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NO. COA01-1266

NORTH CAROLINA COURT OF APPEALS

Filed: 20 August 2002

IN THE MATTER OF:

Buncombe County

No. 99 J 235

MAKALA ALLEN

Appeal by respondent from judgment entered 8 February 2001 by Judge Shirley H. Brown in Buncombe County District Court. Heard in the Court of Appeals 5 June 2002.

*Charlotte A. Wade for petitioner-appellee.*

*Michael E. Casterline for respondent-appellant.*

*Lori D. Loftis for guardian ad litem-appellee.*

WALKER, Judge.

Respondent appeals from an order terminating his parental rights to his minor child, Makala Brooks Allen (Makala). The trial court's findings are not in dispute and are summarized as follows: Makala was born on 17 December 1992 and is the natural child of respondent and Teresa Jewell West (West)<sup>1</sup>. On 1 December 1994, the Buncombe County Department of Social Services (DSS) filed a petition alleging Makala was an abused and neglected child. The petition asserted that Makala was living in an environment in which

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<sup>1</sup> West relinquished her parental rights on 9 July 1998 and is not a party to this proceeding.

there was a history of "severe and consistent domestic violence," specifically noting an incident where respondent had assaulted West while she was holding Makala. On 13 January 1995, respondent and West consented to an adjudication of neglect based on the allegations contained within the petition. They also acknowledged they did not provide Makala with proper care and supervision due to the "many episodes of domestic violence and alcoholism" in their home. The trial court then ordered Makala to remain in the custody of DSS, which subsequently placed her in foster care.

At a six-month review hearing, the trial court found respondent and West had recently been charged with several alcohol-related offenses and that West had sought a domestic violence protective order against respondent. The trial court then concluded that they had made "little progress" towards reunification with Makala. Three months later, the matter was again reviewed, at which time the trial court determined that respondent had completed the "Helpmate Abuser Program" and was visiting with Makala. However, the trial court noted that, following the visits, Makala was upset for several days, had difficulty sleeping, exhibited aggressive behavior, and cried for her mother. At two subsequent reviews, Makala's foster parents reported that her behavior became aggressive and disruptive following visits with respondent. Consequently, in April of 1996, the trial court ordered that Makala receive counseling so as to determine whether she should continue to have contact with respondent.

In August of 1996, Makala's therapist recommended that respondent's visits with Makala be limited to one hour per week which, if she displayed no adverse behaviors, were to progress to overnight and weekend visits at the home of respondent's sister-in-law. By October of 1996, DSS had placed Makala back with West and respondent was visiting with her on weekends. As a result, the trial court determined that both parents had made substantial progress in correcting the conditions which led to Makala's removal and granted West primary custody with visitation rights for respondent, as the parties were not living together. DSS was ordered to continue providing protective supervision for a period of three months. However, soon thereafter, respondent was charged with breaking and entering West's home, and the trial court granted a request by DSS to extend its protective supervision. This arrangement continued until 9 March 1997, at which time the case was closed.

On 2 January 1998, DSS filed a second petition after law enforcement officers had been called to West's home. At a subsequent adjudication hearing, the trial court found that Makala continued to live in an environment which was injurious to her welfare, based on new episodes of "drinking, arguing and fights" involving respondent and West and ordered that Makala be removed from West's custody. At the hearing, DSS and Makala's guardian ad litem recommended that the goal should be termination of respondent's and West's parental rights. The trial court disagreed and ordered reunification efforts.

On 27 April 1998, respondent moved the trial court to review the case on grounds that DSS was not working towards reunification. After a hearing, the trial court determined DSS was not making reasonable efforts towards reunification and ordered that Makala's therapist develop a "therapeutic visitation plan" for Makala and respondent. At a review hearing on 22 May 1998, Makala's therapist testified that Makala was afraid of respondent and was experiencing nightmares in which respondent had come after her with a gun. The therapist further testified that she could not ethically develop a visitation plan because, in her opinion, visits between Makala and respondent would be injurious to Makala's welfare. Nevertheless, the trial court ordered a visitation plan which amounted to supervised visits every other week on the DSS premises. When the matter was reviewed in July of 1998, the trial court found that two therapeutic visits had taken place with mixed results. Makala's foster mother reported that her behavior was "unusually quiet" until the day after the first visit when she became "wild and rambunctious," and, following the second visit, her behavior was "somewhat improved."

