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NO. COA04-1613

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

IN THE MATTER OF
C.I.B.
J.L.P.
L.H.P.

New Hanover County
Nos. 03 J 140
03 J 141
03 J 142

Appeal by respondent from order entered 8 June 2004 by Judge J. H. Corpening, II, in New Hanover County District Court. Heard in the Court of Appeals 17 August 2005.

New Hanover County Department of Social Services, by Dean W. Hollandsworth, for petitioner-appellee.

Regina Floyd-Davis for Guardian ad Litem-Appellee.

Richard E. Jester for respondent-appellant.

CALABRIA, Judge.

Dena B. ("respondent") appeals from an order terminating parental rights to C.I.B., J.L.P., and L.H.P., collectively (the "children"). We affirm.

In February 2001, the New Hanover County Department of Social Services ("Social Services") filed an initial juvenile petition. At the time of the initial petition, the children were ages twelve, ten, and nine, respectively, and respondent was a single-parent. The initial petition included allegations of respondent's substance abuse and improper supervision of the children. Specifically,

Social Services alleged respondent tested positive for cocaine, left the children home alone while she went to work, and, on at least one occasion, left the children unattended at midnight. At one point when respondent left the children unsupervised, their residence burned down.

By the time of the 12 April 2001 adjudicatory hearing on the matter, however, respondent

appeared motivated to remain drug free and provide a stable environment for her children. She was employed full-time, coordinated therapy appointments for her children, maintained contact with their schools, and enrolled in Coastal Horizons Substance Abuse Treatment program ["Coastal Horizons"] and continued to have random drug screens.

Accordingly, the trial court ordered that legal custody remain with Social Services but placed the children with respondent. Soon after Social Services returned the children to respondent, her progress deteriorated. Social Services received reports that respondent left the children with a nineteen-year-old male who drank alcohol around the children, and respondent failed to correct the situation even after agreeing with Social Services to find someone more qualified. Subsequently, respondent's landlord evicted respondent and the children from their residence because respondent continued to associate with a known drug dealer.

After the eviction and prior to the first review hearing, Social Services placed the children in foster care for the second time on 6 June 2001. At the review hearing on 12 July 2001, the court found respondent's attendance at Coastal Horizon became inconsistent, random drug screens administered by Social Services

came back "diluted" twice, and a third screening came back positive for cocaine usage. The court ordered Social Services to retain custody of the children and required that respondent test negative at two random drug screens before her visitation with the children could resume. Respondent never fulfilled this requirement.

In its 17 January 2002 permanency planning order, the trial court noted that "Social Services has exhausted all reasonable efforts to reunify this family to no avail" and changed the permanent plan for the children to adoption. Respondent subsequently moved to Tennessee to live with her aunt in "recognition of the severity of her addiction and need to change her lifestyle." Her move, however, prevented Social Services from monitoring her progress. While in Tennessee, respondent remained unemployed and failed to submit for a drug test when asked to do so by Social Services. Additionally, both before and after respondent's move to Tennessee "[s]he . . . visited the children on an inconsistent and sporadic basis, with gaps as long as ten months between visits on two occasions between September of 2001 until July of 2002, then again from September of 2002 until July of 2003."

At the termination of parental rights hearing that took place on 15 September 2003 and 24 September 2003, the Honorable J. H. Corpening, II of the New Hanover District Court determined that statutory grounds existed for terminating respondent's parental rights and that terminating respondent's rights was in the best

interests of the children. He entered an order terminating respondent's parental rights to the children on the grounds that

the Respondent-Mother has neglected the children . . . and that the probability of repetition of neglect is strong. That the Respondent-Parents have willfully abandoned their children and the Respondent-Mother has willfully and not due solely to poverty, left the children . . . in foster care for more than twelve months without showing to the satisfaction of the Court that reasonable progress under the circumstances has been made to correct the conditions that led to the children's removal.

Respondent appeals.

