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NO. COA05-1203

NORTH CAROLINA COURT OF APPEALS

Filed: 18 April 2006

IN RE:
J.D.R.
C.R.R.

McDowell County
Nos. 04 J 109, 04 J 110

Appeal by respondent mother from order entered 19 April 2005 by Judge Robert S. Cilley in McDowell County District Court. Heard in the Court of Appeals 29 March 2006.

Goldsmith, Goldsmith & Dews, P.A., by James W. Goldsmith, for petitioner-appellee McDowell County Department of Social Services.

*James C. Callahan, for petitioner-appellee Guardian ad Litem.
Carol Ann Bauer, for respondent-appellant.*

TYSON, Judge.

A.R. ("respondent") appeals from order entered terminating her parental rights to her minor children, J.D.R. and C.R.R. We affirm.

I. Background

Respondent is the mother of the minor children J.D.R. and C.R.R. (collectively, the "children"). McDowell County Department of Social Services ("DSS") worked intensely with the family beginning in March 2002. Respondent contacted DSS and requested the children be placed with DSS because she could not properly care for them. The children were placed in DSS custody pursuant to a

non-secure custody order on 1 August 2002. DSS's petition alleged dependency and stated respondent did not have a home or employment, and that respondent had been taken to the emergency room earlier in the week due to a panic attack caused from the stress of trying to care for the children. The petition also alleged respondent and her husband, the father of the children, had experienced episodes of domestic violence and that both parents had been incarcerated at times. Respondent consented to the adjudication of dependency on 6 January 2003. Prior to DSS's involvement with the family, respondent and her husband had left J.D.R. with friends for a period of at least eight months.

After being placed in DSS's custody, the children were evaluated by a pediatric ophthalmologist and diagnosed with oculocutaneous albinism, a condition of the eyes that requires special medical attention. C.R.R. was found to be visually disabled with a corrected vision of 20/180. J.D.R. was required to wear UV-absorbing glasses full time and was found to have a mild developmental delay requiring special attention. A pediatrician also performed an examination on the children and both were found to have low muscle tone. The pediatrician recommended a healthy diet for both children with physical therapy exercises at home.

Subsequent to the children being placed in DSS's custody, DSS worked to reunify the family. Respondent and her husband were requested to attend parenting classes and marriage counseling, obtain and maintain employment, obtain and maintain suitable housing, pay child support, and attend visitation. Respondent was

requested to obtain a driver's license and means of transportation for the children.

Respondent and her husband were separated in February and March 2003. Prior to this separation, respondent obtained employment at Mountainview Care Center and worked a few days. She left to go to Florida with her mother for a few weeks and learned her employment had been terminated upon her return. Respondent and her husband reconciled and moved into a mobile home in April 2003. DSS assisted respondent in obtaining employment at Lake James Rest Home. She worked one day and quit. Respondent and her husband obtained employment at the Baxter Travenol Cafeteria in April 2003. Respondent was injured in August 2003 and lost her job. She obtained employment at Autumn Care Nursing Home, where she was employed until September 2004. Respondent and her husband separated again on 5 January 2004. At the time of the termination of parental rights proceedings, respondent and her husband remained separated.

The first permanency planning review hearing was held on 10 July 2003. The court determined the permanency plan was for DSS to continue efforts to reunify the family. A second permanency planning review hearing was held on 5 February 2004. The father of the children consented to the court ceasing reunification efforts with him.

Respondent neither possessed a driver's license nor the ability to transport the children to their medical appointments. A DSS social worker met with respondent on at least three occasions

to help her establish a budget. Respondent spent in excess of her budget, was frequently in arrears on her rent, lost her housing, and could not obtain transportation. The court continued reunification efforts with respondent for a period of three months to assess whether she would be able to parent the children. The court ordered respondent to: (1) maintain gainful employment sufficient to support suitable and appropriate housing separate from the children's father; (2) maintain visitation with the children; (3) comply with DSS's recommendations regarding further classes or treatment; and (4) comply with the recommendations of the psychological evaluation.

