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NO. COA10-1054

NORTH CAROLINA COURT OF APPEALS

Filed: 1 March 2011

IN THE MATTER OF:

J.S. and A.S.

Stokes County
Nos. 08 JT 23-24

Appeal by respondents from orders entered 10 and 12 May 2010 by Judge William F. Southern, III in Stokes County District Court. Heard in the Court of Appeals 2 February 2011.

J. Tyrone Browder, for petitioner-appellee Stokes County Department of Social Services.

Pamela Newell, for guardian ad litem.

Richard Croutharmel, for mother, respondent-appellant.

Appellate Defender Staples Hughes, by Assistant Appellate Defender J. Lee Gilliam, for father, respondent-appellant.

STEELMAN, Judge.

Father failed to show that he was materially prejudiced by the trial court's denial of his motion to continue. The trial court did not err by finding that grounds existed to terminate Mother's and Father's parental rights based on neglect where they each failed to comply with portions of their case plan. The trial court did not abuse its discretion in concluding that it was in the juveniles' best interests to terminate Mother's and Father's parental rights.

I. Factual and Procedural Background

R.S. (Mother) and Jo.S. (Father) (collectively, respondents) are the parents of two minor juveniles, J.S. and A.S. Mother has a third child, M.L., who is not the subject of this appeal. This family has a history with the Stokes County Department of Social Services (DSS) dating back to 2006 for repeated incidents of substance abuse and domestic violence. On 11 April 2008, DSS filed juvenile petitions alleging J.S. and A.S. were neglected juveniles, in that they did not receive proper care, supervision, or discipline from their parents; and that they lived in an environment injurious to their welfare. The petitions were filed based upon allegations that Mother and Father were intoxicated and fighting in front of the juveniles. On 22 May 2008, DSS filed amended juvenile petitions. The petition filed for A.S. alleged that she was a neglected juvenile, in that she was not provided necessary medical care and lived in an environment injurious to her welfare. The petition filed for J.S. alleged he was a neglected juvenile, in that he lived in an environment injurious to his welfare. On 24 March 2009, the trial court entered an amended order, which stated, "[t]he respondent mother, through counsel, stipulates that the juveniles are neglected, based upon the definition set out in [N.C. Gen. Stat. § 7B-101(15)], in that they did not receive proper medical and dental care."

Respondents entered into case plans with DSS that required them to submit to random drug screens; get a substance abuse assessment, and follow all recommendations; maintain stable housing

for at least six months; maintain stable employment for three months; obtain a domestic violence assessment and follow all recommendations; complete parenting classes; and attend A.S.'s medical appointments. On 12 January 2009, the trial court ceased reunification efforts with Father and changed the permanent plan to reunification with Mother. On 21 May 2009, the trial court ceased reunification efforts with Mother and changed the permanent plan to custody with a relative or foster parent or adoption.

On 29 September 2009, DSS filed motions in the cause to terminate respondents' parental rights. The matter came on for hearing on 14 January, 21 January, and 26 March 2010. The trial court found that grounds existed to terminate respondents' parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) (neglect) and (a)(2) (willfully left juveniles in foster care). On 10 and 12 May 2010, the trial court entered orders terminating respondents' parental rights.

Respondents appeal.

II. Denial of Motion to Continue Hearing

In his first argument, Father contends that the trial court erred in denying his motion for a continuance when an essential witness did not appear at the hearing. We disagree.

A. Standard of Review

Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review. Continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it. The chief consideration is whether

granting or denying a continuance will further substantial justice. However, if a motion to continue is based on a constitutional right, then the motion presents a question of law which is fully reviewable on appeal.

In re D.Q.W., T.A.W., Q.K.T., Q.M.T., & J.K.M.T., 167 N.C. App. 38, 40-41, 604 S.E.2d 675, 676-77 (2004) (internal citation and quotation omitted).

