NO. COA05-590

NORTH CAROLINA COURT OF APPEALS

Filed: 7 March 2006

IN THE MATTERS OF:

J.G.B., J.A.M.B.,
L.W.B., and T.L.B.

Minor Children.

Burke County
No. 04 J 35
04 J 36
04 J 37
04 J 38

Appeal by respondent-father from order entered 10 November 2004 by Judge L. Suzanne Owsley in Burke County District Court. Heard in the Court of Appeals 14 November 2005.

Don Willey for respondent-appellant.

Stephen M. Schoeberle for petitioner-appellee Burke County Department of Social Services.

Mary R. McKay, as guardian ad litem, for the minor children.

ELMORE, Judge.

On 10 November 2004 the district court terminated respondent's parental rights to his children J.G.B., J.A.M.B., L.W.B., and T.L.B. Respondent properly filed a notice of appeal from that order and now argues the district court erred in terminating his parental rights. We disagree.

A proceeding for termination of parental rights is conducted in two phases. During the adjudication phase, the petitioner must

prove by clear, cogent, and convincing evidence that one or more of the statutory grounds for termination exists. N.C. Gen. Stat. § 7B-1109 (2003). The standard of appellate review is whether the evidence supports the court's findings and the findings, in turn, support the conclusions of law. *In re Yocum*, 158 N.C. App. 198, 203, 580 S.E.2d 399, 403, *aff'd per curiam*, 357 N.C. 568, 597 S.E.2d 674 (2003); *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001). If the petitioner proves that one or more grounds for termination exist, the trial court moves to the disposition phase. At this time, the trial court determines whether termination is in the best interests of the child. N.C. Gen. Stat. § 7B-1110 (2003); *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). The standard of review on appeal is abuse of discretion. *In re Yocum*, 158 N.C. App. at 206, 580 S.E.2d at 403; *In re Brim*, 139 N.C. App. 733, 744, 535 S.E.2d 367, 373-74 (2000).

When reviewing the record on appeal, a trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if there was conflicting evidence before the court. *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988). Additionally, findings of fact which were not assigned as error in the record on appeal are conclusive on appeal. *Dreyer v. Smith*, 163 N.C. App. 155, 156-57, 592 S.E.2d 594, 595 (2004).

Here, the petition filed by the Department of Social Services alleged that both parents' rights should be terminated under N.C. Gen. Stat. § 7B-1111(a)(2) and (6): willfully leaving the child in

foster care for more than twelve months while also failing to make reasonable progress toward reunification, and being incapable of providing adequate support and care while also demonstrating a reasonable possibility that nothing will change for the foreseeable future. *See* N.C. Gen. Stat. § 7B-1111(a)(2) and (6) (2003). But after DSS filed its petition, the children's mother relinquished her rights and was no longer included in the proceedings. In its order, the district court found that competent evidence supported each of these grounds.

Respondent excepts to findings number seven and nine. These findings are as follows:

> 7. On July 25, 2002, the Court conducted a review hearing and determined that, although [respondent] had substantially complied with the requirement that he attend Foothills SAIS, he had missed several sessions violating the program's rules, had "failed" 3 polygraph tests regarding the sexual abuse of his own children, hadn't acknowledged the significant issues that the juveniles faced and hadn't made significant process in therapy. [One of the children] was also having significant problems at that time consistent with having been sexually abused. The Court therefore ceased reunification efforts with respect to [respondent].
>
> 9. [Respondent] has diagnoses of pedophilia, both sexes, non-exclusive type; and borderline personality disorder, not otherwise specified. He has not completed treatment, and he is not currently in treatment for either disorder, although the Court has not specifically ordered him to undergo treatment for his borderline personality disorder. He has on at least 2 occasions begun Foothills SAIS treatment without completion, despite being ordered to do so by the Court in these matters, and as a condition of his criminal probation. Testing performed on him by Mr. Middleton, an expert in diagnosis and

> treatment of sex offenders, showed an increased interest in young children. It is Mr. Middleton's opinion that he remains at high risk for re-offense with young children, and that such risk will continue for the foreseeable future without participation in treatment. He currently has returned to his original position that he only offended on his niece twice.

Respondent vigorously argues that the trial court erred in relying on his "failed" polygraph tests regarding the sexual abuse of his children. We agree with that contention; it was indeed error for the district court to rely on the evidence of polygraph results. *See State v. Grier*, 307 N.C. 628, 645, 300 S.E.2d 351, 361 (1983) ("We therefore hold that in North Carolina, polygraph evidence is no longer admissible in any trial. . . . The rule herein announced shall be effective in all trials, civil and criminal . . . .").

We disagree with respondent, however, that this error impaired other aspects of these findings or ultimately prejudiced the district court's decision. There is clear, cogent and convincing evidence in the record that supports respondent's clinical diagnoses of pedophilia and borderline personality disorder. It is also undisputed that respondent failed to complete the plan required by the district court and formulated by Foothills SAIS to assist respondent in coping with his mental disorders. Further, finding number twelve, which was not excepted to, stresses the fact that respondent is not complying with his treatment plan for pedophilia. Finding number eleven, also not excepted to, conclusively establishes that respondent has no permanent address; sleeps in his van; and has been residing with the children's

mother, with whom the district court ordered he was to have no contact.

These findings, along with the undisputed fact that the children had been in the care and custody of DSS for nearly three years at the time of the termination hearing, support the district court's conclusion to terminate respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) (2003). *See, e.g., In re Nolen*, 117 N.C. App. 693, 453 S.E.2d 220 (1995) (respondent's failure to complete treatment for alcoholism during a three-plus year period led to termination of her parental rights).

We also find no abuse of discretion in the district court's determination that it was in the children's best interest to terminate respondent's parental rights. Each report of the guardian *ad litem* showed the children were positively responding to their foster parents. The children successfully completed therapy, were excelling in school, and were adjusting socially. Since the permanent plan had been changed to adoption, DSS had been able to find prospective adoptive parents with the ability to care for all four children.

Accordingly, we affirm the order of the district court terminating respondent's parental rights.

Affirmed.

Chief Judge MARTIN and Judge McGEE concur.

Report per Rule 30(e).