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NO. COA10-649

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

IN THE MATTERS OF:

J.K., S.K. and S.C.,
Minor Children

Burke County
Nos. 08 J 8, 9, 10

Appeal by respondent-mother from order¹ entered 7 April 2010 by Judge J. Gary Dellinger in Burke County District Court. Heard in the Court of Appeals 4 November 2010.

Stephen M. Schoeberle, for petitioner-appellee, Burke County Department of Social Services.

Ryan McKaig, for respondent-appellant.

Pamela Newell, for Guardian ad litem.

THIGPEN, Judge.

Respondent-mother appeals from an order terminating her parental rights to her children. For the following reasons, we vacate the trial court's order.

Respondent-mother is the mother of J.K., born in 1996, S.K., born in 2003, and S.C., born in 2004 (collectively "the children"). The Burke County Department of Social Services ("DSS") became involved with respondent-mother in May 2007 when it received a

¹Although the trial court's order reflects the case number as 089 J 08-10, we have referenced the 08 J 08-10 case number used throughout the rest of the record and in the briefs.

report of neglect. Respondent-mother was given a psychological evaluation and a substance abuse assessment. Respondent-mother was diagnosed with bipolar disorder, post-traumatic stress disorder, and polysubstance dependence. The psychological evaluation recommended a substance abuse outpatient program for respondent-mother, intensive case management, regular follow up to maintain respondent-mother's medication regimen and other treatment, weekly therapy, and in-home family services.

On 9 January 2008, DSS filed a juvenile petition alleging that the children were neglected and dependent juveniles. DSS alleged respondent-mother had a history of assaultive behavior, substance abuse, and psychiatric hospitalizations. DSS also alleged respondent-mother was often unable to supervise the children appropriately due to her use of impairing substances. DSS further alleged there was no appropriate alternative child care arrangement available.

The trial court held an adjudication hearing on 6 March 2008. At the hearing, respondent-mother stipulated that the allegations of the petition were true and the trial court adjudicated the children dependent. After holding a dispositional hearing that same day, the trial court ordered custody of the children be granted to DSS. The trial court ordered respondent-mother to: (1) abstain from using alcohol and illegal drugs; (2) not abuse prescription medications; (3) maintain a stable residence; (4) complete parenting classes; (5) continue counseling through the ACT program; (6) comply with all treatment recommendations; (7)

cooperate with DSS and the guardian ad litem; and (8) submit to at least two drug tests per month. The trial court also ordered supervised visitation with the children contingent upon respondent-mother's continued negative drug tests. A written order was signed on 3 April 2008 and filed with the Burke County Superior Court Clerk's Office on 4 April 2008.

The trial court held a review hearing on 29 May 2008. By order filed 4 June 2008, the trial court found that the children were placed together at South Mountain Children's Home and were doing well. As to respondent-mother, the trial court found that she was "compliant with the case plan[;]" that her drug tests were negative except for prescribed medications; that she was attending counseling, medication management, and substance abuse classes through the ACT program; and that she was involved with the children. The trial court ordered respondent-mother to attend inpatient substance abuse treatment and comply with aftercare recommendations, abstain from using alcohol or illegal drugs, not abuse prescription medications, maintain a stable residence, complete parenting classes, continue counseling through the ACT program, comply with all treatment recommendations, cooperate with DSS and the guardian ad litem, and submit to at least two drug tests per month. Respondent-mother's supervised visitation with the children was again contingent upon negative drug tests.

By review order filed 3 September 2008, the trial court found that respondent-mother had been attending classes through the ACT program; that she had begun an inpatient drug treatment program in

May, but had been discharged early for threatening another patient; that she had partially completed parenting classes; that she had remained involved with the children; and that she was working on her GED. The trial court concluded that reunification was not in the children's best interests at the time, but such efforts should continue.

The trial court held another review hearing on 8 January 2009. By order filed 30 January 2009, the trial court found that respondent-mother had begun dating an individual with an extensive criminal history, including several cocaine charges; and that respondent-mother had taken the children to the individual's home despite being told by DSS that contact by this individual with the children would be inappropriate. The court also found that during a 6 November parenting class, respondent-mother appeared to be intoxicated and slept through the entire class. The court further found that respondent-mother was evicted from her home for non-payment of rent and had since lived in several places; that she was unemployed; and that she had missed scheduled drug tests and visits, claiming lack of transportation.

