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NO. COA08-493

NORTH CAROLINA COURT OF APPEALS

Filed: 16 September 2008

IN THE MATTER OF:

D.I.M.

Wake County
No. 07-JT-48

Appeal by respondent-mother from order entered 22 February 2008 by Judge Eric Craig Chase in Wake County District Court. Heard in the Court of Appeals 25 August 2008.

Office of the Wake County Attorney, by County Attorney Scott W. Warren and Assistant County Attorney Roger A. Askew, for Wake County Human Services petitioner appellee.

Annick Lenoir Peek for respondent-mother appellant.

Anthony H. Morris for Guardian ad Litem.

McCULLOUGH, Judge.

Respondent-mother ("respondent") appeals from an order terminating her parental rights as mother of minor child D.I.M. on the grounds of neglect and failure to pay support.¹ We affirm.

D.I.M. is the seventh of eight children born to respondent and was born on 2 January 2006. Respondent tested positive for cocaine and admitted to using cocaine within 48 hours before the birth. A report was made to Wake County Human Services ("WCHS") but D.I.M.,

¹ D.I.M.'s father M.M. relinquished his parental rights to D.I.M. in November 2007 and is not a party to this appeal.

along with six of his siblings, remained in respondent's care. In May 2006, WCHS discovered respondent was still using cocaine, and the children were voluntarily placed with relatives. D.I.M. was initially placed with his maternal great-aunt and was later placed with his paternal aunt Kim Cotton in August 2006. Respondent completed a substance abuse assessment on 23 May 2006 and was recommended to seek an in-patient residential treatment facility; however, she did not follow the recommendations and did not comply with requests for drug screens. In late June 2006 respondent applied for help from the Raleigh Rescue Mission and was initially rejected due to previous placements there where she tested positive for drugs. She was accepted in July 2006 and stayed for approximately a month before being asked to leave due to a positive drug screen.

In October 2006, respondent was referred to a substance abuse counselor. Her treatment plan included bi-monthly one-on-one counseling, weekly group relapse meetings, random drug tests, and two 12-step meetings per week. Respondent attended four weekly group meetings and one individual counseling session in October, but did not show for several scheduled appointments in November. Her last session with her counselor was in February 2007, when she informed the counselor that she had relapsed during Thanksgiving. Respondent missed the follow-up appointment set for 22 February 2007 and did not see the counselor again. Between October 2006 and January 2007, respondent did not maintain contact with WCHS until an unplanned visit to the home of D.I.M.'s caregiver.

In January 2007, D.I.M. could not stay in the family placement due to interference by respondent. On 24 January 2007, WCHS filed a juvenile petition alleging neglect and seeking custody; nonsecure custody was granted that same day.² At the seven-day hearing held on 30 January 2007, the trial court continued nonsecure custody with WCHS and ordered the adjudication hearing to be set for 13 March 2007. The hearing was held on that date, and the court entered its order on 13 April 2007. The trial court adjudicated D.I.M. neglected and ordered custody to remain with WCHS. The trial court made findings that respondent began drug treatment soon after D.I.M.'s birth but her participation was minimal; she failed to regularly comply with random drug screens when requested; she tested positive for cocaine in the summer of 2006; she did not establish stable housing prior to the filing of the petition; she was employed for a short time, but at the time of the adjudication hearing she was unemployed; she had not provided any financial support to the relative caregivers since May 2006, nor had she maintained regular contact with the relative caregivers. The court ordered respondent to complete a substance abuse reassessment and follow all treatment recommendations, complete random drug screens, complete a parenting class once issues of substance abuse were addressed, and obtain and maintain suitable housing and employment,

² WCHS filed the petition as to both D.I.M. and his 14-year-old sibling D.S. WCHS subsequently dismissed the petition as to D.S., and she is therefore not the subject of this appeal.

among other requirements. Respondent was granted visitation every other week for a minimum of one hour each session.

