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NO. COA08-807

NORTH CAROLINA COURT OF APPEALS

Filed: 6 January 2009

IN THE MATTER OF:

T.D.K., D.D.H.
and J.A.K.

Guilford County
No. 07 JT 89-91

Appeal by Respondents from order entered 14 April 2008 by Judge Susan E. Bray in District Court, Guilford County. Heard in the Court of Appeals 24 November 2008.

Mercedes O. Chut, Guilford County Department of Social Services, for petitioner-appellee.

Margaret Rowlett, for Guardian Ad Litem.

Charlotte Gail Blake, for respondent-appellant mother.

Thomas B. Kakassy, P.A., for respondent-appellant father.

WYNN, Judge.

Under North Carolina law, a court may terminate parental rights by finding a single statutory ground for termination, including neglect, dependency, or abandonment.¹ Here, Respondent-mother and Respondent-father separately contend that the trial court erred in terminating their parental rights on the statutory grounds that their children were neglected, dependent, and abandoned. Because the record shows evidence to support the trial

¹ N.C. Gen. Stat. § 7B-1111(a) (2007).

court's determination that the Father abandoned his children, we affirm the trial court's order terminating his rights. However, because the court failed to make the requisite findings of fact to support terminating the Mother's parental rights on the grounds of neglect and dependency, we reverse the termination of the Mother's parental rights.

In April 2007, the Guilford County Department of Social Services (DSS) filed a juvenile petition alleging that Respondents' children were neglected and dependent. The petition alleged that a nonsecure custody order should be entered because of the children's exposure to domestic violence in the home, the Mother's mental health disabilities, the maternal grandmother's mental health concerns, and the Father's domestic violence and criminal record. DSS took nonsecure custody of the children.

In May 2007, the Mother and Father separately entered into a case plan with DSS. However, on 5 July 2007, the court adjudicated the minor children dependent and neglected. The court found that the Mother had completed substance abuse assessment; attended parenting classes; and resided with her maternal aunt. As to the Father, the court found that he completed the drug assessment, was employed, and had independent housing. The court also found that the Father's visitation with the children on 11 June 2007 "had to be stopped due to [his] behavior. Security had to intervene on the matter and escort [the Father] out of the Department of Social Services' building." Based on these findings, the court concluded

that it was not in the best interest of the children to be returned to their parents.

The court conducted a review hearing on 13 August 2007 and found that neither parent had "successfully initiated or completed the conditions that were requested of them" in their case plan. The court ordered that the children remain in the legal and physical custody of DSS. At the next review hearing on 8 November 2007, the court found that "[s]ince the last court hearing, when the Court was requested to give the parents an opportunity to demonstrate improvement in working towards the plan of reunification, both parents have failed to follow through, and in fact, some of the same factors that have prevented the Court from working towards reunification have occurred again." The court ordered DSS to continue making reasonable efforts to assist in reunification but to proceed with filing a termination of parental rights petition.

In January 2008, DSS filed a petition to terminate the parental rights of both parents pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) (2007) (neglect) and N.C. Gen. Stat. § 7B-1111(a)(6) (2007) (dependency). DSS also sought to terminate the Father's parental rights based upon N.C. Gen. Stat. § 7B-1111(a)(3) (2007) (failure to pay cost of care) and N.C. Gen. Stat. § 7B-1111(a)(7) (2007) (abandonment). By order filed 14 April 2008, the court terminated the parental rights of both parents on grounds of neglect and dependency. The court also terminated the Father's parental rights on the ground of abandonment. The court declined

to find grounds for termination based on § 7B-1111(a)(3) (failure to pay costs of care) as to the Father. The parents separately appeal.