In September of 1998, Makala received a psychological evaluation from Janice Cole, MS (Cole) at the Developmental Evaluation Center in Asheville. Cole reported that Makala appeared to be experiencing a significant degree of anxiety as evidenced by her having difficulty sleeping, recurrent nightmares, and aggressive behavior towards others. During the evaluation, Makala stated that she disliked her visits with her father. At a review

hearing on 29 May 1999, the trial court found that Makala continued to remain anxious and frightened of respondent despite regular visits. As a result, her therapist recommended that the visits cease. At the same review hearing, Makala's teacher and foster mother testified as to how Makala's visits with her father were adversely impacting her behavior at school and at home. Notwithstanding these assertions, respondent stated that Makala was not afraid of him and that he had done nothing to make her afraid of him. Following the hearing, the trial court ceased visits between respondent and Makala, and shortly thereafter, DSS filed a petition to terminate his parental rights.

After receiving evidence and hearing arguments from the parties, the trial court entered an order on 8 February 2001, finding that clear and convincing evidence supported the termination of respondent's parental rights on three alternative grounds. First, respondent "continues to deny that any of his actions were the cause of [Makala] being removed from his care, . . . has either denied or substantially minimized the problems [Makala] is exhibiting due to the violence and neglect [she] was exposed to in the home and caused by [respondent], and [that respondent] lacks any insight into how his actions have effected [sic] [Makala]." Therefore, "it is reasonably probable that [respondent] would continue to neglect [Makala] if [she] was returned to his care . . . ." Second, although respondent "has participated in treatment to address the issues, he has made little, if any, progress in correcting the conditions which led to

the removal of [Makala] from his care." Therefore, respondent "has willfully left [Makala] in foster care for more than 12 months without showing that reasonable progress under the circumstances has been made within 12 months to correct those conditions which led to [her] removal . . . ." Finally, the trial court concluded that respondent "had emotionally abused [Makala] when [she] came into the custody of [DSS], in that he had created or allowed to be created serious emotional damage to [her] as evidenced by [Makala's] severe anxiety, depression, withdrawal, and aggressive behaviors towards herself and others."

Respondent contends that the trial court's findings do not support these conclusions. We disagree.

N.C. Gen. Stat. § 7B-1111 provides nine alternative grounds for the termination of parental rights. See N.C. Gen. Stat. § 7B-1111(a) (1999). Although a finding on any one of these statutory grounds is sufficient to terminate parental rights, such a finding must be based on "clear and convincing evidence." N.C. Gen. Stat. § 7B-1111(b). Thus, our review is limited to whether (1) there is clear and convincing evidence to support the trial court's findings and (2) whether the findings support the trial court's conclusions. See *In re Huff*, 140 N.C. App. 288, 290-91, 536 S.E.2d 838, 840 (2000), *appeal dismissed*, 353 N.C. 374, 547 S.E.2d 9 (2001). Here, respondent has not excepted to the trial court's findings. Accordingly, we presume the findings are supported by clear and convincing evidence and proceed to determine whether the findings support the trial court's conclusions. See *In re Moore*, 306 N.C.

394, 404, 293 S.E.2d 127, 133 (1982), *appeal dismissed*, 459 U.S. 1139, 74 L. Ed. 2d 987 (1983).

Respondent first contends the trial court erred in its conclusion that he had willfully left Makala in foster care for more than twelve months without making reasonable progress towards correcting the conditions which led to her removal from his care. He maintains that despite his "diligent" efforts to comply with the various orders of the trial court, his reunification with Makala became impossible because DSS had failed to assist him in "accessing the services necessary to achieve that goal."

