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NO. COA09-218

NORTH CAROLINA COURT OF APPEALS

Filed: 7 July 2009

IN THE MATTER OF:
N.M.

Buncombe County
No. 08 JT 217

Appeal by Respondent from judgment entered 2 December 2008 by Judge Marvin Pope, Jr. in Buncombe County District Court. Heard in the Court of Appeals 8 June 2009.

J. Suzanne Smith, for Buncombe County Department of Social Services, Petitioner-Appellee.

Janet K. Ledbetter, for Respondent-Appellant.

Michael N. Tousey, for Guardian ad Litem

BEASLEY, Judge.

R.H. (Respondent), father of N.M.¹, appeals from an order terminating his parental rights. For the reasons stated below, we affirm.

On 25 July 2007, N.M. was four months old when the Buncombe County Department of Social Services (Petitioner) received a report from Florida Child Protective Services. The report alleged that N.M.'s parents were in Buncombe County, North Carolina, with N.M., having fled from the State of Florida after the mother was notified that N.M. was about to be removed from her custody. The next day,

¹ To protect their privacy, some parties are referred to by their initials in this opinion.

Petitioner located the mother, Respondent, and N.M. at a motel in Buncombe County. N.M. was removed from the motel and placed with his maternal uncle and aunt. The child was adjudicated neglected on 19 September 2007 and placement was continued with the maternal uncle and aunt until 30 November 2007, when he was placed with another couple.

Respondent appeared for a hearing for the first time on 27 November 2007. He missed the next review hearing on 22 January 2008 due to his incarceration. At a review hearing on 8 May 2008, Respondent informed the trial court that he sought to regain custody of N.M. At that time Respondent was incarcerated for burglary and assaulting N.M.'s mother.

On 28 May 2008, N.M.'s mother executed a voluntary relinquishment of her parental rights of N.M. Subsequently, the trial court entered a review order relieving Petitioner of reunification efforts on 23 June 2008.

On 3 July 2008, Petitioner filed a petition to terminate the parental rights of both parents. On 14 July 2008, Respondent wrote a letter contesting termination of his parental rights. On 4 September 2008, Petitioner filed notice of voluntary dismissal of the petition filed 3 July 2008 and filed a second petition to terminate parental rights on 4 September 2008. On 23 October 2008 the trial court ordered that Respondent's parental rights be terminated.

The trial court found that, from the time N.M. was removed from his custody, Respondent failed to participate in the services

provided by DSS, with the exception of his attendance at one parenting class session. He did not complete a substance abuse assessment nor complete any substance abuse treatment. Respondent also failed to comply with an order requiring him to reimburse Petitioner for the cost of paternity testing. Prior to his incarceration, Respondent had visited the child twice. He had not participated in any court-ordered services in support of reunification with N.M., although he insisted that he did not want N.M.'s mother to rear him. Respondent continued to engage in activities that led to the removal of N.M. from the home, including domestic violence, substance abuse, and other criminal activity. Respondent also violated an earlier trial court order by writing several letters to N.M.'s mother from jail. The trial court made the following findings of fact based upon Respondent's testimony at the hearing:

20. The respondent father testified at this hearing that in July of 2007 he was living at the Rock Haven Terrace motel with the respondent mother and the minor child. The respondent father testified that he was using cocaine up until his incarceration on April 1, 2008. The respondent father testified that he was using crack cocaine while caring for the minor child. He testified that he smoked crack cocaine in the motel room with the minor child; however[,] he further testified that the minor child was never exposed to the smoke. The respondent father further testified that the respondent mother was also using cocaine. He testified that he used cocaine at least two times per week. The respondent father testified that there were times when he and the respondent mother were using crack and caring for the minor child.

21. The respondent father testified that he is currently incarcerated for assault on a

female, driving while impaired and fleeing to elude arrest. The respondent father's projected release date is April 10, 2009. The respondent father acknowledged that he is uncertain if he will use drugs and alcohol again. The respondent father testified that he will not know until he is released from prison.

22. The respondent father acknowledged that he has three other minor children, which he testified are not in his care or custody. The respondent testified that he relinquished his parental rights of the minor children to the paternal grandmother.

23. The respondent father acknowledged that he has not completed any of the court ordered services, which he testified was due to transportation problems and his incarceration. The respondent father testified that while in prison he completed a domestic violence education program. The completion certificate was entered as respondent father's exhibit #1.

24. The respondent father acknowledged domestic violence between himself and the respondent mother. The respondent father testified that he pushed the respondent mother into a fireplace mantel. The respondent father testified that the respondent mother was hospitalized and received three staples as result of injury. The respondent father testified that he was drunk during this altercation.

The trial court terminated Respondent's parental rights on three grounds: (1) pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), neglect; (2) pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), willfully leaving the child in foster care for twelve months while failing to show reasonable progress in correcting the conditions that led to the removal of the child from the home; and (3) pursuant to N.C. Gen. Stat. § 7B-1111(a)(6), failure to provide for the proper care and supervision of the minor child, so that the child is a dependent

juvenile, coupled with the reasonable probability that such incapability will continue for the foreseeable future. The court further found and concluded that it was in N.M.'s best interest to terminate Respondent's parental rights. From this order Respondent appeals.

