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NO. COA01-218

NORTH CAROLINA COURT OF APPEALS

Filed: 5 March 2002

In the Matter of:
FRED WILLIAM BEER, JR.

Lincoln County
No. 96 J 74

Appeal by respondents from order entered 1 August 2000 by Judge Anna F. Foster in Lincoln County District Court. Heard in the Court of Appeals 7 November 2001.

Rebecca J. Pomeroy, for petitioner-appellee.

Brenda S. McLain, for respondent-appellant Fred William Beer.

Timothy K. Moore, for respondent-appellant Gloria Lavada Beer.

Charles E. Wilson, Jr., for the Guardian ad Litem. (no brief filed)

HUDSON, Judge.

On 14 September 1999, the petitioner, Lincoln County Department of Social Services (LCDSS), filed a petition to terminate the parental rights of respondent Gloria H. Beer (mother) and respondent Fred Beer (father), both parents of Fred Beer, Jr. (the "child"[1]) born 3 March 1996. The petition alleged that: (1) both respondents neglected their child, (2) both respondents left

[1] Although the Juvenile Code uses the term "juvenile," we use the term "child" here to be consistent with the terminology used by the trial court. *See* N.C. Gen. Stat. § 7B-101(14) (1999).

their child in foster care for more than the statutorily allowed time "without showing to the satisfaction of the Court that reasonable progress under the circumstances has been made in correcting the conditions that led [to] the child's removal," (3) respondent-mother's parental rights to another child were terminated in the past, and that she lacked the ability or willingness to establish a safe home, and (4) that both respondents were incapable of providing for the proper care of the child. *See* N.C. Gen. Stat. § 7B-1111 (1999). By order entered 28 July 2000, the court terminated the parental rights of both respondents. The trial court made extensive findings of fact, and concluded that the following grounds existed for the termination of both respondents' parental rights: (1) pursuant to N.C.G.S. § 7B-1111(a)(1), respondents neglected their child, (2) pursuant to N.C.G.S. § 7B-1111(a)(2), respondents willfully left their son in foster care for more than twelve months without showing to the satisfaction of the court that reasonable progress has been made, despite the efforts of petitioner in assisting respondents, and (3) pursuant to N.C.G.S. § 7B-1111(a)(9), respondent-mother's rights to another child had been terminated and she lacks the ability or willingness to establish a safe home. The court then concluded that it was in the best interest of the child to terminate the rights of both the mother and the father. Respondents appeal the termination of their parental rights.

First, we summarize the facts in this case. Initially, the petitioner, LCDSS, filed a petition on 7 October 1996, alleging

that respondents had neglected their seven-month old child, Fred Beer, Jr. On 11 October 1996, the trial court adjudged him neglected, and then concluded that it was in the best interest of the child for LCDSS to have custody of Fred Beer, Jr. This order was based on evidence that respondents were driving their infant son on a moped without any protective gear during inclement weather and while he was ill, that he fell off the porch when they left him unattended and he sustained minor injuries, that he fell when they left him unattended on their bed, that the house was filled with trash and infested with bugs, and that respondents regularly failed to keep the child up to date on his immunizations.

On 19 March 1997, the trial court again adjudged the child to be a neglected juvenile pursuant to N.C. Gen. Stat. § 7A-17(21) (1997), now N.C. Gen. Stat. § 7B-101(15) (1999). The court ordered respondents to attend and complete all parenting classes, submit to psychological evaluations, pay all costs associated with these services, and continue visitation with the child according to the previously ordered schedule.

Over the next three years, the court followed the family more frequently than the six-month intervals required by Chapter 7B, but did not return custody of the child to the parents. *See* N.C. Gen. Stat. § 7B-907(a) (1999). The trial court entered orders continuing the petitioner's custody of the child on 30 December 1996, 14 July 1997, 25 February 1998, 20 May 1998, 15 July 1998, 19 August 1998, 26 August 1998, 12 April 1999, 21 July 1999, and 22 March 2000. The trial court incorporated all of these orders into

the final order terminating respondents' parental rights.

