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NO. COA10-790

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

IN THE MATTER OF

Cleveland County

I.R.T.

No. 07 JT 62

Appeal by respondent father from order entered 26 April 2010 by Judge Ali B. Paksoy in Cleveland County District Court. Heard in the Court of Appeals 22 November 2010.

*Charles E. Wilson, Jr., for petitioner-appellee Cleveland County Department of Social Services.*

*North Carolina Administrative Office of the Courts, by Guardian ad Litem Appellate Counsel Pamela Newell, for the minor child.*

*Edward Eldred, for respondent-appellant father.*

MARTIN, Chief Judge.

Respondent father appeals from the trial court's order terminating his parental rights to his daughter, I.R.T., on the grounds of neglect, willfully leaving the minor child in foster care for more than twelve months without making reasonable progress to correct the conditions which led to the removal of the child from the home, and willful abandonment.<sup>1</sup> He challenges certain findings of fact as being unsupported by the evidence, and argues

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<sup>1</sup> The child's mother relinquished her parental rights to the child on 14 October 2009 and is not a party to this appeal.

the trial court erred in concluding that each of the three grounds exist. He also contends the trial court abused its discretion in determining that termination of parental rights is in the best interests of the child.

Respondent father is the biological father of I.R.T., who was born in 2002. Respondent father and the child's mother lived together but have never married. The mother had three other children, two boys, born in 1994 and 1999, and a girl, born in 2005, who also lived in the home. These siblings are not respondent father's biological children.

On 19 March 2007, the Cleveland County Department of Social Services ("DSS") filed a juvenile petition alleging that the minor child was neglected due to living in an environment injurious to her health. The petition alleged that the minor child's mother was chasing the child's sibling around the house with a baseball bat, that the mother had substance abuse and mental health issues, and that the mother was not following through with the mental health needs of one of the children. In the course of investigating the family, DSS determined that the children were exposed to acts of domestic violence occurring between the mother and respondent father, and that there were incidents of inappropriate discipline of the children which resulted in bruising. The juvenile petition was personally served on respondent on 19 March 2007, and he was appointed counsel on that day.

Also on 19 March 2007, DSS was granted non-secure custody of I.R.T., and her siblings. Non-secure custody was continued by

order of the trial court after a hearing held on 21 March 2007, which respondent attended with his attorney. Respondent also appeared at the 11 April 2007 pre-adjudication conference. The adjudication matter was continued on 6 June 2007. On 25 July 2007, respondent's attorney requested that an interpreter be appointed for respondent. The trial court granted the request for a Spanish-English interpreter, and ordered that "[t]he interpreter shall accompany [respondent] to all court proceedings and as requested to meeting[s] with his court-appointed counsel." The matter was continued.

After continuances on 12 September 2007 and 19 September 2007, the adjudication hearing was held on 26 September 2007. Respondent did not appear, although he was represented by counsel. The trial court adjudicated I.R.T. neglected, and ordered respondent father to comply with the following objectives: (1) complete a psychological evaluation and follow all recommended treatment; (2) establish and maintain a safe and stable home; (3) complete a substance abuse assessment and follow all recommended treatment; and (4) submit to random drug tests. With regard to the psychological and substance abuse assessments, the court ordered a court-appointed interpreter to assist respondent with the evaluations. Respondent was granted supervised visitation, contingent upon passing random drug tests.

DSS set up an appointment for a substance abuse assessment for respondent on 12 June 2007; respondent did not attend. DSS told respondent to call and re-schedule, but he never did. DSS also set

up a psychological assessment for respondent on 23 July 2007; respondent failed to attend. Although DSS re-scheduled the psychological assessment for 13 November 2007, the doctor's office informed DSS that the testing would not be accurate because it was not formatted for persons of Hispanic culture. Respondent tested negative from a drug test on 25 July 2007, but refused to take a test on 5 November 2007, stating that he had to go to work. DSS had trouble maintaining contact with respondent. Respondent refused to give DSS contact information despite several requests for an address, and therefore, DSS could not adequately test respondent for drugs. Further, respondent told DSS that he worked for Peachtree Construction, but DSS was told by Peachtree that respondent did not work there, he had never worked for that company, and they did no business in the county where respondent said they were located.

The matter was briefly reviewed at a hearing on 19 December 2007, which respondent attended, although the trial court determined that a continuation was necessary to allow for witnesses to be called for a more lengthy hearing. When the matter resumed on 6 February 2008, respondent did not attend, but was represented by counsel. The trial court found that respondent had not taken any steps toward complying with his court-ordered treatment services, that he had refused to take a drug test when ordered, that he refused to make himself available for drug tests or to give accurate contact information to the DSS social worker, that he had not visited the minor child between July and October 2007, and that

his last visit with the child was in early December 2007. The trial court determined that further reunification efforts with respondent would be futile, and ordered DSS to cease reunification efforts. The trial court reiterated the objectives to be attained by respondent, and continued to authorize supervised visitation.

