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NO. COA09-1115

NORTH CAROLINA COURT OF APPEALS

Filed: 2 February 2010

IN THE MATTER OF:

H.R.S. & R.F.S.

Iredell County
Nos. 06 JT 240, 241

Appeal by respondent-mother from judgment entered 15 June 2009 by Judge L. Dale Graham in Iredell County District Court. Heard in the Court of Appeals 11 January 2010.

Lauren Vaughan, for petitioner-appellee Iredell County Department of Social Services.

Kilpatrick Stockton, LLP, by John M. Moye, for Guardian Ad Litem.

Lucas & Ellis, PLLC, by Anna S. Lucas, for respondent-appellant.

STEELMAN, Judge.

Where clear, cogent, and convincing evidence supports the trial court's findings that Mother had neglected her children in the past and that there was a high probability of future neglect if the children were returned to her care, the trial court properly concluded that grounds existed to terminate Mother's parental rights under N.C. Gen. Stat. § 7B-1111(a)(1).

I. Factual and Procedural Background

T.M. (Mother) and W.S. (Father) are the parents of H.R.S. and R.F.S., ages six and eight. In 2001, shortly after H.R.S. was born, Mother married R. Miller (Miller). On 7 July 2006, the Iredell County Department of Social Services (DSS) received a report that Miller had hit both H.R.S. and R.F.S. in the face with his hands and a belt. There were also concerns about the children being "involved in adult subject matters" and Mother's inability to care for the children because of mental health issues. DSS determined that the family needed DSS services and developed a case plan. In September 2006, Mother separated from Miller, and she and the children moved in with R. Porter (Porter). On 30 November 2006, the children went to school with visible bruises on their bodies. DSS was immediately contacted and investigated the incident. The following is DSS's summary of the events that transpired the previous two days:

On or about Tuesday November 28, 2006, [R.F.S.] was disciplined by both her mother and caretaker ([Porter]) for "lying." The child was hit with a belt and a "switch" that left bruising and broken skin on her buttocks, hips and legs. There also appears to be bruises in different stages of healing on her lower back. The minor child also suffered a bruise on her neck from [Porter] grabbing her. On or about November 29, 2006, the minor child [H.R.S.] suffered extensive bruising on her buttocks, legs, hand and arm as a result of being hit by her mother and her caretaker, the mother's boyfriend, . . . Porter. The child has deep purple bruises on her buttocks and cut marks down the back of her legs and inner thighs. Some of the marks broke the skin causing bleeding. Both children report that they were beat because they were going to "murder [Porter]." . . . On November 30, 2006, the Mother admitted that she and [Porter] spanked both children for lying. The mother

stated that she did not want to get charged with a murder. She stated that the children were going to kill [Porter] and say that she did it. The mother has a diagnosed mental illness and has been hospitalized previously.

On 30 November 2006, the children were placed in DSS's custody by court order. The next day, both Mother and Porter were arrested for assault with a deadly weapon with intent to cause serious injury and an assault on a child under 12. Mother subsequently posted bond and was released pending trial. Upon her release, Mother returned to Porter's residence, but left shortly thereafter because she had started a relationship with C. Tolliver (Tolliver). Mother moved into Tolliver's parent's residence. Mother subsequently pled guilty to aiding and abetting felony child abuse and spent ninety days in jail.

On 2 April 2007, H.R.S. and R.F.S. were adjudicated abused and neglected juveniles. Mother was ordered to comply with her Family Services Case Plan, enter into and complete a psychological evaluation, and complete both parenting and anger management training. Father had been contacted on several occasions and was informed his children were in foster care. Father refused to give DSS his address and his whereabouts remained unknown.

By an order entered 18 December 2007, reunification efforts with Mother ceased. Mother had completed her parenting classes, but there were still concerns regarding her inability to apply parenting techniques. Mother was also inconsistent in attending her counseling sessions and taking her prescription medications.

On 14 May 2008, the trial court determined that the best plan of care for the children was "TPR/adoption."

On 18 August 2008, DSS filed a petition to terminate both Mother and Father's parental rights. DSS alleged four grounds for termination against both Mother and Father: (1) neglect pursuant N.C. Gen. Stat. § 7B-1111(a)(1); (2) willfully leaving the children in foster care pursuant to N.C. Gen. Stat. § 7B-1111(a)(2); (3) willfully failing to pay a reasonable portion of the children's cost of care pursuant to N.C. Gen. Stat. § 7B-1111(a)(3); and (4) willful abandonment pursuant to N.C. Gen. Stat. § 7B-1111(a)(7). DSS also alleged that Mother was incapable of providing for the proper care and supervision of the children pursuant to N.C. Gen. Stat. § 7B-1111(a)(6).