B. Analysis

On 26 March 2010, Father's probation officer was unable to be in court to testify at the termination hearing. Father moved for a continuance on the bases of due process and compulsory process. The trial court denied Father's motion stating that "[t]he . . . matter has been set for today for some time. . . . I believe we will need to go ahead and-and proceed at this time." Father's counsel subsequently made an offer of proof as to what the probation officer would have testified to: "Your Honor, just, uh, for the record, I'd make an offer of proof that Officer Joyce would testify that, uh, my client wa-, is in compliance with, uh, probation."

To establish that the trial court's failure to give additional time to prepare constituted a constitutional violation, defendant must show "how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion." "A motion for a continuance should be supported by an affidavit showing sufficient grounds for the continuance." "A postponement is proper if there is a belief that material evidence will come to light and such belief is reasonably grounded on known facts."

Id. at 41, 604 S.E.2d at 677 (quotations and alterations omitted).

We first note that there was no affidavit prepared or submitted showing sufficient grounds to support the motion for continuance. The only reason given for the probation officer's absence was that the hearing conflicted with his work schedule. Father argues on appeal that the absence of the probation officer's testimony was prejudicial to Father's case because his testimony would have concerned his substance abuse and unemployment status. However, Father's contentions are purely speculative as the only offer of proof that was made was that the probation officer would testify that Father complied with his probation. Further, there were many other requirements of Father's case plan that he failed to comply with, as discussed *infra*, that provided a basis for the trial court's finding of neglect, including his failure to obtain domestic violence counseling, failure to attend the juveniles' necessary medical appointments, and failure to maintain stable housing. Father has failed to show how his case "would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion." *Id.*; see also *In re D.W.*, ___ N.C. App. ___, ___, 693 S.E.2d 357, 359 (2010) ("[T]he denial of a motion to continue . . . is sufficient grounds for the granting of a new trial only when the defendant is able to show that the denial was erroneous and that he suffered prejudice as a result of the error." (quotation omitted)).

This argument is without merit.

III. Termination of Parental Rights Proceedings

In their first and second arguments, respondents contend that the trial court erred by terminating their parental rights as to J.S. and A.S. We disagree.

A. Standard of Review

A termination of parental rights proceeding involves two stages: adjudication and disposition. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). In the adjudicatory stage of a termination of parental rights proceeding:

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). Findings of fact unchallenged on appeal are deemed to be supported by competent evidence and are binding. *In re M.A.I.B.K.*, 184 N.C. App. 218, 222, 645 S.E.2d 881, 884 (2007).

Once it is established that one or more of the grounds for termination exist, the trial court must proceed to the dispositional stage where the best interests of the child are considered. *In re Blackburn*, 142 N.C. App. at 610, 543 S.E.2d at 908. "We review the trial court's decision to terminate parental rights for abuse of discretion." *Anderson*, 151 N.C. App. at 98, 564 S.E.2d at 602 (citations omitted).

B. Grounds for Termination

In the instant case, the trial court found grounds to terminate respondents' parental rights on the basis of neglect. A trial court may terminate parental rights where "[t]he parent has abused or neglected the juvenile. The juvenile shall be deemed to be . . . neglected if the court finds the juvenile to be . . . a neglected juvenile within the meaning of G.S. 7B-101." N.C. Gen. Stat. § 7B-1111(a)(1) (2009). A neglected juvenile is defined as

[a] juvenile 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) (2009). Neglect must exist at the time of the termination hearing. *In re C.W. & J.W.*, 182 N.C. App. 214, 220, 641 S.E.2d 725, 729 (2007). However, where "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." *Id.* (citation omitted).

i. Mother's Parental Rights

Mother contends that the trial court violated her rights and erred in concluding grounds existed to terminate her parental rights because the evidence failed to support the trial court's findings of fact, and the findings of fact in turn failed to support its conclusions of law. We disagree.

