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NO. COA10-575

NORTH CAROLINA COURT OF APPEALS

Filed: 16 November 2010

IN THE MATTER OF: Wilkes County
J.W.S. No. 07 JT 144

Appeal by respondents from order entered 23 February 2010 by Judge Mitchell L. McLean in Wilkes County District Court. Heard in the Court of Appeals 30 September 2010.

Paul W. Freeman, Jr., for petitioner-appellee Wilkes County Department of Social Services.

Wyrick Robbins Yates & Ponton, LLP, by Tobias S. Hampson, for respondent-appellant mother.

Sydney Batch, for respondent-appellant father.

Pamela Newell, for guardian ad litem.

THIGPEN, Judge.

Respondent-mother and respondent-father appeal from an order terminating their parental rights to J.W.S. After careful review, we affirm the trial court's order.

BACKGROUND

DSS first became involved with respondent-mother in 2003 when DSS received and substantiated a report that respondent-mother was not providing proper care to her first child. The first child was eventually "diagnosed with failure to thrive, which was determined to be environmental in etiology"; and the child was placed in the

custody of the paternal grandparents. After the placement, respondent-mother was permitted to have only supervised visitations.

Shortly after respondent-mother lost custody of her first child, she began dating respondent-father. Respondent-father and respondent-mother engaged in a series of domestic disputes during their relationship, including one incident in March 2007 when respondent-mother was pregnant with J.W.S. The DSS report of the incident provides:

On Saturday, 10 March 2007, [respondent-mother] called [her social worker] at home early in the morning to inform [the social worker] that she had left [respondent-father]. [Respondent-mother] stated that he had become extremely intoxicated, had become violent and threatening to her, had threatened her with a knife, and had yanked the phone cord out of the wall when she attempted to call for help. She stated that she could not leave in her car because he kept the keys in his possession [sic]. She stated that [respondent-father] "passed out" around 7am, so she then left the residence and went to his aunt's home. She stated that she did not want to be with [respondent-father], as she feared for her safety and the safety of her unborn child. [The social worker] discussed with [respondent-mother] seeking assistance from SAFE, and taking out a restraining order against [respondent-father]. [Respondent-mother] stated that she had friends with whom she could stay where she would be safe, and she was to contact [the social worker] the following Tuesday to let [the social worker] know where she was staying. [The social worker's] next contact from [respondent-mother] was on 23 March, when [respondent-mother] informed [the social worker] that she and [respondent-father] had married on 20 March[.]

J.W.S. was born on 6 September 2007. The next day, the Wilkes County Department of Social Services ("DSS") filed a petition alleging that J.W.S. was a neglected juvenile as defined in N.C. Gen. Stat. § 7B-101 (2009). Respondent-mother and respondent-father were both served with the petition. The basis for neglect in the petition alleged that J.W.S. "lives in an environment injurious to the juvenile's welfare." In particular, DSS alleged that:

The mother has an extensive history with Surry and Wilkes Co. DSS, and has lost custody of her now 4-year-old son to the paternal grandparents of that child. . . . The parents have a history of domestic violence while the mother was pregnant with [J.W.S.] The father has substance abuse issues and a criminal history including more than one DUI and several assault charges. The mother has a history of significant mental health issues with minimal treatment, and maintains that she is not in need of treatment, though she has repeatedly threatened suicide.

In the petition, DSS sought custody of J.W.S. on the grounds that it was "contrary to the well-being of the child to remain in the care of the parents," and that it was in the "best interests" of the juvenile to be placed in the custody of DSS. On 7 September 2007, a non-secure custody order was entered, and J.W.S. was placed in the custody of DSS.

On 22 October 2007, the trial court entered an order adjudicating J.W.S. as neglected. The trial court found that DSS had worked with respondent-mother "for several years in an attempt to improve those conditions which led to the neglect and removal of" her first child. The trial court found, however, that

respondent-mother "had shown virtually no progress" in dealing with the issues surrounding her first child until after J.W.S. was removed from the home. The trial court found that respondent-father and respondent-mother were cooperative with DSS and were trying to improve their parenting skills, but that nevertheless a substantial risk of serious injury or impairment remained should J.W.S. be allowed to return to their home. The trial court accordingly concluded that it was in J.W.S.'s best interest to be placed in DSS's custody, and respondent-father and respondent-mother were granted supervised visitation.

