IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
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THIRTEENTH JUDICIAL DISTRICT
CHILDREN'S COURT DIVISION
COUNTY OF SANDOVAL
STATE OF NEW MEXICO

No. D-1329 JQ-2
Docket No:

STATE OF NEW MEXICO, ex rel
CHILDREN YOUTH AND FAMILY DEPARTMENT
IN THE MATTER OF
CHILD, AND CONCERNING
, AND
RESPONDENTS.

APPELLANT'S DOCKETING STATEMENT

COMES NOW, Michael J. Doyle, Attorney for Respondent
and hereby files her Docketing Statement as follows:

Nature of Proceedings

This involves an appeal from a Termination of Parental Rights (TPR) proceeding involving . Hearings on the TPR Motion were held on April 7, 2011, April 28, 2011, and May 26, 2011. On June 16, 2011, the district court judge entered its order terminating Appellant's parental rights. The district court found that there was clear and convincing evidence that the causes and conditions of the neglect and abuses are unlikely to change in the foreseeable future despite reasonable efforts by the Children, Youth, and Families Department (CYFD) to assist Appellant in adjusting the conditions that rendered her unable to properly care for the children.

I. Date of Judgment or Order

The order being appealed from was the Judgment Terminating Parental Rights filed on June 16, 2011. Appellant timely filed her Notice of Appeal on July 18, 20011. This Docketing Statement is being filed by October 16, 2011, which is the day the New Mexico Court of Appeals required the Appellant to file her Docketing Statement following her Motion for Extension of Time to File Docketing Statement.

Concise Statement of Facts

At the TPR hearing CYFD presented evidence through its employee Gregoria Kay Rirou that Appellant had not been compliant with her treatment plan for much of the time that her daughter had been in CYFD's custody. Ms. Rirou testified that an attempted transition had been implemented but stopped due to an additional reported domestic violence incident.

Ms. Rirou testified that although Appellant had participated at times and was performing some work on her treatment plan, she was not gaining a sufficient understanding of the information and was not changing the causes and conditions that brought her daughter into custody. She testified it would not be appropriate to return the child to Appellant.

Over Appellant's objection Ms. Rirou testified about the results of drug tests performed by an outside drug testing company. The Court allowed the testimony about the results of the drug testing based on the public records exception to the hearsay rule, NMRA 2010 11-803(H). Ms. Rirou also testified about a domestic violence incident that formed the basis of the departments' decision not to continue the trial transition home.

In support of its case, CYFD presented testimony from one of Appellant's therapists, Ms. Clarkson, who testified that Appellant was resistant to therapy and not making progress.

However. Ms. Clarkson also testified that she had only seen Appellant five times, that there was never a patient therapist bond, she never addressed the issues with Appellant, and that Appellant had requested a different therapist late in the treatment.

CYFD next presented the testimony of Brian Thompson, a therapist from All Faiths Receiving Home, who was working with the Appellant on a Time Limited Reunification with her daughter. Mr. Thompson testified that the he had no concerns about domestic violence of substance abuse. His interactions between Appellant and her child were appropriate. He was not surprised that the time limited reunification was stopped.

CYFD called Marcy Romero, a service coordinator with Peanut Butter and Jelly, who testified that there is a strong bond between Appellant and her child, that they love each other, Appellant was appropriate with her child, and that Appellant was compliant and focused on keeping her daughter safe. Ms. Romero could not say what would happen in the future, but Appellant had accomplished her goals at Peanut Butter and Jelly and was working for the best interests of her daughter. Both Appellant and were working on co-parenting and had shown an ability to co-parent despite their differences. Ms. Romero further testified that Appellant had followed recommendations. On cross-examination she testified that Appellant could keep her daughter safe and showed appropriate concern for her daughter.

A Corporal Ford with the Rio Rancho Police Department testified his knowledge about Appellant's past domestic violence history over 3 years. He testified about a February 27, 2011 incident involving Appellant and an allegation of domestic violence. He heard a muffled scream or yelp. He conducted a welfare check and saw Appellant in the room. He observed that there were drugs in the room. Appellant had scratches and marks on her face and body. She told him that another person had caused the scratches and marks. Appellant appeared to be under the

influence of drugs at the scene. Appellant did not testify.

