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NO. COA04-569

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2004

IN THE MATTER OF:
D.C.
M.L.

Buncombe County
No. 02 J 77

Appeal by respondent mother from judgment entered 9 January 2004 by Judge Gary S. Cash in Buncombe County District Court. Heard in the Court of Appeals 29 November 2004.

John C. Adams for petitioner-appellee Buncombe County Department of Social Services.

Michael N. Tousey, Attorney for Guardian ad Litem Brent Battles, for the minor children.

Richard Croutharmel for respondent-appellant mother.

STEELMAN, Judge.

The minor children came to the attention of Buncombe County Department of Social Services (DSS) in July 2001, when it was reported that the two minor children and their two older half siblings were neglected due to lack of proper medical care and stable housing, and exposure to "constant domestic violence" between respondent mother and respondent father. After two subsequent reports of neglect based upon respondent mother's failure to properly supervise the minor children and failure to correct any of the deficiencies found in this case, DSS petitioned

to have the children adjudicated neglected on 1 March 2002. Non-secure custody hearings were conducted on several occasions in March 2002, with non-secure custody being continued with DSS. Respondent mother was granted supervised visitation at the offices of DSS. Adjudication was set for April 2002.

The district court conducted adjudication and disposition hearings on 22 April 2002. Respondent mother had to-date failed to get a drug assessment or treatment, and had not executed a service or visitation plan. Despite their attempts, DSS and the children's guardian ad litem had been unable to get in contact with respondent mother. With the exception of a visit on 27 March 2002, respondent mother had not visited with the children since they had been in the custody of DSS. Respondent mother was not in attendance at the 22 April 2002 hearings. The court subsequently adjudicated the children neglected and ordered that the children remain in the legal custody of DSS.

While the initial plan of DSS was to reunify the minor children with respondent mother, the plan was changed in January 2003 when respondent mother failed to take any steps to correct the conditions that led to the children's removal from the home. Respondent mother attended only one permanency planning hearing after the non-secure custody hearing on 25 March 2002. In fact, she was in jail from 14 October 2002 through 7 January 2003. It was not until after DSS filed its petition to terminate respondent mother's parental rights, on 4 September 2003, that respondent mother began to participate in various rehabilitative programs.

Significantly, her participation in these programs was to comply with the terms and conditions of her probation, and not necessarily to reunify her family. Despite participation in the rehabilitative programs, however, respondent mother still relapsed into drug use in June and September 2003.

The termination hearing was held on 3 and 6 November 2003 before Judge Gary S. Cash. After hearing the testimony and reviewing the underlying court orders and adjudication, Judge Cash entered an order terminating respondent mother's parental rights as to the two minor children. The trial court found that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and (3) to terminate respondent mother's parental rights. The trial court further found that it was in the best interests of the minor children to terminate respondent mother's parental rights. Respondent mother appeals.

A termination of parental rights proceeding is bifurcated. In the first stage, the adjudicatory stage, the petitioner bears the burden of proving by clear, cogent, and convincing evidence that the termination of such rights is warranted. *In re McMillon*, 143 N.C. App. 402, 408, 546 S.E.2d 169, 173-74 (2001). N.C. Gen. Stat. § 7B-1109(e) requires that the trial court during this stage, "take evidence, find the facts, and . . . adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent." N.C. Gen. Stat. § 7B-1109(e) (2003). Upon the finding of at least one of the statutory provisions authorizing termination

of parental rights, the court then moves to the second stage of the termination proceeding, the disposition stage. *McMillon*, 143 N.C. App. at 408, 546 S.E.2d at 174. In accordance with N.C. Gen. Stat. § 7B-1110, the court during this second stage "shall issue an order terminating the parental rights of such parent," who has been found to have fulfilled one of the provisions justifying termination "unless the court shall further determine that the best interests of the juvenile require that the parental rights of the parent not be terminated." N.C. Gen. Stat. § 7B-1110(a) (2003).