Preliminarily, we point out that a termination of parental rights proceeding is conducted in two phases: (1) adjudication and (2) disposition. See *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). In the adjudication phase, the petitioner has the burden of proving by clear, cogent, and convincing evidence that one or more of the statutory grounds for termination exists under N.C. Gen. Stat. § 7B-1111(a). *Id.* If a petitioner meets its burden of proving one or more grounds for termination, the court then moves to the disposition phase, where it must decide whether termination is in the child's best interests. *Id.*

On appeal, both parents argue that the trial court erred by terminating their parental rights on the grounds of (I) neglect and (II) dependency; and, the Father further challenges the termination of his rights on the ground of (III) abandonment.

I.

First, both parents argue the court erred by terminating their parental rights on the grounds that their children were neglected within the meaning of N.C. Gen. Stat. § 7B-101(15) (2007). We agree.

A neglected juvenile is defined in part as "[a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent[.]" N.C. Gen.Stat. § 7B-101(15). "A finding of neglect sufficient to terminate parental rights must be based on

evidence showing neglect at the time of the termination proceeding." *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997) (citation omitted). However, when a child has not been in a parent's custody for a significant period of time prior to the termination hearing, neglect cannot be established without evidence of respondent's prior neglect and likely repetition of neglect. *In re J.G.B.*, 177 N.C. App. 375, 628 S.E.2d 450 (2006) (finding insufficient grounds for termination where DSS took custody of a child shortly after birth and the child was adjudicated only dependent). Thus, where "there is no evidence of neglect at the time of the termination proceeding . . . parental rights may nonetheless 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 [his or] her parents." *In re Reyes*, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000) (citation omitted).

At the time of the termination hearing, the children had been in the nonsecure custody of DSS for over two years. Although the children were adjudicated neglected on 5 July 2007, the court failed to make a specific finding in its termination order that the children had previously been adjudicated neglected. Further, the termination order does not include a finding that there was a probability of future neglect if the children were returned to either parent. Accordingly, the court failed to make the requisite findings to support its conclusion. We, therefore, hold that the

trial court erred by finding that the statutory ground of neglect supported the order to terminate both parents' parental rights.

II.

Next, the parents contend the court erred by finding and concluding that sufficient grounds existed to terminate their parental rights based upon a finding of dependency within the meaning of N.C. Gen. Stat. § 7B-101(9) (2007). We agree.

A dependent juvenile is defined as a juvenile "in need of assistance or placement because the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or whose parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9). In determining whether a juvenile is dependent, the court is required to "address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005).

Here, the order contains no findings of fact that either parent lacked the ability to provide alternative child care arrangements. Without such a finding, we cannot uphold the court's order terminating the parents' parental rights based on N.C. Gen. Stat. § 7B-1111(a)(6). See *In re Clark*, 151 N.C. App. 286, 289, 565 S.E.2d 245, 247-48 (reversing order when record contained no evidence and court made no findings that the respondent, who was incarcerated, suffered from any physical or mental condition or

that he was incapable of arranging for appropriate supervision for his child), *disc. review denied*, 356 N.C. 302, 570 S.E.2d 501 (2002). Accordingly, we also reverse as to the ground of dependency.

III.

Next, the Father argues that the court erred in finding and concluding that sufficient grounds existed to terminate his parental rights based upon a finding of abandonment. He argues he did not willfully abandon his children because his incarceration interrupted his progress. We disagree.

Grounds for the termination of a parent's rights exist when there is clear, cogent, and convincing evidence that a "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." N.C. Gen. Stat. § 7B-1111(a)(2). "Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175, *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001) (citations omitted).

To support its conclusion that the Father willfully abandoned his children, the court found in pertinent part:

9) . . .

K. Subsequent to signing the above-mentioned case plan, the father has progressed with the terms of his case plan as follows:

i. The father completed the ADS assessment on June 11, 2007 and admitted to using drugs. He missed his appointment at ADS on June 18, 2007 and rescheduled it for June 25, 2007. He attended the ADS appointment on June 25, 2007; however he did not attend the appointment on July 2, 2007, nor has he attended any subsequent appointments with ADS.

ii. In February 2007, the father was employed at Bimini's Seafood Restaurant in High Point, North Carolina working in the kitchen until approximately September 2007. He was released from employment after he was arrested and incarcerated until approximately the 2nd week of October 2007.