A permanency planning review hearing was held on 27 February 2008. The trial court found that respondent, who was not in attendance, had failed to maintain contact with his attorney. The trial court therefore released the attorney from further duties as attorney of record. The permanent plan for the minor child was established as reunification with the mother. The trial court suspended respondent's visitation rights until such time as he appeared in court and demonstrated compliance with court-ordered treatment services. Respondent did not attend the next permanency planning review hearing, which was held on 30 April 2008. No changes were made at that hearing with regard to respondent.

On 27 June 2008, respondent called a DSS social worker about the case, and asked for visitation. The social worker told respondent that he had to go to court to seek visitation. Respondent appeared at the next scheduled hearing, held on 23 July 2008. He was not represented by counsel due to the trial court's previous decision to release counsel. Respondent requested visitation, asserting he was not aware of the treatment services with which he had been ordered to comply. The trial court found that respondent had not complied with any court-ordered treatment services, and had not visited with his daughter since 10 December

2007. The trial court denied respondent's request for visitation, and ordered respondent to contact the DSS social worker for information on the services he needed to complete. The trial court stated that it would reconsider respondent's request after he demonstrated compliance with prior orders of the court.

The next permanency planning review hearing was held on 3 December 2008. Respondent was not present at the hearing. The trial court found that respondent had not contacted the social worker since he appeared at the previous court hearing on 23 July 2008. The trial court determined that the minor child's permanent plan of reunification with the mother was no longer in the best interest of the child. At another hearing on 17 December 2008, the trial court changed the permanent plan for the minor child to adoption. Respondent was not in attendance. No changes were made at a hearing held on 10 June 2009, also not attended by respondent.

On 1 December 2009, DSS filed a petition for termination of respondent's parental rights. DSS alleged the following grounds: (1) neglect pursuant to N.C.G.S. § 7B-1111(a)(1); (2) willful failure to pay a reasonable portion of the cost of care for the juvenile pursuant to N.C.G.S. § 7B-1111(a)(3); (3) willfully leaving the minor child in foster care for more than twelve months without making reasonable progress to correct the conditions which led to the removal of the child from the home pursuant to N.C.G.S. § 7B-1111(a)(2); and (4) willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7). Through counsel, respondent filed an answer to the petition on 7 December 2009, amended on 26 January 2010,

denying the allegations of grounds to support termination of his parental rights.

The termination hearing was held on 24 March 2010, 25 March 2010, and 9 April 2010. Testimony was received from Kelly Smoak, the DSS foster care social worker in the case from May 2007 to February 2009; Ms. Smoak's successor, Teresa Richardson, who took over the case in February 2009; and respondent.

The trial court found that DSS had presented clear, cogent, and convincing evidence to support three of the four grounds for termination alleged in the petition; namely, neglect, failure to make reasonable progress, and wilful abandonment. The trial court declined to find the ground of failure to pay a reasonable cost of care for the child. The trial court then considered the statutory factors contained in N.C.G.S. § 7B-1110 and determined in its discretion that termination of respondent's parental rights is in the best interests of the minor child. The trial court ordered that respondent's rights be terminated. Respondent timely appealed from the trial court's order.

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Proceedings to terminate parental rights are conducted in two parts: (1) the adjudication phase, governed by N.C.G.S. § 7B-1109, and (2) the disposition phase, governed by N.C.G.S. § 7B-1110. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). Upon review of an order terminating parental rights, this Court must determine (1) whether the trial court's findings of fact are supported by clear, cogent and convincing evidence, and (2) whether

the trial court's findings of fact support its conclusions of law that one or more statutory grounds for termination exist. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001); *see also* N.C. Gen. Stat. § 7B-1111(a) (2009). Findings of fact supported by competent evidence are binding on appeal even though there may be evidence to the contrary. *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988). Once a trial court has determined at the adjudication phase that at least one ground for termination exists, the case moves to the disposition phase where the trial court decides whether termination of parental rights is in the best interests of the child. N.C. Gen. Stat. § 7B-1110(a) (2009); *Blackburn*, 142 N.C. App. at 610, 543 S.E.2d at 908. The trial court is not required to terminate parental rights, but has the discretion to do so. *In re Tyson*, 76 N.C. App. 411, 419, 333 S.E.2d 554, 559 (1985). Therefore, this Court reviews the determination for abuse of discretion. *See id.*

I.