At a permanency planning review hearing held on 8 June 2007, the trial court found that respondent had not had contact with WCHS since the January 2007 nonsecure custody review hearing, and she had not complied with her case plan or court orders. Specifically, respondent had not complied with substance abuse treatment or submitted to random drug screens; she had not attended parenting education; she was not employed nor did she have safe housing; and she had not visited with the children since they were removed from her custody. The court determined the permanent plan of care for D.I.M. to be adoption, relieved WCHS of its duty to pursue reunification efforts, suspended visitation, and ordered respondent to complete a substance abuse assessment, drug screens, and parenting classes if she wanted to attempt reunification with her children.

Respondent had no contact with WCHS from January until June 2007, and the social worker assigned to the case, Megan Muzychka, was unable to locate or contact respondent during that time. Respondent did not have any contact with D.I.M. during that same time period, either in person or by sending cards, letters, or gifts, nor did she provide any financial support to his caregivers.

Respondent did contact Ms. Muzychka on 22 June 2007 to let her know she was pregnant with her eighth child, she was residing at the Durham Rescue Mission, and that she hoped to move back to

Raleigh. She also wanted to build a case plan with WCHS. On or about 20 July 2007, respondent entered the Kinton Court residential substance abuse treatment program. She informed Ms. Muzychka that she had entered the program, and she sought to resume visitation with D.I.M. Visitation began on 8 August 2007; however, none of the visits were one-on-one because respondent always had at least her newborn baby with her when she met with D.I.M., and other children were sometimes present as well. The first substance abuse assessment completed by respondent since D.I.M. was taken into custody in January 2007 was done on 2 November 2007. WCHS did not have any record of respondent completing any drug screens in 2007, although she did have to submit to testing as part of the Kinton Court program. Respondent's drug screens at Kinton Court were all negative.

On 17 August 2007, WCHS filed a motion to terminate respondent's parental rights alleging as grounds for termination (1) neglect, (2) failure to pay support for the six months prior to the petition, (3) willfully leaving the child in foster care for more than twelve months without making reasonable progress, and (4) abandonment. The hearing was held on 22 and 23 January 2008. At the start of the hearing, WCHS withdrew the ground of willfully leaving the child in foster care for more than twelve months without making reasonable progress. The trial court took judicial notice of the underlying file in the case, consisting of prior court orders. In the adjudication phase of the hearing, testimony

was taken from social worker Megan Muzychka, substance abuse counselor Pat Vanscore, D.I.M.'s paternal aunt Kim Cotton, and respondent.

Respondent's testimony revealed that she was last employed from October 2006 to January 2007 as a nursing assistant, that from January 2007 she was in "active addiction" and living on the street, and that she entered the Kinton Court residential substance abuse treatment facility in July 2007. At the time of the termination hearing, respondent was caring for her youngest child and was waiting to move into an apartment at Kinton Court so she could have two of her older children returned to her from WCHS custody. She stated her hope to have all eight children returned to her at some point in the future.

After hearing the evidence on grounds, the trial court found that clear, cogent, and convincing evidence was presented to support the grounds of neglect and failure to pay support for the six months prior to the filing of the petition. The court declined to find the ground of abandonment. After the disposition phase of the hearing, the trial court concluded termination was in the best interests of the child and terminated respondent's parental rights.

On appeal, respondent raises two issues: (1) the trial court erred in terminating her parental rights on the basis of neglect where evidence shows that respondent is currently caring for an infant and that WCHS intends to return respondent's three- and four-year-old children to her care; and (2) the trial court erred in terminating parental rights on the ground of failure to pay

support where no evidence was presented to show that respondent had the ability to earn a living in the six months prior to the filing of the termination petition.

"The standard of review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law.'" *In re Shepard*, 162 N.C. App. 215, 221-22, 591 S.E.2d 1, 6 (2004) (quoting *In re Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984)). Findings of fact supported by competent evidence are binding on appeal even if evidence has been presented contradicting those findings. *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988). Once a trial court has determined that at least one ground exists, the trial court then decides whether termination is in the best interests of the child. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001).

