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NO. COA10-688

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

IN THE MATTER OF:

A.M., S.G., A.G.,
P.G., I.G., and E.G.

Mecklenburg County
Nos. 07 JT 354-58
07 JT 956

Appeal by respondents from order entered 4 March 2010 by Judge Hugh B. Lewis in Mecklenburg County District Court. Heard in the Court of Appeals 15 November 2010.

Kathleen Arundell Widelski, Senior Associate Attorney for Mecklenburg County Department of Social Services, Youth and Family Services, petitioner-appellee.

Pamela Newell for Guardian ad Litem.

Janet K. Ledbetter, for respondent-appellant mother.

Assistant Appellate Defender Annick Lenoir-Peek, for respondent-appellant father.

MARTIN, Chief Judge.

M.G. ("respondent-mother") and E.H.M. ("respondent-father") (collectively "respondents") appeal from the trial court's order terminating their parental rights. For the reasons discussed herein, we affirm the order of the trial court.

Respondent-mother is the biological mother of A.M. ("Adam"), S.G. ("Sarah"), A.G. ("Annie"), P.G. ("Paul"), I.G. ("Ivan"), and

E.G. ("Eric").¹ Respondent-father is the biological father of only Eric. The biological fathers of the other children are not parties to this appeal. The Mecklenburg County Department of Social Services, Youth and Family Services ("YFS") received a child protective services ("CPS") report regarding this family on 2 February 2007. Annie, Sarah, Paul, and Ivan attended Devonshire Elementary School, and the school was concerned that the children were not being properly supervised. YFS received a second CPS report regarding the children on 21 February 2007. The allegations were that respondent-father, who was respondent-mother's boyfriend, was abusive towards Adam and that respondent-mother inappropriately disciplined the children. The YFS social worker investigating the report visited the home on 21 February 2007. The social worker observed a bite mark on Adam's face and questioned respondent-mother. Respondent-mother did not know how Adam got the bite mark and she denied having a boyfriend. Respondent-mother also denied hitting the children. There was a young man in the home during the social worker's visit. Respondent-mother said the young man was her cousin.² At some point after the social worker's visit on 21 February 2007, respondent-mother and the children became homeless and YFS was unable to locate the family.

On 20 April 2007, YFS received two CPS reports regarding the children. On that date, Adam, who was fourteen months old at the

¹ Pseudonyms are used to protect the privacy of the children.

² It was later determined that the young man was respondent-mother's boyfriend, who is respondent-father in this appeal.

time, was brought to the Reedy Creek Fire Department by respondents. Mark Smith, a captain with the Charlotte Fire Department, testified that Adam was hyperventilating and non-responsive. Adam later stopped breathing and the firemen removed Adam's clothing in anticipation of performing CPR. Upon removing Adam's clothing, Smith observed multiple bruises on Adam's torso. Smith also observed Adam had a laceration on his forehead. Adam was transported to the hospital via ambulance. Adam was diagnosed with left subdural hematoma with 4mm shift; L2-L3 endplate fractures; old bilateral tibia fractures; bilateral retinal hemorrhages; old proximal rays fracture; laceration midforehead 2.5 cm in length; and multiple areas of bilateral ecchymosis over his face and bilateral upper and lower extremities.

On 23 April 2007, YFS filed a juvenile petition alleging Adam was abused, neglected and dependent. The petition further alleged that Sarah, Annie, Paul, and Ivan were neglected and dependent. YFS obtained non-secure custody of the children. Respondent-mother entered into a mediated family services agreement. The adjudication hearing was held on 5 July 2007. On 6 August 2007, the trial court entered an order as to respondent-mother, adjudicating Adam abused, neglected, and dependent, and Sarah, Annie, Paul, and Ivan neglected and dependent.

Respondent-mother gave birth to another child, Eric, in November 2007. YFS filed a juvenile petition on 5 November 2007 alleging Eric was neglected and dependent. YFS obtained non-secure

custody of Eric as well. On 25 February 2008, Eric was adjudicated neglected and dependent.

On 29 July 2008, a separate adjudication and disposition hearing was held as to respondent-father as caregiver of Adam, Sarah, Annie, Paul, and Ivan. The adjudication and disposition order, entered on 1 August 2008, stated that until the court learned by whom and how Adam was injured, it was unlikely to place the children with either of the respondents because of grave concerns about the children's safety.

A permanency planning hearing was conducted on 30 October 2008. By order entered 5 November 2008, the trial court changed the permanent plan from reunification to adoption, and suspended visitation with respondent-mother.

