

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA10-343

NORTH CAROLINA COURT OF APPEALS

Filed: 16 November 2010

IN THE MATTER OF:

Burke County

No. 09 J 31

E.E.L.

Appeal by respondent from order entered 29 January 2010 by Judge Robert M. Brady in Burke County District Court. Heard in the Court of Appeals 1 November 2010.

*No brief filed on behalf of petitioner-appellee.*

*Jon W. Myers for respondent-appellant.*

HUNTER, Robert C., Judge.

This appeal arises from a private termination of parental rights action. Respondent-father appeals from an order terminating his parental rights to his four-year-old son, E.E.L. ("Eddie")<sup>1</sup>. After careful review, we reverse the trial court's order.

#### Background

On 25 February 2009, petitioner-mother filed a petition to terminate respondent's parental rights to Eddie. Petitioner alleged the following grounds for termination: (1) failure to legitimate pursuant to N.C. Gen. Stat. § 7B-1111(a)(5) (2009); and

---

<sup>1</sup> A pseudonym is used to protect the identity of the juvenile and for ease of reading.

(2) willful abandonment pursuant to N.C. Gen. Stat. § 7B-1111(a)(7). Respondent filed an answer on 26 May 2009, in which he admitted certain allegations and denied the existence of grounds for termination.

The trial court entered an order terminating respondent's parental rights on 9 July 2009. However, upon motion by respondent, the trial court vacated the termination order on 18 September 2009 because a guardian *ad litem* ("GAL") for Eddie had not been appointed. On 15 July 2009, the trial court appointed a GAL and attorney advocate and scheduled a new hearing for 29 October 2009.

After several continuances, the trial court conducted a termination of parental rights hearing on 21 January 2010. Petitioner and the GAL testified at the hearing. Evidence from the hearing tended to establish the following facts: Eddie was four years old at the time of the termination hearing and had lived with petitioner since his birth. Respondent had no involvement in raising Eddie and has never met him. He has not provided any financial support or care for Eddie. Respondent and petitioner have never been married. According to a letter respondent sent to the GAL, he learned of Eddie's existence approximately two years prior to the filing of the termination petition. He did not know petitioner was pregnant, and a family member told him about Eddie. He has sent Eddie a few letters; petitioner received the last letter approximately a year before the termination hearing. He

also sent letters addressed to petitioner, in which he was combative.

Respondent has been incarcerated since 17 June 2006, a few months prior to Eddie's birth. At the time the petition was filed, respondent was incarcerated in Arizona on drug charges. After his release from prison in Arizona, he was taken into custody in Ohio and is serving a sentence for armed robbery. Respondent had been convicted of assault by strangulation in North Carolina, and petitioner was the complaining witness in that case. Petitioner believed that respondent would be serving his sentence on that conviction after being released from prison in Ohio.

By order entered 29 January 2010, the trial court found the existence of one ground for termination: failure to legitimate pursuant to N.C. Gen. Stat. § 7B-1111(a)(5). In the dispositional portion of the order, the trial court found that termination of respondent's parental rights was in Eddie's best interest. From this order, respondent appeals.

#### Discussion

Proceedings to terminate parental rights are conducted in two stages: (1) the adjudication stage, governed by N.C. Gen. Stat. § 7B-1109 (2009), and (2) the disposition stage, governed by N.C. Gen. Stat. § 7B-1110 (2009). *In re Baker*, 158 N.C. App. 491, 493, 581 S.E.2d 144, 146 (2003). Respondent argues that the trial court failed to make a necessary finding of fact pursuant to N.C. Gen. Stat. § 7B-1111(a)(5) and that, in any event, there was no evidence to support the missing finding. As further explained, we agree.

Pursuant to N.C. Gen. Stat. § 7B-1111(a), a trial court may terminate parental rights upon a finding of one of the ten enumerated grounds. "In [the adjudication] stage, the burden is on the petitioner to provide 'clear, cogent, and convincing evidence' that the named grounds in [the statute] exist." *In re S.W.*, 187 N.C. App. 505, 506, 653 S.E.2d 425, 425-26 (2007). On appeal, we review the trial court's order to determine

whether the trial court's findings of fact were based on clear, cogent, and convincing evidence, and whether those findings of fact support a conclusion that parental termination should occur. . . . So long as the findings of fact support a conclusion [that one of the enumerated grounds exists], the order terminating parental rights must be affirmed.

*In re Oghenekevebe*, 123 N.C. App. 434, 435-36, 473 S.E.2d 393, 395-96 (1996) (internal citation omitted).

Here, the trial court concluded that termination of respondent's parental rights was justified based solely on the ground of failure to legitimate. Pursuant to N.C. Gen. Stat. § 7B-1111(a)(5), a trial court may terminate a father's parental rights based on a finding that:

The father of a juvenile born out of wedlock has not, prior to the filing of a petition or motion to terminate parental rights:

- a. Established paternity judicially or by affidavit which has been filed in a central registry maintained by the Department of Health and Human Services; provided, the court shall inquire of the Department of Health and Human Services as to whether such an affidavit has been so filed and shall incorporate into the case record the Department's certified reply; or

- b. Legitimated the juvenile pursuant to the provisions of G.S. 49-10 or filed a petition for this specific purpose; or
- c. Legitimated the juvenile by marriage to the mother of the juvenile; or
- d. Provided substantial financial support or consistent care with respect to the juvenile and mother.

N.C. Gen. Stat. § 7B-1111(a) (5). "When basing the termination of parental rights on this statutory provision the court must make specific findings of fact as to all four subsections and the petitioner bears the burden of proving the father has failed to take any of the four actions." *In re I.S.*, 170 N.C. App. 78, 88, 611 S.E.2d 467, 473 (2005); accord *In re Hunt*, 127 N.C. App. 370, 373, 489 S.E.2d 428, 430 (1997) ("Upon a finding that the putative father has not attempted any of the four possible ways to legitimate his child, the trial court may terminate parental rights.").