Pursuant to the version of N.C. Gen. Stat. § 7B-1111(a)(2) applicable to this case, parental rights may be terminated where:

The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made within 12 months in correcting those conditions which led to the removal of the juvenile. Provided, however, that no parental rights shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

N.C. Gen. Stat. § 7B-1111(a)(2)(1999)<sup>2</sup>. Under this provision, "[a] finding of willfulness is not precluded even if the respondent has made some efforts to regain custody of [his child]." *In re Nolen*, 117 N.C. App. 693, 699, 453 S.E.2d 220, 224 (1995). Our Supreme Court has also recently held that the operative time frame for

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<sup>2</sup> We note that our legislature has amended N.C. Gen. Stat. § 7B-1111(a)(2) effective 1 January 2002 and applicable to actions pending or filed on or after that date. See 2001 N.C. Sess. Laws ch. 208, § 6. The current version does not include the words "within 12 months." N.C. Gen. Stat. § 7B-1111(a)(2)(2002).

review is the twelve-month period immediately preceding the filing of the petition; in the instant case, the twelve months prior to 26 August 1999. See *In re Pierce*, \_\_\_ N.C. \_\_\_, \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_ (No. 647A01 filed 28 June 2002).

Here, the trial court made the following findings with respect to whether respondent had made reasonable progress within twelve months to correct the conditions which led to Makala's removal from his care:

31. This matter was reviewed on October 12, 1998, at which time the court found that Makala . . . had had a psychological evaluation which concluded that Makala appeared to be experiencing a significant degree of anxiety as evidenced by her difficulty sleeping, recurrent nightmares, and aggressive behaviors towards others; that Makala appeared to dislike visits with her father, as evidenced by her own admission and by her apparent increase in anxious symptoms prior to and following her visits with her father . . . .

. . . .

33. This matter was reviewed on [May] 29, 1999, at which time the court found that Makala continued to remain anxious and frightened of [respondent] in spite of regular visits, and that Makala's therapist . . . recommended that these visits cease as they were detrimental to the child's stability as evidenced by her continued anxious, regressive and somatic behavior. The court further found that [Makala's former therapist] indicated that continued visits between Makala and [respondent] were exceptionally harmful and injurious to the child's emotional health and stability, and . . . recommended that the visits cease to protect the child's best interest . . . . Makala's foster mother stated that the past month has been the worst for the child before and after visits with her father. At that hearing [respondent]



testified that Makala was not afraid of him and that he had never done anything to make Makala afraid of him.

34. At that hearing the court ceased visits between [respondent] and [Makala] and found "That the minor child is having a very hard time with visits with her father. The therapists, social worker, foster mother and teachers have all seen the extreme fear that the child has about her father and how these visits are adversely impacting on the child's school and home behaviors. The Court cannot understand why [respondent] does not understand or see the extremely negative effect that he has had on the child. The Court is concerned with how the father can correct his relationship with the child if he cannot understand how he has damaged that relationship."

. . .

44. In an attempt to try and work towards reunification, the court ordered that family therapy be initiated. Dr. Aubrey 'Rusty' Harris was hired to set up a plan to work towards reunification. Dr. Harris participated with the treatment team that worked with this case and agreed to schedule his appointments with [respondent] for 6:00 p.m. or later so that it would not conflict with his work schedule. The reunification plan he set up was a step-by-step process in which one step must be accomplished before going on to the next step. The first step was individual sessions with [respondent] to focus on what he needed to do to ensure Makala's safety in his presence, and then a taped session of [respondent] to be shared with Makala and her therapist to show that her father was working towards providing a safe, sober, healthy home for her to visit. The next step was for Makala to provide a taped response to be shared with her father to demonstrate her fears and anxieties about her father's past behaviors, then joint therapy sessions with Makala's therapist in the room, then joint therapy sessions with Makala's therapist not in the room but available to her, then joint therapy sessions with just

[respondent] and Makala, and finally visits between [respondent] and Makala.

