NO. COA01-881

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

IN THE MATTERS OF:	Mecklenburg County Nos.
BREYETTA SAMANTHA KILLIAN	2000-J-528
LASHANTE LABRESHA KILLIAN	2000-J-529
SAMMIE LEE KILLIAN	2000-J-530
DEANDRE DAVANTE KILLIAN	2000-J-531
BEATRICE BERNICE FLEMING	2000-J-589
SHAKITA SHANELLE FLEMING	2000-J-590

Appeal by respondent from order entered 27 December 2000 by Judge William G. Jones in Mecklenburg County District Court. Heard in the Court of Appeals 25 March 2002.

Leslie C. Rawls, for respondent-appellant.

J. Edward Yeager, Jr., for petitioner-appellee.

BRYANT, Judge.

Respondent appeals from an order terminating her parental rights. Respondent is the mother of six children: Beatrice (DOB 02/23/1987), Shakita (DOB 05/11/1989), Breyetta (DOB 08/30/1990), Sammie (DOB 11/19/1992), LaShante (DOB 04/12/1996) and Deandre (DOB 04/12/1996). The children were born to two different fathers, Sammie Killian and Santiago McClain, who are not parties to this appeal.

Respondent has been married to Sammie Killian, the father of her four youngest children, for approximately five years. They

have been together for approximately twelve years. A referral was made to Youth and Family Services [YFS] on 5 December 1994 after the children were left unsupervised. Another referral was received on 16 August 1996 alleging that the children were left unsupervised, that one of the children was hurt and had not received medical treatment, and that the parents had been fighting. Referrals were also received on 12 February 1998 and 13 February 1998 alleging that the children were dirty, had been beaten with wet rags by their father, and had been sexually abused. Consequently, the Department of Social Services [DSS] filed a petition for custody on 13 February 1998. Shortly thereafter, the children were placed into foster homes. The children were adjudicated as neglected and dependent as to both parents on 12 May 1998 and have been in foster care since that time.

DSS filed petitions to terminate respondent's parental rights as follows: 25 April 2000 for Breyetta, LaShante, Sammie, and Deandre; and 9 June 2000 for Beatrice and Shakita. On 24 October 2000, the district court entered an order terminating respondent's parental rights as to all of the children. The order was signed on 22 December 2000 and filed on 27 December 2000. Respondent appealed.

On appeal, respondent raises the following assignments of error: 1) whether the trial court erred by finding that respondent's responses to questions asked during parenting classes were inaccurate and distorted the material presented in class; 2) whether the trial court erred by concluding that there was clear,

cogent and convincing evidence of grounds to terminate respondent's parental rights; and 3) whether the trial court erred by concluding that it was in the children's best interest to terminate respondent's parental rights. We find no error and affirm the trial court's order.

Standard of Review

There are two stages of a hearing on a petition to terminate parental rights: adjudication and disposition. At the adjudication stage, the petitioner has the burden of proving by clear, cogent and convincing evidence that at least one statutory ground for termination exists. *In re McMillon*, 143 N.C. App. 402, 408, 546 S.E.2d 169, 173-74 (citing *In re Young*, 346 N.C. 244, 485 S.E.2d 612 (1997)), *review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001); *In re Bluebird*, 105 N.C. App. 42, 411 S.E.2d 820 (1992); *see* N.C.G.S. § 7B-1109(f) (2001) (requiring findings of fact to be based on clear, cogent, and convincing evidence). A finding of one statutory ground is sufficient to support the termination of parental rights. *In re Pierce*, 67 N.C. App. 257, 261, 312 S.E.2d 900, 903 (1984). If there is a past adjudication of neglect but no evidence of neglect at the time of the termination proceeding, parental rights may be terminated upon a showing of a probability of repetition of neglect in the event the child is returned to the parent(s). *In re Reyes*, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000) (citing *In re Ballard*, 311 N.C. 708, 319 S.E.2d 227, 232 (1984)). Furthermore, "[w]here evidence of prior neglect is presented, '[t]he trial court must also consider any evidence of

changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect.'" *In re Young*, 346 N.C. 244, 250, 485 S.E.2d 612, 616 (1997) (alteration in original) (quoting *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984)). Upon a finding that at least one statutory ground for termination exists, the trial court proceeds to the disposition stage, where it determines whether termination of parental rights is in the best interests of the child. *In re McMillon* at 408, 546 S.E.2d at 174.