Review hearings on respondents' progress were held on 4 February 2008, 3 March 2008, 1 April 2008, and 12 May 2008. On 4 June 2008, the trial court entered an order regarding the review hearings, and it noted that in December 2007, respondent-father and respondent-mother were granted extended supervised visits lasting eight hours. These supervised visits went well, and beginning on 8 March 2008, respondents were allowed to have supervised overnight visits every weekend from Saturday afternoon to Sunday afternoon. The overnight visitations, however, ceased after an incident of domestic violence occurred on 19 April 2008. Regarding this incident, the trial court found in its order:

[W]hile [J.W.S.] was in his parents' home for a supervised visit, [respondent-father] became intoxicated and became threatening and physically violent with [respondent-mother]. [Respondent-mother], being afraid that [respondent-father] would hurt the child[,] covered the child with [her] body. Law enforcement was summoned to [respondents'] residence and [respondent-father] was arrested. At the time of this incident, . . .

[the] paternal grandfather [] was supervising the visits. [The paternal grandfather] and [respondent-father] became involved in a physical altercation when [the paternal grandfather] tried to take a gun away from [respondent-father].

As a condition of respondent-father's release after the 19 April 2008 assault, respondent-father was ordered not to have contact with respondent-mother.

The trial court also found in its order, in addition to the incident on 19 April 2008, that respondent-mother had obtained a criminal warrant against respondent-father alleging that he had assaulted her just prior to the 12 May 2008 hearing. The trial court observed that the 19 April 2008 incident was "almost identical" to the assault perpetrated by respondent-father in the petition alleging neglect. The trial court noted, however, that despite the continuing domestic violence, respondents intended to remain together.

The trial court also found in its 4 June 2008 order that: (1) "domestic violence and family discord" posed a significant threat to J.W.S.'s welfare; (2) the continued relationship between respondents posed a danger to J.W.S. should he be returned to their care; and (3) respondents did not have a "safe and stable environment in which any type of visitation would be appropriate[.]" The trial court accordingly ordered that J.W.S. remain in custody with DSS, and further ordered that respondents each be allowed supervised visitation with J.W.S. for one hour, two times each month, but not at the same time. Respondent-father and respondent-mother were both ordered to attend family counseling.

The order required respondent-father to have a substance abuse and alcohol assessment and an anger assessment, and respondent-father was ordered to complete any therapy recommended by the assessments. The order also provided that respondents' visits would be supervised by staff at the Wilkes County Child Advocacy Center ("Our House").

A permanency planning review hearing was held pursuant to N.C. Gen. Stat. § 7B-907 (2009) on 3 November 2008. The trial court found that while respondents had initially made progress resulting in such improvements as the extended supervised visitations, the progress had declined after the incident in April 2008. The trial court cited respondents' continuing domestic violence and instability and respondent-father's excessive use of alcohol. The trial court found that although respondent-mother had been "relatively consistent" in keeping up with her visitation schedule, respondent-father had not visited J.W.S. since 11 August 2008.

The trial court further found that respondents had not complied with their case services plan. Specifically, the trial court found that respondents had not maintained "stable" housing, respondent-mother had failed to hold steady employment, neither respondent-mother nor respondent-father had participated in counseling, and neither parent could demonstrate any skills learned in the parenting classes. Moreover, the court indicated that it was "troubled" by respondents' "dishonesty." The trial court characterized respondents as being "more interested in investing time and energy into efforts to manipulate the system rather than

having their children returned to them." The trial court described respondent-mother's "mistaken belief that this case is about having her children removed and not returned to her because other persons have nicer homes or automobiles." Based on these observations, the trial court also found that it was not possible for J.W.S. to be returned to respondents' home within the next six months. Furthermore, the order provided that DSS should cease reunification efforts, change the permanent plan for J.W.S. to adoption, and file a petition to terminate parental rights.

On 13 January 2009, DSS filed a petition to terminate the parental rights of respondent-father and respondent-mother. In the petition, DSS alleged facts supporting termination of respondents' parental rights pursuant to N.C. Gen. Stat. §§ 7B-1111(a)(1)-(3), (6) (2009). DSS alleged that it was in J.W.S.'s best interest to be adopted, and requested that the trial court terminate respondents' parental rights to allow for J.W.S. to be adopted.