The trial court made the following findings of facts regarding

Mother:

29. On May 22, 2008 the juvenile was adjudicated to be a neglected juvenile in Stokes County District Court by stipulation of the mother and the father.

30. On July 3, 2008 the Stokes County District Court entered a Disposition Order continuing custody of the juvenile with the Stokes County Department of Social Services; and requiring the parents to comply with their case plans.

31. The mother started substance abuse counseling with Samantha Leary Debacco, a therapist at Daymark Counseling Services in October 2008. On March 19, 2009 the mother completed 50 hours of counseling, which was 10 hours more than the required 40 hours to complete the counseling.

32. The mother admits that she has an alcohol problem, and at the completion of the substance abuse counseling she understood that she needed to remain sober which meant total abstinence from alcohol.

33. Despite the mother's completion of the substance abuse program on March 19, 2009, she has had several relapses, and continues to use alcohol.

. . . .

37. On August 14, 2009 the mother was arrested and charged with driving under the influence of alcohol. This charge was dismissed at trial; however the mother testified that she was driving after drinking alcohol on this occasion.

38. After her arrest for driving under the influence on August 14, 2009, the mother checked herself into the ARCA seven week inpatient program; however, she quit the program after only five days. The mother testified that she did not complete the program due to transportation problems and interference with her work schedule.

39. Therapist Samantha Debacko saw the mother at a court hearing during the latter part of 2009 at which time the mother told her that she had relapsed. Ms[.] Debacko recommended that the mother attend a relapse program through Daymark; however, the mother never contacted Ms. Debacko to attend the relapse program. The relapse program would have been at no cost to the mother.

. . . .

42. As of the current date, the mother has not attended any substance abuse relapse program.

. . . .

45. The mother had a domestic violence assessment on February 6, 2009 through Greg Lewis at Daymark Counseling. Twenty six counseling sessions were recommended. The mother started group counseling sessions on February 13, 2009 and attended a total of five sessions through March 27, 2009; however, she never completed the remaining twenty one sessions. The mother testified that she did not complete the program because she did not like the counselor.

. . . .

47. The mother lived at a residence on Main Street in Walnut Cove, North Carolina from April 2009 to November 4, 2009; at which time she was evicted and moved into a two bedroom mobile home on which she has a one year lease. The electricity to the mobile home was cut off in March 2010 due to mother's failure to pay a \$216.00 electric bill. As of March 26, 2010, the bill has not been paid and the electricity is still off. The mother testified that she has the money to pay the bill; however, she has not decided if she is going to continue living in the mobile home.

. . . .

49. Since the Department of Social Services was granted custody of the minor children, [A.S.] has had weekly physical therapy appointments, and the mother has attended one. [A.S.] has had two Botox injections, and the mother attended one of these. The mother did

attend [A.S.'s] oral surgery appointment on June 10, 2008 when she had eight teeth pulled; however, the mother has attended only five of over fifty medical appointments for [A.S.] since the Department of Social Services has had custody.

. . . .

66. Although the mother has made some progress on her case plan, she has failed to make reasonable progress to correct the conditions which led to the Stokes County Department of Social Services taking custody of the juvenile on April 11, 2008. The mother has failed to address the substance abuse and domestic violence issues which existed on April 11, 2008. The mother has also failed to complete essential portions of her case plan as set forth above; and, has acted inconsistently with her rights as a parent.

67. The juvenile was adjudicated as a neglected juvenile by order dated May 22, 2008; and, the mother has failed to complete her case plan and correct the conditions that constituted the neglect. Therefore there is a reasonable likelihood that such neglect will be repeated and continue in the future.

Mother does not specifically challenge any of the above findings of fact in her brief. Rather, Mother makes broad assertions that the trial court's findings of fact regarding her failure to attend A.S.'s medical appointments, unstable housing, failure to complete domestic violence classes, and alcohol relapses were not supported by competent evidence. Mother's arguments mainly center around her asserted justifications for her failure to comply with the requirements of her case plan, *i.e.*, financial constraints, lack of transportation, and that it is normal for substance abusers to relapse, rather than challenging the findings directly. Even though Mother failed to challenge the individual

findings of fact, we have conducted a thorough review of the record and hold that the trial court's findings of fact are supported by clear and convincing evidence.