A trial court may terminate parental rights based on neglect "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) (2007). A "neglected juvenile" is defined as

[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.

N.C. Gen. Stat. § 7B-101(15) (2007). A prior order adjudicating neglect is admissible evidence to show past neglect. *In re Ballard*, 311 N.C. 708, 713-14, 319 S.E.2d 227, 231 (1984). However, termination of parental rights may not be determined solely on a finding of past neglect. *Id.* at 714, 319 S.E.2d at 231-32. A trial court must find either that neglect exists at the time of the termination hearing or that there is a reasonable likelihood of repetition of neglect if the children were returned to the parents. *Id.*; see also *In re Reyes*, 136 N.C. App. 812, 526 S.E.2d 499 (2000). This is especially true if a respondent has not had custody of the child for quite some time. *Ballard*, 311 N.C. at 714, 319 S.E.2d at 231.

As part of her argument challenging the ground of neglect, respondent challenges certain findings of fact as being unsupported by competent evidence and maintains that the trial court should not have terminated her rights where WCHS stated it intended to return two of respondent's other children to her care. We do not agree with respondent's arguments.

Respondent first assigns error to the trial court's finding of fact 18 that "[t]he mother has not participated in any parenting education focused on parenting a two year old child." WCHS social worker Megan Muzychka testified that, to her knowledge, respondent did not attend any parenting classes in the time frame between January 2007 and 17 August 2007 when the termination motion was filed. The guardian *ad litem*'s court report from 30 November 2007

does acknowledge that respondent began participating in Strengthening Families, a parenting program approved by WCHS. Respondent continued to participate in this program up until the 22 January 2008 hearing. However, no evidence was presented that this program was specifically designed for or focused on parenting a two-year-old child and respondent points to no evidence which directly contradicts this finding. Thus, the finding was not made in error and this assignment of error is therefore overruled.

Respondent next challenges a finding of fact regarding her substance abuse treatment:

25. That the mother has a history of beginning substance abuse treatment and not completing it. A substance abuse assessment in May 2006 recommended inpatient treatment, but the mother did not follow through with the necessary appointments. In June 2006, the mother was refused admission to the Raleigh Rescue Mission due to her history of being asked to leave that program and dirty drug screens. In July 2006, the mother was admitted to the Raleigh Rescue Mission; she remained for approximately one month, then was asked to leave due to testing positive for cocaine.

Respondent contends this finding comes from a review order where the standard of proof was a lower standard than clear and convincing, and the trial court should therefore not be allowed to rely on it. Respondent further argues that her recent progress, which is successful enough that WCHS stated its intention to return two of her other children to her care, belies the finding that she has a history of failing to complete treatment. We do not agree. There is sufficient competent evidence showing respondent's failure

to adequately address her substance abuse problem since WCHS began involvement in early 2006. The finding is supported not only by prior court orders, but also by uncontradicted testimony given at the termination hearing from social worker Ms. Muzychka and from substance abuse counselor Pat Vanscore. This assignment of error is overruled.

The next challenged finding of fact is finding 28, which states "placement of this child with the mother in Kinton Court is likely to result in one of her other young children coming into the care of Wake County Human Services." We note that evidence was presented that respondent was limited to having only three children under the age of 12 live with her while she was living in Kinton Court. Respondent was already taking care of her youngest child, born in August 2007, and WCHS was expecting to return respondent's three- and four-year old children to her care. The two older children had been placed with their maternal great-aunt beginning in May 2006, but that placement was supposed to be temporary and was not a permanent plan for those two children. A reasonable inference may be made that if D.I.M. were returned to respondent's care at Kinton Court, one of the older children would have to remain in the relative placement, which is not a permanent plan, and at some point in the future might have to be taken into care by WCHS. Since the evidence supports the finding, this assignment of error is overruled.