On 19 December 2008, YFS filed a petition to terminate respondent-mother's parental rights to Adam, and motions in the cause to terminate her parental rights to Sarah, Annie, Paul, Ivan, and Eric. The motion in the cause filed regarding Eric also sought termination of respondent-father's parental rights. A pre-trial hearing was held on 8 January 2009. The termination of parental rights hearing was held on 28-29 September, 18 November, 3 December 2009, and 25 January 2010. The trial court found grounds to terminate respondents' parental rights pursuant to (1) neglect, N.C.G.S. § 7B-1111(a)(1); (2) failure to make reasonable progress, N.C.G.S. § 7B-1111(a)(2); and (3) willful failure to pay a reasonable portion of the cost of care, N.C.G.S. § 7B-1111(a)(3).

On 4 March 2010, the trial court entered its order terminating

respondent-mother's parental rights to Adam, Sarah, Annie, Paul, Ivan, and Eric. In that same order, respondent-father's parental rights to Eric were terminated.

Respondents appeal. On appeal, respondents argue that the trial court's findings of fact do not support the conclusion that grounds existed to terminate their parental rights. Additionally, respondents challenge the trial court's denial of their request for an expert.

We first address the denial of respondents' request for an expert. Respondents made an oral motion at the pre-trial hearing for an expert witness to review the medical information regarding the injuries suffered by Adam. The trial court denied the request for an expert finding that respondents stipulated to the injuries suffered by Adam.

"[I]t is in the trial court's discretion whether to grant requests for expenses to retain an expert witness[.]" *In re D.R.*, 172 N.C. App. 300, 305, 616 S.E.2d 300, 304 (2005) (citing *State v. Sandlin*, 61 N.C. App. 421, 426, 300 S.E.2d 893, 896-97, *disc. review denied*, 308 N.C. 679, 304 S.E.2d 760, *cert. denied*, 464 U.S. 995, 78 L. Ed. 2d 685 (1983)). In making such a request, the indigent party must show "that there is a reasonable likelihood that [the expert witness will] materially assist [him] in the preparation of his defense or that without such help it is probable that [he] will not receive a fair trial." *Id.* (internal quotation marks omitted).

Here, the record does not show there was "a reasonable likelihood" that an expert witness would assist respondents or that without the assistance of an expert they would not receive a fair hearing. *See id.* The record before us does not contain the arguments advanced to the trial court by respondents to support their motion. Moreover, in their briefs, respondents pose questions that an expert could have assisted in answering, but point to no specific evidence which could have been developed. Our courts have held that "[m]ere hope or suspicion that favorable evidence is available is not enough to require that such help be provided." *Id.* at 305, 616 S.E.2d at 304 (quotation omitted). Accordingly, we cannot conclude that the trial court abused its discretion.

We now turn to respondents' challenge to the trial court's determination that grounds existed to terminate their parental rights. A termination of parental rights proceeding is conducted in two phases: (1) adjudication and (2) disposition. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). In the adjudication phase, the petitioner has the burden of proving by clear, cogent, and convincing evidence that one or more of the statutory grounds for termination under N.C.G.S. § 7B-1111(a) exists. *Id.* In reviewing an order terminating parental rights, we examine the findings of fact to determine whether they are supported by clear, cogent, and convincing evidence and the conclusions of law to determine whether they are supported by the findings of fact. *In re Pope*, 144 N.C. App. 32, 40, 547 S.E.2d

153, 158, *aff'd per curiam*, 354 N.C. 359, 554 S.E.2d 644 (2001). Findings of fact supported by competent evidence are binding on appeal, even where there is evidence which supports contrary findings. *In re Mills*, 152 N.C. App. 1, 6, 567 S.E.2d 166, 169 (2002), *cert. denied*, 356 N.C. 672, 577 S.E.2d 627 (2003).

Pursuant to N.C.G.S. § 7B-1111, the trial court may terminate parental rights where:

The juvenile has been placed in the custody of a county department of social services, . . . 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.

N.C. Gen. Stat. § 7B-1111(a) (3) (2009).