Hearings were held on the petition to terminate respondents' parental rights on 27 October 2009 and 26 January 2010; and in an order filed 23 February 2010, the trial court concluded that grounds existed to terminate respondent-mother's and respondent-father's parental rights pursuant to subsections (1),¹ (2),² and

¹"The parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of G.S. 7B-101 or a neglected juvenile within the meaning of G.S. 7B-101." N.C.G.S. § 7B-1111(a)(1).

²"The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the

(3)³ of N.C.G.S. § 7B-1111(a). The court further concluded that it was in J.W.S.'s best interest that respondent-father's and respondent-mother's parental rights be terminated; accordingly, the trial court ordered that respondents' parental rights be terminated.

Respondents both filed timely notices of appeal to this Court, and each parent has filed a separate brief. Respondent-mother argues that: (1) the trial court erred in concluding that grounds existed to terminate her parental rights under subsections (1), (2), and (3) of N.C.G.S. 7B-1111(a); and (2) the trial court abused its discretion in terminating her parental rights. Respondent-father contends only that the trial court erred in concluding that grounds existed to terminate his parental rights under N.C.G.S. § 7B-1111(a) (1) - (3).

ANALYSIS

I.

circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C.G.S. § 7B-1111(a) (2).

³ The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent, for a continuous period of six months next preceding the filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

We first consider respondents' arguments that the trial court erred by concluding that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(1)-(3) to terminate their parental rights. On the issue of whether J.W.S. was neglected under section 7B-1111(a)(1) in particular, respondent-father argues that: (1) the trial court relied on incompetent evidence to make its findings regarding the incidents of domestic violence; (2) no competent evidence was adduced at trial showing a likelihood of future neglect; and (3) the record shows, contrary to the trial court's findings, that respondent-father was improving his parenting skills and refraining from acts of domestic violence. Respondent-mother, on the other hand, contends that the finding of neglect is erroneous because: (1) the acts of domestic violence involving respondent-father occurred almost a year and a half before the termination of parental rights hearing, and no acts of domestic violence appear in the record from May 2008 to October 2009; and (2) DSS was relieved of its obligation to provide support services to respondent-mother in November 2008, and from that time until the termination hearings began in October 2009, respondent-mother was without the proper support to improve her parenting skills. We disagree.

"A proceeding to terminate parental rights is a two-step process with an adjudicatory stage and a dispositional stage." *In re C.C., J.C.*, 173 N.C. App. 375, 380, 618 S.E.2d 813, 817 (2005). "A different standard of review applies to each stage." *Id.* "In the adjudicatory stage, the trial court must find that at least one ground for the termination of parental rights listed in [N.C.G.S.

§ 7B-1111] exists." *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). "Once one or more of the grounds for termination are established, the trial court must proceed to the dispositional stage where the best interests of the child are considered." *Id.*

This Court reviews the adjudicatory phase in a termination of parental rights case to determine "whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law." *In re Shermer*, 156 N.C. App. 281, 285, 576 S.E.2d 403, 406 (2003). A finding of any one of the separately enumerated grounds in section 7B-1111 is sufficient to support the termination of parental rights. *In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990).

Under N.C.G.S. § 7B-1111(a)(1), 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.G.S. § 7B-101(15). 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). However, "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 a prior adjudication of neglect is considered by the trial court, "[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *Id.* at 715, 319 S.E.2d at 232. Furthermore, where, as is the case here, the juvenile is a newborn infant or child who has never resided in the home, "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). Thus, where

there is no evidence of neglect at the time of the termination proceeding . . . parental rights may nonetheless be terminated if there is a showing of a past adjudication of neglect and the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to [his or] her parents.

In re Reyes, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000) (citation omitted).

Here, J.W.S. was adjudicated a "neglected juvenile" on 22 October 2007 - approximately two years before proceedings began to terminate respondents' parental rights. Since respondents do not challenge the order adjudicating J.W.S. as neglected, we need only review the trial court's finding that there exists a likelihood of

future neglect to ascertain whether the finding is supported by clear, cogent, and convincing evidence.

