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NO. COA02-365

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

IN THE MATTER OF:

LAQUITA DOCKERY
DARIUS GATEWOOD
TYRIC GATEWOOD

Durham County
Nos. 99 J 157
99 J 159
99 J 160

Appeal by respondent from order entered 19 October 2001 by Judge Ann McKown in Durham County District Court. Heard in the Court of Appeals 9 December 2002.

Deputy County Attorney Thomas W. Jordan, Jr. for Durham County Department of Social Services, petitioner-appellee.

Guardian Ad Litem Attorney Wendy C. Sotolongo for Guardian Ad Litem

Hosford & Hosford, P.L.L.C., by Sofie W. Hosford, for respondent-appellant.

CAMPBELL, Judge.

Charles Dockery ("respondent") appeals an order terminating his parental rights as the father of Laquita Dockery, Darius Gatewood and Tyric Gatewood.

Durham County Department of Social Services ("DSS") initially filed petitions alleging the three minor children were neglected. As of the 15 July 1999 hearing on the petitions, service upon respondent had not been successful. On 8 October 1999, the trial

court adjudicated the three minor children neglected. DSS filed a supplemental juvenile petition on 9 December 1999. At a 15 January 2000 hearing for continued custody, respondent, who was represented by appointed counsel, accepted service of the summons, petition and supplemental petition filed by DSS.

On 6 February 2001, DSS filed a separate Motion and Petition For Termination of Parental Rights ("TPR") to terminate the parental rights of respondent as to each of the three minor children. DSS specifically alleged that respondent had: (1) neglected the minor children; (2) willfully left the minor children in foster care for more than twelve months without showing any reasonable progress under the circumstances within the twelve months which led to the minor child's removal; (3) failed to pay a reasonable portion of support for the minor children for a continuous period of six months after the minor child had been placed in the custody of DSS; and (4) willfully abandoned the child. Respondent was served with the three motions to terminate the parental rights of respondent by mailing a copy of them by first class mail to his attorney of record. Prior to trial, respondent moved for the court to order that there be personal service of DSS's motions to terminate respondent's parental rights. The trial court denied the motions. On 19 October 2001, the trial court entered three orders and terminated respondent's parental rights as to each child based on all four statutory grounds set forth in N.C. Gen. Stat. §§ 7B-1111(a)(1), (2), (3) and (7) (2001). DSS also sought to terminate the parental rights of Andrea

Gatewood, the mother of the minor children; however, she signed a relinquishment for adoption. Respondent appeals from the order terminating his parental rights.

Respondent first contends that the trial court erred by denying his motion for personal service. Respondent argues that service upon his attorney "pursuant to Rule 5 fails to provide proper notice to [him]." We disagree.

N.C. Gen. Stat. § 7B-1102 provides:

(a) When the district court is exercising jurisdiction over a juvenile and the juvenile's parent in an abuse, neglect, or dependency proceeding, a person or agency specified in G.S. 7B-1103(a) may file in that proceeding a motion for termination of the parent's rights in relation to the juvenile.

(b) A motion pursuant to subsection (a) of this section and the notice required by G.S. 7B-1106.1 shall be served in accordance with G.S. 1A-1, Rule 5(b), except:

(1) Service must be in accordance with G.S. 1A-1, Rule 4, if one of the following applies:

a. The person or agency to be served was not served originally with summons.

b. The person or agency to be served was served originally by publication that did not include notice substantially in conformity with the notice required by G.S. 7B-406(b) (4) e.

c. Two years has elapsed since the date of the original action.

(2) In any case, the court may order that service of the motion and notice be made pursuant to G.S. 1A-1, Rule 4.

N.C. Gen. Stat. § 7B-1102(a)-(b) (2001). N.C. Gen Stat. § 1A-1, Rule 5(b) provides in pertinent part: "With respect to all pleadings subsequent to the original complaint and other papers required or permitted to be served, service with due return ... may be made upon either the party or, unless service upon the party personally is ordered by the court, upon the party's attorney of record." N.C. Gen Stat. § 1A-1, Rule 5(b) (2001).

Here, respondent accepted service of the summons, petition and supplemental petition at a 15 January 2000 hearing. Therefore, respondent's attorney was properly served with the motion to terminate respondent's parental rights after respondent accepted service of the summons and petition in this case pursuant to N.C. Gen. Stat. § 7B-1102. Respondent cannot show that any of the exceptions exist to require service under G.S. § 1A-1, Rule 4 nor can he show that the trial court abused its discretion in failing to require service of the motion pursuant to Rule 4. More importantly, respondent cannot show he was prejudiced by having the motion served upon his attorney rather than upon himself. Respondent had notice that his parental rights might be terminated at the 15 January 2000 hearing. The summons he accepted service for specifically stated that if the court determines that the allegations of the petition are true, the court "may" [] "order for Termination of Parental Rights of the parent to the juvenile." Accordingly, this assignment of error is overruled.