On appeal, the dispositive issues are ""whether the court's 'findings of fact are based upon clear, cogent and convincing evidence' and whether the 'findings support the conclusions of law.'" *In re Baker*, 158 N.C. App. 491, 493, 581 S.E.2d 144, 146 (2003) (citations omitted). "So long as the findings of fact support a conclusion based on [the relevant statute], the order terminating parental rights must be affirmed." *In re Oghenekevebe*, 123 N.C. App. 434, 436, 473 S.E.2d 393, 395-96 (1996).

At the outset, we note that respondent mother has failed to assign error to any true finding of fact. Instead, she assigned error to findings of fact 36 and 39 arguing that "they were actually conclusions of law and not supported by competent evidence or findings of fact." Accordingly, the court's findings of fact are presumed correct and are binding on appeal. See *In re Beasley*, 147 N.C. App. 399, 405, 555 S.E.2d 643, 647 (2001). Our review is therefore limited to whether the trial court's findings of fact support its conclusions of law.

In the case *sub judice*, the trial court terminated respondent mother's parental rights based upon N.C. Gen. Stat. § 7B-1111(a)(1) and (a)(3). Defendant first argues that the trial court erred in terminating her parental rights based upon N.C. Gen. Stat. § 7B-1111(a)(1) because there was not sufficient evidence to support such a conclusion.

N.C. Gen. Stat. § 7B-1111(a)(1) provides that the trial court may terminate a parent's parental rights based upon neglect if "[t]he parent has . . . neglected the juvenile. The juvenile shall be deemed to be . . . neglected if the court finds the juvenile to be . . . a neglected juvenile within the meaning of G.S. 7B-101." N.C. Gen. Stat. § 7B-1111 (a)(1)(2003). N.C. Gen. Stat. § 7B-101 defines a neglected juvenile 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. Gen. Stat. § 7B-101(15) (2003). In instances, where the minor children have been adjudicated neglected and the parents have not had custody for a significant period prior to the termination hearing, the prior adjudication standing alone will not be sufficient to support termination. *In re Brimm*, 139 N.C. App. 733, 742, 535 S.E.2d 367, 372 (2000). In *Brimm*, this Court further explained that:

[T]he court must take into consideration 'any evidence of changed conditions in light of the

evidence of prior neglect and the probability of a repetition of neglect. The determinative factors must be the best interests of the child and the fitness of the parent to care for the child at the time of the termination proceeding.'

Id. (quoting *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984)).

The trial court, after hearing the evidence, made the following pertinent findings of fact:

16. That the Respondent Mother has neglected the minor children pursuant to the provision of N.C.G.S. 7B-1111(a)(1) in that the minor children were not receiving proper care and supervision while living with the Respondent Mother, and since the minor children have been removed from [sic] her care, the Respondent Mother has not addressed any of the issues which led to the removal of the minor children from her care. Specifically, the Respondent Mother continues to abuse and use illegal substances. She is not stable and has failed to obtain and maintain stable employment or living arrangements. She has abandoned the minor children, and she has continued to engage in criminal and anti-social behaviors, which have resulted in her being incarcerated at times during the pendency of this action. Therefore, the minor children would continue to be neglected if the minor children were returned to the care of the Respondent Mother.

. . . .

28. That the Buncombe County Department of Social Services has had continuous custody of the minor children since March 1, 2002. Respondent Mother has last had a visit with the minor children on March 27, 2002. On May 2, 2002, the mother stopped by unannounced and spoke with the social worker, Ms. Ensley. The social worker had asked Respondent Mother during May to obtain a substance abuse assessment and comply with treatment, to obtain stable housing, to improve on her parenting skills and to attend the Women at

Risk program. Ms. Ensley did not hear from the mother again until January 7, 2003 when Respondent Mother called her. The Buncombe County Department of Social Services worker had tried to contact the mother earlier. The Respondent Mother had missed two visits in April but had one visit with the children on March 27, 2002. On January 7, 2003 Respondent Mother stated to the social worker that she had been in jail from October 14, 2002 until January 7, 2003 and was now in Swain Recovery Center for substance abuse. That up to this point Respondent Mother had not complied with the services offered by the Buncombe County Department of Social Services. . . .