A termination hearing was held on 11, 18, and 23 February 2009. The trial court concluded that grounds existed to terminate Mother's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and (7), and Father's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), (3), and (7). The trial court further determined that it was in the best interests of the children to terminate Mother and Father's parental rights. Mother appeals. Father is not a party to this appeal.

II. Grounds for Termination

In her first argument, Mother contends the trial court erred by concluding that DSS had established by clear, cogent, and convincing evidence that grounds existed to terminate her parental

rights based upon abuse and neglect pursuant to N.C. Gen. Stat. § 7B-1111(a) (1). We disagree.

A. Standard of Review

In the adjudicatory stage of a termination of parental rights hearing,

the petitioner has the burden of establishing by clear and convincing evidence that at least one of the statutory grounds listed in N.C. Gen. Stat. § 7B-1111 exists. We review whether the trial court's findings of fact are supported by clear and convincing evidence and whether the findings of fact support the conclusions of law.

In re Anderson, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (internal citations omitted). Unchallenged findings of fact are deemed to be supported by competent evidence and are binding on appeal. *In re M.A.I.B.K.*, 184 N.C. App. 218, 222, 645 S.E.2d 881, 884 (2007).

B. Analysis

N.C. Gen. Stat. § 7B-1111(a) (1) provides that the trial court may terminate the parental rights upon a finding that "[t]he parent has abused or neglected the juvenile." N.C. Gen. Stat. § 7B-1111(a) (1) (2007). In the instant case, the trial court concluded that the children were both abused and neglected juveniles as defined by N.C. Gen. Stat. § 7B-101. However, N.C. Gen. Stat. § 7B-1111(a) (1) clearly states that a finding of *either* abuse or neglect is adequate grounds for termination of parental rights. Because DSS's termination petitions only alleged neglect under 7B-1111(a) (1), we focus our analysis on whether the trial court properly terminated Mother's parental rights on that basis.

A neglected juvenile is one who "does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; . . . or who lives in an environment injurious to the juvenile's welfare" N.C. Gen. Stat. § 101(15) (2007).

To establish neglect as a ground for termination of parental rights, the petitioner must present clear, cogent, and convincing evidence that (1) the child is neglected as described in N.C. Gen. Stat. § 7B-101(15) above, and (2) the child "has sustained some physical, mental, or emotional impairment . . . or there is substantial risk of such impairment as a consequence of the neglect." *In re Beasley*, 147 N.C. App. 399, 403, 555 S.E.2d 643, 646 (2001) (internal citation and quotation omitted). Neglect must exist at the time of the termination hearing, or *if the parent has been separated from the child for an extended period of time, the petitioner must show that the parent has neglected the child in the past and that the parent is likely to neglect the child in the future.* *In re Ballard*, 311 N.C. 708, 714-15, 319 S.E.2d 227, 231-32 (1984)

In re C.W. & J.W., 182 N.C. App. 214, 219-20, 641 S.E.2d 725, 729 (2007) (emphasis added). The trial court must "consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *Ballard*, 311 N.C. at 715, 319 S.E.2d at 232 (citation omitted).

The trial court made the following findings of fact to support its conclusion that grounds for termination of parental rights existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(1):

7. That the Court takes judicial notice of the underlying juvenile file. The evidence presented to the Court is sufficient to support the allegations of the TPR Petitions

and sufficient to find grounds for termination of the parental rights of the parents.

. . . .

10. That on or about November 28, 2006, the minor children were living with the Respondent Mother and her boyfriend, . . . Porter. On or about this date, Mr. Porter accused the minor children of lying and maintained that the minor children were contemplating a murder plot against him. The Respondent Mother apparently placed some credence in this plot, even though the minor children were only six and eight years old at the time.

11. That thereafter, the Respondent Mother and Mr. Porter punished the minor children by striking them with a belt and switch about the buttocks and legs; this assault left numerous severe bruises on the minor children. The minor child [H.R.S.] sustained the most extensive bruising, leaving her entire buttocks completely and extensively bruised to the point that no flesh was of a natural color. Switch marks were also found on the children's lower thighs and hands, where they had attempted to deflect the blows. That the photographs of these children show the most severe bruising this Court has ever seen.

12. That the Respondent Mother denied she inflicted the bruises on these minor children but admitted to the administration of the beating, and she was present during the entire time and condoned the punishment and assaults inflicted by Mr. Porter on the minor children.

13. That the Respondent Mother did little if anything to attempt to protect the minor children.

. . . .

16. That the Respondent Mother entered into a Family Services Case Plan with the Petitioner pursuant to which she agreed to address the following areas of concern: lack of stable employment, parenting, resolution of criminal charges, transportation, lack of independent and stable housing, and mental health needs.