When reviewing an appeal from an order terminating parental rights, our standard of review is whether: 1) there is clear, cogent and convincing evidence to support the trial court's findings of fact; and 2) the findings of fact support the conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *appeal dismissed and review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001). Clear, cogent and convincing evidence "is greater than the preponderance of the evidence standard required in most civil cases, but not as stringent as the requirement of proof beyond a reasonable doubt required in criminal cases." *In re Montgomery*, 311 N.C. 101, 109-10, 316 S.E.2d 246, 252 (1984) (citing *Santosky v. Kramer*, 455 U.S. 745, 71 L. Ed. 2d 599 (1982)). If the decision is supported by such evidence, the trial court's findings are binding on appeal, even if there is evidence to the contrary. *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988). The trial court's conclusions of law are reviewable de novo. *Starco, Inc. v. AMG Bonding and Ins. Servs.*, 124 N.C. App.

332, 336, 477 S.E.2d 211, 215 (1996).

N.C.G.S. § 7B-1111(a) sets out the grounds for terminating parental rights. Finding only one of the statutory grounds under § 7B-1111(a) is sufficient to support the termination of parental rights. *In re Pierce*, 67 N.C. App. 257, 261, 312 S.E.2d 900, 903 (1984). In this case, the trial court found, *inter alia*, that: 1) the children were abused or neglected under § 7B-1111(a)(1); 2) under § 7B-1111(a)(2), respondent left her minor children in foster care for more than twelve months without showing that she made reasonable progress under the circumstances within twelve months to correct the conditions that led to the removal of the children; and 3) under § 7B-1111(a)(3) for a continuous period of six months prior to the filing of the petition respondent willfully failed to pay a reasonable portion of the cost of care for the children.

I.

Respondent first argues that the trial court erred by finding that respondent's responses to questions asked during parenting classes were inaccurate and distorted the material presented in class, when the testimony upon which this was based was excluded at the hearing. We disagree.

Specifically, respondent argues that Finding of Fact 10 is supported solely by evidence properly excluded at trial. The trial court found in Finding of Fact 10: "Both Mr. and Ms. Killian attended parenting classes at the Family Center. Ms. Killian attended between March and April 1999. During that time, she actively participated; however, her responses to questions were

inaccurate and she appeared to distort the material which had been presented." During trial, respondent's attorney made the following objection:

> Q: When Mrs. Killian took the course, did she participate as other participants in terms of watching the video and answering the questions?
>
> A: Mrs. Killian did actively participate. She watched the video and she did respond to my questions.
>
> Q: Can you tell the court about her responses to your questions?
>
> A: Okay. Although Mrs. Killian did actively participate, in general, her responses were inaccurate. She usually distorted the material --
>
> MS. DIXON: OBJECTION, conclusory.
>
> THE COURT: SUSTAINED.
>
> Q: More specifically, can you give us an example of questions and inaccurate responses that Mrs. Killian gave you?
>
> A: Okay. There was a mismatch between how to use concepts and when you would use them. It would be a basic general question, and her responses usually went into her issues with Youth and Family Services, --
>
> MS. DIXON: OBJECTION.
>
> A: -- didn't focus on the techniques. She --
>
> THE COURT: OVERRULED.
>
> Q: Go ahead.
>
> A: Okay. Her responses were usually tied to her issues with Youth and Family Services. She didn't -- I cannot recall her giving me any statements that said she knew how to use the techniques that were presented.

It is clear from the transcript that, although the court initially sustained respondent's objection, the court later overruled respondent's objection to similar testimony. When respondent was asked how to use the concepts learned in parenting class, she responded by talking about her own problems with YFS. This is an inaccurate response to the questions asked.