In the 15 July 1998 order, the court found that despite sustained efforts, both "parents had problems making decisions regarding common sense situations," and that the respondent mother "show[s] a pattern of inability to make simple decisions and continues to exhibit a lack of judgment." The trial court also noted that both the social worker and the Guardian ad Litem expressed concern about the parents' interactions with the child during supervised visitation. The court noted further that petitioner's attorney and the Guardian ad Litem "stated to [the] court that at this time it appears that the situation is 'as good as it is going to get' and recommended that the Judge reevaluate the permanent plan for the child."

In the 26 August 1998 order, the court again noted that despite the "extraordinary efforts" made by petitioner and the Guardian ad Litem to reunify this family, problems including safety issues continued to arise during visitation. The court included in the findings of fact a summary of the testimony given by Dr. William Varley, a psychologist who evaluated the respondents. Dr. Varley described respondent-father as "marked by impaired concentration, poor judgment, poor insight, and is quick to anger." He concluded that respondent-father "lacks the emotional stability and reasoning ability to provide a safe and secure environment for his child." As to respondent-mother, Dr. Varley reached the same conclusion, but based it on his observation that she "is compulsive, defensive, has difficulty making decisions, has

difficulty following instructions, has poor judgment, and lacks emotional stability." She also lacks the "emotional stability necessary to provide a safe environment for her child." In addition, he noted that she "meets the criteria for Borderline Intellectual Functioning, Personality Disorder, and suffers from immaturity, dependency, and self-absorption." The court found that her lack of judgment and inability to make simple decisions persisted.

In the same order, the court noted "the mother and father's inability to remain calm and seated" during the presentation of the evidence. "The Court was also extremely alarmed by the parent's [*sic*] response to several questions addressing parenting skills and the parent's [*sic*] reactions to various situations. The Court found the behavior of the parents and responses of the parents to be consistent with the opinion provided by Dr. Varley." The Court concluded as a matter of law that pursuant to N.C. Gen. Stat. § 7A-657(c) (1997) (now N.C.G.S. 7B-907), "reunification efforts clearly would be futile and inconsistent with the juvenile's safety and need for a safe, permanent home within a reasonable period of time and that reunification efforts should cease."

In its 12 April 1999 order, the court ordered Dr. Douglas J. Freeman to conduct a more extensive psychological examination of the respondents, and to review all of the documents provided. In the 21 July 1999 order, the court included a summary of Dr. Freeman's testimony. Dr. Freeman found that although neither respondent is "retarded[, t]heir situation is simply minimal." He

also found that "they both have a marginal ability to learn but progress may be slow and difficult. Both Mr. and Mrs. Beer lack the intellectual, emotional, and social components to understand their need for support with parenting and because of this deficiency, they have problems accepting assistance and guidance." He did not recommend returning the child to the respondents' home, and he could not determine how quickly the respondents might improve. Included in the record on appeal are both Dr. Varley's and Dr. Freeman's reports on their psychological evaluations of respondents. In the July 1999 order, the court determined that pursuant to N.C.G.S. § 7B-907, "proceeding towards termination of [respondents'] parental rights is in the best interest of this child."

The record also includes an 8 March 1994 order adjudicating as neglected all three of respondent-mother's children from a previous marriage. In that order, the court terminated respondent-mother's parental rights to Shanaree Darnell Hamrick based on two statutory grounds: (1) she neglected the child, she failed to improve the situations leading to the original neglect, and there is a probability of continued neglect; and (2) she willfully left her daughter in foster care for more than twelve months and has not improved the situation leading to the removal of the child. The court concluded that respondent-mother failed to correct harmful conditions in her home, which included allowing Freddy Beer (respondent-father in the current case) to live in the home, contrary to orders of the court, even though he sexually molested

Shanaree and physically abused respondent-mother's sons. As a consequence, the court terminated the mother’s parental rights to Shanaree. Her two sons remained in the custody of other relatives, instead of with respondent-mother.