17. That the Respondent Mother has obtained employment, completed parenting classes and paid some child support for the minor children.

. . . .

19. That the Respondent Mother has numerous mental health and psychological issues, including bi-polar disorder and generalized anxiety.

20. That the Respondent Mother receives some medication for these mental health issues, but is at best inconsistent in getting treatment for her mental health needs.

. . . .

22. That the Respondent Mother has not seen the minor children since November of 2007, which was the approximate date the Petitioner was relieved of reunification efforts with the Respondent Mother.

23. That the Respondent Mother has only called to inquire about the minor children one time since that time, and has not attempted to arrange any visitation with them since that time.

24. That on February 20, 2007, the minor children were adjudicated abused and neglected on the underlying Juvenile Petitions; they have remained in the custody of the Iredell County Department of Social Services on a continuous basis since December 1, 2006.

25. That the Court finds that there is a high likelihood of reoccurrence of abuse and neglect of the minor children if they were reunified with the Respondent Mother.

. . . .

27. That the Court concludes that these minor children are abused and neglected in that the minor children's Respondent Mother inflicted or allowed to be inflicted physical abuse on the children and they did not receive proper care, supervision or discipline from either of their Respondent Parents (or their caregivers). Further, the minor children lived

in an injurious environment which was injurious to both their health and welfare.

Mother challenges findings of fact 11, 12, 20, 22, 23, and 25 as not being supported by clear, cogent, and convincing evidence.

i. Prior Neglect

As to findings of fact 11 and 12, Mother contends that there was no evidence in the record that Mother inflicted the bruises on the children or that she had condoned the punishment and assaults inflicted by Porter.¹

On 30 November 2006, Mother admitted that she and Porter had "spanked" the children for lying about an alleged plot to kill Porter. As a result of this "discipline", the children suffered extensive bruising on their arms, legs, and buttocks. In her initial interview with DSS, Mother "was very unemotional, explaining that the children kept lying and they didn't know what else to do." Mother blamed the children's behavior for the reason they were going into foster care, and stated the children were "crazy" and asked "what do you do with rotten children?" As Mother left the interview, she told the children "they shouldn't have lied."

In its adjudication order, the trial court found that: (1) "Respondent Mother did admit that she and Mr. Porter had spanked

¹We note that in Mother's appellate brief she concedes that "[b]ased on the evidence presented to the trial court, it cannot be argued that the children were not abused and neglected as a result of . . . Porter beating them."

both of the minor children for lying[;] (2) Mother informed DSS that R.F.S. "did not get hit as much" as H.R.S. because she knew R.F.S. had multiple personalities; and (3) the children informed law enforcement that Mother "whips" them sometimes, but she does not leave bruising.

At the termination hearing, Mother again admitted that she had "spanked" her children on 28 and 29 November 2006, but stated that she was not responsible for their injuries. Mother contended that although she was present when Porter was beating the children and suspected the children were in a lot of pain, she never checked the children for injuries nor gave the children pain medication. Mother also asserted that she never saw the bruises on the children until DSS showed her pictures. This assertion was made despite the fact that the trial court stated that DSS's photographs of the children's injuries showed "the most severe bruising [the] Court ha[d] ever seen."

We hold that there was clear, cogent, and convincing evidence in the record supporting the trial court's findings of fact 11 and 12, that Mother participated in and condoned the physical abuse inflicted upon the children on 28 and 29 November 2006.

ii. Inconsistent Mental Health Treatment

As to finding of fact 20, Mother contends that the trial court erred by finding Mother "is at best inconsistent in getting treatment for her mental health needs."

It is undisputed that Mother "has numerous mental health and psychological issues, including bi-polar disorder and generalized anxiety." As part of Mother's case plan she was ordered to obtain

a psychological evaluation, maintain all counseling and case management services, and to take all of her medications. The most important factor in her case plan was her "mental health."

At the termination hearing, both Nicole Winterhalter (Winterhalter), a staff psychologist at My Sister's House, and Jessica Marge (Marge), a DSS social worker, testified regarding Mother's progress as to her mental health treatment. Winterhalter described Mother's attendance to her counseling sessions as "fairly sporadic" and testified that "we still have work left to do" as to her identified issues. Winterhalter informed DSS that Mother had developed goals to achieve, but had "not even begun to work on her goals." Winterhalter also reported that Mother "fails to see the role she plays in her children's lives; [Mother] is wrapped up in a world with out [sic] her children." Mother only attended eight of seventeen appointments with Winterhalter that were scheduled from January until November 2007. Mother did not attempt to schedule any other appointment with Winterhalter after November.