. . .

iv. The father incurred criminal charges for assault on a female, felonious possession of cocaine, second degree trespassing, and resisting public officer since entering into the case plan.

v. The father no showed for the parenting assessment appointments on August 13, 2007 and August 20, 2007. He has not rescheduled or attended any subsequent appointments.

vi. The father was referred to the Domestic Violence Intervention Program through Family Services of the Piedmont; however, he has not attended the DVIP program.

vii. The father has not maintained a stable residence. When he is not incarcerated, he has stayed in two boarding housing [sic] with the assistance of family members.

viii. The father did not provide a nurturing attitude or environment during visitation. He last visited with the minor child, T.[D.K.] on June 11, 2007; however, the visit was ended due to the father cursing and yelling obscenities to the extent that the supervisor of security had to be dispatched to the Department of Social Services' building. The father did not submit three negative drug screens to maintain visitation as ordered in the November 2007 court order.

ix. The father has not maintained contact with the Department of Social Services.

. . .

12) Grounds exist to terminate the parental rights of the father pursuant to N.C.G.S. § 7B-1111(a)(7) in that he has willfully abandoned the juveniles for at least six consecutive months immediately preceding the filing of this Petition as demonstrated by his actions in not visiting the minor children, not cooperating with reunification efforts, or attending court hearings.

The above findings are supported by court orders and testimony from DSS social worker Karen Hall. The Father entered into a case plan on 17 May 2007 and was not incarcerated until 20 September 2007. During this time, the Father had the ability to show reasonable progress toward the goals set by DSS, but did not do so. Although the Father maintained stable employment until his incarceration, he also failed to comply with the case plan by incurring criminal charges, not maintaining stable housing, and not attending the domestic violence intervention program or his parenting appointments. His lack of reasonable progress is sufficient to constitute willful abandonment of his children.

We hold that the court's findings were supported by clear, cogent, and convincing evidence and these findings of fact support the court's conclusion that grounds existed to terminate the Father's parental rights under N.C. Gen. Stat. § 7B-1111(a)(7).

We also conclude that the court did not abuse its discretion, during the disposition, in concluding that the termination of the Father's parental rights was in the best interest of his three children.

In determining whether the termination of parental rights is in a child's best interest, the court shall consider the following:

- (1) The age of the juvenile.
- (2) The likelihood of adoption of the juvenile.
- (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
- (4) The bond between the juvenile and the parent.
- (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
- (6) Any relevant consideration.

N.C. Gen. Stat. § 7B-1110 (2007).

At the disposition hearing, Ms. Hall testified to the following: the children are ages five, four, and one; the relationship between the three children and their foster parents is excellent; the two younger children have bonded to their foster mom; the foster parents want to adopt both children; and the foster placement for the eldest, who is a special needs child, is committed to her long term care. Ms. Hall further testified that the bond between the Father and the children is "not good" and that the children "seemed comfortable with [the Mother]."

The court made the following findings of fact in support of its determination:

3. The best interest of the juveniles would require that the parental rights be terminated.

4. All three juveniles are in placements that are permanent for each of them.

5. D.[D.H.] and J.[A.K.] are in a foster home, wherein the foster parents would like to adopt the children. The foster mother is essentially the only mother J.[A.K.] has known due to his young age.

6. T.[D.K.]'s foster parents do wish to provide for her on a permanent basis; however, they are not committed to adoption at this time. They are committed to providing for her care long-term.

7. The children have a very good bond with their respective foster parents.

These findings of fact indicate that the court considered all of the statutorily mandated factors, and came to its decision to terminate the Father's parental rights through a rational reasoning process. Thus, we conclude that the court did not abuse its discretion in concluding that the termination of the Father's parental rights was in the best interests of the children.

Accordingly, we reverse the court's order terminating the parental rights of the Mother and affirm the court's order terminating the parental rights of the Father.

Reversed in part, affirmed in part.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).