Furthermore, in the custody evaluation, Max Nunez states, "Beyond admitting that there was domestic abuse, and allowing the children to witness that, Ms. Killian was evasive, defensive, and somewhat argumentative. It was difficult to establish things with her." Mr. Nunez goes on to say,

> It was also apparent that Ms. Killian did not give that much importance to the concerns that YFS has had over the years about her parenting practices . . . . At no time during these interviews did she acknowledge that there was any problem with her parenting. She maintained, . . ., that YFS lied about them.

We find clear, cogent and convincing evidence in the transcript and custody evaluation to support the trial court's finding of fact 10 that respondent's answers were inaccurate and distorted. This assignment of error is overruled.

II.

Respondent next argues that the trial court erred by finding that she failed to pay child support and that grounds existed for termination of parental rights for non-support. Because the trial court need find only one ground for terminating parental rights under N.C.G.S. § 7B-1111(a), we proceed to respondent's third assignment of error.

III.

Respondent next argues the trial court erred by concluding that there was clear, cogent and convincing evidence of grounds to terminate her parental rights. Specifically, respondent complains that there was insufficient evidence to support the court's conclusion that she willfully 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 had been made to correct the conditions that led to the children's removal. We disagree.

A parent's parental rights may be terminated upon a finding that the parent "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." N.C.G.S. § 7B-1111(a)(2) (1999) (emphasis added) (amended by Act of June 15, 2001, ch. 208, sec. 6, 2001 Sess. Laws 111, 113 (deleting 'within 12 months'). Our Supreme Court has recently held that the twelve-month period in which a parent must show or fail to show reasonable progress is "within 12 months from the time the petition for termination of parental rights is filed with the trial court," in other words within 12 months immediately preceding the filing of the petition. *In re Pierce*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (June 28, 2002) (No. 647A01). However, "evidence of a parent's progress that falls outside the designated twelve-month period is

admissible and relevant to a degree . . . ," and may be considered in determining the best interests of the child. *Id.*

In its order terminating respondent's parental rights, the trial court concluded:

> That in accordance with N.C.G.S. § 7B-1111(a)(2), Beverly Killian, Sammie Killian and Santiago McCain [sic] have willfully left their respective children in foster care for more than twelve (12) months without showing to the satisfaction of the Court that reasonable progress under the circumstances has been made within twelve (12) months correcting those conditions which led to the removal of these children.

In addressing this assignment of error, we must determine: 1) whether the children were in foster care for more than 12 months; 2) whether respondent failed to make reasonable progress toward correcting the conditions that led to the children's removal; and 3) whether respondent's failure was willful. *See generally In re McMillon*, 143 N.C. App. 402, 408, 546 S.E.2d 169, 173-74, *review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001).

A.

First, it is undisputed that the children were in foster care for over twelve months. DSS took custody of all six children on 13 February 1998. At the time of the hearings in September and October of 2000, the children had been in foster care for over two-and-one-half years.

B.

Second, there is clear, cogent and convincing evidence that respondent failed to show to the satisfaction of the court that she made reasonable progress under the circumstances to correct the

conditions that led to the removal of her children in the twelve months preceding the filing of the petitions for termination of parental rights. The relevant twelve-month period is 25 April 1999 to 25 April 2000 for Breyetta, LaShante, Sammie, and Deandre, and 9 June 1999 to 9 June 2000 for Beatrice and Shakita. The record shows that case plans developed by DSS recommended reunification as long as respondent complied with the case plans; however, in the two-and-one-half years that the children were in foster care, this recommendation changed from reunification to adoption, and finally to termination of parental rights. The record specifically indicates that on occasion during the relevant 12 month period social workers had to intervene when respondent got upset, talked loudly, and cursed. Respondent's comments to social workers that they were "telling [her] children lies" and they would "go to hell" were made in the presence of the children. Respondent's behavior led to social workers cutting some of respondent's visits short.

The evidence in the record shows that respondent failed to deal with her husband's domestic violence, which was a problem throughout the Killians' relationship and included elements of child abuse. The domestic violence between the Killians continued long after the children were placed in foster care. In October 1999 Mr. Killian told YFS that respondent hit him with a hammer. However, Mr. Killian was arrested. At some point, respondent purchased a gun although she testified that she did not do so because of the domestic violence.