Respondent also contends there was not clear, cogent, and convincing evidence to support a termination of his parental rights

under any of the four grounds upon which the trial court based its decision. We find the evidence sufficient to support the order terminating parental rights and affirm the decision of the trial court.

Termination of parental rights proceedings are conducted in two phases: (1) the adjudication phase, governed by N.C. Gen. Stat. § 7B-1109, and (2) the disposition phase, governed by N.C. Gen. Stat. § 7B-1110. See *In re Mitchell*, 148 N.C. App. 483, 487, 559 S.E.2d 237, 241 (2002), *temporary stay allowed*, 355 N.C. 349, 561 S.E.2d 891 (2002), *and rev'd*, ___ N.C. App. ___, 570 S.E.2d 212 (2002) (citations omitted). During the adjudication phase, the burden of proof rests on petitioner to prove by clear, cogent, and convincing evidence that one or more of the statutory grounds set forth in section 7B-1111 for termination exists. *Id.*; see N.C. Gen. Stat. § 7B-1109(e)-(f). The standard of appellate review is whether the trial court's findings are supported by clear, cogent and convincing evidence and whether the findings support the conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001).

If petitioner meets its burden of proof that grounds for termination exist, the trial court enters the disposition phase and must consider whether termination is in the best interest of the child. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). It is within the trial court's discretion to terminate parental rights upon a finding that it would be in the best

interests of the child. *Id.* at 613, 543 S.E.2d 910.

Section 7B-1111 provides nine separate grounds upon which an order terminating parental rights may be based. N.C. Gen. Stat. § 7B-1111 (2001). A court's finding of one of the statutory grounds for termination, if supported by competent evidence, will support an order terminating parental rights. *In re Nolen*, 117 N.C. App. 693, 700, 453 S.E.2d 220, 225 (1995). The trial court's decision to terminate parental rights is reviewed on an abuse of discretion standard. *In re Allred*, 122 N.C. App. 561, 569, 471 S.E.2d 84, 88 (1996).

A trial court may terminate parental rights under the 7B-1111(a)(2) upon a finding that:

The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing . . . 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) (2001). Willfulness under section 7B-1111(a)(2) is something less than willful abandonment. *Nolen* at 699, 453 S.E.2d at 224. "A finding of willfulness is not precluded even if the respondent has made some efforts to regain custody of the children." *Id.* The trial court must also find that the parent has failed to make reasonable progress in correcting the conditions which led to the removal of the child. N.C. Gen. Stat. § 7B-1111(a)(2). In *Nolen*, this Court held that sporadic efforts by the parent to improve her situation constituted willful failure to correct conditions that led to the removal. *Nolen* at 699-700, 453 S.E.2d at 224-25. In *In re Oghenekevebe*, 123 N.C. App. 434,

437, 473 S.E.2d 393, 397 (1996), this Court found the respondent willfully left her child in foster care where she failed to show any progress in her therapy until her parental rights were in jeopardy.

In support of its conclusion that respondent's parental rights should be terminated pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) as to Darius Gatewood, the trial court entered the following pertinent findings of fact:

7. The child was placed in foster care on December 9, 1999 pursuant to a supplemental petition. The father was served with the summons and petitions on January 15, 2000. The case was reviewed on February 23, 2000. Legal custody was placed in Durham DSS. Due to his requesting paternity testing as to the child, recommendations as to Charles Dockery were deferred.

. . .

9. The case was reviewed on December 6, 2000. Paternity was established. The father had requested visits; however, the child's therapist was concerned over introducing the father into the life of the child. The father was allowed visits with the concurrence of the child's therapist. He had some visits. The father was ordered to become involved with the child's therapy if recommended. Legal custody was continued in Durham DSS. The father was allowed visits. The father was ordered to pay support. The father was directed to establish a home in order to maintain a stable residence for the child.

10. The case was reviewed on March 16, 2001. At that time, the father had not contacted Darius's therapist. The father was not involved with Darius' therapy. He was not paying support for the child. Legal custody continued with Durham DSS. Visitation was allowed but conditioned on compliance with the

prior court orders. Prior orders were continued in effect. The permanent plan of termination of parental rights and adoption was recognized by the court.

. . .

12. Durham DSS discussed with Charles Dockery the steps he needed to take for the child to be placed in his care. Charles Dockery initially showed interest in being involved with the child; however, he has failed to follow through with being involved with his mental health treatment. He has not visited the child since January 19, 2001. He has not been in contact with the Durham DSS social worker since January 5, 2001.

As to Tyric Gatewood, the trial court entered the following pertinent findings of fact pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) :

4. The child has been in the custody of the Durham County Department of Social Services (hereinafter Durham DSS) since December 9, 1999. The child has remained continuously in foster care up to the hearing on this date.

. . .