FINDINGS OF FACT

Respondent first argues that the trial court erred by failing to make specific and ultimate findings of fact to support terminating his parental rights. Respondent argues that the findings of fact are mere recitations of allegations in the petition for termination of parental rights and the testimony presented at the hearing. We disagree.

"In a non[-]jury trial it is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000). "Where there is directly conflicting evidence on key issues, it is especially crucial that the trial court make its own determination as to what pertinent facts are actually established by the evidence, rather than merely reciting what the evidence may tend to show." *Id.* at 480, 539 S.E.2d at 366. The trial court's "factual findings must be more than a recitation of allegations. They must be the 'specific ultimate facts . . . sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence.'" *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (quoting

Montgomery v. Montgomery, 32 N.C. App. 154, 156-57, 231 S.E.2d 26, 28 (1977)).

The findings Respondent cites as recitations of allegations in the petition include the procedural history of the case, from its inception through the filing of the petition. Our Court previously concluded that "a court may take judicial notice of earlier proceedings in the same cause." *In re Byrd*, 72 N.C. App. 277, 279, 324 S.E.2d 273, 276 (1985). The findings of fact that Respondent characterizes as recitations of testimony are statements taken from Respondent's own testimony. The trial court used the language "respondent father testified" in making the findings. However, "[t]here is nothing impermissible about describing testimony, so long as the court ultimately makes its own findings, resolving any material disputes." *In re C.L.C., K.T.R., A.M.R., E.A.R.*, 171 N.C. App. 438, 446, 615 S.E.2d 704, 708 (2005). Respondent does not dispute the accuracy of the findings nor does he proffer that his testimony conflicted with other evidence. Indeed, these findings are accurately based on Respondent's uncontradicted testimony. This assignment of error is overruled.

TERMINATION OF PARENTAL RIGHTS

By his remaining assignments of error, Respondent argues that there was no clear, cogent, and convincing evidence to support the trial court's findings of fact and conclusions of law to support the three grounds to terminate his parental rights. We disagree.

A proceeding to terminate parental rights consists of two distinct stages, adjudication and disposition. *In re Montgomery*,

311 N.C. at 110, 316 S.E.2d at 252. During the adjudication phase, the petitioner must show by clear, cogent, and convincing evidence the existence of a statutory ground authorizing the termination of parental rights. *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614 (1997). "Upon determining that one or more of the grounds for terminating parental rights exist, the court moves to the disposition stage to determine whether it is in the best interests of the child to terminate the parental rights." *Id.* at 247, 485 S.E.2d at 615. In reviewing an order terminating parental rights, the appellate court is bound by the trial judge's findings of fact "where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." *Montgomery*, 311 N.C. at 110-111, 316 S.E.2d at 252-53. "A finding of any one of the enumerated grounds for termination of parental rights under N.C.G.S. 7B-1111 is sufficient to support a termination." *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426 (2003).

We first address the trial court's decision that Respondent's parental rights were subject to termination on the ground that he neglected the child. A neglected juvenile is defined by N.C. Gen. Stat. § 7B-101(15) (2007) as one

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. In determining whether a juvenile is a neglected juvenile, it

is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

"Neglect may be manifested in ways less tangible than failure to provide physical necessities. Therefore, on the question of neglect, the trial judge may consider, in addition, a parent's complete failure to provide the personal contact, love, and affection that inheres in the parental relationship.'" *In re Pierce*, 67 N.C. App. 257, 263, 312 S.E.2d 900, 904 (1984) (quoting *In re Apa*, 59 N.C. App. 322, 324, 296 S.E.2d 811, 813 (1982)).

In determining whether to terminate parental rights on the ground that the parent has neglected a child, the trial court may consider evidence of neglect prior to removal of a child from custody, and "must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984). When a child has been absent from the parent's home for a period of time preceding the termination hearing, "the decision of the trial court must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case." *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999).

Respondent argues that the trial court failed to consider evidence of changed circumstances at the time of the termination

hearing and failed to address the issue of probability of future neglect in addressing the "neglect" issue. We disagree.

The trial court's findings reflect that Respondent abused drugs and alcohol in the presence of the child while he was in his custody and continued to engage in this activity after the child was removed from his custody. Respondent also admitted that he could not give any assurance that he would not engage in drug and alcohol abuse after his release from prison and he admitted that he has committed acts of domestic violence. As a result, despite the presence of evidence to the contrary, there was adequate evidence in the record to support the trial court's finding that N.M. would probably be neglected in the future. Thus, the trial court did not err by concluding that Respondent's parental rights in N.M. were subject to termination for neglect.

Having upheld the determination of one ground to terminate Respondent's parental rights, we need not consider the other grounds. *In re B.S.D.S.*, 163 N.C. App. 540, 546, 594 S.E.2d 89, 93-94 (2004).

For the foregoing reasons, the judgment terminating Respondent's parental rights is affirmed.

Affirmed.

Judges HUNTER, JR. and ERVIN concur.

Report per Rule 30(e).