended the relationship. In mid-November 2006, she moved in with her sister in Winston-Salem.

On 14 November 2006, R.M.H. and C.N.P. left foster care and were placed with their maternal great aunt and uncle.

The trial court conducted another permanency planning hearing on 30 November 2006, which Respondent also did not attend. At the hearing, the children's permanent plan was changed from reunification to adoption. On 21 June 2007, the case was transferred to social worker Jolene Armstrong. Between 21 June 2007 and 7 March 2008, Respondent only had two contacts with Ms. Armstrong.

On 15 November 2007, DSS filed a petition to terminate Respondent's parental rights to R.M.H. and C.N.P. The trial court conducted a hearing in the matter on 28 April 2008 at which Respondent was not present. The trial court concluded that one ground existed to terminate Respondent's parental rights to R.M.H. and C.N.P.: Respondent willfully left the children in foster care for over twelve months without showing reasonable progress in correcting the conditions which led to the children's removal. The trial court then determined that it was in the children's best

interests to terminate the parental rights of Respondent because there was a high probability of adoption for R.M.H. and C.N.P.

On appeal from the trial court's order, Respondent argues that the trial court erred by (I) consolidating the adjudicatory and dispositional hearings, (II) concluding that grounds existed to terminate Respondent's parental rights, and (III) determining that it was in the best interests of the children to terminate Respondent's parental rights.

I.

Respondent first argues that the trial court erred by consolidating the adjudicatory and dispositional hearings. A termination of parental rights proceeding involves two stages: (1) adjudication, where the burden is on the petitioner to prove a ground for termination exists by clear, cogent, and convincing evidence, and (2) disposition, where the decision to terminate parental rights is within the court's discretion. N.C. Gen. Stat. §§ 7B-1110-1111 (2007); *In re White*, 81 N.C. App. 82, 85, 344 S.E.2d 36, 38, *disc. review denied*, 318 N.C. 283, 347 S.E.2d 470 (1986). Although a proceeding for the termination of parental rights involves a two-stage process, a trial court is not required to conduct two separate hearings as long as it applies the appropriate evidentiary standards during each phase. *In re White*, 81 N.C. App. at 85, 344 S.E.2d at 38; see also *In re R.B.B.*, 187 N.C. App. 639, 643-44, 654 S.E.2d 514, 518 (2007) ("[A] trial court may combine the N.C.G.S. § 7B-1109 adjudicatory stage and the N.C.G.S. § 7B-1110 dispositional stage into one hearing, so long as

the trial court applies the correct evidentiary standard at each stage”), *disc. review denied*, 362 N.C. 235, 659 S.E.2d 738 (2008).

Respondent contends that, as a result of conducting both phases in the same hearing, the trial court improperly shifted the burden from the petitioner to Respondent during the adjudicatory phase. In support of her contention, Respondent cites the following statement by the trial court:

Most of the Department's evidence could have been rebutted maybe had she been here to say this is what I've been doing, this is the progress I've made, this is [sic] the steps that I've tried to take in the last 18 months or so. And despite her attorney's and her Guardian's best efforts today, that just is not there and that's solely on her.

We disagree with Respondent's contention. The trial court's admonition was not an improper shifting of DSS's burden. Instead, it was an observation that Respondent failed to rebut DSS's clear, cogent, and convincing evidence that Respondent had not made any progress in correcting the circumstances that led to the children's removal. Moreover, prior to making the aforementioned observation, the trial court specifically determined that DSS had met its burden, stating:

I do find that clear, cogent, and convincing evidence has been presented as to 7B-1111(a)(2) as to willfully leaving the juvenile in foster care placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile.

Accordingly, we conclude that the trial court did not improperly shift the burden of proof to Respondent.

II.