As a whole, the trial court's orders indicate that during the child’s three years in the custody of LCDSS, respondents carried out the tasks the court required, including finding jobs, attending GED courses, following through with service agreements with petitioners in order to learn better parenting skills, and taking advantage of opportunities to visit with their child, but that they never made actual progress as required by the court and the Juvenile Code. *See* N.C.G.S. § 7B-1111(a)(1) & (a)(2). In a March 1999 report to the petitioner, following the evaluation of respondents, Dr. Freeman writes:

> Both [respondents] have a desire to raise their son to the best of their ability and resources. They desire for him to succeed educationally and socially and morally. Their energies will be applied toward these goals and they are capable of distinguishing appropriate and inappropriate sexual boundaries. They are capable of construing the safety interests of the child, yet they may not always have the advantages of resources both physical and intellectual.

However, Dr. Freeman “could not recommend returning this child home to his parents.”

The court found and concluded that evidence supported all grounds for termination alleged in the petition, and that termination was in the best interest of the child. Both parents appeal. Respondents make six arguments, challenging the trial

court's findings of fact, conclusions of law, and ultimate termination of respondents' parental rights. We note initially that the General Assembly revised the North Carolina Juvenile Code, Chapter 7A, effective 1 July 1999 and enacted Chapter 7B. The provisions of Chapter 7B regarding termination of parental rights apply here.

Under the old and new codes, a termination of parental rights proceeding has two steps: adjudication and disposition. In the adjudicatory stage, the petitioner has the burden of proving the grounds for termination as described by N.C.G.S. § 7B-1111 by clear, cogent, and convincing evidence. *See* N.C. Gen. Stat. § 7B-1109 "Adjudicatory hearing on termination" (1999). "This intermediate standard 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); *see also In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001) (describing the adjudicatory stage under Chapter 7B as the same as under the previous chapter applied in *Montgomery*). Once the petitioner meets this burden of proof, the court moves to the second stage, disposition. *See* N.C.G.S. § 7B-1109; N.C. Gen. Stat. § 7B-1110 "Disposition" (1999); *Blackburn*, 142 N.C. App. at 610, 543 S.E.2d at 908. During the dispositional stage, N.C.G.S. § 7B-1110(a) requires:

> [s]hould the court determine that any one or more of the conditions authorizing a

> termination of the parental rights of a parent exist, the court shall issue an order terminating the parental rights of such parent with respect to the juvenile unless the court shall further determine that the best interests of the juvenile require that the parental rights of the parent not be terminated.

See also N.C.G.S. § 7B-1110(b). At this phase, termination of parental rights is in the discretion of the trial court. *See In re McMillon*, 143 N.C. App. 402, 408, 546 S.E.2d 169, 174, *disc. rev. denied*, 354 N.C. 218, 554 S.E.2d 341 (2001). The trial court may decide not to terminate parental rights, even if grounds exist. *See id.*

We first turn to the adjudication. Both respondents argue that the evidence was insufficient at the adjudicatory stage to support the findings and conclusions that grounds existed to terminate their parental rights. We disagree. The trial court found two grounds for the termination of respondent-father's parental rights and three grounds for the termination of respondent-mother's parental rights. The court terminated both parents' rights based on N.C.G.S. §§ 7B-1111(a)(1) & (a)(2). Under section (a)(1), termination may be based upon a finding that "[t]he parent has abused or neglected the juvenile. . . .within the meaning of G.S. 7B-101." N.C.G.S. § 7B-1111(a)(1). Pursuant to N.C.G.S. § 7B-101(15), a neglected juvenile is

> [a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's

> welfare; or who has been placed for care or adoption in violation of law. In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