The trial court made specific findings of fact regarding several of the actions enumerated in N.C. Gen. Stat. § 7B-1111(a) (5):

- 14. That the Petitioner filed an Affidavit from the North Carolina Department of Health and Human Services which stated that the Respondent has not filed an affidavit with the Central Registry in Raleigh to establish paternity.
- 15. That the parties were not married at the time of the minor child's birth, did not marry after the birth of the minor child and the Respondent has never legitimated the minor child pursuant to the provisions of North Carolina General Statutes § 49-10 or filed a petition for that purpose.

16. That the Petitioner never requested financial support from the Respondent, as he has been incarcerated at all times since the minor child's birth, but the Respondent has had some employment within the Arizona Department of Corrections while incarcerated in the state of Arizona.
17. That, although the Respondent has been incarcerated, it is still a fact that the juvenile is in need of financial and emotional support which the Respondent has failed to provide in any way.

Thus, the trial court made findings that respondent failed to legitimate Eddie by marriage to petitioner, that he failed to legitimate Eddie by providing financial support or consistent care, that he failed to legitimate Eddie by filing an affidavit of parentage with the Department of Health and Human Services' ("DHHS") central registry, and that he failed to legitimate Eddie pursuant to the provisions of N.C. Gen. Stat. § 49-10.

However, absent from the trial court's order is any finding that respondent failed to establish paternity judicially. See N.C. Gen. Stat. § 7B-1111(a)(5)(a). Pursuant to N.C. Gen. Stat. § 7B-1111(a)(5), a petitioner must prove that the respondent failed to take any of the enumerated actions. *I.S.*, 170 N.C. App. at 88, 611 S.E.2d at 473. Subsection (a) contains two actions. Thus, in order to comply with the statute, a petitioner must prove that the respondent failed to take either of the actions listed in subsection (a). A petitioner must prove that the respondent failed to establish paternity either judicially or by affidavit. Here, the trial court's order contains no finding that respondent failed to establish paternity judicially.

Additionally, we have reviewed the record, and conclude that there is not sufficient evidence from which the trial court could have made such a finding. Thus, petitioner failed to prove by clear, cogent, and convincing evidence that respondent failed to establish paternity judicially. The only testimony which arguably touches on this subject is respondent-mother's answer to a confusing question by counsel:

Q. And to your knowledge has he in any way acknowledged paternity of this child due to by power of an affidavit with Raleigh filed [sic] petition with the Court?

A. Not that I know of.

Although counsel uses the words "affidavit" and "petition" in his question, it is not clear what he is asking. Furthermore, petitioner's answer is vague and provides no factual basis for her belief. Moreover, we note that the affidavit from DHHS does not support a finding that respondent failed to establish paternity judicially. The affidavit states that DHHS's central registry has not received an Affidavit of Paternity "from any person acknowledging paternity or purporting to be the father of [Eddie]." However, the affidavit also specifically states: "This does not include any Affidavit of Paternity on file with the Department of Vital Records, Child Support Enforcement, or the Clerk of Court." Thus, even if the trial court had made all pertinent findings, the evidence would not support a finding that respondent failed to establish paternity judicially. Accordingly, we hold that petitioner failed to meet her burden of proof and that the trial court erred in concluding that a ground for termination existed

pursuant to N.C. Gen. Stat. § 7B-1111(a)(5). *In re I.S.*, 170 N.C. App. at 88, 611 S.E.2d at 473; *In re Harris*, 87 N.C. App. 179, 188, 360 S.E.2d 485, 490 (1987).

Furthermore, we note that one of the above-referenced findings is not supported by clear, cogent, and convincing evidence. Although not raised by respondent, the trial court's finding that "Respondent has never legitimated the minor child pursuant to the provisions of North Carolina General Statutes § 49-10 or filed a petition for that purpose" is not supported by competent evidence. After reviewing the record and the hearing transcript, we find no testimony or competent evidence which would support this finding.

We acknowledge the difficulty petitioners face in proving a negative under N.C. Gen. Stat. § 7B-1111(a)(5). However, it is well-established that "[t]he petitioner bears the burden of proving a father has failed to take any of the four actions enumerated under N.C. Gen. Stat. § 7B-1111(a)(5)." *I.S.*, 170 N.C. App at 88, 611 S.E.2d at 473. Additionally, we note that other petitioners have been successful in proving this ground. *See A Child's Hope, LLC v. Doe*, 178 N.C. App. 96, 105, 630 S.E.2d 673, 678 (2006) (noting, in dicta, that "the record contains affidavits and photocopies of searches from Courtsearch.com, indicating no records indexed in the names of [the juvenile], the biological mother, or respondent, which would exist had a legitimation procedure been filed.").

In conclusion, we determine that the trial court's factual findings do not support its legal conclusion that grounds under



N.C. Gen. Stat. § 7B-1111(a)(5) existed to terminate respondent's parental rights to Eddie. Although we are skeptical as to whether respondent actually established paternity, the trial court's findings of fact are not sufficient to support termination of his parental rights based on the ground of failure to legitimate. Moreover, our review of the record suggests that petitioner failed to meet her burden of presenting clear, cogent, and convincing evidence that respondent failed to take any of the actions enumerated in N.C. Gen. Stat. § 7B-1111(a)(5). Accordingly, we reverse the order and remand the case to the trial court for further action consistent with this opinion. Because we reverse the trial court's order based on an error in the adjudication portion of the order, we need not address respondent's remaining challenges to the trial court's disposition.

Reversed and remanded.

Judges STROUD and HUNTER, Robert N., Jr. concur.

Report per Rule 30(e).