"The word 'willful' means something more than an intention to do a thing. It implies doing the act *purposely* and *deliberately*. Manifestly, one does not act willfully in failing to make support payments if it has not been within his power to do so." *In re Adoption of Maynor*, 38 N.C. App. 724, 726, 248 S.E.2d 875, 877 (1978) (citations omitted). "A parent's ability to pay is the controlling characteristic of what is a 'reasonable portion' of cost of foster care for the child which the parent must pay." *In re Clark*, 303 N.C. 592, 604, 281 S.E.2d 47, 55 (1981). "A parent is required to pay that portion of the cost of foster care for the child that is fair, just and equitable based upon the parent's ability or means to pay." *Id.* "[N]onpayment would constitute a failure to pay a 'reasonable portion' if and only if respondent[s]

were able to pay some amount greater than zero." *In re Bradley*, 57 N.C. App. 475, 479, 291 S.E.2d 800, 802 (1982). The absence of a court order, notice, or knowledge of a requirement to pay support is not a defense to a parent's obligation to pay reasonable costs. See *In re T.D.P.*, 164 N.C. App. 287, 289, 595 S.E.2d 735, 737 (2004), *aff'd*, 359 N.C. 405, 610 S.E.2d 199 (2005); *In re Wright*, 64 N.C. App. 135, 139, 306 S.E.2d 825, 827 (1983).

In the case *sub judice*, the trial court made the following relevant findings of fact:

49. Amy Weinstein was an YFS permanency planning social worker assigned to the case in January 2008.

50. The mother was employed at Wendy's the entire time Ms. Weinstein supervised the case.

. . . .

67. YFS expended the board rate of approximately \$500.00 for foster care monthly for each of the children. YFS has also had to pay for all medical expenses for [Paul] and [Ivan] due to their undocumented immigrant status.

68. The mother has never made any contributions towards the cost of the care of the children.

69. [Respondent-father] has never made any contributions towards the cost of the care of his child.

. . . .

75. [Respondent-father] has been employed at several different jobs during the course of this case. He has worked at Wendy's, as a bricklayer and now works as a painter. He currently earns between \$300.00 and \$400.00 per week as a painter. He has worked consistently since moving to Charlotte, only

missing one to two days, and has always earned between \$300.00 and \$400.00 dollars per week.

76. The mother has maintained consistent employment throughout the life of this case.

. . . .

84. [Respondent-father] and [Respondent-mother] currently live together in a one bedroom apartment. They have a one year lease and pay \$450.00 per month rent.

Based upon its findings of fact, the trial court concluded:

10. [Respondent-mother] has not contributed anything towards the cost of the children's care. [Respondent-mother] was able to contribute some amount greater than zero towards the cost of the children's care.

11. [Respondent-father] has not contributed anything towards the cost of [Eric's] care, though he provided some clothing. [Respondent-father] was able to contribute some amount greater than zero towards the cost of the children's care.

13. Sufficient grounds exist to terminate the parental rights of [Respondent-mother] and [Respondent-father], namely:

. . . .

(3) The [Respondent-mother] has willfully failed, for a continuous period of six months next preceding the filing of these motions, for such period to pay a reasonable portion of the cost of care for the juveniles although physically and financially able to do so.

(4) The [Respondent-father] has willfully failed, for a continuous period of six months next preceding the filing of this motion, for such period to pay a reasonable cost of care for the juvenile although physically and financially able to do so.

Respondents argue the trial court's findings are insufficient to support its conclusions. Furthermore, respondents argue the

trial court failed to make any findings that they could pay some amount greater than zero and that their failure to pay was willful.

The evidence tended to show that Amy Weinstein was the permanency planning social worker assigned to this case from January 2008 to 1 December 2008. Ms. Weinstein testified that respondent-mother was regularly employed with Wendy's, and Ms. Weinstein attached copies of respondent-mother's pay stubs to the court summaries she submitted to the court. Ms. Weinstein further testified that respondent-father was regularly employed and obtained a second job at Wendy's. During the time Ms. Weinstein was assigned to this case, neither parent made any contribution to the cost of the care for the children. Permanency planning social worker Stephanie Separ was assigned to the case on 1 December 2008. Ms. Separ testified that respondent-mother maintained employment and was still employed with Wendy's. We conclude that the evidence supports the trial court's findings of fact. Moreover, the trial court's findings of fact support its conclusion that grounds existed to terminate respondents' parental rights pursuant to N.C.G.S. § 7B-1111(a)(3).

The trial court also found grounds to terminate respondent-mother's and respondent-father's parental rights on the basis of neglect and willful failure to make reasonable progress. Having concluded that one ground for termination of parental rights exists, we need not address the additional grounds found by the

trial court. *See in re Brim*, 139 N.C. App. 733, 743, 535 S.E.2d 367, 373 (2000).

Based on the foregoing, the trial court's order is affirmed.
Affirmed.

Judges MCGEE and BRYANT concur.

Report per Rule 30(e).