29. The children who are [the] subject matter of this action have been in the same foster care since March of 2002. This is not a pre-adoptive placement but the children are doing superbly. The behaviors that the children originally exhibited when they were placed into this home included being whinny, fussy, not having a set routine, and acting out like slapping, hitting and biting at daycare. These improper behaviors have now disappeared and the children are greatly improved. Respondent Mother did send cards, letters and gifts to the children while she was in jail and subsequent thereto and the social worker has received these but has not delivered them to the children. Respondent Mother has not asked for visitation since the Court has suspended it since it's [sic] order in January of 2003.

. . . .

31. That Respondent Mother lives in a two-bedroom mobile home with a friend with whom she splits her expenses at 35 Brookdale Road in Asheville, since May or June of 2003. She has been continually involved with the Women at Risk Program and the 28th Judicial District Drug Court Program since her release from Swain Recovery Center. She had a substance abuse assessment probably in December of 2002 while she was incarcerated and had substance abuse treatment while at Swain Recovery Center. She has attempted to obtain parenting classes since she has completed her Swain Recovery Program by

contacting the Buncombe County Health Department but has been told that there would have to be a referral for any such classes by the Court or by the Buncombe County Department of Social Services. The Buncombe County Department of Social Services has stated to her that she can not get a referral since termination of parental rights have been sought. Respondent Mother attended NA and AA meetings and currently attends 5 to 7 meetings a week. She receives medication for a bi-polar diagnosis and individual counseling through the services of Blue Ridge Center, the community mental health center serving this Judicial District, and she is in the phase two portion of the Drug Court Program having done 50 hours of community service, three drug screens each week, individual therapy, and attending NA/AA meetings each week. Respondent Motehr [sic] has completed 16 weeks of group therapy and 20 weeks of substance abuse counseling. Her use of cocaine has continued for at least 20 years.

32. That Respondent Mother desires to have custody of her children so that she might be able to find a residential placement for her and her children such as the one operated by Summit House in Greensboro, North Carolina.

33. That Respondent Mother did not complete the Pathways Program because she began to see the father of the children again and relapsed in her substance abuse. She has had two relapses in the current year, one in June after testifying in a stressful criminal case against an individual who had raped her, and once in September after she started seeing [the putative father of the minor children] again. This last relapse was approximately six or seven weeks prior to the trial of this matter. She testifies that she has had no contact with the father since her last relapse and intends to get a restraining order. She is just beginning the ARP Phoenix drug abuse program here in Asheville. Respondent Mother also has testified that she felt stable after Swain recovery treatment but relapse is a common thing in her recovery. She is taking individual counseling to help her address the problems of [the minor children's father] who she feels has had a negative effect on her

substance abuse recovery.

34. That at the date the petition was filed herein where the Buncombe County Department of Social Services was granted custody of Respondent Mother's children, the mother was using crack-cocaine and was involved in a domestic violent relationship with . . . the father of the children. That, today, she has had a stable residence for 5 or 6 weeks, does not yet have stable full time employment and has recently relapsed for a second time in September of 2003 by again using crack cocaine for three days, when she was with [the minor children's father] and again experiencing some domestic violence. Prior to that she used crack cocaine for two days in June of 2003.

35. That the Court finds by clear, cogent and convincing evidence that . . . [the] mother of the minor children, continues to struggle with her addiction to crack-cocaine. She has made considerable effort to receive and has received substance abuse treatment and services in this community. She does not yet have stable employment; her housing has been stable for six weeks but there is no evidence of long-term stability of housing. The juveniles have not, at the time of this proceeding, received proper care, supervision, or discipline from their parents. There is a showing of a past adjudication of neglect and there is clear and convincing evidence of a probability of repetition of that neglect if the juveniles were to be returned to their mother due to the recent history of said parent's relapse to the use of crack cocaine.

36. That the Court finds by clear, cogent and convincing evidence that grounds exist for the termination of parental rights of Respondent Mother pursuant to N.C.G.S. 7B-1111 a, (1) and (3) based on the allegations contained in the motion. The Court will not find grounds pursuant to N.C.G.S. 7B-1111 a (2) and (7).

. . . .