6. The child was placed in foster care on December 9, 1999 pursuant to a supplemental petition. The father was served with the summons and petitions on February 8, 2000. The case was reviewed on February 23, 2000. Legal custody was placed in Durham DSS. Due to his requesting paternity testing as to the child, recommendations as to Charles Dockery were deferred.

. . .

8. The case was reviewed on December 6, 2000. Paternity was established. The father had requested visits; however, the child's therapist was concerned over introducing the father into the life of the child. The father was allowed visits with the concurrence of the child's therapist. He had some visits. The

father was ordered to become involved with the child's therapy if recommended. Legal custody was continued in Durham DSS. The father was allowed visits. The father was ordered to pay support. The father was directed to establish a home in order to maintain a stable residence for the child.

9. The case was reviewed on March 16, 2001. At that time, the father had not contacted [Tyric's] therapist. The father was not involved with [Tyric's] therapy. He was not paying support for the child. Legal custody continued with Durham DSS. Visitation was allowed but conditioned on compliance with the prior court orders. Prior orders were continued in effect. The permanent plan of termination of parental rights and adoption was recognized by the court.

11. Durham DSS discussed with [Charles Dockery] the steps he needed to take for the child to be placed in his care. Charles Dockery initially showed interest in being involved with the child; however, he has failed to follow through with being involved with his mental health treatment. He has not visited the child since January 19, 2001. He has not been in contact with the Durham DSS social worker since January 5, 2001. He has not taken a parenting program for children with developmental delays.

The trial court entered the following pertinent findings of fact pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) as to Laquita Dockery:

7. The child was placed in foster care on December 9, 1999 pursuant to a supplemental petition. The father was served with the summons and petitions on January 15, 2000. The summons and petition included termination of parental rights as a possible future disposition in the case. The case was reviewed on February 23, 2000. Legal custody was placed in Durham DSS. Laquita was ordered to have mental health counseling services. Due to his requesting paternity testing on siblings, recommendations as to Charles Dockery were deferred.

8. The case was reviewed on May 17, 2000. The father initiated visits with Laquita, but there was a substantial period during which he had no visits with his daughter. Laquita received mental health treatment. Her problems in school decreased. Legal custody was continued in Durham DSS. The father was allowed visitation.

9. The case was reviewed on December 6, 2000. The father was inconsistent in his visitation. He missed some visits without calling to explain why he did not come for the visits. Legal custody was continued in Durham DSS. The father was allowed visits. The father was ordered to become involved in Laquita's therapy. The father was ordered to pay support. The father was directed to establish a home in order to maintain a stable residence for the child.

10. The case was reviewed on March 16, 2001. The father had not contacted Laquita's therapist. He had not participated in Laquita's therapy. Legal custody continued with Durham DSS. The father was ordered to pay child support. Visitation with the child was allowed but conditioned upon his compliance with the prior court order. Prior orders were continued in effect. The permanent plan of termination of parental rights and adoption was recognized by the court.

. . .

12. Durham DSS discussed with [Charles Dockery] the steps he needed to take for the child to be placed in his care. Charles Dockery initially showed interest in being involved with the child and did attend a parenting program; however, he has failed to follow through with being involved with the mental health treatment. He has not obtained a mental health evaluation. He has not visited the child since January 19, 2001. He has not been in contact with the Durham DSS since January 5, 2001.

The court further found that each child has been in the custody of the Durham County Department of Social Services since December 9,

1999, and has remained continuously in foster care up to the hearing.

Respondent did not except to any of these findings, and they are presumed to be correct and supported by the evidence. *In re Moore*, 306 N.C. 394, 293 S.E.2d 127 (1982), *appeal dismissed*, 459 U.S. 1139, 74 L. Ed. 2d 987 (1983). Nevertheless, we have examined the record and determined that these findings are based upon orders entered in the case, the testimony of a DSS social worker who worked with the three minor children. Accordingly, we find the trial court's findings are supported by clear, cogent and convincing evidence. Furthermore, we hold that these findings support the court's conclusion that Charles Dockery was subject to having his parental rights terminated pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). *See, e.g., In re Nolen*, 117 N.C. App. 693, 453 S.E.2d 220; *In re Oghenekevebe*, 123 N.C. App. 434, 473 S.E.2d 393. Respondent fails to show, nor do we find, that the trial court abused its discretion in terminating respondent's parental rights. *See Dept. of Social Services v. Roberts*, 22 N.C. App. 658, 207 S.E.2d 368 (1974).

Because we have determined that one of the grounds set forth in N.C. Gen. Stat. § 7B-1111 supports the trial court's order, we need not address respondent's challenge to the trial court's termination on other grounds. *See In re Allred* at 568, 471 S.E.2d at 88. Accordingly, the trial court's order terminating respondent's parental rights is affirmed.

Affirmed.

Judges WYNN and McGEE concur.

Report per Rule 30(e).