Next, Respondent contends that the trial court erred in concluding that grounds existed to terminate her parental rights. Preliminarily, we note that this Court reviews the trial court's order to determine "whether the trial court's findings of fact were based on clear, cogent, and convincing evidence, and whether those findings of fact support a conclusion that parental termination should occur." *In re Oghenekevebe*, 123 N.C. App. 434, 435-36, 473 S.E.2d 393, 395 (1996).

In this case, the trial court concluded that sufficient grounds existed to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), which states that a court may terminate parental rights where "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." Further, this Court has consistently held that "[w]illfulness may be found where even though a parent has made some attempt to regain custody of the child, the parent has failed to show 'reasonable progress or a positive response to the diligent efforts of DSS.'" *In re Clark*, 159 N.C. App. 75, 84, 582 S.E.2d 657, 662 (2003) (quoting *Oghenekevebe*, 123 N.C. App. at 440, 473 S.E.2d at 398).

Here, the trial court made the following findings of fact relevant to this ground for termination:

5. . . . Respondent [] confided in Ms. Pearce that her children were afraid of her father and that there was domestic violence in the home between her father and his wife. Respondent [] was unwilling to confront her father for fear of jeopardizing having a roof over her and her children's heads.

. . .

7. That based on information gathered from a variety of sources and upon the statements of the Respondent and the confirmation of mistreatment by the child [B.P.], [DSS] filed a petition seeking removal of all the minor children from the home. . . . Ms. Pearce found R[.M.H.] and C[.N.P.] in a bedroom which they shared with their mother and her boyfriend. The room was unlit, the boys slept on the floor amid clutter of dirty clothes including feces stained underwear.

. . .

11. That Respondent moved from her father's home within two weeks of the removal of the children. Respondent and her companion Tony Durant obtained housing and Respondent got a job working at a McDonalds [sic] 20 to 25 hours per week. Respondent was cooperative with the case plan and was provided and participated in regular visitation with her children . .

. .

12. That Respondent's hours at her job were cut and she and Mr. Durant faced eviction. Respondent did not inform Ms. Hennessey of the pending eviction or ask for assistance in meeting her rent payment despite the fact that [DSS] had provided assistance with utility payments for Respondent's residence.

14. That on July 31, 2006, Respondent and Tony Durant moved from Wilmington. That a visit for the children in Respondent's home was scheduled for August 1, 2006. Respondent informed Social Worker Hennessey that the visit had to be cancelled as she had left town the night before.

. . .

16. That Respondent returned to Wilmington on August 12, 2006, to gather her personal belongings. A visit for Respondent with her children was arranged and Respondent visited with R[.M.H.] and C[.N.P.] on August 12, 2006. That the visit of August 12, 2006, was the last visit with her children Respondent attended.

17. That Social Worker Hennessey requested the Wilkes County Department of Social Services contact Respondent and offer services to continue to pursue the plan of reunification. Wilkes County DSS was unable to contact [Respondent]. In the interim between August 12, 2006, and November 30, 2006, Respondent and [her boyfriend] lived at various motels and boarding houses and Respondent broke off her relationship with [her boyfriend]. . . . Respondent did not maintain regular communication with Ms. Hennessey in this period.

. . .

21. That C[.N.P.] and R[.M.H.] have been placed in foster care or placement outside the home of their mother for twenty seven months. That at no time during the twenty seven months the children have been in foster care, has Respondent [] established a safe, stable environment for her sons. That for approximately three of the twenty seven months, November 2007 to January 2008, Respondent was in the custody of Stokes and New Hanover County Sheriffs awaiting disposition of a Show Cause Order for failure to pay child support.

Although Respondent assigned error to findings of fact 12, 14, 17, and 21, she does not argue them in her brief.¹ Therefore, we deem these assignments of error abandoned and treat them as presumptively conclusive on appeal. See *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426 (2003). Having found these findings to be binding on this Court, we also find that they are sufficient to support the trial court's conclusion that Respondent willfully left her children in foster care for over twelve months and has not made reasonable progress to correct the conditions which led to removal of the children.