In its order terminating respondents' parental rights, the trial court made the following findings:

15. Unfortunately, the schedule of overnight visitation did not go well. Specifically, on April 19, 2008, and in May, 2008, the parties were involved in incidents of domestic violence. [respondent-father] was also consuming alcohol. As a result of the acts of domestic and alcohol abuse, the overnight visitation between the parents and child were stopped. The primary reason for this was that [respondent-father] became intoxicated and physically violent toward [respondent-mother] during a time when [J.W.S.] was present for a supervised visit. Law enforcement officers were called to [respondents'] residence. [Respondent-father] and his father were involved in a physical altercation when [respondent-father] drew a weapon and began threatening those present.

16. [T]he incident of April 19, 2008, was very similar to an incident which occurred between [respondents] at a time when [respondent-mother] was pregnant with [J.W.S.], in that [respondent-mother] was pregnant with [J.W.S.'s younger sister], the child who was [also] subsequently removed from [respondents].

17. Although the parents had made relatively good progress in dealing with those issues which had caused [J.W.S.] to be removed from their custody, after the April 19, 2008 incident, this changed.

18. Since the April 19, 2008 incident, the parents have made no progress in strengthening their relationship with the child or in preparing a fit and suitable home for [J.W.S.]

19. Specifically, the Court finds that the parents have continued to exhibit the sort of instability and domestic violence which caused all of the children to be removed from

them. Since [J.W.S.] has been in the custody of [DSS], the mother has had at least five (5) jobs, and the father has had at least three (3). The parents have changed their residence on at least one occasion and have been separated at least twice. Additionally, there have been at least two (2) incidents involving domestic violence and alcohol abuse, leading to [respondent-father's] arrest on one occasion and his hospitalization on another.

20. Although each of the parents had been visiting with [J.W.S.] on a fairly regular basis up to April, 2008, following April, 2008, the visits became more sporadic and eventually ceased. With regard to visitation, the Court finds that the parents could have visited with the child at least twice per month for at least one hour per visit. Since April, 2008, the Court finds that from April, 2008 until November, 2008, the parents could have visited with the child on twelve (12) occasions. The parents missed five (5) of these visits.

21. With the exception of a visit on November 17, 2008, at Wal-Mart, [respondent-father] has not visited with [J.W.S.] since August 11, 2008.

22. Since November, 2008 up to January, 2010, the mother of the child has had four (4) visits. The last visit which the mother had with [J.W.S.] was February 23, 2009. She left early for that visit. The mother has had only two (2) visits with the child since January, 2009, both of these visits occurred in February, 2009.

. . . .

24. Since the child has been in the care and custody of [DSS], neither parent has provided consistent gifts, clothing, or tokens of love and affection. Although in August, 2009, [Respondent-mother] contacted Lisa Phillips of [DSS] and indicated a desire to provide clothing for [J.W.S.], no such clothing was provided.

25. Neither parent has accepted any responsibility for [J.W.S.] being in foster

care or indicated any understanding of the child's needs, or a parent's responsibility to meet those needs.

26. On April 17, 2008, Dr. James A. Powell, psychologist, performed a psychological evaluation on [respondent-mother]. Dr. Powell also completed a psychological evaluation on [respondent-father], the same being dated April 18, 2008. Judge Duncan considered Dr. Powell's evaluations and incorporated same into the Order filed in the underlying juvenile matter on June 4, 2008.

27. As early as the spring, 2008, Dr. Powell recommended that [respondents] attend joint therapy sessions to focus on the needs of [J.W.S.], how to raise a newborn, and means to cooperate in providing for those needs. In May, 2008, Judge [Michael D.] Duncan ordered that the parents submit to family counseling and therapy, as recommended by Dr. Powell. The parents have failed and refused to do this.

28. Judge Duncan also directed in May, 2008[,] that [respondent-father] was to have a substance abuse and alcohol assessment and to successfully complete any follow up program of therapy and treatment. [Respondent-father] has failed to do this.

29. Judge Duncan also ordered [respondent-father] to have an anger management assessment. He was to follow up with any treatment or counseling recommended by such assessment. [Respondent-father] has failed to have such assessment or to participate in any therapy or treatment.

Respondents do not dispute the trial court's findings concerning their lack of visitation after April 2008. Respondent-mother did not visit J.W.S. the entire seven months before the termination of parental rights hearing; and from August 2008 to October 2009, respondent-father visited with J.W.S. just once. When confronted at the hearing about the incidences of domestic

violence occurring in the home, neither respondent took responsibility for their actions:

Q. Have you [respondent-mother] done or failed to do something to cause [J.W.S.] to be taken into the custody of the Department of Social Services?