The trial court's findings of fact tend to show that Mother failed to comply with portions of her case plan in that she failed to: (1) complete substance abuse counseling and continuously relapsed into substance abuse; (2) complete domestic violence counseling; (3) attend a majority of A.S.'s medical appointments; and (4) maintain stable housing. The trial court's findings of fact are sufficient to support the trial court's conclusion of law that Mother "neglected the juvenile[s] within the meaning of G.S. 7B-101 and G.S. 7B-1111(a)(1); and there is a reasonable likelihood of such neglect continuing in the future[.]" See *In re J.W., K.W.*, 173 N.C. App. 450, 465, 619 S.E.2d 534, 545 (2005) (holding that the trial court's finding that the mother failed to comply with her case plan supported a conclusion of neglect), *aff'd per curiam*, 360 N.C. 361, 625 S.E.2d 780 (2006); see also *In re Leftwich*, 135 N.C. App. 67, 72, 518 S.E.2d 799, 803 (1999) (holding that the trial court properly found neglect where the mother had not made meaningful progress in improving her lifestyle, including continuing to abuse alcohol and refusing treatment).

This argument is without merit.

ii. Father's Parental Rights

Father contends that the trial court erred in concluding that grounds existed to terminate his parental rights where the findings of fact were not supported by clear and convincing evidence and the

findings were not sufficient to support its conclusions of law. We disagree.

The trial court made the following findings of fact regarding Father:

29. On May 22, 2008 the juvenile was adjudicated to be a neglected juvenile in Stokes County District Court by stipulation of the mother and the father.

. . . .

53. The father was incarcerated from July 2008 until September 2008 for conviction on three counts of simple possession of schedule IV controlled substance. He was also incarcerated from October 5, 2008 until February 2009 for conviction of possession with intent to sell and distribute a controlled substance. On December 16, 2009, a Department of Social Services social worker asked the father to take a random drug screen; and the father refused.

54. The father completed a substance abuse assessment on May 27, 2008. He was referred to Triumph Counseling Services for substance abuse treatment and a mental health assessment. The father was scheduled to start substance abuse treatment on June 2, 2008; however, he did not attend the appointment. The father did not provide any documentation to the Department of Social Services concerning any substance abuse treatment until the termination of parental rights proceeding began. A certificate of completion for the TASC program was provided at the hearing.

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56. The father has never maintained stable housing for six months. Since April 2008 he has either been in jail, lived with his mother, or his father, or [K.L.] who he married in July 2009. The father and [K.L.] separated around January, 2010 and are currently living in a state of separation. The father currently has no residence of his own.

57. The father has not established any stable employment, and has been mostly unemployed since prior to April 2008. The father has worked occasionally in construction work; but not on a permanent basis.

. . . .

59. The father has not provided any documentation that he has obtained a domestic violence assessment or treatment.

. . . .

61. The father never attended any medical appointments for [J.S.] or [A.S.].

. . . .

63. The father attended two out of five permanency planning meetings for the juvenile.

. . . .

69. The father has made very little progress on his case plan, and has failed to make reasonable progress to correct the conditions which led to the Stokes County Department of Social Services taking custody of the juvenile on April 11, 2008. The father has failed to address the substance abuse and domestic violence issues which existed on April 11, 2008. The father has also failed to complete any other portions of his case plan, other than parenting classes, as set forth above; and, has acted inconsistently with his rights as a parent.

70. The juvenile was adjudicated as a neglected juvenile by order dated May 22, 2008; and, the father has failed to complete his case plan and correct the conditions that constituted the neglect. Therefore there is a reasonable likelihood that such neglect will be repeated and continue in the future.