Respondent challenges each of the three grounds for termination as being unsupported by clear, cogent, and convincing evidence or by the findings of fact. Respondent also challenges several findings of fact as being unsupported by the evidence. As only one ground for termination is required under N.C.G.S. § 7B-1111 to uphold an order terminating a parent's rights to a child, we begin by analyzing the ground that respondent willfully left the minor child in foster care without making reasonable progress to



correct the conditions which led to the removal of the child from the home.

A parent's rights to a child may be terminated upon finding that:

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 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) (2009). Willfulness does not imply fault on the part of the parent, but may be established "when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re O.C.*, 171 N.C. App. 457, 465, 615 S.E.2d 391, 396 (quoting *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175 (2001)), *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005). Even if a parent has made some efforts to regain custody, a trial court may still find that he or she willfully left the child in foster care under N.C.G.S. § 7B-1111(a)(2). *Id.*

The trial court made the following findings of fact which pertain to the ground of willfully leaving the minor child in foster care while failing to make reasonable progress:

19. That the juvenile has been in the physical and legal custody of the Cleveland County Department of Social Services since March 16, 2007, pursuant to a petition filed by the Cleveland County Department of Social Services.

. . . .

26. That the Court entered a dispositional order on September 26, 2007, in which the respondent father was ordered to establish and maintain safe and stable housing that did not pose a risk of harm to the juvenile due to substance abuse, domestic violence or improper supervision; complete a psychological evaluation through Dr. Brian Monteleone or another court-approved provider and comply with all recommendations for treatment; obtain a substance abuse assessment through the Center for Assessment and Treatment Services or another court-approved provider and comply with all recommendations for treatment; and submit to random drug testing.

27. That a court-appointed interpreter was ordered to accompany [respondent] to his psychological evaluation and his substance abuse assessment.

. . . .

35. That the respondent father met with social worker Kelly Smoak in May 2007 after a court hearing. [Respondent] did not request an interpreter but Ms. Smoak suggested that he have one. That [respondent] admitted being told in May 2007 by Ms. Smoak about the services he would need to complete. He could not attend appointments because he did not have a car or a license. [Respondent] admitted that he was aware of the recommended substance abuse assessment but he was living at that time in Burke County and did not have a car or a license.

36. That the respondent father tested positive for marijuana and amphetamines in March 2007. He tested negative a second time and he refused to submit to a drug test in November 2007.

. . . .

41. That Kelly Smoak met with the father in May 2007 to explain to him the Department's recommendation for court-ordered services and to offer him assistance in complying with those services. Ms. Smoak told the respondent

father that she would schedule the appointments for him and provide directions. She offered to provide transportation. Ms. Smoak spoke to [respondent] in English and [respondent] appeared to understand and he spoke in English to Ms. Smoak and did not indicate that he did not understand nor did he ever request a translator.

. . . .

43. That a psychological evaluation was scheduled for the respondent father by Kelly Smoak for the father on July 23, 2007. [Respondent] was given the date and the location of the appointment and was offered transportation. He did not indicate that he did not understand the instructions and stated that he would drive himself to the appointment. However, the respondent father failed to attend the appointment and did not call to reschedule.

. . . .

48. That [respondent] did appear in court on July 23, 2008. The father had not complied with any court-ordered services. He was given information about the locations of his psychological evaluation and substance abuse assessment both verbally and in writing. The respondent father indicated no problems in understanding then or during the court hearing. The respondent father spoke to the judge at that hearing in English. The respondent father did not question the location or the directions and was told that he would need to begin efforts before requesting visitation.

49. That the Cleveland County Department of Social Services had no further contact from the respondent father after July 23, 2008, until February 24, 2010 after this petition to terminate parental rights was filed.

. . . .

52. That the Cleveland County Department of Social Services made attempts to drug test the father but [respondent] was unable to give the social worker an address other than to say he

was living in Sylva, North Carolina. The respondent father refused to submit to a drug test on November 5, 2007 because he said he had no time. That the respondent father conversed in English with the social worker.

53. That the Cleveland County Department of Social Services lost contact with the father after that time.

54. That since the juvenile has been in the custody of the Cleveland County Department of Social Services the respondent father has lived in Sylva and Morganton, North Carolina, and currently lives in Laurinburg, North Carolina, where [respondent] stated he has lived . . . for the past two years.

55. That the respondent father's current residence is with two friends and he lives in a three-bedroom home. [Respondent] stated that this residence is not appropriate for his daughter. The respondent father's plan was to, at some point, move back to Morganton to live with his brother, but he gave no specifics about his plan of care for his daughter.