I. Service of Process

As a preliminary matter, respondent argues that the trial court lacked jurisdiction because the summons and petition to terminate parental rights were not properly served upon the respondent, proof of delivery with an affidavit was not filed, and the return receipt in the case file is not dated and the postmark is unreadable. Rule 12(h) of the North Carolina Rules of Civil Procedure states, "A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived . . . (ii) if it is neither made by motion under this rule nor included in a responsive pleading[.]" N.C. Gen. Stat. § 1A-1, Rule 12 (2003). See also *In re Howell*, 161 N.C. App. 650, 656, 589 S.E.2d 157, 160 (2003) (stating, "[T]he filing of an answer is equivalent to a general appearance, and a general appearance waives all defects and irregularities in the process and gives the court jurisdiction of the answering party even though there may have been no service of summons.")

By filing an answer and fully participating in the hearing without raising the issue of lack of personal jurisdiction or improper service of process, respondent waived this defense, and therefore, we do not address the merits of this argument. Additionally, although the heading in her brief suggests that respondent also argues ineffective assistance of counsel, she made no argument and cited no authority supporting this assignment of error in her brief, and we deem it abandoned under N.C. R. App. P. 28(b)(6) (2005).

We note that respondent has submitted a reply brief to this Court that argues her assignment of error regarding ineffective assistance of counsel. As a matter of judicial economy, we reject respondent's attempt to get a second chance to more effectively argue this issue. North Carolina Rule of Appellate Procedure 28(h)(3) states, in pertinent part,

If the parties are notified under Rule 30(f) that the case will be submitted without oral argument on the record and briefs, an appellant may, within 14 days after service of such notification, file and serve a reply brief limited to a concise rebuttal to arguments set out in the brief of the appellee which were not addressed in the appellant's principal brief or in a reply brief filed pursuant to Rule 28(h)(2).

Respondent's reply brief raised a new argument as opposed to a concise rebuttal, and as such, we do not consider respondent's ineffective assistance of counsel argument.

II. Challenges to Adjudicatory and Dispositional Phases:

Respondent next argues that the trial court erred in its findings of fact and conclusions of law in that the trial court

based its findings on insufficient evidence and considered past rather than present conditions. Moreover, respondent argues that "it was not in the best interest of the children to terminate parental rights." Termination of parental rights is a two step process with an adjudicatory stage and a dispositional stage. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). In the adjudicatory stage, the burden is on the petitioner to prove by clear, cogent, and convincing evidence that one of the grounds for termination of parental rights set forth in N.C. Gen. Stat. § 7B-1111(a) exists. *Id.* On appeal from the adjudicatory stage, we consider whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether those findings of fact support its conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000). "Clear, cogent, and convincing describes an evidentiary standard stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt." *North Carolina State Bar v. Sheffield*, 73 N.C. App. 349, 354, 326 S.E.2d 320, 323 (1985) (citation omitted). If the petitioner meets its burden of proving at least one ground for termination of parental rights exists under N.C. Gen. Stat. § 7B-1111(a), the court proceeds to the dispositional phase and considers whether termination of parental rights is in the child's best interests. On appeal from the dispositional stage, we consider whether the trial court abused its discretion in terminating parental rights. *In re Nesbitt*, 147 N.C. App. 349, 352, 555 S.E.2d 659, 662 (2001).

In this case, the trial court proffered three statutory grounds for terminating respondent's parental rights: respondent "neglected the juvenile," "willfully left the juvenile in foster care . . . for more than 12 months[,]" and "willfully abandoned the juvenile[.]" See N.C. Gen. Stat. §§ 7B-1111(a)(1), (2), (7) (2003). If any of these three grounds on which the trial court based its order terminating parental rights was based upon findings of fact supported by clear, cogent, and convincing evidence, the order appealed from should be affirmed. *In re Swisher*, 74 N.C. App. 239, 240, 328 S.E.2d 33, 35 (1985). Because we hold that the trial court properly made findings, supported by clear, cogent, and convincing evidence, that respondent neglected the children and that the trial court did not abuse its discretion in determining that terminating respondent's rights was in the best interests of the children, we need not address the alternative statutory grounds for terminating respondent's rights.