A third permanency planning review hearing was held on 13 May 2004. The court found that the only recommendation respondent had completed from the previous court order was purchasing telephone service. Respondent did not follow the budget DSS helped her to establish. Respondent ran out of oil in February and April 2004. DSS assisted her to obtain funds from a church to pay her oil bill. One visit between respondent and the children was postponed because respondent's residence was too cold for the children to visit.

In April 2004, respondent told DSS that she had prepared a bedroom for the children. DSS found the room to be unsuitable for the children. The mattress and box springs were leaning against a window and the room had a door that led to an outside porch with steps that went under the floor of the house. In addition to the previous orders, the trial court ordered respondent to: (1) not have contact with the children's father; (2) maintain

transportation; (3) maintain a clean and suitable residence for the children; (4) demonstrate how to budget finances; and (5) attend to all of the children's needs during visitation. Respondent's visitation was increased to four hours a day twice a week. The visitation was contingent upon her picking up the children from Head Start at 9:00 a.m. and returning them at 1:00 p.m.

A fourth permanency planning review hearing was held on 12 July 2004. DSS was unable to expand respondent's visitation because she had failed to comply with the conditions of the previous court order requiring her to provide transportation for the children. A fifth permanency planning review hearing was held on 19 August 2004. The order found respondent had set up a suitable bedroom for the children, had obtained a car, and was trying to gain experience as a driver. The order provided structured unsupervised visitation so long as respondent was able to provide transportation for the children. The order required respondent to: (1) maintain a suitable residence for the children; (2) maintain a vehicle and insurance; (3) demonstrate an ability to maintain her driver's license and safely transport the children; (4) demonstrate an ability to meet the children's medical, emotional, and physical needs; and (5) maintain gainful employment sufficient to support the children and demonstrate an ability to budget her finances.

The final permanency planning review hearing was held on 23 September 2004. The order found respondent had lost her job and lost her residence due to non-payment of rent. She had not made

her first car payment and was at risk of losing her transportation. Respondent also violated a previous court order directing her not to have contact with the children's father. The order established a permanent plan of adoption and directed DSS to file a petition to terminate respondent's parental rights.

Respondent was unable to pay rent and moved in with her mother. Respondent's mother did not allow the children to be placed in her home. At the time of the termination of parental rights hearing, respondent was training for a job at a mortgage company. She had obtained a learner's permit that required another licensed driver to be present while she operated a vehicle.

Respondent testified that she bought a computer from her mother sometime before September 2004 for \$250.00. In the fourth permanency planning review order, the trial court found, "Despite having the need for purchasing an automobile, the respondent mother took on extra monthly payments for internet service and Direct TV service."

The trial court terminated respondent's parental rights on 17 April 2005. At the time of the termination of parental rights hearing, J.D.R. was four years old and C.R.R. was almost three years old. The children had continuously remained in foster care since 1 August 2002. DSS witnesses testified respondent had actively parented J.D.R. for fourteen out of the fifty-four months of her life. Respondent had actively parented C.R.R. for two-and-one-half out of the thirty-five months of her life.

The trial court concluded respondent 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 in correcting those conditions which led to the removal of the children pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). Respondent appeals.

II. Issues

Respondent argues: (1) findings of fact numbers 26 and 27 are not supported by clear, cogent, and convincing evidence; (2) the trial court erred in concluding grounds existed under N.C. Gen. Stat. § 7B-1111(a)(2) to terminate her parental rights; and (3) the trial court abused its discretion in terminating her parental rights.