We also reject Respondent's arguments that her progress was reasonable given her limited capabilities and that her limitations were also due to poverty. First, when concluding that grounds existed to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), the trial court specifically found that the termination "has not been caused by any financial stability or instability." Indeed, Respondent obtained a job in Wilmington after the initial juvenile petition, and was thus able to work. Finally, although Respondent had a limited education, she was offered the means to enhance her capabilities with vocational rehabilitation but failed to pursue it. Therefore, we conclude

¹ Respondent makes a few references to "the findings" in general, but we have previously held that "[a] broadside exception . . . does not present for review the sufficiency of the evidence to support the entire body of the findings of fact." *In re Beasley*, 147 N.C. App. 399, 405, 555 S.E.2d 643, 647 (2001) (internal citation omitted). "Instead, the trial court's findings of fact are binding on appeal, and we are left to determine whether the trial court's findings support its conclusion of law." *Id.*

that Respondent had the ability to make reasonable progress, but failed to do so. See *In re B.D.*, 174 N.C. App. 234, 248, 620 S.E.2d 913, 922 (2005), *disc. review denied*, 360 N.C. 289, 628 S.E.2d 245 (2006).

Accordingly, we find that the trial court did not err in concluding that grounds existed to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2).

III.

Finally, Respondent contests the trial court's determination that it was in the best interest of the children to terminate Respondent's parental rights. After an adjudication determining that grounds exist for terminating parental rights, the trial court is required to consider six factors in determining whether termination is in the best interests of the child. N.C. Gen. Stat. § 7B-1110(a). We review this determination for an abuse of discretion. *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002).

First, Respondent argues that the trial court abused its discretion in concluding that termination was in the best interests of the children because Respondent offered other relative placements as an alternative to placement with the children's maternal great aunt and uncle. In August 2007, one of Respondent's sisters indicated a desire to have the children placed in her home; and in March 2008, Respondent indicated that another one of her sisters desired to have the children placed in her home. In findings of fact 23 and 24, the trial court noted the sisters'

offers to take the children, but made no specific findings rejecting these proposed placements.

A similar argument was raised and rejected in *In re J.A.A.*, 175 N.C. App. 66, 75-76, 623 S.E.2d 45, 51 (2005), where the respondent argued that termination of her parental rights was not in the best interests of her children because the mother's sister offered to take custody of her children. However, this Court concluded that, while the existence of fit relatives as potential custodians may be considered, the trial court is not required to do so nor "to make findings of fact on all the evidence presented, nor state every option it considered." *Id.* at 75, 623 S.E.2d at 51.

Here, the trial court found that the Respondent's aunt and uncle were committed to the adoption of R.M.H. and C.N.P. and they provided for the children's needs in a loving, safe home environment for the children. The trial court also found that "[t]he placement affords R[.M.H.] and C[.N.P.] the opportunity to grow up in a home with their aunt, B[.P.]." Based on this finding, we hold that the trial court did not abuse its discretion in finding that adoption by the aunt and uncle was in the children's best interests.

Respondent also argues that because the father's rights were not terminated at the time of the order, the children could not have been adopted, and therefore termination of Respondent's parental rights would not aid in adoption and a permanent plan for the children. This argument is without merit.

While "[t]he likelihood of adoption" and "[w]hether the termination of parental rights will aid in the accomplishment of the permanent plan" are two of the factors a trial court must consider in determining whether termination is in a child's best interest, the statute does not *require* that termination lead to adoption in order for termination to be in a child's best interests. N.C. Gen. Stat. § 7B-1110(a). Moreover, DSS introduced evidence that the father, who lives in Mexico, agreed to relinquish his parental rights, but had not yet returned the paperwork to DSS. Accordingly, we conclude that the trial court did not abuse its discretion in concluding that "there is a high probability of adoption for R[.M.H.] and C[.N.P.] upon their being freed for adoption."

Affirmed.

Chief Judge MARTIN and Judge McGEE concur.

Report per Rule 30(e).