A. Neglect

"Where, as here, a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, the trial court must employ a different kind of analysis to determine whether the evidence supports a finding of neglect." *In re Shermer*, 156 N.C. App. 281, 286, 576 S.E.2d 403, 407 (2003). In the absence of such a modified analysis, Social Services would never be able to show by clear, cogent, and convincing evidence that a child is *currently neglected* by the parent, and termination of parental rights for neglect would be impossible. *In re Ballard*,

311 N.C. 708, 714, 319 S.E.2d 227, 232 (1984). The determinative factors remain 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.*, 311 N.C. at 715, 319 S.E.2d at 232, and "although prior adjudications of neglect may be . . . considered by the trial court, they will rarely be sufficient, standing alone, to support a termination of parental rights, since the petition must establish that neglect exists at the time of hearing." *In re Shermer*, 156 N.C. App. at 286, 576 S.E.2d at 407. Accordingly, in analyzing a child's best interests and the fitness of the parent in cases where the child has not been in the parent's custody, the trial court must "consider evidence of changed conditions in light of the history of neglect by the parent and the probability of a repetition of neglect." *Id.* In addition, visitation by the parent is a relevant factor in such cases. *In re Pierce*, 146 N.C. App. 641, 651, 554 S.E.2d 25, 31 (2001).

In regard to neglect, the trial court made the following pertinent finding:

8. The children in this matter were found to be neglected in that adjudication order of the Honorable J.H. Corpening, II dated April 21, 2001 by way of lack of proper care, supervision or discipline and by environment injurious to their welfare due to the Respondent-Mother's history of substance abuse and supervision issues since March of 2000, including leaving her children unsupervised late at night and on one occasion when left unsupervised, their residence caught on fire and burned down. The mother tested positive for cocaine on February 22, 2001, such drug usage interferes with her ability to parent in significant ways,

including endangerment of her children by leaving them alone in the residence. She has been deceptive in admitting to her drug usage, specifically by signing a protection plan denying such activity on February 21, 2001, one day before testing positive for cocaine. Since the date of adjudication, she has not addressed her drug usage in a substantial and meaningful manner. She initially enrolled in the Coastal Horizons Substance Abuse Treatment Program, complied at first, then began missing sessions and turning up diluted on drug screens before testing positive for cocaine on June 27, 2001. She entered an inpatient program on July 31, 2001, was discharged successfully on August 21, 2001 but was not compliant with an after care program and tested positive for cocaine on September 12 and 26, 2001 and October 2, 2001. She represented that she had enrolled in the New Visions program in court on January 17, 2002, however she moved to Tennessee in June of 2002, which effectively ended the petitioner's ability to monitor the case in a fashion suitable to the severity of her problem. The social worker, Ms. Brooks, was unable to request random drug screens of the mother and when she attempted to do so in December of 2002, the mother failed to submit on that date. *The history of failure in addressing her drug problem and lack of compliance with random screens, coupled with the impossibility of proper monitoring of her treatment progress and sporadic and infrequent visitations lead the Court to find that the likelihood and probability of repetition of neglect is strong in this matter.*

(Emphasis added.)

After reviewing the record, briefs, and transcripts, we hold this finding is supported by clear, cogent, and convincing evidence, and we reject respondent's argument that the trial court considered her past rather than present conditions. This Court has

specifically held "parental rights may . . . 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 [was] returned to [his] parents." *In re Reyes*, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000) (emphasis added). We further hold, the trial court appropriately considered past adjudications of neglect in light of the probability of repetition of neglect at the time of the termination proceeding and that this finding supports the court's conclusion that "grounds to terminate parental rights of [respondent] . . . have been established by clear, cogent, and convincing evidence [including that respondent] has neglected the children . . . and that the probability of repetition of neglect is strong."