Father only challenges findings of fact 29, 56, 57, and 69. Because Father failed to challenge the remaining findings of fact, they are deemed to be supported by competent evidence and are

binding on this Court. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

As to finding of fact 29, Father contends that there was no evidence that he previously stipulated to the neglect of the juveniles. In the original neglect adjudication order, the trial court stated:

The juveniles are neglected, according to the definition set out in [N.C. Gen. Stat. §] 7B-101(15) in that they were in an environment injurious on March 9, 2008 [and] March 28, 2008, as set out in the petition and amended petition, when there was violence and substance abuse in their presence. In addition, [A.S. and M.L.] had not been receiving proper medical/dental care, as set out in the petition and amended petition and are therefore neglected juveniles, [N.C. Gen. Stat. §] 7B-101(15).

On 4 December 2008, Father filed a motion to correct judgment on the basis that "Respondents only stipulated to the facts in the Petition and Amended Petition relating to medical and dental care." The trial court subsequently entered an amended order, which stated: "The respondent mother, through counsel, stipulates that the juveniles are neglected, based upon the definition set out in [N.C. Gen. Stat. §] 7B-101(15), in that they did not receive proper medical and dental care." Father argues that because his name was deleted from the finding, there was no evidence as to a previous stipulation. However, the deletion of Father's name appears to be inadvertent as Father clearly acknowledged that he stipulated to neglect based upon the juveniles not receiving proper medical and dental care in his motion to correct the judgment.

Further, the trial court made numerous unchallenged findings of fact that are sufficient to establish Father's previous neglect, including domestic violence by Father in front of the juveniles; Father had cut his wrists while the juveniles were present in the home; Mother came to DSS and requested assistance with housing because the juveniles "needed to move away from the father because they were not safe with him"; Father and Mother had failed to leave enough required seizure medication for two of the juveniles while they were staying with a relative; and Father and Mother failed to attend A.S.'s medical appointments for her treatment of seizures, cerebral palsy, and ataxia. We hold that finding of fact 29 is supported by clear and convincing evidence.

As to finding of fact 56, Father contends that his housing situation had not contributed to the removal of the juveniles and was therefore irrelevant. However, this Court has considered whether the respondent was able to comply with his case plan as a relevant inquiry in whether there was a reasonable likelihood that the neglect will be repeated in the future. See *In re J.W.*, 173 N.C. App. at 465, 619 S.E.2d at 545. As part of his case plan, Father was ordered to maintain stable housing for at least six months. This factor is relevant to our analysis.

Father alternatively argues that finding 56 regarding his housing situation is not supported by the evidence. Father cites testimony from his wife at the time that they had lived together from March 2009 until January 2010, when they separated. Father contends the trial court's finding was erroneous because that time

period equaled ten months. However, Father does not dispute that he and his then wife were subsequently evicted from the residence and that at the time of the termination hearing, he had no residence. Finding of fact 56 is supported by clear and convincing evidence.

As to finding of fact 69, Father contends that there was evidence that he had made substantial progress in correcting his domestic violence issues. At the hearing, a DSS social worker testified that Father had failed to present any documentation that he had completed a domestic violence assessment or treatment to comply with his case plan requirements.

While we acknowledge that Father has challenged finding 57 and a portion of finding 69, we hold that the above discussed findings of fact are sufficient to support the trial court's order. The trial court's findings of fact establish that Father had failed to comply with portions of his case plan in that he failed to: (1) obtain a domestic violence assessment and treatment; (2) attend A.S.'s or J.S.'s medical appointments; or (3) maintain stable housing. The trial court's findings of fact support its conclusion that Father neglected the juveniles within the meaning of N.C. Gen. Stat. §§ 7B-101 and 7B-1111(a)(1), and that there is a reasonable likelihood of such neglect continuing in the future. *In re J.W.*, 173 N.C. App. at 465, 619 S.E.2d at 545.