Ordinarily, "[i]n determining neglect, the trial judge must find evidence of neglect at the time of the termination proceeding." *Blackburn*, 142 N.C. App. at 611, 543 S.E.2d at 909. Here, where the children were not in the custody of the parents at the time of the termination proceeding, the court employs a different analysis. When the child has not been in the custody of the parents for a significant period of time, the trial court "must also consider evidence of any change in condition up to the time of the hearing, but this evidence is to be considered in light of the evidence of prior neglect and the probability of repetition of neglect." *In re White*, 81 N.C. App. 82, 90, 344 S.E.2d 36, 41, *disc. rev. denied*, 318 N.C. 283, 347 S.E.2d 470 (1986); *see also In re Ballard*, 311 N.C. 708, 319 S.E.2d 227 (1984) (holding that parental rights may be terminated based on a prior adjudication of neglect if changed conditions are also considered); *In re Pierce*, ___ N.C. App. ___, ___, 554 S.E.2d 25, 31 (2001) (overturning a termination of mother's parental rights because the mother did make reasonable progress). Visitation is also a relevant factor in such cases. *See White*, 81 N.C. App at 90, 344 S.E.2d at 41.

Respondents argue in response to termination based on the adjudication of the child as neglected that "[a]t the time of the

termination hearing there was no clear, cogent and convincing evidence of neglect because the child had been in DSS custody for approximately 43 months." *See* N.C.G.S. § 7B-1111(a)(1). They also argue that the conditions that led to the child initially being taken from respondents and adjudged neglected had been eliminated. However, in accordance with *Ballard* and *Pierce*, we examine whether the findings support the conclusions of neglect based on the fitness of respondents to care for the child at the time of the hearing, changed conditions in light of the history of neglect by the parents, and the probability of a repetition of neglect. *See* *Ballard*, 311 N.C. at 714-15, 319 S.E.2d at 231-32; *Pierce*, ___ N.C. App. at ___, 554 S.E.2d at 31.

Before analyzing the issues, we must address certain inadequacies of form in the findings of fact. Although respondents have not assigned error to these findings, we must address them because both respondents have assigned as error and argued that the findings do not support the conclusions and adjudication on all statutory grounds for termination. In finding number seventeen, the court stated, "[t]hat the following is a summary of evidence presented to the Court by the Petitioner at the Termination of Parental Rights Hearing supporting the findings of the court which the Court finds as a fact[.]" This was followed by a lengthy nine and one-half page summary of the evidence presented by petitioner during the hearing, without specifying which evidence the court believed. In finding number nineteen, the court summarized additional evidence, and again failed to specify which evidence it

found as fact.

Generally, in a non-jury trial, the trial judge must "consider and weigh all of the competent evidence, and [] determine the credibility of the witnesses and the weight to be given their testimony." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000). In *Gleisner*, a termination of parental rights case, this Court held that the trial court's findings of facts were not actually findings of fact because they were "simply a recitation of the evidence presented at trial, rather than ultimate findings of fact." *Id.* It was incumbent on the trial court to make determinations as to "what pertinent facts are actually established by the evidence." *Id.* at 480, 539 S.E.2d at 366. In *In re Green*, 67 N.C. App. 501, 505, 313 S.E.2d 193, 195 (1984), this Court explains in a footnote that

> verbatim recitations of the testimony of each witness *do not* constitute *findings of fact* by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented. . . .[T]he judge is required to find the facts specially and state separately his conclusions of law thereon.

In *Gleisner*, this Court remanded to the trial court for further findings because it was "unable to conduct a proper review" of the findings. *See* 141 N.C. at 480, 539 S.E.2d at 366.

While some of the trial court's findings of fact, particularly findings number seventeen and nineteen, appear to violate the principles enunciated in *Gleisner* and *Green*, we are able to review them and, in our discretion, do not remand on this basis. After

reviewing the testimony at trial and the entire record, we conclude that although the findings are not particularly clear, they are more so than in *Gleisner* and *Green*. *See Gleisner*, 141 N.C. App. at 480, 539 S.E.2d at 365; *Green*, 67 N.C. App. at 505, 313 S.E.2d at 195. The plainest distinction between this order and the order in *Gleisner* is that with the exception of findings number seventeen and nineteen, the findings of fact here are not recitations of evidence, but are actual findings. *See Gleisner*, 141 N.C. App. at 480, 539 S.E.2d at 365. More important is that even without the recitations of evidence in findings number seventeen and nineteen, the actual findings here are sufficient to support the conclusions. However, we emphasize, as we did in *Gleisner* and *Green*, that recitations of evidence are not findings of fact, and we discourage this practice. *See Gleisner*, 141 N.C. App. at 480, 539 S.E.2d at 365; *Green*, 67 N.C. App. at 505, 313 S.E.2d at 195.