Furthermore, given respondent's failure to remedy her substance abuse problems, her failure to properly supervise the children, her infrequent visitations with the children, and her failure to maintain employment, along with the trial court's determination that the likelihood of repetition of neglect is strong, the trial court did not abuse its discretion in determining that terminating respondent's parental rights is in the children's best interests. As such, we reject respondent's arguments.

III. North Carolina General Statutes § 7B-1109(e) (2003)

Finally, respondent argues that the trial court erred in failing to comply with the time requirement set forth in N.C. Gen. Stat. § 7B-1109(e), which states:

The court shall take evidence, find the facts,
and shall 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. The adjudicatory order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing.

In this case, the termination of parental rights hearing ended on 24 September 2003; however, the adjudicatory order was not entered until 8 June 2004, approximately 250 days later. This Court has recently reaffirmed our holdings that there is no *per se* reversal for violation of the statutory time lines; rather, the respondent must show prejudice resulting from the delay. *In re C.J.B.*, ___ N.C. App. ___, ___, 614 S.E.2d 368, 369 (2005). Furthermore, "whether a party has adequately shown prejudice is always resolved on a case-by-case basis." *In re A.L.G.*, ___ N.C. App. ___, ___, 619 S.E.2d 561, 564 (2005). This Court has said,

[D]etermining prejudice is not a rubric by which this Court vacates or reverses an order when, in our opinion, the order is not in the child's best interest. Nor is prejudice, if clearly shown by a party, something to ignore solely because the remedy of reversal further exacerbates the delay. If we were to operate as such, we would either reduce the General Assembly time lines to a nullity, or worse, escalate violations of them beyond the reason for their existence: the best interests of the child.

Id. (internal quotations and citations omitted).

While this Court has recognized that "the longer the delay in entry of the order beyond the thirty-day deadline, the more likely prejudice will be readily apparent," *In re C.J.B.*, ___ N.C. App. at ___, 614 S.E.2d at 370, we have also said that even in the face of a lengthy delay "the party asserting prejudice must actually bear

its burden of persuasion.” *In re A.L.G.*, ___ N.C. App. at ___, 619 S.E.2d at 564. Respondent argues that “her appellate counsel had not been appointed because her appeal could not be filed until the order was entered” and she was “prejudiced by not being allowed to talk to or see her children, or send them presents or letters” because of the delays in entering orders. While we reiterate that it is important for orders to be entered in a timely manner so that the children can “sett[e] into a permanent family environment,” *In re L.E.B.*, 169 N.C. App. 375, 427, 610 S.E.2d 424, 426-27 (2005), on these facts, we hold that respondent has not shown prejudice by the delay in entry of the order and further delaying the termination of respondent’s parental rights is not in the best interests of the children.

In regard to her visitation with the children, respondent has shown no prejudice since even if the order had been entered in a timely manner she would have been unable to see her children during the time period at issue because our review indicates her rights were properly terminated. Further, we find it noteworthy that even when respondent had an opportunity to see her children prior to the order at issue she failed to do so as shown in the trial court’s findings, supported by clear, cogent, and convincing evidence, that respondent “visited the children on an inconsistent and sporadic basis, with gaps as long as ten months between visits on two occasions,” “removed herself from meaningful and frequent contact with [the children] by relocating to Tennessee and not complying with the court order to the ends that her visits were suspended,”

and "has been unavailable to them emotionally." Regarding respondent's argument that her appellate counsel could not be appointed until entry of the order, we hold that the delay in appointment of appellate counsel has not prejudiced respondent given that she can point to no specific harm the delay caused, especially in light of our determination that her parental rights were properly terminated. Additionally, upon consideration of the facts of this case, we hold that further delaying the termination of respondent's parental rights because of the untimely order would not be in the best interests of the children.

Accordingly, since respondent cannot show prejudice and further delaying the termination of respondent's parental rights is not in the best interests of the children, we reject this assignment of error.

Affirmed.

Judges ELMORE and GEER concur.

Report per Rule 30(e).