In addition to these findings, the trial court made further findings regarding prior court orders where the court previously found respondent not to be in compliance with his court-ordered services. We note that respondent specifically challenges findings of fact 23 and 45, as well as portions of findings 44 and 67, none of which are listed above. Finding of fact 23 states that respondent stipulated to an adjudication of neglect, while findings 44, 45, and 67 pertain to respondent's lack of visitation with the minor child. We decline to address respondent's arguments regarding these four findings of fact, as they are not necessary to our determination of whether the trial court erred in concluding that grounds exist to terminate respondent's parental rights on the

basis of failure to make reasonable progress. Respondent has not challenged the remaining findings of fact, including those set forth above, and they are therefore deemed supported by competent evidence and binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991); *In re S.N.H.*, 177 N.C. App. 82, 83, 627 S.E.2d 510, 512 (2006).

The findings above, as supported by evidence from DSS foster care social worker Kelly Smoak and respondent at the termination hearing, establish the following: (1) the minor child has been in the custody of DSS for more than twelve months, having come into custody on 16 March 2007; (2) respondent was ordered by the trial court in May 2007 to complete specific objectives as part of the reunification process, and on 23 July 2008 respondent was informed again he had to fulfill those same objectives in order to earn back his visitation rights; (3) respondent never completed a psychological evaluation or a substance abuse assessment despite having appointments set up for him by DSS; (4) respondent failed to maintain contact with DSS, thereby preventing DSS from determining whether he had established a safe and stable home; and (5) respondent refused one drug test and otherwise failed to make himself available for random drug testing. We conclude that the findings of fact support the trial court's conclusion that respondent willfully left the minor child in foster care for more than twelve months without making reasonable progress under the circumstances to correct the conditions which led to the removal of the child from the home.

Respondent argues that the evidence does not show that his failure to make reasonable progress was willful where evidence was presented that he does not speak or read English. He contends the trial court erred in resolving an evidentiary conflict in favor of DSS. Further, he argues that since he never had the services of an interpreter or translator prior to the termination hearing, his right to due process was violated. Finally, he points to the efforts he did make to regain custody, including attending court hearings and providing child support for his daughter. We do not agree with these contentions.

The evidence establishes that respondent is originally from Nicaragua. He moved to North Carolina with several relatives, including a brother and an aunt who speak English, although Spanish was spoken in the home. Respondent stated he began learning English when he moved to North Carolina although he never took any classes. He lived with the child's mother for four years, and spoke English with her, as well as with his employers.

Despite evidence that respondent's native language is Spanish, testimony from DSS social worker Kelly Smoak and from respondent himself undermine respondent's contentions that he was not aware of the obligations placed on him by the trial court or that he could not communicate in English in order to comply with his case plan. Ms. Smoak testified that when she spoke to respondent in May 2007, he spoke English and appeared to understand the conversation. She also observed respondent speaking English with the children and the children's mother at visitation. In February 2007, respondent left

voicemail messages for Ms. Smoak in English in which he requested visitation and explained that he had no transportation. When he called again in June 2008, Ms. Smoak spoke with him directly and told him he had to go to court to ask for visitation rights to be resumed. She gave him the next court date, which was 23 July 2008. Respondent attended the court hearing on that date. Although respondent was no longer represented by counsel and no interpreter was present, he did not indicate that he did not understand the proceedings. After the hearing, Ms. Smoak provided respondent with information for scheduling the psychological evaluation and substance abuse assessment. Respondent never indicated that he did not understand. He never followed up with scheduling the required appointments.

In his own testimony, respondent acknowledged that Ms. Smoak spoke to him about plan objectives in May 2007, including the requirement for a substance abuse assessment, and that he knew he had court-ordered obligations to fulfill. He admitted that he stopped visiting with his daughter, but stated that he was told he did not have anything more to do with the case by the child's mother. With regard to housing, he stated that the place where he was living at the time of the hearing was not suitable for the minor child.

Our review of the record and transcript discloses sufficient competent evidence to fully support the trial court's determination that respondent willfully failed to comply with the court-ordered services. Even though the trial court initially ordered a court-

appointed interpreter to accompany respondent to all court proceedings, respondent did not attend any court hearings until 23 July 2008. By that point, his non-participation had caused his attorney to seek to withdraw, which the trial court allowed. When respondent appeared at the 23 July 2008, no interpreter services were in place due to his lack of prior involvement. Respondent gave no indication that he did not understand when the judge spoke to him in court.