Respondent next argues the trial court erred in entering finding of fact 31, "[t]hat prior to the filing of the motion for

termination of parental rights, the mother had not contacted the relative caregivers for the child since he was placed there to inquire about the child's well-being or health." This finding, however, is supported by testimony given by Kim Cotton, D.I.M.'s paternal aunt, who testified that respondent began contacting her regarding D.I.M. after finding some stability in the Kinton Court program, around August 2007, and that prior to August, respondent did not attempt to make any contact. Respondent contends that since the motion to terminate was filed on 17 August 2007, and testimony indicates respondent began to inquire about D.I.M. in early August, the finding is technically incorrect. The evidence does indicate that visitation resumed between respondent and D.I.M. on 8 August 2007; however, the overwhelming weight of the evidence shows that respondent failed to try to contact D.I.M. or his caregivers for the majority of the time D.I.M. was out of respondent's care. Thus, although the exact date respondent resumed contact with the caregivers might not have coincided precisely with the filing of the motion to terminate parental rights, we find the underlying proposition--that the respondent had not contacted the caregivers until shortly before the motion was filed--was supported by clear, cogent, and convincing evidence. Respondent makes no argument, nor can we conclude, that the exact date this contact occurred was critical to the trial court's determination of neglect. Further, even assuming *arguendo* that this finding constituted error, we hold the trial court's order contains sufficient additional findings of fact--based on clear,

cogent, and convincing evidence--to support the trial court's adjudication order. Therefore, we hold that any error in the trial court's finding is harmless. Respondent's assignment of error is overruled.

Respondent also challenges finding 34, "[t]hat the circumstances of the mother are such that the mother did not make reasonable progress toward correcting the conditions which led to the removal of the child prior to the filing of the Motion for Termination of Parental Rights." Respondent acknowledges that this finding is accurate, but states that the finding ignores the statutory requirement that neglect exist at the time of the hearing held in January 2008. Respondent's argument is misplaced; respondent concedes and we find that this finding of fact is supported by competent evidence. This argument has no merit.

Finally, respondent contends the trial court erred in entering finding 35(a), which states that findings exist to support termination of respondent's parental rights on the ground of neglect, because "it is probable that there would be a repetition of neglect if the child was returned to the care of the mother." Respondent argues that since WCHS stated its intention to return two of respondent's children to her, and that respondent was already caring for a newborn baby, the trial court's finding that a repetition of neglect of D.I.M. would be likely is illogical. We do not agree. The evidence is more than sufficient to support the trial court's finding and ultimate conclusion that a repetition of neglect may occur in the future should D.I.M. be returned to

respondent's care. The evidence shows respondent's history of drug abuse, incomplete participation in substance abuse treatment, her disappearance and lack of contact with WCHS and the social worker assigned to the case for several months after D.I.M. was taken into custody, her failure to contact D.I.M.'s caregivers to learn about his care and visit with him, as well as failure to provide any token of parental love such as letters, cards or gifts for Christmas or birthdays for a significant period of time. Further, respondent had not obtained employment or suitable housing while D.I.M. was in relative placement; although she began her involvement with the Kinton Court program in July 2007, this placement is temporary and respondent was still working on finding a job at the time of the termination hearing. Testimony was given indicating respondent will remain in the Kinton Court program until at least August 2008, and then she will be in a transitional period where she will need to obtain appropriate housing for her children as well as employment. We find the trial court did not err in making this finding as it is supported by competent evidence.

After reviewing the record, prior court orders, transcript, and the findings and conclusions in the trial court's order, we hold the trial court's findings of fact are supported by clear, cogent, and convincing evidence and the findings of fact support the conclusions of law. Therefore, the trial court did not err in terminating respondent's parental rights on the ground of neglect.

Since we find the trial court properly terminated respondent's parental rights on the ground of neglect, we need not address respondent's arguments regarding the ground of failure to pay support. See N.C. Gen. Stat. § 7B-1110(a) (once the trial court finds at least one ground for termination, it must then consider the best interests of the child).

Affirmed.

Judges JACKSON and STEPHENS concur.

Report per Rule 30(e).