NO. COA06-936

NORTH CAROLINA COURT OF APPEALS

Filed: 6 February 2007

IN THE MATTER OF:

K.J.

Guilford County
No. 04 J 764

Appeal by respondent from judgment entered 28 April 2006 by Judge Susan Bray in Guilford County District Court. Heard in the Court of Appeals 8 January 2007.

Joyce L. Terres for petitioner-appellee Guilford County Department of Social Services.

Janet K. Ledbetter for appellant-respondent.

MARTIN, Chief Judge.

Respondent-mother ("respondent") appeals from an order terminating her parental rights to her minor son, K.J.

On 22 October 2004, Guilford County Department of Social Services ("DSS") took custody of K.J. through a nonsecure custody order obtained pursuant to a juvenile petition alleging that K.J. was abused and neglected. The report alleged that respondent became angry with her son and punched him in the face. In addition, respondent admitted disciplining K.J. with a switch. K.J. had a busted lip, marks on his face, as well as marks on his chest, back and left leg. On 19 November 2004, respondent and DSS stipulated to a finding of neglect based on inappropriate

discipline resulting in K.J's physical injuries. The court concluded that the child was a neglected juvenile.

DSS maintained custody of K.J. and reunification efforts were initiated through the development of a family services case plan. Respondent was to complete parenting classes, complete a mental health evaluation and a parenting evaluation and follow all recommendations resulting from the evaluations. In May 2005, respondent changed her residence but refused to disclose her new address to the DSS social worker. Respondent did, however, obtain employment and only missed three of the scheduled weekly visits with K.J. During the 21 July visit, a social worker was forced to intervene to discuss inappropriate comments respondent made to K.J. Respondent became angry, walked off and missed the visitation schedule for the following week. Respondent failed to follow through with the required evaluations and classes. At a 19 August 2005 review hearing, it was determined that respondent was not in compliance with her case plan. The court suspended reunification efforts.

On 24 October 2005, DSS filed a petition to terminate parental rights, alleging neglect, willfully leaving the child in foster care for over a year, and the failure to pay a reasonable portion of the child's care costs. *See* N.C. Gen. Stat. § 7B-1111 (2005). The termination of parental rights hearing was held on 4 April 2006. The court terminated respondent's parental rights on all three of the grounds alleged in the petition. The order for termination was entered on 28 April.

In her first argument, respondent contends the trial court committed reversible error in terminating her parental rights because she did not receive adequate notice of the termination hearing.

Respondent was served by certified mail with a summons for the termination proceedings on 26 October 2005. Respondent did not submit a written answer to the trial court. On 22 November, a notice of hearing was filed and mailed stating that the termination hearing was set for 13 December. Respondent was appointed counsel on 13 December and the termination hearing was continued until 17 January 2006. On 13 January, respondent filed a motion to continue. The motion was granted and the termination hearing was set for 28 February. On 17 February, a review hearing was held regarding respondent's compliance with the original case plan. Respondent and her attorney were present at this hearing. In the presence of respondent, the termination hearing was again continued at her attorney's request and was set for 4 April. The respondent was not present on 4 April and now challenges the notice for the termination hearing.

When a proceeding is initiated by petition, notification of the date, time, and place of the termination hearing must be mailed upon filing of an answer or thirty days from the date of service. *See* N.C. Gen. Stat. § 7B-1106(b)(5). Respondent does not contest the adequacy of notice received for the original hearing date. We do not extend the statutory rules for notice of a termination

hearing to serve as the rules for notice when a hearing is continued. *See In re Taylor*, 97 N.C. App. 57, 60, 387 S.E.2d 230, 231 (1990). The continuances granted in this case were at the request of respondent's counsel. Respondent was present at a review hearing when her case was continued to 4 April. Respondent had adequate notice of the termination hearing. This assignment of error is without merit.