Despite the history of domestic violence and abuse, respondent

failed to comply with domestic violence therapy. Respondent stated on more than one occasion that she did not need therapy. Respondent testified that she had been going to the Battered Women's Shelter, but refused to sign a release to allow YFS to confirm her presence at the Shelter. Respondent never presented a safety plan to the court in the event of future acts of domestic violence by Mr. Killian. Instead, respondent testified that she did have a safety plan, "To stand on my feet and have my husband prosecuted." Meanwhile, Mr. Killian continued to reside in the household without domestic violence counseling. Further, respondent failed to complete parenting classes, and in the absence of these classes, could not demonstrate an ability to learn the information needed to properly parent the children.

In reviewing the entire record, we find clear, cogent and convincing evidence in support of the trial court's conclusion that respondent failed to show to the satisfaction of the court that she made reasonable progress under the circumstances to correct the conditions that led to the removal of her children.

C.

We next look at whether respondent's failure to make reasonable progress was willful. "Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re McMillon*, 143 N.C. App. at 410, 546 S.E.2d at 175.

In its termination order, the trial court found as fact that "[d]espite the above-named incidences of domestic violence, Mr. and

Mrs. Killian continue to reside together." The record indicates that respondent continues to maintain an abusive relationship, and tends to minimize the extent of the abuse and its effect on her. She maintained that the abuse happened "maybe only four times," while admitting that police records indicate she had called them "about 26 times." As we stated above, respondent failed to comply with the requirement that she receive domestic violence therapy, despite having the resources available to her. We conclude that this is clear, cogent and convincing evidence that respondent willfully failed to make reasonable progress to eliminate domestic violence.

Further, there is ample evidence in the record that respondent failed to cooperate with the social workers. Respondent on many occasions accused social workers of lying to her children, telling social workers they would "go to hell." When Gloria Phifer, a social work assistant for YFS, asked respondent to discipline the children during a visit, respondent refused to talk to her and refused to discipline the children. Most times, respondent was verbally abusive toward Phifer to such an extent that Phifer was afraid to testify. There is also ample evidence that respondent acted inappropriately in front of the children and social workers, that respondent was abusive toward social workers and that respondent had to be escorted from the premises on several occasions during visitation. Respondent's behavior eventually led to the termination of her visitation. Respondent was encouraged the entire time her children were in foster care to learn how to be

a better parent. However, her attitude and behavior resulted in little progress being made towards reunification. We find this to be clear, cogent and convincing evidence of respondent's willful failure to make reasonable progress to eliminate the conditions that led to the removal of the children. Accordingly, this assignment of error is overruled.

IV.

Respondent's final argument is that the trial court erred by concluding that it was in the children's best interest to terminate her parental rights. We disagree.

The record indicates that visitation was not beneficial to respondent or the children. Visits between respondent and the children were chaotic. During several visits social workers had to suggest that respondent not engage in inappropriate or negative discussions with the children. One social worker testified that instead of talking appropriately to the children, as instructed, respondent told the children not to obey their foster parents and not to follow their foster parents' rules.

In his custody evaluation, Nunez stated that he had doubts about respondent's ability to "properly and consistently nurture, guide, stimulate, inspire, educate and protect [her] children." In addition, there were special concerns with some of the children. For example, Shakita had significant emotional and behavioral problems and needed a very structured setting. Breyetta, who according to Nunez, showed signs of emotional and behavioral problems, would likewise present considerable management

difficulties. The twins — LaShante and Deandre — were determined to be doing well in their foster placement, such that placing them back with their parents could result in a reversal of their progress. As to the allegations of child molestation by Mr. Killian, respondent seemed inclined to believe the children lied and that Mr. Killian had not done anything inappropriate because she "did not see or hear it." According to Nunez, "[I]t is questionable how well she could protect them from something she does not believe has happened or would happen." "Ms. Killian is not likely to be able to protect the children from direct abuse or from witnessing abuse."

In light of respondent's lack of progress we find that the trial court's determination that termination of respondent's parental rights was in the best interests of the children was based on clear, cogent and convincing evidence. Accordingly, this assignment of error is overruled.

For the reasons stated above, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

Judges EAGLES and HUDSON concur.

Report per Rule 30(e).