39. That it is in the best interest of

the minor children . . . that the parental rights of Respondent Mother . . . to said minor children be terminated and the minor children be released for adoption.

Based upon the court's findings, which are presumed correct, the court concluded:

3. That within the meaning of N.C.G.S. 7B-1111(1) [sic] the Respondent Mother neglected the minor children when the minor children were placed in the custody of the Buncombe County Department of Social Services on March 1, 2002, and continues to neglect the minor children in that she has abandoned the minor children; she has failed to provide any love, nurturance, or support for the minor children; she has failed to provide the personal contact, love, and affection that inheres in the parental relationship; and, she has failed to provide a stable living environment and proper food and clothing for the children. That . . . [the] mother of the minor children, continues to struggle with her addiction to crack-cocaine. She has made considerable effort to receive and has received substance abuse treatment and services in this community. She does not yet have stable employment; her housing has been stable for six weeks but there is no evidence of long-term stability of housing. There is a reasonable probability of continuing neglect from the Respondent Mother.

. . . .

11. That grounds exist for the termination of parental rights and that it is in the best interest of the minor children . . . that the parental rights of the Respondent Mother . . . to said minor children be terminated and the minor children be released for adoption.

In the instant case, the minor children were adjudicated neglected primarily based upon respondent mother's drug abuse and domestic violence existing between respondent mother and the putative father of the minor children, which prevented respondent

mother from properly supervising and caring for the minor children. As a result of that adjudication, the trial court ordered respondent mother to complete an assessment for substance abuse, participate successfully in treatment, and to maintain a stable and clean home environment. The trial court also ordered her to stop entertaining friends that may pose a risk of abuse or neglect to the minor children. At the time of the termination hearing, respondent mother had completed an assessment for drug abuse, and had even participated in treatment for her dependency issues. The court found, however, that respondent mother had not taken any of these steps towards rehabilitation until it was ordered as a condition of her probation. Moreover, the court found respondent mother had twice relapsed into drug use, despite having participated in drug treatment, with the most recent relapse just six or seven weeks prior to the termination hearing. In fact, respondent mother was just beginning treatment in yet another treatment program at the time of hearing. The court also found respondent mother's living arrangements of only five or six weeks was not necessarily long-term stable housing, especially since she did not have stable full time employment and was living with a friend. Here, the court's findings show respondent mother's drug addiction, the major circumstance which led to the minor children being adjudicated neglected, still exists. Notwithstanding respondent mother's attempts to overcome her addiction, the trial court's findings show she is still struggling in this regard. Further, respondent mother's continued lack of employment and

uncertainty about future living conditions, support the trial court's conclusion that the neglect will likely recur. The trial court did not, therefore, err in that grounds existed under N.C. Gen. Stat. § 7B-1111(a)(1) to terminate respondent mother's parental rights.

Having so concluded, we need not inquire as to the trial court's conclusion as to grounds existing under N.C. Gen. Stat. § 7B-1111 (a)(3). See *Brimm*, 139 N.C. App. at 743, 535 S.E.2d at 373. We then move to a consideration of the propriety of the trial court's finding that it was in the best interest of the children to terminate respondent mother's parental rights to them.

As argued by respondent mother, though labeled a "finding of fact," the best interest determination is more correctly termed a conclusion of law. To that end, the court's determination that termination of parental rights would be in the best interest of the child is reviewed applying an abuse of discretion standard. *In re Nolen*, 117 N.C. App. 693, 700, 453 S.E.2d 220, 225 (1995).

Here, the trial court's findings tend to show that the court gave careful consideration of the evidence, arguments of counsel, and the law as it exists in this jurisdiction. After discussing the respondent mother's efforts and failures to correct the conditions that led to the removal of her minor children from the home, the trial court specifically made findings as to the improvement that the minor children have made since their placement in foster care. Based upon those findings, which again are presumably correct, we conclude that the trial court did not abuse

its discretion in determining that it was in the best interests of the minor children to terminate respondent mother's parental rights.

In light of the foregoing, the judgment of the trial court is affirmed.

AFFIRMED.

Judges HUNTER and ELMORE concur.

Report per Rule 30(e).