A. I don't see why neither of my kids were took because the only reason I know is because of [my first child]. That's the only excuse they would use, . . . "[My first child] this. [My first child] that."

Q. Okay. Have you [respondent-mother] done or failed to do anything that has caused [J.W.S.] to remain in the Department of Social Services?

A. No, I've not.

. . . .

Q. [Respondent-father], do you feel like you - did you do or fail to do something that caused the visits to be moved to Our House?

A. No, sir.

This inability to take ownership was part of the impetus for the trial court ordering both respondents to attend individual and joint counseling. Respondents do not dispute that they refused to participate. Respondents also do not take issue with the trial court's finding that their housing and employment situations were unstable.

This evidence in the record clearly, cogently, and convincingly, supports the trial court's finding that, were J.W.S. to return to his parents, "there is a substantial likelihood that [J.W.S.] would be exposed to the same or similar acts/omissions

which caused the child to be removed initially." Respondents had ample time to cure the behaviors leading to the initial adjudication of neglect, and they chose not to do so. Thus, we conclude that the finding of the likelihood of future neglect, when coupled with the juvenile's prior adjudication of neglect, supports the trial court's conclusion of law that grounds existed to terminate respondents' parental rights pursuant to N.C.G.S. § 7B-1111(a)(1).

Because we conclude that grounds existed pursuant to section 7B-1111(a)(1) to support the trial court's order, we need not address the remaining grounds contained in N.C.G.S. § 7B-1111(a)(2)-(3) found by the trial court to support termination. *Taylor*, 97 N.C. App. at 64, 387 S.E.2d at 233-34. Accordingly, this argument is overruled.

II.

Respondent-mother also argues that the trial court erred by concluding that it was in the best interest of J.W.S. to terminate her parental rights. We disagree.

"The trial court has discretion, if it finds that at least one of the statutory grounds exists, to terminate parental rights upon a finding that it would be in the child's best interests." *In re Nesbitt*, 147 N.C. App. 349, 352, 555 S.E.2d 659, 662 (2001). We review the trial court's determination on the issue of best interests of the juvenile for an abuse of discretion. *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002). "Abuse of discretion exists when the challenged actions are manifestly

unsupported by reason." *Barnes v. Wells*, 165 N.C. App. 575, 580, 599 S.E.2d 585, 589 (2004) (citation and quotation marks omitted).

After finding that at least one of the statutory grounds is satisfied at the adjudication phase, the trial court must proceed to the dispositional phase to

determine whether terminating the parent's rights is in the juvenile's best interest. In making this determination, the court shall consider the following:

- (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.
- (6) Any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a) (2009). The trial court is to take action "which is in the best interests of the juvenile" when "the interests of the juvenile and those of the juvenile's parents or other persons are in conflict." N.C. Gen. Stat. § 7B-1100(3) (2009).

In the instant case, the trial court made the following findings in accordance with section 7B-1110(a):

- A. [J.W.S.'s] age is approximately 28 months, and that the child has been

placed outside of the home of a parent for the entirety of the child's life;

- B. The likelihood of adoption is significantly high. [The foster mother] has indicated a consistent desire and willingness to adopt [J.W.S.] As previously found, and as reiterated herein, there are no barriers to this adoption. [J.W.S.] has no special needs, and he has flourished while in [the foster mom's] home;
- C. Termination of parental rights will aid in the accomplishment of the Permanent Plan of adoption previously approved for [J.W.S.] ;
- D. [J.W.S.] has no bond with his biological parents. This is evident from the relatively small amount of time the child spent with the parents from his birth until April, 2008, and the almost total lack of contact or involvement of the child and parents since that time;
- E. [J.W.S.] has a strong and loving bond with [the foster mom]; and
- F. [The foster mom] has provided the only home which [J.W.S.] has known.

The above findings show that the trial court did not abuse its discretion in determining that it was in J.W.S.'s best interest to terminate respondent-mother's parental rights. Thus, we conclude that the trial court did not abuse its discretion. This argument is overruled, and the trial court's order terminating parental rights of respondent-father and respondent-mother is

Affirmed.

Judges ELMORE and JACKSON concur.

Report per Rule 30(e).