III. Standard of Review

A proceeding to terminate parental rights is a two-step process involving an adjudication stage and a dispositional stage. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). A different standard of review applies to each stage. *Id.* _____ "At the adjudication stage, the party petitioning for the termination must show by clear, cogent, and convincing evidence that grounds authorizing the termination of parental rights exist." *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614 (1997). The grounds for termination of parental rights are listed in N.C. Gen. Stat. § 7B-1111(a) (2005). The petitioner must prove at least one enumerated ground in the statute exists. *Id.* Our standard of review is whether the trial court's findings of fact are supported

by clear, cogent, and convincing evidence, and whether those findings of fact support its conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *disc. rev. denied*, 353 N.C. 374, 547 S.E.2d 9 (2001).

If the trial court determines the petitioner has shown at least one ground for termination of parental rights exists, the trial court moves to the dispositional stage and determines whether it is in the best interests of the child to terminate parental rights. *In re Young*, 346 N.C. at 247, 485 S.E.2d at 615. We review the trial court's "best interests" determination under an abuse of discretion standard. *In re Nesbitt*, 147 N.C. App. 349, 352, 555 S.E.2d 659, 662 (2001).

IV. Termination of Respondent's Parental Rights

A. Findings of Fact

Respondent argues findings of fact numbers 26 and 27 are not supported by clear, cogent, and convincing evidence. We disagree.

The trial court found:

26. Since the permanency planning review hearing held September 23, 2004, the respondent mother obtained a job but lost the job in December, 2004, due to absences from work. The respondent mother was unable to pay her rent at Triple J Mobile Home Park and left her residence and moved into the residence of her mother in December, 2004. The respondent mother did not go back to her former residence to pick up her personal property, and after the property was stored by the landlord for a few months, he disposed of them. The respondent mother is not able to have the children at the residence of her mother, as the respondent's mother will not allow the children to be placed in her home. The respondent mother is currently in training for a job at a mortgage company, but has not been

receiving any pay during her training period, except for one payment of \$100.00 a few days ago. It is uncertain whether the respondent will be able to receive income through this potential employment. Although the social worker had understood from the respondent mother that she had her driver's license, the respondent mother has only had a learner's permit, which requires another licensed driver to be with her while she is operating a car. The respondent mother lost her transportation as she did not make the payments on her vehicle, and still has no transportation. Although the respondent mother was not properly licensed, she drove the children on two occasions when she had unsupervised visits prior to the last permanency planning hearing.

27. The respondent mother testified at the hearing that she currently resides in the mobile home residence of her mother, where she has lived since December, 2004. The respondent mother admitted that she abandoned all of her personal property, including her pictures of the children and other items of the children's when she left her former residence and did not pay the \$540.00 storage fee for her personal property. The respondent mother admitted that during most of the time that would constitute twelve months prior to the filing of the termination of parental rights proceeding in this cause, she was employed and earning a sufficient income to meet all of her expenses and to have money left over to be used to purchase transportation. The only income earned by the respondent mother since January, 2005, was the sum of \$100.00 which was recently paid to her by the mortgage brokerage agency where she is in training to become a mortgage broker. The respondent mother admitted that she still does not have a driver's license or transportation. The respondent mother conceded that she is not under any disability, does not use drugs or alcohol, and could not explain why she has not been able to comply with the prior orders of the Court. The issue of domestic violence that was occurring at the time the children were placed in the care of the agency has not continued since the respondents separated in January, 2004. However, the respondent mother still does not have adequate housing for the

children, income to support the children, or a means to transport the children. On multiple occasions during the twelve months prior to the filing of the termination of parental rights petition in this cause, and subsequent thereto, the respondent mother has had sufficient income to maintain housing, but has fallen behind on her rent and has demonstrated an instability in maintaining a residence. Although respondent mother has had numerous jobs, she has had instability in maintaining employment as she has lost several jobs due to absenteeism. Throughout the majority of the time the children have been in foster care, the respondent mother has had the means and ability to obtain a driver's license and transportation, but has not done so for reasons that the respondent mother cannot explain. The respondent could have budgeted her money, maintained a stable and suitable residence and employment, secured transportation, and enjoyed expanded visitation with the minor children, but chose not to do so. Despite having an adequate income to provide for all of her expenses, the respondent mother, on occasions, has had to have the assistance from the Department of Social Services in providing heating oil for her residence.

