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NO. COA09-390

NORTH CAROLINA COURT OF APPEALS

Filed: 1 September 2009

IN THE MATTER OF:

C.R. and M.A.R.

Chatham County
No. 07 JA 50
No. 07 JA 71

Appeal by respondent-mother from order entered 14 January 2009 by Judge Beverly Scarlett in Chatham County District Court. Heard in the Court of Appeals 3 August 2009.

Northen Blue, LLP, by Carol J. Holcomb and Samantha H. Cabe, for petitioner-appellee Chatham County Department of Social Services.

Pamela Newell Williams, for the Guardian ad Litem to the minor children.

Mercedes O. Chut, for respondent-appellant mother.

CALABRIA, Judge.

M.R¹ ("respondent"), the biological mother of the minor children C.R. and M.A.R. ("the minor children"), appeals an order entered 14 January 2009 terminating her parental rights to her children. We reverse and remand for additional findings of fact.

In late June 2007, the Chatham County Sheriff's Department received information that drugs were being sold from a home in Moncure, North Carolina. Respondent resided at the home along with

¹ Initials are used throughout to protect the identity of the minor children.

C.R., her boyfriend E.S., her boyfriend's mother, and his brother. E.S. and his mother were the persons primarily responsible for maintaining a drug operation in the home. Respondent was dependent upon the support of E.S. and did not understand the source of his income.

On 28 June 2007, the Chatham County Sheriff's Department executed a search warrant on the home and discovered fifteen kilograms of cocaine, two assault rifles, one pistol, ammunition, \$420,000 in cash, and numerous other items related to the packaging and sale of cocaine. Officers conducting the raid arrested respondent along with the other occupants of the home and called the Chatham County Department of Social Services ("petitioner") to take custody of C.R., then five years old. The officers took respondent to the Chatham County jail where she remained incarcerated until 21 April 2008. At the time of her arrest, respondent was pregnant with M.A.R.

Petitioner filed a juvenile petition on 2 July 2007 alleging C.R. was a neglected and dependent juvenile, and the trial court granted petitioner non-secure custody of the juvenile that same day. Petitioner placed C.R. in a foster care home on 16 July 2007. The trial court heard the juvenile petition on 9 August 2007 and found C.R. was a neglected juvenile. The trial court therefore continued custody of C.R. with petitioner, ordered petitioner to continue to make reasonable efforts to prevent or eliminate the need for placement of C.R., and ordered supervised visits occur with respondent at the Chatham County jail as deemed appropriate by

the treatment team and as allowed by jail officials. The trial court further ordered petitioner to file a juvenile petition and assume temporary custody of respondent's unborn child immediately after birth.

Respondent gave birth to M.A.R. in late August 2007, and petitioner filed a juvenile petition on 4 September 2007 alleging M.A.R. was a dependent juvenile due to respondent's incarceration. After a hearing on 13 September 2007, the trial court entered an order on 21 April 2008 finding M.A.R. was a dependent juvenile. The trial court therefore continued custody of M.A.R. with petitioner, ordered petitioner to continue to make reasonable efforts to prevent or eliminate the need for placement of M.A.R., and ordered supervised visitation with respondent in the Chatham County jail as deemed appropriate by the treatment team and as allowed by jail officials. Petitioner placed M.A.R. in the same foster home as C.R.

On 28 February 2008, the trial court held a permanency planning review hearing for the minor children. From this hearing, the trial court entered an order dated 25 April 2008 ceasing reunification efforts and changing the permanent plan for the minor children to adoption. The trial court then ordered petitioner to file a motion to terminate respondent's parental rights to the minor children, and petitioner filed said motion on 22 April 2008. Petitioner alleged grounds existed to terminate respondent's parental rights because she had neglected both children.

Petitioner also filed petitions to terminate the parental rights of the fathers of the minor children.

In April 2008, respondent entered an Alford plea to charges which are not identified in the record before this Court. The criminal court entered judgment pursuant to the entry of respondent's plea, gave respondent credit for time served pending her trial and released her without further obligation to the court. Additionally, a federal detainer for deportation was lifted.

Upon release, respondent asked petitioner for visitation with the minor children, but petitioner denied her request. Respondent filed a motion for visitation and reinstatement of reunification efforts, which the trial court denied by order entered 20 August 2008. Respondent again filed a motion for reunification efforts and visitation based on a substantial change in circumstances on 23 July 2008. The trial court denied this second motion by order entered 13 November 2008. Respondent thus filed a response to the motion to terminate her parental rights to the minor children on 2 July 2008.

On 5 November and 12 December 2008, the trial court held a hearing on the motion to terminate respondent's parental rights to C.R. and M.A.R. The trial court found grounds existed to terminate respondent's parental rights to M.A.R. pursuant to N.C. Gen. Stat. § 7B-1111(a)(6) (2007). The trial court found grounds existed to terminate respondent's parental rights to C.R. pursuant to N.C. Gen. Stat. §§ 7B-1111(a)(1) and (6) (2007). The trial court further found it was in the best interests of the minor children to

terminate respondent's parental rights. By order entered 14 January 2009, the trial court terminated respondent's parental rights to C.R. and M.A.R. Respondent filed notice of appeal on 21 January 2009. While the trial court also terminated the parental rights of the fathers of the minor children, the fathers are not parties to this appeal.

