NO. COA08-932

NORTH CAROLINA COURT OF APPEALS

Filed: 20 January 2009

IN THE MATTER OF:

M.B.

Cumberland County
No. 06 JT 441

Appeal by respondent-mother from order entered 6 May 2008 by Judge John W. Dickson in Cumberland County District Court. Heard in the Court of Appeals 15 December 2008.

Cumberland County Department of Social Services, by John F. Campbell, for petitioner-appellee.

Hunton & Williams, LLP, by Eric M. D. Zion, for guardian ad litem-appellee.

Janet K. Ledbetter, for respondent-appellant.

CALABRIA, Judge.

Respondent-mother ("respondent") appeals from the trial court's order terminating her parental rights with respect to the minor child, M.B. We affirm the trial court's order.

On 8 June 2006, M.B. was placed in the custody of Cumberland County Department of Social Services, ("DSS") pursuant to a nonsecure custody order based on allegations that M.B. was a dependent juvenile because: 1) respondent was unable to maintain a stable living environment; and 2) respondent would leave M.B.

with friends or relatives for periods of time and did not provide food, clothing or any contact information.

On 12 September 2006, based upon respondent's stipulation, the trial court adjudicated M.B. a dependent juvenile. Respondent was ordered to complete parenting classes, complete a substance abuse assessment and treatment program, submit to random drug testing, maintain suitable and stable housing, and maintain stable employment. Respondent was allowed supervised visitation contingent upon negative drug screens.

On 19 December 2007, DSS filed a petition to terminate respondent's parental rights to M.B., asserting as grounds for termination that respondent: (1) willfully left the juvenile in a placement outside of the home for more than twelve months without making reasonable progress to correct the conditions that necessitated the placement, and (2) willfully failed to pay a reasonable portion of the cost of care for the juvenile for more than six continuous months immediately prior to the filing of the petition.

A hearing was held on the petition on 14 April 2008. The trial court entered the following adjudication findings of fact pertinent to respondent:

> 12. That the juvenile has been in the continual care of the Cumberland County Department of Social Services since on or before June, 2006. That on or about August 15, 2006, the juvenile was adjudicated dependent based on the Respondent Mother moving from place to place and not having a stable residence and lacking an alternative child care arrangement.

> 13. That the Respondent Mother would leave the juvenile with the maternal grandfather without leaving food or clothing for the juvenile. That the Respondent Mother would also leave the juvenile with other family members without food or clothing.
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> 14. That the Respondent Mother, at that time, was living from hotel to hotel. That the Respondent Mother continued to live from hotel to hotel during the months prior to the filing of the Petition to Terminate Parental Rights.
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> 15. That for the sixth [sic] month period prior to the filing of the Petition to Terminate Parental Rights, the Respondent Mother was employed just about the entire period of time. That the Respondent Mother earned hourly wages of $6.00 per hour at least. That for some jobs, the Respondent Mother made up to $500 per day. That the Respondent Mother was physically able to provide some amount of support for the juvenile, greater than zero.

Based on its findings, the trial court concluded:

> 3. That grounds exist to terminate the parental right of the Respondent Mother . . ., pursuant to G.S. 7B-1111(a)(3) in that juvenile has been placed in the custody of the Cumberland County Department of Social Services for a period of six months next preceding the filing of the Petition and the Respondents have willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

Subsequently, the trial court determined that it was in M.B.'s best interest that respondent's parental rights be terminated and entered an order accordingly. From this order, respondent appeals.

Respondent asserts that the trial court erred in its adjudication order by finding one ground to terminate respondent's parental rights when the trial court's findings of fact were not supported by clear, cogent, and convincing evidence. Specifically,

respondent asserts that only finding of fact number 15 addresses child support and finding of fact number 15 is not supported by clear, cogent and convincing evidence as there is no evidence that respondent was capable of providing financial support during the six month period of 18 June 2007 to 18 December 2007. We disagree.

Termination of parental rights cases involve two separate components. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). In the adjudicatory stage, the burden is on the petitioner to prove that at least one ground for termination exists by clear, cogent, and convincing evidence. N.C. Gen. Stat. § 7B-1109 (2007); *id.* This Court reviews the adjudicatory stage to determine "whether the trial court's findings of fact are based on clear, cogent, and convincing evidence and whether those findings support the trial court's conclusion that grounds for termination exist pursuant to N.C. Gen. Stat. § 7B-1111." *In re C.W. & J.W.*, 182 N.C. App. 214, 219, 641 S.E.2d 725, 729 (2007)(citation omitted). Findings of fact supported by competent evidence are binding on appeal, even where there is evidence which supports contrary findings. *In re Mills*, 152 N.C. App. 1, 6, 567 S.E.2d 166, 169 (2002). "If a conclusion that grounds exist under any section of the statute is supported by findings of fact based on clear, cogent, and convincing evidence, the order terminating parental rights must be affirmed." *Id.* (quoting *In re Ballard*, 63 N.C. App. 580, 586, 306 S.E.2d 150, 154 (1983), *rev'd on other grounds*, 311 N.C. 708, 319 S.E.2d 227(1984)).