45. Dr. Harris scheduled [respondent's] first session for May 17, 1999 at 6:00 p.m., as requested by [respondent]. [Respondent] did not call to cancel nor did he appear for that session. At the next treatment team meeting [respondent] agreed to another session, which was scheduled for June 7, 1999. [Respondent] did attend that session, told Dr. Harris that it was [West] who had the violence problem, that Makala had no reason to be afraid of him, that it was all a conspiracy by [DSS], Makala's therapist and the foster parents. [Respondent] did not accept or acknowledge any responsibility for the fear Makala had for him, or for her being in the custody of [DSS]. [Respondent] did not appear at his next appointment on June 14, 1999, nor did he call to cancel. Dr. Harris did not have any more contact with [respondent] until the next treatment team meeting on July 8, 1999, at which time [respondent] was encouraged to continue with this treatment. [Respondent] did come to a session on July 17, 1999, at which time Dr. Harris again discussed the plan with [respondent], and Dr. Harris encouraged [respondent] to make a video tape for Makala. Initially [respondent] agreed to do the tape then asked that Makala do the tape first so that he could understand why she was so afraid of him. This was attempted but Makala became so distraught after making the tape that she wrote a letter to the Judge begging him not to let [respondent] see the tape as he would come and get her and hurt her. The tape was not shown to [respondent]. The next therapy session with Dr. Harris was August 13, 1999, at which time [respondent] told Dr. Harris that he was not a violent person, that all the violence was caused by . . . West, that he was the victim of her violence. The next therapy session with Dr. Harris was August 20, 1999, at which time [respondent] did make a tape but it was not an adequate response or acknowledgment of the life of violence Makala had been subjected to. Specifically, [respondent] only stated that he was sorry for the pain that Makala was feeling, but he did not acknowledge that he had any responsibility for what had happened to Makala. Again, at

that session, [respondent] stated that the only violence he had been involved in was defensive violence against . . . West when he was protect[ing] himself from her . . . . [Respondent] never returned for any further therapy, and [he] did not comply with or complete family therapy, which was necessary for reunification. In Dr. Harris' opinion, [respondent] and . . . West engaged in collateral violence, meaning that each party engaged in violence towards the other party.

. . .

51. [Respondent] saw Dr. Linda Shamblin for individual therapy beginning in April 1999, and saw her for 12 individual session[s], and Dr. Shamblin attended three treatment team meetings. During these sessions [respondent] stated that Makala was never afraid of him, that the therapist and the social worker were encouraging her to say she was afraid of him, that she saw a few episodes of domestic violence, but never on a regular basis. . . .

These findings clearly demonstrate that Makala began to develop a significant fear of respondent as a result of her exposure to respondent's violent relationship with West. The findings also show that, contrary to defendant's contentions, DSS had made "diligent" efforts to reunite respondent with Makala in that respondent was provided with professional counseling. Despite these efforts, respondent continually refused to acknowledge that he was in any way responsible for the conditions leading to Makala's removal on two separate occasions from his and West's care. Accordingly, we hold the trial court properly concluded respondent had willfully left Makala in foster care for more than twelve months without making reasonable progress towards correcting the conditions which led to her removal from his care. See *In re*

*Tate*, 67 N.C. App. 89, 94, 312 S.E.2d 535, 539 (1984) (holding under a previous statute that "[i]mplicit in the term 'positive response' is that not only must positive efforts be made towards improving the situation, but that these efforts are obtaining or have obtained positive *results*").

Since we have concluded that the trial court properly found one of the statutory grounds for the termination of respondent's parental rights, respondent's remaining assignments of error need not be addressed. However, after careful review of the record, we conclude the trial court's findings support a conclusion that (1) it is reasonably probable that respondent would continue to neglect Makala if she were returned to his care and (2) respondent had emotionally abused Makala when she came into the custody of DSS. The decision of the trial court is

Affirmed.

Judges McCULLOUGH and BRYANT concur.

Report per Rule 30(e).