Marge also testified that Mother was "very inconsistent" in attending the counseling sessions scheduled in 2007. Mother did not receive any counseling from November 2007 until August 2008. On 11 August and 6 October 2008, Mother attended counseling sessions with Cheryl Goldberg at New River Behavioral Healthcare. However, these were the only counseling sessions attended at that facility within a five-month period. Mother was not attending counseling with Goldberg at the time of the termination hearing. Mother had also visited a psychiatrist, Dr. Peters, on two occasions in September and December 2008. When DSS asked why she

had not been attending counseling regularly, Mother "didn't seem to be very concerned and she basically said, 'Well, I've gone when I felt I needed to go.'" Mother also continuously denied that she had bi-polar disorder despite being diagnosed with this disorder on several occasions. The portion of the trial court's finding of fact 20, which states Mother "is at best inconsistent in getting treatment for her mental health needs" was supported by clear, cogent, and convincing evidence in the record.

iii. Lack of Contact with the Children

Mother contends the trial court erred by making findings of fact 22 and 23 regarding her lack of contact with the children since November 2007. Mother contends these findings were erroneous because she was under a court order prohibiting her from visiting the children.

A review of the trial court's permanency planning orders shows that as of 6 November 2007, Mother was ordered to visit the children once per week. Mother's visitation with the children was not prohibited until 18 March 2008. During this four-month period, Mother did not visit the children despite the permanency planning order.

Although Mother's visitation with the children ceased in March 2008, nothing in the trial court's order prohibited Mother from calling DSS to inquire about the welfare of her children. DSS worker Marge testified that from November 2007 until the termination hearing in February 2009, Mother had only once contacted her to discuss the children. The trial court's findings

of fact 22 and 23 are supported by clear, cogent, and convincing evidence.

iv. Probability of Repetition of Neglect

Mother finally contends that the trial court erred by finding that there is a high likelihood of a repetition of neglect if the children were returned to Mother's care.

This Court has held that a respondent's failure to make any substantial change in the conditions that led to a child being taken from her care and custody signify a strong probability of a repetition of abuse or neglect. *In re Greene*, 152 N.C. App. 410, 417-18, 568 S.E.2d 634, 639 (2002). In *In re Greene*, this Court held that there was not a substantial change in the conditions that led to the child's removal from the respondent's care based upon the following evidence presented at the termination hearing: (1) the respondent's prior abusive behavior; (2) the respondent's failure to comply with a court order prohibiting her from providing child care services to other minor children; (3) despite attending numerous therapy sessions and treatment for her mental health issues, the respondent continued to exhibit behaviors related to her disorder; and (4) the respondent stopped her therapy sessions and treatment after making only minimal progress and before she had met any of her goals or objectives. *Id.* at 417, 568 S.E.2d at 638-39.

In the instant case, the trial court's other findings of fact establish that Mother participated in and condoned the physical abuse inflicted upon the children, but failed to take responsibility for her role in the physical abuse; (2) Mother has

several documented mental illnesses, has failed to acknowledge one of her disorders, and has been inconsistent in seeking treatment for these illnesses; and (3) Mother had only once contacted DSS in over a year to inquire about the children's welfare.

In addition, although Mother had completed her court-ordered parenting classes, "she continued to have difficulty appropriately parenting the children." The Termination of Parental Rights Summary dated 14 January 2009, which was fully incorporated into the trial court's termination order, stated that despite completing parenting classes "[Mother] would encourage and engage in inappropriate topics of conversation with the children, encourage them to date and focus on having boyfriends as well as talking to them about her relationship with her own boyfriend." The report also stated that during her parenting classes Mother's "discipline and consequences continued to be extreme" and Mother's parenting teacher "could not indicate whether [Mother] would be able to apply the skills she learned in class."

Based upon the holding in *In re Greene*, Mother has failed to make any substantial change in the conditions that led to the children being taken from her care and custody. Clear, cogent, and convincing evidence supports the trial court's finding that there is a high likelihood of the repetition of neglect if the children were returned to Mother's care.

III. Conclusion

The evidence in the record and the trial court's findings of fact clearly establish that: (1) the children were neglected as defined by N.C. Gen. Stat. § 7B-101(15) and they had sustained

physical impairments as a consequence of this neglect, *In re C.W. & J.W.*, 182 N.C. App. at 220, 641 S.E.2d at 729; and (2) that there was a high probability of future neglect if they were returned to Mother's care. Because we hold that the trial court properly based termination on the ground of neglect pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), we need not address Mother's argument regarding willful abandonment. *In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990). We further note that Mother does not challenge the trial court's best interest determination. The trial court's order terminating Mother's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) is affirmed.

AFFIRMED.

Chief Judge MARTIN and Judge ELMORE concur.

Report per Rule 30(e).