II. Issue Raised on Appeal

A. The Children, Youth, and Families Department did not meet its burden of establishing through sufficient clear and convincing evidence that the causes and conditions that brought the child into custody were unlikely to change in the foreseeable future.

(1). How the issue arose: The issue arose during the course of the termination of parental rights hearing. Appellant preserved the issue by arguing in closing arguments that CYFD had not meet its burden of clear and convincing evidence.

(2). List of Authorities:

(a). State of New Mexico ex Rel CFYD vs. Hector C. 2008-NMCA-079 (Parental rights implicate a fundamental liberty interest and CYFD has to provide reevaluations when there is significant progress toward change);

(b). In re Michael R.C., 1999-NMCA-036, ¶ 26, 126 N.M. 760,975 P.2d 373 (terminating parental rights implicates rights of fundamental importance);

(c). State ex rel. Dep't of Human Servs. v. Natural Mother, 96 N.M. 677, 679, 634 P.2d 699, 701 (Ct. App. 1981)(Respondent's past problems are not relevant to whether the conditions would continue in future);

(d). State ex rel. Dep't of Human Servs. v. Natural Mother, 96 N.M. 677, 679, 634 P.2d 699, 701 (Ct. App. 1981) (grounds for termination must be proved by clear and convincing evidence);

(e). In re Candice Y., 2000- NMCA-035, ¶ 10, 128 N.M. 813, 999 P.2d 1045 (appellate court reviews the evidence in the light most favorable to the judgment to determine whether the clear and convincing standard are met);

(f). In re Adoption of Doe, 100 N.M. 764, 767, 676 P.2d 1329, 1332 (1984) (" For evidence to be clear and convincing, it must instantly tilt the scales in the affirmative when weighed against the evidence in opposition and the fact finder's mind is left with an abiding conviction that the evidence is true.");

(g). State ex rel. Children, Youth & Families Dep't v. Athena H., 2006-NMCA-113, ¶¶ 9, 12, 140 N.M. 390, 142 P.3d 978 (CYFD must prove reasonable efforts to assist the respondent to change the conditions and the district court must consider the results of the efforts; it is a de novo review);

(h). State ex rel. Children, Youth & Families Department v. Tammy S., 1999-NMCA-009, ¶¶ 13-15 ("What constitutes reasonable efforts may vary with a number of factors, such as the level of cooperation demonstrated by the parent and the recalcitrance of the problems that render the parent unable to provide adequate parenting").

B. The District Court abused its discretion in allowing CYFD witness Gregoria Kay Rirou to testify about results of drug testing done by an outside company when CYFD had not laid the proper foundation for a business record exception for the records and the records were not public records but records of a private company that transmitted the information to CYFD. The results of the drug tests were double hearsay and no exceptions for their admission were met.

(1). How the issue arose: The issue arose during the course of the termination of parental rights hearing on April 28, 2011 during the testimony of Gregoria Kay Rirou. Appellant preserved the issue by objecting prior to the introduction of the evidence and having a standing objection to discussions about the drug tests.

(2). List of Authorities:

(a). Cadle Co. v. Phillips, 120 N.M. 748, 750-51, 906 P.2d 739, 741-42 (Ct. App. 1995)(court has discretion to admit evidence, and the court did not err in excluding records when the witness did not know how the records were made, kept, and did not know the origin of the records).

(b). State v. Hoeffel, 112 N358, 361 815 P.2d 654, 657 (Ct. App. 1991) ("We review evidentiary rulings by the district court under an abuse-of-discretion standard.").

(c). State v. Ramirez, 89 N.M. 635, 646, 556 P.2d 43, 54 (Ct. App. 1976) (for the public records exception to apply, "the custodian of records 'or other qualified witness,' not necessarily the original entrant, must appear in court, identify the records, and testify as to the mode of preparation and their safekeeping.").

V. Statement regarding recording

The proceedings were recorded.

VI. Prior Appeals

There are no prior appeals.

VII. Order Appointing Counsel

By separate motion Appellant is requesting appointment of appellate counsel.

Respectfully Submitted,

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I certify that I mailed a true and correct copy of the foregoing pleading to all counsel of record this 4 day of October, 2011 to the parties entitled to notice:

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