On 30 December 1996, the court adjudged this child neglected based on findings indicating that he lived in an environment injurious to his welfare. In its order terminating parental rights the trial court found as fact that "the child continues to be a neglected child pursuant to North Carolina General Statute 7B-101(15) in that the child continues to remain in foster care due to the fact that the child cannot be sent home due to an injurious environment." On appeal, the burden is on the respondents to demonstrate a "lack of clear, cogent and convincing competent evidence to support the findings." *Blackburn*, 142 N.C. App. at 612, 543 S.E.2d at 909. "The trial court's findings of fact will

be overturned only if respondent can show a lack of clear, cogent and convincing competent evidence to support the findings." *Id*.

While respondents made every effort to see their child as scheduled, and did attend court ordered parenting classes and counseling, they failed to demonstrate to the court that their ability to properly parent their child or their willingness to provide for his safety and welfare had improved. For example, they consistently refused to allow petitioner's employees and the Guardian ad Litem into their home until late on the afternoon before the hearing, when it was too late for a visit. In addition, at one point respondent-father was informed that his child had tubes in his ears due to an ear infection. Respondent-father told petitioner that should the child come home with him, he would remove the tubes from his ears. During an observed visit with their child, respondent-mother placed a plastic bag over her son's head and "thought it was funny." According to Dr. Freeman, "[t]he Beer's [*sic*] do care for their child they just have a limited ability to make decisions in the best interest of their child and refuse to acknowledge any responsibility for their child being in foster care. . . . It would be foolish to put a child back in a home in circumstances like this." These findings support an inference that future neglect is probable. While the court clearly appreciated the respondents' efforts to visit their son, we see no indication in the findings of facts that respondents' willingness to address multiple safety and health issues has improved since the child was initially deemed neglected. Respondents have failed to

show a lack of clear, cogent and convincing competent evidence to support these findings of the trial court. *See Blackburn*, 142 N.C. App. at 612, 543 S.E.2d at 909. The findings support the conclusions that the child is currently neglected within the meaning of the N.C.G.S. 7B-1111(a)(1) by both parents. *See id.*

Respondents also contend that the trial court erred in finding and concluding that grounds for termination under N.C.G.S. § 7B-1111(a)(2) were satisfied. Pursuant to N.C.G.S. § 7B-1111(a)(2), the trial court found that

> [t]he 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.

Respondents contend and the evidence indicates that as the court ordered they have attended over one-hundred visits with their child, and participated in psychological evaluations, parenting classes, as well as counseling.

They contend that this evidence supports their contention that they have made reasonable progress in accordance with the requirements of the statute. The court found and concluded otherwise, and we believe the evidence supports the trial court's findings, which in turn support its conclusions. Petitioners provided extensive services and instruction to respondents before seeking to terminate parental rights. Respondents were given many opportunities to become better parents, but they simply did not. The "willfulness" requirement in N.C.G.S. § 7B-1111(a)(2) "does not

require a showing of fault on the part of the parent." *In re Bishop*, 92 N.C. App. 662, 669, 375 S.E.2d 676, 681 (1989) (holding that sufficient evidence supported the termination of parental rights based on mother willfully leaving child in foster care and not making reasonable progress in correcting conditions that led to the child's removal). Respondents' *inability* to improve the conditions that led to the child's removal from their care may satisfy the statute. *See id.* at 670, 375 S.E.2d at 682; *see also* N.C.G.S. § 7B-1111(a)(2). Here, however, there is also evidence that both petitioners exhibited an unwillingness to improve conditions affecting the health and safety of the child and even an unwillingness to allow the social worker into the home. Accordingly, clear, cogent, and convincing evidence supports the findings, which in turn support the conclusions that grounds for termination have been established under this section as well. *See* N.C.G.S. § 7B-1111(a)(2).