The trial court conducted a permanency planning hearing on 5 February 2009. By order filed 4 March 2009, the trial court found that respondent-mother continued her relationship with the individual with an extensive criminal history. The trial court further found that respondent-mother did not have a stable residence or employment. The trial court also found that due to respondent-mother's "lack of progress, it is not possible to return

the juveniles to her immediately or within 6 months. No appropriate relatives are willing to provide placement for the juveniles." The trial court ordered the permanent plan for the children to be adoption.

On 3 April 2009, DSS filed a "Motion/Petition to Terminate Parental Rights" based upon the grounds of willfully leaving the children in foster care for more than twelve months without showing reasonable progress under N.C. Gen Stat. § 7B-1111(a)(2)(2009) and willfully failing to pay reasonable costs under N.C. Gen. Stat. § 7B-1111(a)(3)(2009). The trial court was unable to proceed with the motion/petition on 20 August 2009 and, instead, held a permanency planning hearing. The trial court ordered that adoption should remain the permanent plan for the children. The hearing on the termination motion/petition was continued in November 2009 and January and February 2010.

The trial court held a termination of parental rights hearing on 4 March 2010. By order filed 7 April 2010, the trial court terminated respondent-mother's parental rights under section 7B-1111(a)(2). The trial court further determined that termination of respondent-mother's parental rights was in the best interest of the children. Respondent-mother appeals.

Termination of parental rights involves a two-stage process. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). "In the adjudicatory stage, 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." *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002). "If the trial court determines that grounds for termination exist, it proceeds to the dispositional stage, and must consider whether terminating parental rights is in the best interests of the child." *Id.* at 98, 564 S.E.2d at 602. The trial court's decision to terminate parental rights is reviewed under an abuse of discretion standard. *Id.*

The dispositive issue on appeal is whether the trial court erred in concluding that grounds existed to terminate respondent-mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(2). Respondent-mother contends her children had not been "removed" from her home for the requisite period of time before DSS filed the motion/petition to terminate parental rights.

N.C.G.S. § 7B-1111(a)(2) provides a parent's rights may be terminated where:

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 circumstances has been made in correcting those conditions which led to the removal of the juvenile.

N.C. Gen. Stat. § 7B-1111(a)(2) (2009). In the case of *In re A.C.F.*, 176 N.C. App. 520, 626 S.E.2d 729 (2006), this Court concluded that the language, "for more than 12 months," in N.C. Gen. Stat. § 7B-1111(a)(2), must be defined as "the duration of time beginning when the child was 'left' in foster care or placement outside the home pursuant to a court order, and ending when the motion or petition for termination of parental rights was

filed[.]" *Id.* at 526, 626 S.E.2d at 734 (emphasis added) (emphasis in original omitted). Where the twelve-month threshold does not expire before the motion or petition is filed, a termination on the basis of N.C.G.S. § 7B-1111(a)(2) cannot be sustained. *Id.* at 527, 626 S.E.2d at 735.

Our review discloses that the children had not been in foster care pursuant to a court order for the requisite period of time. The trial court granted DSS custody of the children after the adjudication and disposition hearings held on 6 March 2008. The adjudication/disposition order was not entered that day. Rather, the order removing the children from respondent-mother's custody was signed by the judge on 3 April 2008 and entered on 4 April 2008 when the order was filed with the Burke County Clerk of Superior Court. DSS filed the motion/petition to terminate respondent-mother's parental rights on 3 April 2009.

The "announcement of judgment in open court merely constitutes the rendition of judgment, not its entry." *In re Estate of Walker*, 113 N.C. App. 419, 420, 438 S.E.2d 426, 427 (1994). Thus, the duration of the time the children were "left" began on 4 April 2008 when the children were removed from respondent-mother pursuant to the filed adjudication/disposition order and ended on 3 April 2009 when DSS filed the motion/petition to terminate respondent-mother's parental rights. The children, therefore, lived outside of respondent-mother's custody pursuant to a court order for less than twelve months, not "for more than 12 months" as required by N.C.G.S. § 7B-1111(a)(2) and interpreted by *In re A.C.F.*

Accordingly, the trial court's order terminating respondent-mother's parental rights under N.C. Gen. Stat. § 7B-1111(a)(2) must be vacated.

Vacated.

Judges CALABRIA and GEER concur.

Report per Rule 30(e).