Respondent argues she was prejudiced by the failure to record the entire termination hearing, resulting in an incomplete transcript. The unavailability of a verbatim transcript does not automatically constitute error. *See Hunt v. Hunt*, 112 N.C. App. 722, 726, 436 S.E.2d 856, 859 (1993). To prevail on such grounds, a party must demonstrate that the missing recorded evidence resulted in prejudice. *In re Clark*, 159 N.C. App. 75, 80, 582 S.E.2d 657, 660 (2003). General allegations of prejudice are insufficient to show reversible error. *Id.*; *see also In re Peirce*, 53 N.C. App. 373, 382, 281 S.E.2d 198, 204 (1981) (finding an insufficient showing of prejudice where appellee did not indicate the content of the lost testimony in the record). As to unavailable verbatim transcripts, a party has the means to compile a narration of the evidence through a reconstruction of the testimony given. *Id.* (citing *Miller v. Miller*, 92 N.C. App. 351, 354, 374 S.E.2d 467, 469 (1988)); *see also* N.C. R. App. P. 9(c)(1). Overall, a record must have the evidence "necessary for an understanding of all errors assigned." N.C. R. App. P. 9(a)(1)(e).

In the present case, the court reporter was unable to transcribe anything said by respondent's attorney, the DSS attorney or the Guardian ad Litem due to faulty recording equipment. Respondent did not attempt to provide a narration of the evidence in order to reflect what might be missing within the transcript. *See* N.C. R. App. P. 9(c)(1). Respondent contends that the time constraints of an expedited appeal precluded the creation of a narration of the evidence. We find no merit in this assertion. As to prejudice, respondent argued that the missing portions within the transcript prevented her from pursuing an effective appeal. Such an argument amounts to a general allegation of prejudice which is insufficient as a showing of reversible error. *In re Clark*, 159 N.C. App. at 80, 582 S.E.2d at 660. On review of the record, the missing portions of the transcript primarily affected questions asked during the hearing and do not prevent this Court from understanding the remaining assignments of error.

Next, respondent challenges the adjudication order on the grounds that the findings of fact were mere recitations of the allegations in the petition. An "adjudicatory order shall be in writing and shall contain appropriate findings of fact and conclusions of law." N.C. Gen. Stat. § 7B-807(b) (2005). Although there is no statutory criteria that must be stated in the findings of fact or conclusions of law, "the trial court's findings must consist of more than a recitation of the allegations." *In re O.W.*, 164 N.C. App. 699, 702, 596 S.E.2d 851, 853 (2004) (citing *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002)).

Findings of fact must be ultimate facts, sufficient for this Court to determine that the judgement is adequately supported by competent evidence. *In re Anderson*, 151 N.C. App. at 97, 564 S.E.2d at 602.

In this case, while many of the allegations of the petition to terminate parental rights were recited, there were also independent findings of fact; all of the findings were based on the evidence received. Although the trial court included findings of fact which summarized the testimony, the court also included the necessary ultimate findings of fact. "There is nothing impermissible about describing testimony, so long as the court ultimately makes its own findings, resolving any material disputes." *In re C.L.C.*, 171 N.C. App. 438, 446, 615 S.E.2d 704, 708 (2005).

Respondent argues the trial court's findings of fact were not supported by clear, cogent and convincing evidence and its conclusions of law were not supported by those findings. On appeal, this Court must determine whether the trial court's findings of fact were supported by clear, cogent and convincing evidence, and whether its conclusion that grounds existed to terminate parental rights was supported by those findings of fact. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000). The trial court's findings of fact are conclusive, even where some evidence supports contrary findings, if they are supported by clear and convincing competent evidence. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997).

Respondent contends that many of the findings of fact were "mere recitations of the chronological events and restatements of the case, and not ultimate findings of fact sufficient for this Court to conduct a proper review." Among the challenged findings, respondent claims that numbers four, seventeen and nineteen are actually conclusions of law. Within these three findings, the court found that respondent neglected the child, that respondent willfully left the child in foster care for more than twelve months and that respondent willfully failed to pay a reasonable cost of the child's care. Findings four, seventeen and nineteen are, in fact, conclusions of law and will be reviewed as such. *See Johnson v. Adolf*, 149 N.C. App. 876, 878 n.1, 561 S.E.2d 588, 589 n.1 (2002). As conceded by DSS, finding number two contains an improper date on which respondent was served by certified mail with a summons. The remaining challenged findings were primarily based on the testimony of Erin Caligan, a foster care worker with DSS. Careful review of the record reveals that each finding was supported by clear, cogent, and convincing evidence. The trial court's findings are, therefore, binding on appeal. *In re Helms*, 127 N.C. App. at 511, 491 S.E.2d at 676.