Respondent argues the trial court erred in concluding grounds existed to terminate her parental rights to C.R. pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). We agree.

"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, 591 S.E.2d 1, 6 (2004) (quoting *In re Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984)). A trial court may terminate parental rights where the parent has neglected the juvenile as defined by N.C. Gen. Stat. § 7B-101. N.C. Gen. Stat. § 7B-1111(a)(1) (2007). The North Carolina Juvenile Code defines a neglected juvenile 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.

N.C. Gen. Stat. § 7B-101(15) (2007). Generally, "[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) (emphasis added). However, it is well established that "a prior adjudication of neglect may be admitted and considered by the trial court in ruling upon a later petition to terminate parental rights on the ground of neglect." *In re Ballard*, 311 N.C. 708, 713-14, 319 S.E.2d 227, 231 (1984). Where evidence of prior neglect is considered, however, a trial court must also consider evidence of changed circumstances and the probability of a repetition of neglect. *In re J.G.B.*, 177 N.C. App. 375, 382, 628 S.E.2d 450, 455 (2006). A trial court may terminate parental rights based upon a past adjudication of neglect if "the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to [his] parents." *In re Reyes*, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000). Additionally, for a trial court to find that a juvenile is a neglected juvenile, "this Court has consistently required that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline." *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (internal citations and quotation marks omitted).

In the instant case, the trial court concluded C.R. had been neglected by respondent "in that he lived in an environment injurious to his welfare and was not properly supervised by his custodian." The trial court's conclusion is based upon the past

finding, reaffirmed at the termination hearing, that respondent allowed C.R. to live in a home where her boyfriend conducted an extensive cocaine operation. The trial court further found that C.R. had been diagnosed with Post Traumatic Stress Disorder, "is impaired and has suffered significant trauma and is at a substantial risk of impairment as a result of respondent[']s neglect as of the time the petition was filed." However, the trial court's conclusion that C.R. had been neglected is based on circumstances that arose in June 2007 and respondent has not had care or custody of C.R. since her arrest on 28 June 2007. The trial court made no findings of fact that would support a conclusion that C.R. was a neglected juvenile at the time of the termination proceeding, and the trial court made no finding of fact that there is a probability of repetition of neglect if C.R. were returned to respondent's custody and care. Although there may be evidence in the record to support such a finding, this Court does not make findings of fact. It is the duty of the trial court to make findings of fact and we are limited to reviewing whether those findings are supported by competent evidence. *In re C.G.A.M.*, ___ N.C. App. ___, ___, 671 S.E.2d 1, 5 (2008) ("Review in the appellate courts is limited to a determination of whether clear, cogent, and convincing evidence exists to support the findings of fact . . . "). Accordingly, the trial court erred in concluding grounds existed to terminate respondent's parental rights to C.R. pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) (2007).

Respondent next argues the trial court erred in concluding grounds existed to terminate her parental rights to both C.R. and M.A.R. pursuant to N.C. Gen. Stat. § 7B-1111(a)(6) (2007). Again, we agree.

A trial court may terminate parental rights upon concluding:

That the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

N.C. Gen. Stat. § 7B-1111(a)(6) (2007). However, petitioner did not allege this ground in its motion in the cause to terminate respondent's parental rights to either minor child. Respondent had no notice that dependency would be at issue during the termination hearing and thus the trial court erred in using N.C. Gen. Stat. § 7B-1111(a)(6) as a ground for terminating respondent's parental rights to the minor children. *See In re S.R.G.*, ___ N.C. App. ___, ___, 671 S.E.2d 47, 50-51 (2009) (holding where a ground was not alleged in the termination petition, it could not be used as a ground for terminating parental rights); *see also In re C.W.*, 182 N.C. App. 214, 228-29, 641 S.E.2d 725, 735 (2007) ("Because it is undisputed that DSS did not allege abandonment as a ground for termination of parental rights, [the] respondent had no notice that abandonment would be at issue during the termination hearing.

Accordingly, the trial court erred by terminating [the] respondent's parental rights based on this ground.").

As discussed above, the trial court erred in concluding grounds existed to terminate respondent's parental rights to C.R. pursuant to N.C. Gen. Stat. §§ 7B-1111(a)(1) and (6). The trial court also erred in concluding grounds existed to terminate respondent's parental rights to M.A.R. pursuant to N.C. Gen. Stat. § 7B-1111(a)(6). These were the only grounds upon which the trial court based its order terminating respondent's parental rights to the minor children. As no valid grounds exist to support the trial court's order, we must reverse the 14 January 2009 order terminating respondent's parental rights and remand this matter to the trial court for further action consistent with this opinion. Based on our disposition, we do not reach respondent's remaining assignments of error.

Reversed and remanded.

Judges MCGEE and JACKSON concur.

Report per Rule 30(e).