Once the trial court has determined that a ground for termination exists, the court moves to the disposition stage, where it must determine whether termination is in the best interest of the child. N.C. Gen. Stat. § 7B-1110(a)(2007). The decision of the trial court regarding best interest is within the discretion of the trial court and will not be overturned absent an abuse of discretion. *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002).

Pursuant to N.C. Gen. Stat. § 7B-1111, the trial court may terminate parental rights where:

> The juvenile has been placed in the custody of a county department of social services, . . . or a foster home, and the parent, for a continuous period of six months next preceding the filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C. Gen. Stat. § 7B-1111(a)(3)(2007). "A parent's ability to pay is the controlling characteristic of what is a 'reasonable portion' of cost of foster care for the child which the parent must pay. A parent is required to pay that portion of the cost of foster care for the child that is fair, just and equitable based upon the parent's ability or means to pay." *In re Clark*, 303 N.C. 592, 604, 281 S.E.2d 47, 55 (1981). Moreover, "nonpayment would constitute a failure to pay a 'reasonable portion' if and only if respondent were able to pay some amount greater than zero." *In re Bradley*, 57 N.C. App. 475, 479, 291 S.E.2d 800, 802 (1982).

In this case, testimony at the hearing constituted clear, cogent, and convincing evidence to support the finding that respondent mother worked during the relevant six month period and was physically able to provide some amount of support for M.B., greater than zero. Respondent's own testimony supports the court's finding. Respondent testified that she worked as a dancer at the Pure Titanium Club in 2007 and sometimes earned as much as $500.00 an evening. Following her job at Pure Titanium, respondent worked at Cash Converters for one month earning $6.25 per hour in September 2007. Respondent's next job, at Baymont Inn and Suites, was also for a period of one month and there she earned approximately $6.00 per hour. Respondent testified that after M.B. was taken into custody by DSS, she had worked consistently earning an amount above the minimum wage. Respondent further testified that although she did not have a high school diploma, she could get jobs, however, they were not jobs she considered "decent." Most importantly, respondent testified she was capable of paying some amount for the support of M.B. but that she had not done so because no one told her she had this obligation. On the basis of this evidence, the trial court could properly conclude that respondent had some income during the six months preceding the filing of the petition for termination of parental rights, giving her the ability to pay an amount greater than zero for M.B.'s support, and respondent willfully failed to pay any support. Accordingly, this assignment of error is overruled.

Respondent further asserts that the trial court erred by failing to make specific findings of fact in the adjudication order that respondent's failure to pay child support was willful.

"The word 'willful' means something more than an intention to do a thing. It implies doing the act *purposely* and *deliberately*. Manifestly, one does not act willfully in failing to make support payments if it has not been within his power to do so." *In re Maynor*, 38 N.C. App. 724, 726, 248 S.E.2d 875, 877 (1978)(emphasis in original)(citations omitted).

Here, the trial court found that respondent was employed for almost the entire period of time during the six months preceding the filing of the petition for termination of parental rights; that respondent earned hourly wages of at least $6.00 per hour; that for some jobs, respondent earned up to $500 per day; and, that respondent had the ability to pay some amount greater than zero. Furthermore, respondent testified that she was willing and able to pay child support if she had been ordered to do so.

The absence of a court order, notice, or knowledge of a requirement to pay support is not a defense to a parent's obligation to pay reasonable costs. *See In re T.D.P.*, 164 N.C. App. 287, 289, 595 S.E.2d 735, 737 (2004), *aff'd*, 359 N.C. 405, 610 S.E.2d 199 (2005); *In re Wright*, 64 N.C. App. 135, 139, 306 S.E.2d 825, 827 (1983). As discussed above, we believe the evidence supports the trial court's conclusion that respondent had the ability to pay an amount greater than zero for M.B.'s support and

willfully failed to do so. Accordingly, we affirm the order of the trial court.

Affirmed.

Judges WYNN and BRYANT concur.

Report per Rule 30(e).