This argument is without merit.

We note that the trial court also found grounds to terminate respondents' parental rights pursuant to N.C. Gen. Stat. §

7B-1111(a) (2) for willfully leaving the juveniles in foster care or placement outside the home for more than 12 months without showing that reasonable progress under the circumstances had been made in correcting those conditions which led to the removal of the juveniles. Because a finding of any one of the enumerated termination grounds is sufficient to support the order of the trial court, we do not address this issue. *In re Yocum*, 158 N.C. App. 198, 204, 580 S.E.2d 399, 403-04, *per curiam aff'd*, 357 N.C. 568, 597 S.E.2d 674 (2003).

C. Best Interests

Respondents each argue that the trial court abused its discretion by concluding it was in the juveniles' best interests to terminate their parental rights. We disagree.

N.C. Gen. Stat. § 7B-1110 sets forth the factors the trial court is required to consider in making a best interests determination: (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; and (6) any relevant consideration. N.C. Gen. Stat. § 7B-1110(a) (2009).

The trial court entered separate dispositional orders for J.S. and A.S. In the order terminating respondents' parental rights to J.S., the trial court found that: J.S. was born 27 March 2001 and

has been in the same foster home since April, 2008; there was a bond between J.S. and his parents; J.S. has expressed his desire that he be returned to his parents; however, if this does not happen, he has expressed his desire to remain in his current placement and be adopted by his foster parents; J.S. appears to have a strong bond with Father according to the visits witnessed by Desmond Adams; the foster parents have established a bond with J.S., and he refers to his foster parents as "Mom" and "Dad," and refers to their two children as his brothers; the foster family and J.S. interact well with each other, and the family enjoys a close relationship; the foster parents have provided a safe, stable, and nurturing home for J.S., and can continue to do so in the future; J.S. initially experienced adjustment problems in the foster home; however, with therapy, he has made progress and is now doing well; J.S. is currently receiving therapy from Mark Kelly, who qualified as an expert witness in Family Therapy and testified, and the Court found as fact, that it would be detrimental for J.S. to be removed from his foster home; the foster parents have expressed a desire to adopt J.S., and there is a strong probability that the foster parents will adopt J.S.; not terminating the parental rights of the Father and Mother at this time would delay the adoption of J.S. and possibly jeopardize the progress J.S. has made to date; and terminating the parental rights of Father and Mother will assist in achieving the primary permanent plan of adoption for J.S.

In the order terminating respondents' parental rights to A.S., the trial court found that: A.S. was born 13 February 2003 and has

been in the same foster home since June 2009; A.S. has multiple medical problems and will always need to have some therapy intervention; A.S. will need weekly therapy for at least the next year; it is difficult to determine the bond between A.S. and her parents; A.S. reacts positively to interaction with both familiar and unfamiliar people; A.S. responds appropriately to both Mother and Father; Desmond Adams witnessed A.S.'s visits with Father and there was a bond between the two; A.S. responds appropriately with the foster parents and the other children in the home; the foster parents have provided a safe, stable, and nurturing home for A.S., and can continue to do so in the future; the foster parents have also provided for all the special medical needs of A.S. and can continue to do so in the future; the foster parents have expressed a desire to adopt A.S., and there is a strong probability that the foster parents will adopt A.S.; not terminating the parental rights of the father and the mother would delay the adoption of A.S. and possibly jeopardize the progress A.S. has made to date; and terminating the parental rights of Father and Mother will assist in achieving the primary permanent plan of adoption for the juvenile.

The trial court's findings of fact are sufficient to show that it considered the required factors enumerated under N.C. Gen. Stat. § 7B-1110(a). We discern no abuse of discretion in the trial court's conclusion that it was in the best interests of the juveniles to terminate respondents' parental rights.

AFFIRMED.

Judges GEER and STEPHENS concur.

Report per Rule 30(e).