Respondent also points out that the trial court ordered a court-appointed interpreter to assist respondent with his psychological evaluation and substance abuse assessment. He argues that this provision for an interpreter indicates he could not understand what was required of him. However, by respondent's own testimony at the termination hearing, he acknowledged that the court had ordered him to complete certain tasks. He simply failed to show up for the appointments that were scheduled for him, and made no effort to re-schedule those appointments. Further, he failed to maintain contact with DSS or to let DSS know his whereabouts, thereby failing to comply with the random drug testing. His failure to apprise DSS of his whereabouts also precluded DSS from determining whether he was fulfilling the requirement that he maintain a safe and stable residence. The evidence is clear that respondent's lack of compliance with his court-ordered objectives is due entirely to his lack of effort rather than a lack of understanding.



In sum, the evidence supports the trial court's findings of fact which, in turn, are sufficient to support its conclusion that respondent willfully left the minor child in foster care while failing to make reasonable progress to correct the conditions which led to the removal of the child from the home. Since that ground existed for termination of respondent's parental rights, we need not address respondent's arguments regarding the remaining grounds for termination of neglect and willful abandonment. See *In re Shermer*, 156 N.C. App. 281, 285, 576 S.E.2d 403, 406 (2003); N.C. Gen. Stat. § 7B-1111(a).

II.

Next, respondent contends the trial court abused its discretion in determining that termination of his parental rights is in the best interests of the minor child. He argues the trial court failed to properly consider the factors enumerated in N.C.G.S. § 7B-1110. In particular, he argues the court failed to consider the child's likelihood of adoption, the quality of the bond between the child and the foster parents, or the bond between the child and respondent.

By statute, the trial court is required to consider the following factors when determining whether termination is in the best interests of the minor children:

- (1) The age of the juvenile.
- (2) The likelihood of adoption of the juvenile.
- (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
- (4) The bond between the juvenile and the parent.

(5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.

(6) Any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a). The determination by the trial court that termination is in the best interests of the children will not be overturned absent an abuse of discretion. *In re C.W.*, 182 N.C. App. 214, 219, 641 S.E.2d 725, 729 (2007).

The trial court made the following findings of fact regarding the best interests of the minor child:

82. That the juvenile is currently in a pre-adoptive foster home.

83. That the juvenile was placed in this foster home on March 18, 2010 with her sister who is four years old. These siblings have been placed together since coming into the custody of the Cleveland County Department of Social Services on March 16, 2007. These juveniles were in the same placement from March 16, 2007 until April 2009 and then in another home from April 2009 until March 18, 2010.

84. That the current foster parents are interested in adopting both children.

85. That both children have a close relationship with each other and a close bond. The children are being well cared for in their current foster home.

86. That the parental rights of the unknown father of the sibling have been terminated by order of the Court in a separate order. The mother has relinquished her parental rights.

87. That the permanent plan [for] the juvenile is a plan of adoption, and the termination of the parental rights of [respondent father O.P.] would aid in the achievement of this plan for the juvenile.

88. That because the respondent father has not visited his daughter since December 10, 2007 and has not made any inquiry about the welfare of his child, the bond between the respondent father and the juvenile is very limited, if there is a bond in existence at all.

89. That at the time of this hearing, the respondent father does not have a suitable or permanent home for his daughter.

90. That on the basis of these findings and evidence, the Court in its discretion does find as fact and will conclude as a matter of law that it is in the best interest of the juvenile that the parental rights of the respondent father [O.P.] should be terminated.

Respondent challenges finding of fact 88 as being unsupported by the evidence because evidence was presented that he made inquiries about his daughter after December 2007. After examining the evidence, we conclude that although respondent asked DSS about visitation in February and June 2008, and attended a hearing in July 2008, no evidence shows that he made inquiry into his daughter's life and well-being, or that he followed through on his court-ordered objectives in order to regain his visitation rights. Since the evidence is unequivocal that the last time respondent saw his daughter was in December 2007, two and a half years before the termination hearing, we conclude that the trial court's finding of fact 88 is amply supported.

We also conclude that the trial court adequately considered the factors enumerated in N.C.G.S. § 7B-1110(a) where it considered the foster parents' interest in adopting the child, the bond and relationship between the minor child and her sister with whom she was placed, and the lack of a bond between the child and

respondent. We see nothing to indicate the trial court abused its discretion in determining that termination of respondent's parental rights is in the best interests of the child.

For the foregoing reasons, the trial court did not err in concluding that at least one ground for termination is supported by clear, cogent, and convincing evidence, and did not abuse its discretion in determining that termination of respondent's parental rights is in the best interests of the minor child. The trial court's order terminating respondent's parental rights is therefore affirmed.

Affirmed.

Judges MCGEE and BRYANT concur.

Report per Rule 30(e).