The trial court also found and concluded there were grounds for the termination of respondent-mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(9): "[t]he parental rights of the parent with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home." Respondent-mother contends that even though her rights to another child were terminated, the second requirement of the statute is not supported by evidence, i.e. that respondent-mother "lacks the ability or willingness to establish a safe home." N.C.G.S. § 7B-

1111(a)(9). We disagree.

The evidence indicates that the court terminated the respondent-mother's parental rights to her daughter from her first marriage due to the unsafe and unhealthy living conditions in her home. These include: failing to provide enough food for more than one meal a day, failing to supervise the child, and leaving her daughter in the company of her then boyfriend Fred Beer (respondent), who had sexually abused the daughter. In the earlier case, the trial judge ordered that "Freddie Beer not be allowed to be in the presence of the juveniles." When respondent-mother refused to expel Fred Beer from her home and keep him away from her children, her rights to her daughter were terminated. The trial court found that during the court's three and one-half years involvement with the family, conditions in the home did not improve.

Since the earlier termination, in lieu of expelling Fred Beer from the home, respondent-mother has married and had a child with respondent-father. The court here found that their child (Freddie Beer, Jr.) was not supervised properly, and that respondent-mother has not made progress in caring for her child, or providing a safe environment for the child. The statute requires that the petitioner prove (1) a previous termination and (2) a lack of "ability or willingness to establish a safe home." N.C.G.S. § 7B-1111(a)(9). Here, the trial court found that respondent-mother lacked the "ability or willingness" to improve her skills to establish a safe home.

As to the adjudication, we uphold the trial court's determination that petitioner has proved all three grounds alleged for the termination of respondent-mother's parental rights, and has proved both grounds alleged for the termination of respondent-father's parental rights. These grounds are based on findings supported by clear, cogent, and convincing evidence.

Next, we turn to the disposition. "After the trial court has determined grounds exist for termination of parental rights at adjudication, the court is required to issue an order of termination in the dispositional stage, unless it finds the best interests of the child would be to preserve the parent's rights." *Blackburn*, 142 N.C. App. at 613, 543 S.E.2d at 910; N.C.G.S. § 7B-1110(a) & (b). At this stage, "it is the child's best interests which is our guiding beacon." *Montgomery*, 311 N.C. at 116, 316 S.E.2d at 256; *see also In re Parker*, 90 N.C. App. 423, 431, 368 S.E.2d 879, 884 (1988).

Respondents argue in their last assignment of error that the trial court abused its discretion in ordering the termination of respondents' parental rights. At the adjudicatory stage, the trial court found several grounds for the termination of respondents' parental rights pursuant to N.C.G.S. § 7B-1111. In the dispositional stage, the trial court concluded that "it would be in the best interest and welfare of the minor child for the parental rights of [respondents] to be terminated." This conclusion will not be disturbed absent an abuse of discretion. *See Blackburn*, 142 N.C. App. at 613-14, 543 S.E.2d at 910-11.

If the trial court had found that "there is reasonable hope that the family unit within a reasonable period of time can reunite and provide for the emotional and physical welfare of the child, the trial court is given discretion not to terminate rights." *Id.* at 613, 543 S.E.2d at 910. The trial court did not make such a finding, but instead included findings based on two psychologists that the child would not be safe if returned to the care of the respondents. After three and one-half years of unsuccessfully attempting to improve respondents' parenting abilities, the trial court properly concluded that it was in the best interest of the child to terminate respondents' parental rights. We see no abuse of discretion.

In sum, we hold that clear, cogent, and convincing evidence supports the trial court's finding of fact; these findings support the trial court's conclusions of law that respondents' parental rights should be terminated. Based upon the foregoing, the order of the trial court terminating the respondents' parental rights is affirmed.

AFFIRMED.

Judges TIMMONS-GOODSON and TYSON concur.

Report per Rule 30(e).