Respondent next challenges the trial court's conclusion of law that K. J. was neglected. Having found the trial court's findings binding, this Court must determine whether the conclusion that certain grounds existed to terminate parental rights was supported by those findings of fact. *In re Huff*, 140 N.C. App. at 291, 536 S.E.2d at 840. A neglected juvenile is defined as follows:

> 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.

N.C. Gen. Stat. § 7B-101(15) (2005). "The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*." *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984). "[A] prior adjudication of neglect may be admitted and considered by the trial court in ruling upon a later petition to terminate parental rights on the ground of neglect." *Id.* at 713-14, 319 S.E.2d at 231. In addition, the trial court must consider evidence of changed circumstances and the probability of a repetition of neglect. *Id.* at 715, 319 S.E.2d at 232.

In the present case, K.J. was adjudicated neglected by the trial court on 19 November 2004 on the basis of inappropriate discipline administered by the respondent. Efforts were made by DSS to reunite K.J. with respondent through the development of a case plan. The trial court found that the respondent had failed to complete "each and every component of her case plan." A probability of repetition of neglect was based on respondent's demonstrated lack of initiative to comply with the DSS case plan. In sum, the trial court found that the respondent was "unable to demonstrate that she is willing or able to provide a loving

nurturing environment" for the juvenile. The findings of fact support the trial court's conclusion of neglect.

Respondent challenges the trial court's conclusion that respondent "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." N.C. Gen. Stat. § 7B-1111(a)(2) (2005).

> [T]o sustain the trial court's finding that grounds existed for termination of parental rights under G.S. § 7B-1111(a)(2), we must also determine that there was clear, cogent, and convincing evidence that (1) respondents "willfully" left the juvenile in foster care for more than twelve months, and (2) that each respondent had failed to make "reasonable progress" in correcting the conditions that led to the juvenile's removal from the home.

In re Baker, 158 N.C. App. 491, 494, 581 S.E.2d 144, 146 (2003). "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 (2001) (citations omitted). Willfulness may be established even where the parent made some effort and progress to regain custody. *See In re Bishop*, 92 N.C. App. 662, 669, 375 S.E.2d 676, 681 (1989). The twelve-month period required by statute is measured from the time of the child's removal from the home pursuant to a court order and the filing of the motion or petition to terminate parental rights. *In re A.C.F.*, __ N.C. App. __, 626 S.E.2d 729, 734 (2006).

Respondent argues that as of the 24 October 2005 filing of the petition, the twelve-month period had not yet expired. Over a year earlier, on 22 October 2004, a nonsecure custody order granted DSS custody of the child. Respondent challenges the validity of this order. Respondent has not assigned error to the custody order, however, and its validity is not before this Court. *See* N.C. R. App. P. 10(a). The petition was filed more than twelve months after DSS was granted custody.

As to evidence of "willfulness", the trial court found respondent to have made insufficient progress on her case plan. *See In re McMillon*, 143 N.C. App. at 410, 546 S.E.2d at 175 (finding "willfulness" where respondent was unwilling to comply with tasks in a case plan for which respondent had both the financial and social resource to achieve). Respondent failed to notify DSS of her contact information or to arrange a time for her home to be evaluated. Respondent put off attending her classes and completing her evaluations. Respondent did not financially support the child. Although respondent made efforts, the court's findings show efforts that fall short of reasonable progress, supporting the court's finding of "willfulness."

Respondent also claims that the evidence failed to support the trial court's conclusion that respondent willfully failed to pay child support. A court may terminate the parental rights of a parent on a showing of the following:

> The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent,

> for a continuous period of six months next preceding the filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C. Gen. Stat. § 7B-1111(a)(3) (2005).

Here, the trial court found that respondent was gainfully employed full time from January 2005 until January 2006, a period of time that included the six months preceding the filing of the petition. Despite her employment, the court found that respondent "has failed to provide any financial support for the child since he has been in DSS custody." The required findings were made by the trial court in its order and after careful review, we hold that such findings were supported by competent evidence. Respondent's assignments of error are overruled.

Affirmed.

Judges McCULLOUGH and LEVINSON concur.

Report per Rule 30(e).