In termination proceedings, "the trial judge acts as both judge and jury, thus resolving any conflicts in the evidence." *In re Oghenekevebe*, 123 N.C. App. 436, 439, 473 S.E.2d 393, 397 (1996).

This is because when a trial judge sits as "both judge and juror," as he or she does in a non-jury proceeding, it is that judge's duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom.

In re Whisnant, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984).

After reviewing the record and transcript in this case, we find sufficient evidence was presented to support the trial court's

findings of fact. Further, "[s]ince respondent specifically assigned error to only [two] of the trial court's findings of fact, the remaining findings of fact are binding on this Court." *In re P.M.*, 169 N.C. App. 423, 424, 610 S.E.2d 403, 404 (2005) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). Presuming, without deciding, insufficient evidence was presented to support findings of fact numbers 26 and 27, the trial court's order contains numerous other sufficient findings of fact to support its conclusion. This assignment of error is overruled.

B. Conclusion of Law

Respondent argues the trial court erred in concluding grounds existed to terminate her parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). We disagree.

N.C. Gen. Stat. § 7B-1111(a)(2) provides:

(a) The court may terminate the parental rights upon a finding of one or more of the following:

. . . .

2) 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.

"A finding of willfulness does not require a showing of fault by the parent." *In re Oghenekevebe*, 123 N.C. App. at 439, 473 S.E.2d at 398. "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. 402, 410, 546 S.E.2d 169, 175, *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001). This Court has stated, "a respondent's *prolonged inability to improve her situation, despite some efforts in that direction*, will support a finding of willfulness regardless of her good intentions." *In re B.S.D.S.*, 163 N.C. App. 540, 546, 594 S.E.2d 89, 93 (2004) (citation and internal quotation marks omitted) (emphasis supplied).

The children have continuously remained in foster care since 1 August 2002. The trial court conducted six permanency review hearings in this case. Orders from five hearings directed DSS to continue reunification efforts. Respondent failed to demonstrate an ability to provide suitable housing, transportation, and income so that the trial court could assess whether she was able to parent the children.

Sufficient evidence exists to support the trial court's conclusion of respondent's lack of progress to warrant termination of her parental rights. This assignment of error is overruled.

C. Disposition

Respondent argues the trial court abused its discretion by terminating her parental rights. We disagree.

N.C. Gen. Stat. § 7B-1110 (2005) provides:

(a) After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest. In making this

determination, the court shall consider the following:

- (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.

We review the trial court's decision to terminate respondent's parental rights for an abuse of discretion. *In re Nesbitt*, 147 N.C. App. at 352, 555 S.E.2d at 662.

A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. See *Clark v. Clark*, 301 N.C. 123, 271 S.E. 2d 58 (1980). A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.

White v. White, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

The trial court concluded:

6. Each of the minor children has been in a prospective adoptive placement for a substantial length of time, are bonded into their present placements, and the children's adoption by their present placement providers is likely to occur in the event the respondent's parental rights are terminated. It is in the best interest of each of the

minor children that the parental rights of . . . respondent mother . . . be terminated.

Respondent has failed to show the trial court's decision to terminate her parental rights was "manifestly unsupported by reason." *Id.* This assignment of error is overruled.

V. Conclusion

The trial court's findings of fact numbers 26 and 27 are supported by clear, cogent, and convincing evidence. The trial court's order further contains other findings of fact, not excepted to by respondent, to support the conclusion that respondent willfully left the children in foster care for a period of twelve months without showing she had made reasonable progress to correct the circumstances that led to the removal of the children. N.C. Gen. Stat. § 7B-1111(a)(2). The trial court did not abuse its discretion in terminating respondent's parental rights. The trial court's order is affirmed.

Affirmed.

Judges GEER and JACKSON concur.

Report per Rule 30(e).